

ILLINOIS STATE LABOR RELATIONS BOARD
INTEREST ARBITRATION

In the Matter of the Arbitration

Before

between

HARVEY A. NATHAN,
Sole Arbitrator

CITY OF ROCK ISLAND, IL.

AND

ISLRB No. S-MA-03-211

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS, LOCAL 26

Hearing Held:

November 18, 2003

Final Offers Exchanged:

December 1, 2003

Briefs Exchanged:

January 20, 2004

For the Employer:

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For the Union:

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Attorneys

O P I N I O N A N D A W A R D

I. INTRODUCTION

This is an interest arbitration proceeding held pursuant to Section 14 of the Illinois Public Labor Relations Act (5 ILL 315/14), hereinafter referred to as the "Act," and the Rules and Regulations of the Illinois State Labor Relations Board ("Board"). The parties are City of Rock Island, IL ("Employer" or "City") and International Association of Fire Fighters, Local 26 ("Union").

The City of Rock Island is located along the Mississippi River in northwestern Illinois, and is part of the "Quad Cities," a metropolitan area with a population of 436,672. Rock Island's population is about 39,700. It is about 165 miles west of Chicago, north northwest of Springfield and east of Des Moines. The City's fiscal year runs from April 1st through March 31st. Its most recent collective bargaining agreement ("Agreement") with the Union was for the period of April 1, 2000 through March 31, 2003.

The Fire Department consists of four stations staffed by 56 full-time personnel organized in a platoon system working 24 hours on followed by 48 hours off.¹ The platoon employees work 56.2 hour weeks, or 2922 hours annually. At the outset of these proceedings the parties stipulated to certain ground rules addressing procedural aspects of this case. They agreed that the

¹ The number 56 comes from a City exhibit. It includes the ranks of firefighter, EMS coordinator, lieutenant, captain and battalion chief. The bargaining unit also includes the classifications of Training Officer and Fire Marshall. The Fire Chief, Assistant Chiefs and civilian personnel are excluded from the unit. The City's Annual report for the year ending March 31, 2003, indicates that there are a total of 63 full-time employees in the fire department.

undersigned shall be the sole arbitrator, that the requirement to issue an award within thirty days of the close of the hearing is waived, and that the arbitrator has the authority and jurisdiction to award wages retroactive to April 1, 2003.²

The parties also agreed that the tentative agreements reached prior to the hearing shall be incorporated into the new Agreement. They may be summarized as follows:

1. Rule 36 will be incorporated into the Agreement.
2. The Memorandum of Notice will be included in the Agreement.
3. The City's drug testing proposal will be included in the Agreement.
4. The Agreement shall be in effect from April 1, 2003 through March 31, 2006, but of the new provisions only wages shall be retroactive (to April 1, 2003).

The parties are at impasse on five issues. They are:

1. Wages, including merit system

² The parties agreed that employees leaving employment after March 31, 2003, but prior to the issuance of this Award, will be paid back pay through their cessation of employment. The parties also agreed to certain procedures for the conduct of the hearing. Those procedures were followed, and need not be recited here. The arbitrator finds that this matter is properly before him, as provided in the Act.

2. Kelly Days
3. Standards for promotion
4. Scope of grievance procedure (discipline)
5. Vacation scheduling.

The arbitrator found that the first two issues, Wages and Kelly Days, are economic issues.

II. STATUTORY REQUIREMENTS

Section 14(h) of the Act provides that the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- "(1) The lawful authority of the employer.
- "(2) Stipulations of the parties.
- "(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- "(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - "(A) In public employment in comparable communities.
 - "(B) In private employment in comparable communities.
- "(5) The average consumer prices for goods and services, commonly known as the cost of living,
- "(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, and the continuity and stability of employment and all other benefits received.
- "(7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- "(8) Such other factors not confined to the foregoing, which are

normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding arbitration, or otherwise between the parties, in the public service or private employment."

III. COMPARABILITY

The parties have proposed different comparability groups. They agree on the following cities:

Normal	45,400	(population rounded to nearest hundred)
Moline	43,800	
Belleville	41,400	
Quincy	40,400	
Urbana	36,400	
Pekin	33,900	
Danville	33,800	
Galesburg	33,700	
Alton	30,500	
Average	37,700	
Rock Island	39,700	

The Union proposes DeKalb (40,100) and Granite City (33,700). The Employer opposes using these cities for comparability purposes. It argues that DeKalb has traditionally been excluded from the mix because it is located too close to the Chicago metropolitan area. Granite City, the Employer argues, should be excluded because it has consistently failed to provide timely statistics as to its financial condition.

The historical development of Rock Island's comparability group is a little confusing. In the 1992 impasse case before Arbitrator Herbert Berman the

Employer suggested DeKalb and Granite City. The Union did not object, and in his decision, Arbitrator Berman first indicates that he would use the Employer's proposed list but then deleted references to DeKalb's statistics from discussion.³

Granite City, however, was included as per the Employer's proposal. In 1996 the parties went to impasse arbitration a second time, before Arbitrator Howard Eglit. In this award there was an extended discussion about the appropriateness of Granite City as a comparable. Eglit decided that there was insufficient information about Granite City and it was excluded. There was no discussion of DeKalb and it does not appear in any of the charts included in that award. The arbitrator here infers that DeKalb was not a proposed comparable city. There was a reference to not using cities in the Chicago metropolitan area but there was no discussion of whether DeKalb was excluded for that reason.

Based on this history, the arbitrator here finds that DeKalb and Granite City are not comparable cities because historically they have been excluded

³ Because this has become a point of controversy for the parties, it will be discussed here. On page 6 of Berman's award he states that the Employer included Granite City in its list of comparables and also "suggested" DeKalb was "also comparable to Rock Island." He indicates that the Union did not object. On page 7 Berman displays the census figures from the Employer's exhibit. DeKalb is not included. On p. 8, fn 9, Berman explains that DeKalb was left out of some exhibits because the Employer did not include sufficient data. Then, in fn 11, page 9, Berman writes, "I have altered the rankings to reflect the deletion of East St. Louis and DeKalb." Thereafter DeKalb was dropped from the discussion.

from consideration. At this juncture in the parties' bargaining history if the list of comparable cities is to be changed it must be done so at the bargaining table.

IV. FINANCIAL DATA AND ABILITY TO PAY

At the outset it should be pointed out that a public employer's "ability to pay" in these impasse proceedings should not be an analysis of whether the systems used for obtaining revenues are being utilized to the maximum advantage. As Arbitrator Elliott Goldstein opined in *City of DeKalb and DeKalb Professional Firefighters Association, Local 1235, IAFF (1988)*, it is not appropriate for an arbitration panel in these cases to make political judgments such as whether the employer can increase taxes or has other sources of revenue from which the amounts at issue can be paid. According to Goldstein "ability to pay" is little more than an examination of the desirability of "expending funds in a certain manner."

In other words, an arbitrator's examination of "the financial ability of the unit of government to meet those costs," to cite the statutory language, means that the arbitrator looks at the available funds and not whether the public employer has the ability to obtain additional sums. Raising revenues is a political judgment. How those revenues are spent once they are obtained is within the purview of the arbitrator. Thus, while Rock Island has the highest tax rate of any of the comparable cities, the tax rate is not a major

consideration in arbitration. What the arbitrator needs to look at is the funds available generated by taxes and other sources.

Among the comparable cities, Rock Island generates proportionately more property tax revenue than most of cities in the group. While this is a reflection of the tax rates, property values also are proportionately higher in Rock Island. Rock Island's equalized assessed valuation for 2002 was third among the comparables. Of course, Rock Island's high property tax revenues are also a reflection of its low sales tax revenue. Rock Island is last among the comparable cities in this category both on a gross and a per capita basis. Rock Island's inability to generate substantial sales tax revenues hampers its financial stability. Nonetheless, in terms of total tax revenues from all sources, Rock Island is third. Only Urbana and Normal, cities with state universities which substantially prop up the economies, have greater total tax revenues.

Rock Island's fire department is of average size among the comparables. But its expenditures to operate this department is second only to Moline. On a per capita basis, Rock Island is fourth of ten in fire department expenditures.

A very significant factor in the assessment of financial resources is the declining amount of money supplied by the state. Because of the downturn in the economy Illinois has had less revenue coming in and, consequently, less money to disburse. The City has lost about 18% of the combined proceeds

of shared income tax, replacement tax and use tax in 2003. While the arbitrator takes notice that the economy has improved since the hearing in this case, the City will still receive less in tax sharing revenues than it has received in past years. The arbitrator must conclude that without foreseeable substantial economic growth, Rock Island will be hard pressed to pay substantial increases in wages and fringe benefits. In most impasse cases the parties and the arbitrator must prognosticate what revenues will be. In this case one year of the contract has passed and the parties know that the loss of state revenues is a reality.

Of course, financial growth is only one factor to be considered. The law requires the arbitrator to consider several factors in determining what is a statutorily appropriate award. The City's financial ability to meet the costs of a wage and benefit package is only one consideration. Moreover, the arbitrator does not measure appropriateness in a vacuum. His own judgment, based upon the statutory factors, of what is good and proper for the parties is tempered by the parties' final offers. It is often the case that the arbitrator must select not the "best" offer, but the one that is the least offensive to the statutory criteria.

V. DISCUSSION OF THE ISSUES

A. Economic Issues

1. Wages

It is never easy to describe a wage schedule succinctly. The fire

department has schedules for the ranks of (1) firefighter, (2) EMS coordinator and fire lieutenant, (3) fire captain, and (4) fire battalion chief and fire marshall. Each schedule has a starting rate and five steps. Step increases are given after an employee's anniversary date and may be withheld or delayed for disciplinary reasons. Employees receive longevity pay increases after 5, 10, 15, 20, 25 and 30 years of continuous service. Additionally, employees are eligible for merit pay under certain conditions and in accordance with a detailed evaluation plan.⁴ In the last agreement, negotiated voluntarily for the period of April 1, 2000 through March 31, 2003, employees received annual increases of 3.5% plus an additional 1% per year which was earmarked to offset the loss of scheduled overtime. Merit pay increases have averaged .9% but may be higher and be spread over several years.⁵ Merit pay as described in this labor agreement is unique among the comparables.

The parties respective offers may be summarized as follows:

<u>Union</u>	<u>Employer</u>
<p>Across-the-board increases of 3.5% each year for three years. The memorandum of understanding controlling the merit system would be suspended on April 1, 2005</p>	<p>A 3.25% general wage increase each year for three years and the elimination of the merit system. Employees who received a merit increase after March 31, 2003,</p>

⁴ **Merit pay is discretionary and must be separately funded by the City Council. Merit increases among individual employees has varied greatly.**

⁵ **Although the City argues that merit pay was newly adopted in the last contract, the evidence indicates that merit pay in one form or another has existed for many years.**

(the beginning of the third year of the Agreement). would have them subtracted from their general wage increases so that no employee would receive more 3.25% each year.

The parties disagree as to the relative value of the salary schedule compared with those in comparable cities. Among the reasons for differences is that the work year in Rock Island is based upon 2922 hours, or 56.2 hours per week. Most of the comparables have lesser schedules which affects the hourly rates. This becomes significant when employees work overtime. Thus, while the starting pay in Rock Island (2002 salaries) was slightly above average, the average hourly starting pay was measurably below average. Nor do Rock Island fire employees catch up over their careers. Based upon 2002 schedules lifetime earnings for Rock Island fire employees over a 25 year period are below average in the comparability group.⁶ Among the cities which settled their 2003 contracts as of the hearing in this case, all increases were

⁶ Rock Island is among a cluster of cities in the middle range. It would be more accurate to say that base wages for career Rock Island employees are just slightly less than average. Longevity does not greatly affect these statistical rankings.

3.5% or above.⁷

Internal comparability is not a major factor because the police department's contracts (two units) did not expire until March 28, 2004, and as of the time of the hearing new agreements had not been settled. Settlements with non-public safety units are based on different factors and do not represent a fair comparison. Cost of living, however, is sharply lower than it has been in past years. The CPI has remained in tandem with the general malaise of the economy. Either of the proposals at issue would place affected employees ahead of inflation.

The arbitrator has carefully considered all of the data. Neither proposal would greatly affect Rock Island's standing among the comparables. This is a matured bargaining unit among comparable well-established organized bargaining units in middle-sized Illinois cities. In some of the comparable cities it may be more financially advantageous to be a fire fighter. In other cities the reverse is true. Neither of the wage offers before the arbitrator is going to change that. There is no need to greatly increase or decrease the

⁷ Quincy's settlement cannot be compared because its entire schedule was altered. Since the hearing in this case Moline had its salary structure changed and a new merit system was awarded. The totals however, were greater than the Employer's offer in this case.

pattern of wage increases the parties have developed over the years if the purpose is to bring Rock Island in line with other comparable cities. On the other hand, the City has made a strong case for financial hardship. These are difficult times and dollars have to be stretched further than in the past. However, as stated above, the City's restricted revenues are only one factor.

The situation is not such that finances must override all other factors. The Employer has not made a case which demands that the lower offer be accepted lest other City programs be sacrificed. Additionally, more than a year has past since the old contract expired. The City has had the use of the new money for a considerable time. The arbitrator also takes notice that since the hearing in this case the economy has improved.

There are several problems with the Employer's offer. To begin with, the retroactive elimination of the merit system would mean that a considerable number of employees might have only token increases for the first year, and if substantial merit pay had been granted, no wage increases at all. The Union's proposal for the elimination of the merit system is prospective. The impact on employees will be less draconian. Too much has elapsed for there to be an elimination of an entire year's merit increases.

The City argues that the merit system was only an experiment, and should not be treated as a negotiated benefit to be tossed away. But if the merit system were intended to be for a limited period, the parties would have negotiated a sunset clause. Nothing in the old language indicates that the

parties intended that the merit system be temporary. The Union has also submitted evidence that a merit system, perhaps in a different form, has existed in the department for many years. Thus, while the present formula might be new in the year 2000, the City's proposal would eliminate any merit system.

The City also argues that the system has not worked as intended. The fire chief so testified. However, this testimony was somewhat short on specifics. Given the extensive evaluation instrument submitted into the record, it is not clear why the system broke down. While not every factor can be applied to every position, or task, within the department, this is true with any evaluation procedure. The more detailed the process the more difficult it is to have a universal fit for every job. Obviously certain factors are more pertinent in some positions than in others. There was no explanation at the hearing as to why this was not taken into consideration. If the merit system is discretionary, as both parties agreed, it is not clear why the City could not have exercised its authority more discretely. Indeed, it is not clear why the City could not refuse to fund the system if its operation was so onerous.

In sum, the record is too sparse for the arbitrator to eliminate what the parties voluntarily agreed to. Changes such as this must be made at the bargaining table. The merit system as now constituted was agreed to at the bargaining table. If it is to be eliminated that, too, must occur through negotiations. The exception might occur where it can be shown that problems

arose which the parties did not anticipate and could not fix through negotiations. That has not been shown in this case. Finally, the Union's proposal accepts the elimination of the merit system, albeit prospectively. This is a more reasonable approach. The Union's proposal for wages is accepted.

2. Kelly Days

Kelly Days are scheduled days off at periodic intervals which affect an employee's normal FLSA work cycle. It is a feature designed to reduce the number of hours worked in a regular cycle and thereby avoid FLSA overtime which would normally occur in many municipal fire fighter schedules. Because staffing requirements remain the same, the effect of Kelly Days is to require an employer to either hire more employees or call back the existing employees on an overtime basis. Because the number of days worked within a regular cycle is reduced, the hourly rate increases and overtime caused by the Kelly Days is that much more expensive.

Kelly Days are about money more than they are about hours of work. Employees usually will not work less hours because staffing needs remain constant. Rather they will be paid more money for the hours worked within a cycle because more of those hours will be on an overtime basis. From an employer's point of view, common sense requires that overtime should be minimized because it is the same work but at a 50% premium. On the other hand, as the rhythm of a schedule becomes embedded, employees view overtime as part of their regular pay and look at it as simply another feature

of their wages. However, unless the employer reduces the amount of equipment in use or decreases the number of employees assigned to the equipment, it is difficult to avoid some overtime. Thus, overtime becomes part of the general wage package which employees rely upon.

The expired contract did not provide for Kelly Days. The standard work year for bargaining unit employees has 2922 hours, or 56.2 hours per week.

The Union proposes the reduction of the workweek to 55.1 hours, or 2864 hours per year effective on January 1, 2005. This would be three months prior to the start of the third year of the Agreement. It would be accomplished by the creation of two Kelly Days, or one every 60th duty day. In order to lessen the impact of the Kelly Days on the City's staffing needs, the Union also proposes that a scheduled Kelly Day would occupy one of the slots for vacations. In other words, it would be less likely that the City would have to hire back an off duty firefighter to replace the employee taking a Kelly Day because the Kelly Day would be taken from the pool of days reserved for employees to take vacations. The theory is that the City would be under no different position in terms of overtime liability than it would be if there were no Kelly Days. The City opposes any change in the work schedule.

Kelly Days are common within the comparability group. Most cities in the group have at least two. Moline negotiated two Kelly Days in its prior agreement and was awarded two additional Kelly days in a recent impasse arbitration award.

The Union argues that the implementation of Kelly Days is an appropriate *quid pro quo* for the elimination of the merit pay system.⁸ The Union argues that if the merit system is removed from the Agreement the employees will lose money. A fair trade for this loss would be the creation of Kelly Days. In fact, the Union argues, the cost of two Kelly Days would be substantially less than what the City was spending on merit pay increases. Additionally, the City would save some money by the reduction of FLSA overtime which is otherwise unavoidable in a 2922 hour annual schedule. The Union also argues that Kelly Days would benefit the City because potential overtime liability would be offset by the elimination of an equal number of vacation availability slots.

The City argues that the implementation of Kelly Days is a major change in the structure of the work schedule. The City urges that groundbreaking proposals should be agreed to at the bargaining table and not imposed in arbitration. The City points out that the implementation of Kelly Days would increase the hourly rate by 1.7% and this would affect all overtime hours, not

⁸ This is in line with the theory that if a party wants a new benefit it has to trade something for it. This approach is more common in whole package arbitration, such as used in Wisconsin, and not in the issue by issue approach of the Illinois statute. In arbitration, as opposed to across the bargaining table, a proposal should rise or fall on its own merits and should not require something in trade. The critical factor in Illinois is need, not what is being offered in trade.

just those generated by the Kelly Days themselves.⁹

⁹ The City compares the 1.7% hourly rate increase with the merit pay average increase of 9%. The two cannot be compared. The hourly rate becomes significant only when employees are accruing overtime. The merit pay increase applies to all hours worked.

The arbitrator rejects the Union's proposals for two reasons. The primary reason is that Kelly Days will affect the total earnings for employees. While it is difficult to compute how much effect it would have, the arbitrator believes that the 3.5% is an adequate wage increase and does not need a Kelly Day embellishment. That the Union voluntarily proposed the elimination of the merit pay system at about the same time as the Kelly Days would go into effect does not alter the balance. The arbitrator was bound to accept the Union's proposal for merit pay because it was part of the wage proposal.¹⁰ There is no requirement that the arbitrator adopt the Union's *quid pro quo* theory.

The second reason for rejecting the Union's proposal is the arbitrator's belief that collective bargaining is a better way of setting terms and conditions of employment than arbitration. If collective bargaining is to be nourished the parties must be encouraged to address their problems with each other. The arbitrator is the resource of last resort. When one party or the other seeks to make a major change in contract language, that party must demonstrate that it has exhausted all reasonable efforts at collective bargaining and there is very good cause for the arbitrator to intervene. See, Nathan, "Arbitral Standards for Deciding Non-Economic Issues," Illinois Public Employee

¹⁰ The arbitrator instructed the parties that all aspects of the wage schedule were a single issue. Other than by mutual agreement, it was not possible for one the parties to separate merit system from its base pay proposal.

Relations Report, Vol 21, No. 1 (2004). The record in this case does not support the argument that there is a true need for the introduction of this major change in terms and conditions of employment which cannot otherwise be obtained at the bargaining table.

B. Non-Economic Issues

1. Discipline

The Union proposes the initiation of an arbitration procedure for the final and binding disposition of disciplinary appeals. The expired agreement, and those before it, mandated that such appeals be taken to the Rock Island Board of Fire and Police Commissioners ("Fire and Police Board") which had the final authority over the discipline of bargaining unit employees. The City opposes this change. All comparable cities other than Moline have a binding arbitration provision for discipline.

The Fire and Police Board consists of political appointees. The appearance, although not necessarily the fact, is that political appointees owe an allegiance to their sponsor. The sponsor is the Employer, or at least a branch of the employing entity. As fair-minded as the Fire and Police Board might attempt to be it will always be open to suspicion that it cannot decide a sensitive case with the same neutrality as an outside arbitrator. The Fire and Police Board is a holdover from a time when public safety employees had

no bargaining rights. The Act changed that. It not only provides for final and binding arbitration, but mandates it "unless mutually agreed otherwise."¹¹ Thus, there is a statutory presumption that binding arbitration is the preferred method of deciding disputes. The Act makes no exception for issues involving discipline. The parties are permitted to agree otherwise and maintain the Fire and Police Board. That is what these parties here have done.

The record in this case does not reveal why the Union abandoned its right to insist on a binding grievance arbitration system for discipline. However, in support of its proposal the Union has offered evidence in this case of one instance where an employee was allegedly treated unfairly and was unable to secure satisfactory relief from the Fire and Police Board. As the City has argued, one example of dissatisfaction is not a basis for overturning a system in place for so many years.

The issue is whether the Union has carried its burden of demonstrating

¹¹ Section 8 of the Act states, "The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise." ***

that the negotiated disciplinary appeal system should be changed. As stated in the discussion of Kelly Days, the party seeking a change in a basic system has the burden of proving to the arbitrator not only that the change is necessary but that reasonable efforts to secure the change at the bargaining table have failed. Any lesser standard would discourage hard bargaining and would encourage parties to rely on the judgment of outside arbitrators. Outside arbitrators can rarely provide a better answer to the parties' negotiating difficulties than the parties can provide for themselves. Although the Union has a statutorily presumptive right to arbitration of discipline, once it has negotiated an alternative system it must meet the same burden of persuading the arbitrator of the need for a change as it would had the presumption not existed.

The arbitrator must reject the Union's proposal for want of an adequate record. The Union has failed to demonstrate that the Fire and Police Board system has not worked fairly and appropriately. It may be that there have not been many cases of discipline in the first place. It also may be that although there have been few cases the present system has not worked well. Whatever the facts, it is for the Union to develop the record. When a party wants an arbitrator to make a major change in contract language it must demonstrate the need.

2. Promotions

For some period of time, from at least 1993, the parties' bargaining agreement has had a succinct promotion article. It states that the Board of Fire and Police Commissioners ("Fire and Police Board") set the rules for promotions on the basis of merit, seniority and examinations. All ranks other than the Chief are covered.¹² The Fire and Police Board's rules provide the following:

1. The applicant takes a written exam worth 40% of the total score.
2. The applicant is interviewed by the Board and the Chief, the results of which are worth 25% of the total score. A score of at least 70 or higher must be achieved on the oral interview.
3. The applicant is evaluated by the Chief. This is worth 25%.
4. The remaining 10% comes from seniority, grade and military credit.
5. A vacancy is filled by the selection of any of the top 5 candidates by a vote of the members of the Board and the Chief.

¹² **The language also covers the salary increase upon promotion and that vacancies shall be filled "as soon as possible" from the list of qualified individuals.**

In 2003 the Fire Department Promotion Act was enacted (hereinafter the "statute.") The statute sets standards for the promotion of fire department personnel in all ranks below the fire chief which are included in a collective bargaining unit.¹³ In Rock Island this would include the ranks of battalion chief and fire marshal. The statute sets forth the standards for eligibility but leaves to the parties the weight to be assigned to each factor.¹⁴ There are precise guidelines for how tests are to be constructed and administered, how seniority is to be measured and how "ascertained merit is to be determined." It also provides standards for a "subjective evaluation" component."¹⁵

¹³ The statute allows for supplemental or additional standards provided that those set forth in the statute are the minimum standards.

¹⁴ The statute provides: "The weight, if any, that is given to any component included in a test may be set at the discretion of the appointing authority provided that such weight shall be subject to modification by the terms of any collective bargaining agreement ***." (Section 30)

¹⁵ The statute provides that the subjective components must be identified for all applicants, must be job-related, documented and

subject to review and challenge through the grievance procedure.
(Section 50)

Darrel Unzel, a Rock Island firefighter-paramedic and president of the Union testified that the new statute opens up negotiations for new weights to be given to the promotion components. Unzel expressed the opinion that the present promotion scheme was not in compliance with the statute because the written examination must be given last, and not first as occurs now.¹⁶ Unzel also expressed the opinion that the subjective measurement was unfairly administered and persons who scored high on the written test had their ranking greatly affected by the oral component.

The Union proposes a new promotion article which, it represents, substantially tracks the language of the statute. The proposal would substitute detailed language on the administration of the promotion process for the more general language of the present Article XIII. The proposal changes the weighting factors, but it still maintains the written exam as the first procedure in the process. The Union's proposal reads as follows:

Section 13.1 General - Promotions to the ranks of Lieutenant, Captain, Battalion Chief, Training Officer, Fire Marshal and Assistant Chief shall be conducted in accordance with the provisions of the [statute]. A copy of the [statute] is attached as Appendix A to this agreement. Except where expressly modified by the terms of this Article, the procedures for promotion shall be made in accordance with the provisions of the [statute].

¹⁶ **Section 35(a) of the statute provides *inter alia*: "The written examination shall be administered after the determination and posting of the seniority list, ascertained merit points, and subjective evaluation scores."**

Section 13.2 Vacancies - This Article applies to promotions to vacancies in the ranks of Lieutenant, Captain, Battalion Chief, Training Officer, Fire Marshal, and Assistant Chief. A vacancy shall be deemed to occur on the date upon which the position is vacated, and on that same date, a vacancy shall occur in all ranks inferior to that rank, provided that the position or positions continue to be funded and authorized by the corporate authorities.

If a vacated position is not filled due to a lack of funding or authorization and is subsequently reinstated, the final promotion list shall be continued in effect until all positions vacated have been filled for a period up to five (5) years beginning from the date on which the position was vacated. In such event, the candidate or candidates who would have otherwise been promoted when the vacancy originally occurred shall be promoted.

Section 13.3 Eligibility - All promotions shall be made from employees in the next lower rank who have at least three (3) years of seniority in the Fire Department.

Section 13.4 Rating Factors and Weights - All examinations shall be impartial and shall relate to those matters, which will test the candidate's ability to discharge the duties of the position to be filled. The placement of employees on promotional lists shall be based on the points achieved by the employee on promotional examinations consisting of the following components weighted as specified.

1) Written examination = 55% of total score. The written exam shall consist of questions composed and deemed to be job related. Candidates shall have access to study materials at least 90 days prior to the date of the exam. Candidates must achieve a score of 60% or better to continue in the promotion process.

2) Seniority = 15% of total score. Seniority will be accomplished by awarding 5 points for each year up to 20 years.

3) Ascertained merit = 15% of total score. Ascertained merit will be accomplished by awarding 25 points for each of the following certifications: A) Firefighter III, B) Hazardous Materials Operations, C) Fire Officer I, D) Fire Officer II.

4) Subjective Evaluation = 15% of total score. The subjective evaluation will be accomplished by the Police and Fire Commission awarding up to 50 points, and the Fire Chief awarding up to 50 points.

Section 13.5 Scoring of Components - Each component of the promotional test shall be scored on a scale of 100 points. The component scores shall then be reduced by the weighting factor assigned to the component on the test and the scores of all components shall be added to produce a total score of 100 points. Candidates shall then be ranked on the list in rank

order based on the highest to the lowest points scored on all components of the test. Such ranking shall constitute the preliminary promotion list.

A candidate on the preliminary promotion list who is eligible for a veteran's preference under the laws and agreements applicable to the department may file a written application for that preference within 10 days after the initial posting of the preliminary promotion list. The preference shall be calculated as provided under Section 55 of the [statute] and added to the total score achieved by the candidate on the test. The appointing authority shall then make adjustments to the rank order of the preliminary promotion list based on any veteran's preferences awarded. The final adjusted promotion shall then be posted in each Firehouse and copies provided to the Union and each candidate.

Section 13.6 Right to Review - The Union or any affected employee who believes that an error has been made with respect to eligibility to take an examination, examination results, placement or position on a promotion list, or veteran's preference shall be entitled to a review of the matter by the appointing authority. Any disputes as to such matters may be resolved and remedied by filing a grievance as provided in Article VII of this agreement or as otherwise provided by law.

Section 13.7 Order of Selection - Whenever a promotion rank is created or becomes vacant due to resignation, discharge, promotion, death, or the granting of a disability retirement pension, or any other cause, the appointing authority shall appoint to that position the person with the highest ranking on the final promotion list for that rank, except that the appointing authority shall have the right to pass over that person and appoint the next highest ranked person on the list if the appointing authority has reason to conclude that the highest ranking person has demonstrated substantial shortcomings in work performance or has engaged in misconduct affecting the person's ability to perform the duties of the promoted rank since the posting of the list.

If the highest-ranking person is passed over, the appointing authority shall document its reasons for its decision to select the next highest-ranking person on the list. Unless the reasons for passing over the highest-ranking person are not remedial, no person who is the highest-ranking person at the time of the vacancy shall be passed over more than once. Any dispute as to the selection of the first or second highest-ranking person shall be subject to resolution in accordance with the grievance procedure in Article VII of this agreement.

Section 13.8 Maintenance of Promotion Lists - Final eligibility lists shall be effective for a period of two (2) years. The Employer shall take all necessary steps to ensure that the Board of Fire and Police Commissioners maintain in effect current eligibility lists so that promotional vacancies are filled not later than 30 days after the occurrence of the vacancy.

The City offered the testimony of the fire chief, Jerry Shirk, on the subject of promotions. Shirk testified the City was not seeking major changes to the promotion Article. Other than what was required by the statute, the City wants to add a provision for bonus points for Fire Officer I and II certifications to be used in the rating procedure, and it wishes to exempt the fire marshal and battalion chiefs from the process. The City believes that these high ranking positions should be discretionary appointments by the City Manager and not subject to the formalities of the contractual procedure. Chief Shirk testified that he needs to implement new department policies and he must have supervisors who will enforce these policies in the way the Chief wants. The City's proposal for Article XIII is as follows:

Section 13.1 Promotions - The Board of Fire and Police Commissioners shall by its rules and regulations provide for promotion in the Fire department on the basis of ascertained merit, seniority in service and examinations.

Applicants for promotions to Fire Lieutenant, Fire Captain and Battalion Chief shall receive bonus points for Fire Officer I of five (5) points and Fire Officer II five (5) points.

The Board of Fire and Police Commissioners shall govern and provide for promotions for each rank within the Fire Department except that of Fire Chief, Battalion Chief, and Fire Marshall. On the effective date of a promotion, the next promoted employee shall receive an increase in pay to the next highest pay step in the new salary range which is not less than 5% of his base salary. The City shall fill permanent vacancies as soon as possible subject to the availability of qualified individuals in the applicable Board of Fire and Police Commission rules.

The Union argues that the City's proposal is unlawful because it does not address the rules of the Fire and Police Board which, the Union alleges, are in

conflict with the new statute. It is not clear to the arbitrator, however, that the City's contract proposal is unlawful on that basis. The proposal does not describe applicable rules and regulations. It only makes reference to their applicability. It must be presumed that if the present rules are in conflict with the statute the Fire and Police Board will adjust their rules accordingly. The Union has no basis to argue that the Fire and Police Board intends to follow old rules which are now in conflict with the statute. The City's proposal simply reaffirms that the rules of promotion shall be determined by the Fire and Police Board. As with any contract proposal, the arbitrator assumes that the parties intend to apply them in a lawful manner.

The Union's other objection to the City's proposal is more serious. The City seeks to exempt battalion chiefs (there are three of them) and the fire marshal even though these ranks are included in the bargaining unit. The City argues that it needs complete control over these ranks because of the need to have management with uncompromised loyalty to the Chief and to the City. There is certainly nothing unreasonable in this request. However, the City's complaint should be addressed to the Labor Board, not to the arbitrator. The City's proposal seeks to remove negotiated benefits from certain bargaining unit members. If they legitimately belong in the bargaining unit they should have the same benefits as all other employees. If they are truly managers then the City needs to seek a remedy in Springfield.

There are, however, greater problems with the Union's proposal. The

proposal is very detailed and precise. While there is nothing inappropriate in this approach the Union did not provide the arbitrator with any detailed review or explanation of its proposed terms. It is insufficient to simply refer to the statute and claim that the language tracks the statute. If the arbitrator is going to impose new language on the parties he wants to be very sure that everyone knows what is intended.

On the other hand, the City provided no detailed explanation of what was wrong with the Union's proposal. It asserts that if the language merely mimics the statute it is unnecessary. The City understands that the statute applies to its internal procedures. However, the Union's proposal contains provisions which the statute provides as negotiable. Indeed, Section 10(d) of the statute provides as follows:

(d) This Act is intended to serve as a minimum standard and shall be construed to authorize and not to limit:

(1) An appointing authority from establishing different or supplemental promotional criteria or components, provided that the criteria are job-related and applied uniformly.

(2) The negotiation by an employer and an exclusive bargaining representative of clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees who are members of bargaining units.

(3) The negotiation by an employer and an exclusive bargaining representative of provisions within a collective bargaining agreement to achieve affirmative action objectives, ***.

It appears to the arbitrator that the statute gives the parties considerable latitude in negotiating alternate provisions. The Union's proposed language may not be precisely what the statute sets as minimum standards.

This may be perfectly acceptable or not, but the City has not reviewed the

language for the arbitrator. It simply rejects it out-of-hand. That is not acceptable in a situation where the parties are faced with a new statute and they need to respond to its requirements. This is not simply a situation where one party or the other wants to change existing language because it wants to improve its relative position vis-a-vis that subject. Here the ground rules, in the form of a new statute, are new. The parties are not even able to compare the proposals with comparable language in other cities because the statute is so new that most cities have not had an opportunity to negotiate new procedures. If they have, neither party called this to the arbitrator's attention.

The City objects to a recitation of the statute, or the statutory language, in the agreement. However, articulating the statute, or referring to it, establishes a bargaining history showing that the parties intended to follow the minimum standards of the statute and not permit additional regulations by the appointing authority.

The arbitrator is left to his own devices to craft language which comports with the parties' unique relationship and bargaining history. With non-economic issues the arbitrator may adopt the parties proposals, or part of them, or compose his own language which he believes best reflects what the parties themselves might have agreed to eventually. *Town of Cicero v. Illinois Association of Firefighters, IAFF Local 717*, 338 Ill. App. 3d 364, 374, 788 N.E.

2d 286, 293 (1st Dist. 2003).¹⁷

After careful consideration of the evidence, the proposals and the new statute, the arbitrator has reached the following conclusions:

1. The battalion chiefs and fire marshall should not be removed from the contractual promotion provisions. The reasoning was covered above. This is a basic change which the parties should negotiate themselves or should send to the Illinois Labor Relations Board.

2. There needs to be a recitation that the Fire and Police Board control the process subject to statutory standards and to the limitations contained in the collective bargaining agreement. The statute should be specifically referenced to indicate that the parties are aware of that law's new standards and accept them. In referring to the statute the arbitrator is also demonstrating an intent that the Fire and Police Board is not to alter the requirements under the guise of setting "supplemental" standards. In this

¹⁷ This decision enforced ILRB Case No. S-MA-98-230 (Berman, 1999). See *Village of Western Springs and Teamsters Local 714*, ILRB Case No. S-MA-91-153 (Goldstein, 1992). See also, Richard Laner and Julia Manning, *Interest Arbitration: A New terminal Impasse Resolution Procedure for Illinois Public Sector Employees*, 60 CHI-KENT L. REV. 839,852 (1984). See also *Twin City Rapid City Co.*, 7 LA 845 (McCoy, 1947).

regard, there should be a specific reference to access to the grievance procedure.

3. The weighting of the standards must be re-set. The Union's evidence that subjective factors have been too controlling in the past was not addressed by the City. The arbitrator assumes that if, contrary to the Union's allegations, most applicants who scored the highest on the objective portions of the process actually got the promotions, the City would have submitted such evidence. That not being the case, the arbitrator concludes that the subjective portions of the process have played too large a role.

4. Both parties seek a provision assigning points for training certification, but disagree as to the amounts. This will be addressed, as well as the 100 point concept.

5. The Union offered no evidence on why it is necessary to have a provision which keeps a high graded applicant from being passed over twice. No special provision should be inserted without supporting evidence.

The arbitrator finds the following language most appropriate given the limited record developed by the parties:

ARTICLE XIII PROMOTIONS

Section 13.1 - The Board of Fire and Police Commissioners shall provide for promotion for each rank in the Fire Department, except for the Fire Chief, according to rules and regulations which are in compliance with the Fire Department Promotions Act of 2003 [insert ILCS citation]. The Board of Fire and Police Commissioners may promulgate rules and regulations supplementing the Fire Department Promotions Act but may not promulgate any rule or regulation which alters or modifies a specific standard contained in the Fire Department Promotions Act.

Section 13.2 - The Board of Fire and Police Commissioners, in consultation with the Fire Chief, shall determine when a vacancy exists. When a vacancy exists it shall be filled as soon as possible from the list of qualified individuals. No employee is eligible for promotion who does not have at least three (3) years of seniority in the Rock Island Fire Department.

Section 13.3 - Employees eligible for promotion are those who appear on the promotion list for each rank. An individual's position on a promotion list shall be determined by a combination of factors including a written examination, ascertained merit, seniority and subjective evaluations. Each factor shall be measured in terms of 100 points per factor but the score for each factor shall then be reduced by the weight assigned to each factor. The total weighted score may be subsequently augmented by the application of any veteran's preference as provided by applicable law. In no event shall an applicant with a veteran's preference pursuant to applicable law receive less than five (5) additional points to be added to the applicant's total weighted score. The weightings for each factor shall be as follows:

- A) Written examination - 50%
- B) Ascertained merit as determined by training - 20%. Each certification shall be worth 25 points but no score for ascertained merit shall exceed 100 points.
- C) Subjective evaluations, which may include oral interviews - 20%
- D) Seniority - 10%. Each year of service shall be worth five points but no score for seniority shall exceed 100 points.

Section 13.4 - Any applicant for promotion, or the Union, who believes that an error has been made with respect to any provision contained in this article may file a grievance under Article VII of this Agreement.

Section 13.5 - An employee receiving a promotion shall receive an increase in pay to the next highest step in the new salary range which is not less than five (5%) percent of the employee's base salary.

3. Vacation Scheduling

Employees accrue vacation/holiday leave each pay period. The amount

of leave they accumulate is based upon years of service. Currently there is no limitation on how much vacation time may be taken on each occasion an employee wants time off. As long as the department's master schedule has available time slots for vacations, an employee may, even on short notice, take as much or as little vacation as the employee has accrued.¹⁸ The record on the issue of vacation time is as sparse as it was with the promotion issue. It is not clear how available vacation slots are, how it developed that employees can schedule themselves for vacation as opposed to applying for it with advance notice so that battalion chiefs can schedule employee staffing efficiently, or why employees were allowed to take vacations in small slices in the first place.¹⁹

¹⁸ The City acknowledges in its brief: "Currently, an employee who starts work at 8:00 a.m. can report to work and request a few hours of vacation at 2:00 p.m. that same afternoon, and if the vacation slots are open, the battalion chief has to allow the vacation." (Employer's Brief at p. 41.)

¹⁹ The parties also did not make a comparability study showing what the contracts in other cities provide and what the practices regarding advance notice for vacations, the availability of vacation slots and the amount of discretion management has in granting partial day vacations time.

The City complains that this system causes inefficiencies, if not confusion, for management because a battalion chief can never be sure what the staffing will be. The City suggests, and the Union does not really rebut, that employees can come and go as they please to suit their personal schedules.

The City proposes adding the following language to Article XIV, Section 14.1 of the Agreement:

Vacation leave shall be scheduled in not less than twelve (12) hour increments with the prior approval of the employee's command officer.

The Union, acknowledging that there should be some limitations, proposes the following:

For 24-hour employees vacation/holiday leave shall be used in minimum increments of 6 hours.

The Union argues that the ability to take vacations with liberal restrictions is a valuable benefit for employees. The Union argues that the arbitrator should move cautiously because these proposals are a diminution of benefits. Arbitrators should not take away benefits unless there is a very good reason for doing so. In this case, the Union contends, the Fire Chief testified in generalities. He was unable to recall a single instance when there was a problem staffing a shift because of a vacation request with short notice. Furthermore, the Union points out, restricting vacations to a minimum number of hours per occasion does not address the City's concern. Employees can still

request vacation time with short notice albeit that these last minute time off periods must be in increments of several hours.

The City objects to the Union's proposal because there could still be four periods of vacation (each at six hours) within a duty day. The City points out that nothing in the Union's proposal prevents an employee, or more than one employee, to take paid time off in the middle of the day.

Given the limited record on this issue, the arbitrator finds that vacations in 12 hour increments makes the most sense. While the 12 hour limitation, or any limitation of minimum hours, does not address the problem of short notice time off, it reduces the risk of frequency because now employees know that if they take time off it will be for a measurable period impacting their total accrual. Employees will be less eager to take vacation time willy-nilly if the cost is an entire half day. However, the arbitrator prefers the Union's language because the City's proposed language with the insertion of the words "prior approval" may imply that the arbitrator is allowing restrictions on the granting of the time off that are not now the practice. That is not the intent here. Whatever the practice has been it should remain the same for the life of this contract except that vacation time must be for a minimum period of 12 hours. Accordingly, the following sentence should be added to Section 14.1:

For 24-hour employees vacation/holiday leave shall be used in minimum increments of twelve (12) hours.

A W A R D

1. General Wage Increase

The salary schedule attached to the current collective bargaining agreement shall be increased in its entirety as follows:

1) Retroactive to April 1, 2003, a 3.5% increase with status quo for the pay for performance system. The retroactivity for salary would include all bargaining unit members who retired after March 31, 2003.

2) April 1, 2004, a 3.5% increase with status quo for the pay for performance system.

3) April 1, 2005, 1 3.5% increase with suspension of the current Addendum of Agreement on Pay for Performance.

2. Kelly Days

There shall be no change in the status quo.

3. Discipline

There shall be no change in the status quo.

4. Promotions

The following language shall replace the current Article XIII:

ARTICLE XIII PROMOTIONS

Section 13.1 - The Board of Fire and Police Commissioners shall provide for promotion for each rank in the Fire Department, except for the Fire Chief, according to rules and regulations which are in compliance with the Fire Department Promotions Act of 2003 [insert ILCS citation]. The Board of Fire and Police Commissioners may promulgate rules and regulations supplementing the Fire Department Promotions Act but may not promulgate any rule or regulation which alters or modifies a specific standard contained in the Fire Promotions Act.

Section 13.2 - The Board of Fire and Police Commissioners, in consultation with the Fire Chief, shall determine when a vacancy exists. When a vacancy exists it shall be filled as soon as possible from the list of qualified individuals. No employee is eligible for promotion who does not have at least three (3) years of seniority in the Rock Island Fire Department.

Section 13.3 - Employees eligible for promotion are those who appear on the promotion list for each rank. An individual's position on a promotion list shall be determined by a combination of factors including a written examination, ascertained merit, seniority and subjective evaluations. Each factor shall be measured in terms of 100 points per factor but the score for each factor shall then be reduced by the weight assigned to each factor. The total weighted score may be subsequently augmented by the application of any veteran's preference as provided by applicable law. In no event shall an applicant with a veteran's preference pursuant to applicable law receive less than five (5) additional points to be added to the applicant's total weighted score. The weightings for each factor shall be as follows:

- A) Written examination - 50%
- B) Ascertained merit as determined by training - 20%.
Each certification shall be worth 25 points but

no score for ascertained merit shall exceed 100 points.

C) Subjective evaluations, which may include oral interviews - 20%

D) Seniority - 10%. Each year of service shall be worth five points but no score for seniority shall exceed 100 points.

Section 13.4 - Any applicant for promotion, or the Union, who believes that an error has been made with respect to any provision contained in this article may file a grievance under Article VII of this Agreement.

Section 13.5 - An employee receiving a promotion shall receive an increase in pay to the next highest step in the new salary range which is not less than five (5%) percent of the employee's base salary.

5. Vacations

The following sentence should be added to Section 14.1:

For 24-hour employees vacation/holiday leave shall be used in minimum increments of twelve (12) hours.

6. Tentative Agreements

The tentative agreements reached prior to the hearing shall be incorporated into the new Agreement.

Respectfully submitted,

HARVEY A. NATHAN

April 1, 2004