BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration **between** **CITY OF OAK FOREST** **and** **OAK FOREST FIREFIGHTERS UNION, LOCAL 3039, IAFF, AFL-CIO, CLC**	**CASE NOS.:** S-MA-03-251 Arb. Ref. 04.227 (Interest Arbitration - Promotions)

OPINION AND AWARD

APPEARANCES:

For the City: Burton S. Odelson, Esq.
Amy E. Smith, Esq.

For the Union: Lisa B. Moss, Esq.

Date of Award: September 26, 2005

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I. INTRODUCTION

This is an interest arbitration.

The Oak Forest Firefighters Union, Local 3039, IAFF ("Union") represents all sworn full-time fire fighters, engineers and lieutenants employed by the City of Oak Forest ("City"). The parties reached impasse over the terms for the successor collective bargaining agreement to replace the parties' 1999-2003 Agreement. Impasse procedures under the Illinois Public Labor Relations Act ("IPLRA")[1] were implemented, with the undersigned selected as the interest arbitrator. I also served as a mediator prior to formal proceedings in the interest arbitration and the parties were able to agree upon terms for all issues for a new Agreement ("Agreement") with the exception of Article 19 ("Vacancies and Promotions"). The dispute concerning the terms of Article 19 for the new Agreement are now before me for resolution.

Because the issues in this case concern promotions and because the parties have incorporated the terms of the Fire Department Promotion Act ("FDPA")[2] into their proposals, in addition to the IPLRA, this proceeding is also governed by the FDPA.[3]

Review of the parties' proposals and briefs shows the following issues are in dispute:

A. Whether the rank of Captain should be included as a rank subject to the promotional process under the Agreement?;

B. Eligibility for promotion;

C. Rating factors and weights;

D. Test components;

E. Order of selection; and

F. Maintenance of promotional lists.

Those issues (and sub-issues) will be separately addressed.

II. DISCUSSION

A. Should The Rank Of Captain Be Included As A Rank Subject To The Promotional Process Under The Agreement?

Captains are not covered by the Agreement.[4] The Union seeks to in-

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[1] 5 ILCS 315/1 et seq.

[2] 50 ILCS 742/1 et seq.

[3] The FDPA came into effect August 4, 2003 — after the parties' negotiated the 1999-2003 Agreement.

[4] Article 1.1 of the Agreement provides that "[t]he City recognizes the Local as the sole and exclusive bargaining representative for all sworn full-time fire fighters, engineers, and lieutenants, but *excluding* all

[footnote continued]

clude the rank of Captain for the promotional process, while the City seeks to exclude that rank.[5]

Section 5 of the FDPA provides, in pertinent part:

> Sec. 5. Definitions. In this Act:
>
> * * *
>
> "Promotion" means any appointment or advancement to a rank within the affected department (1) for which an examination was required before January 1, 2002; (2) that is included within a bargaining unit; or (3) that is the next rank immediately above the highest rank included within a bargaining unit, provided such rank is not the only rank between the Fire Chief and the highest rank included within the bargaining unit, or is a rank otherwise excepted under item (i), (ii), (iii), (iv), or (v) of this definition. "Promotion" does not include appointments (i) that are for fewer than 180 days; (ii) to the positions of Superintendent, Chief, or other chief executive officer; (iii) to an exclusively administrative or executive rank for which an examination is not required; (iv) to a rank that was exempted by a home rule municipality prior to January 1, 2002, provided that after the effective date of this Act no home rule municipality may exempt any future or existing ranks from the provisions of this Act; or (v) to an administrative rank immediately below the Superintendent, Chief, or other chief executive officer of an affected department, provided such rank shall not be held by more than 2 persons and there is a promoted rank immediately below it. Notwithstanding the exceptions to the definition of "promotion" set forth in items (i), (ii), (iii), (iv), and (v) of this definition, promotions shall include any appointments to ranks covered by the terms of a collective bargaining agreement in effect on the effective date of this Act.

The Union's position to include the rank of Captain as a rank required to be part of the promotional process is adopted.

First, the City's current Fire and Police Commissioners Rules and Regulations specify Captain as a promotional position:[6]

> <u>Section A-1</u> <u>Classification</u>
>
> * * *
>
> <u>Fire Service</u>
>
> * * *
>
> Promotional Positions:
>
> Captains - Paramedic
> Captains
>
> * * *

Second, in an interest arbitration, the party seeking to change the *status quo* has the burden of demonstrating the necessity for the change. The *status quo* included Captain as a promotional position.

[continuation of footnote]
sworn firefighters in the ranks of Fire Chief, *Captain*, and any employees excluded from the definition of 'firefighters' as defined in Section 1603(g)-(l) of the Illinois Public Labor Relations Act, and all managerial, supervisory, confidential, and professional employees as defined by the Act, as amended" [emphasis added].

[5] Union and City Proposals at Section 19.2; Union Brief at 3-5; City Brief at 1-2.

[6] Fire and Police Commissioners Rules and Regulations at Section A-1.

There is no sufficient reason articulated by the City to now justify the exclusion of promotions to Captain.

Third, the chain of command is Chief, Deputy Chief, Captain, Lieutenant, Engineer and Firefighter.[7] The highest position in the bargaining unit is Lieutenant.[8] Under Section 5 of the FDPA, the rank of Captain is therefore "... the next rank immediately above the highest rank included within a bargaining unit ..." which should be included in the promotional process.

Fourth, the City argues that "[t]he position of Captain is considered a chief executive officer", thereby requiring exclusion under (ii) of the definition of promotion in Section 5 of the FDPA ("'Promotion'" does not include appointments ... (ii) to the positions of Superintendent, Chief, or other chief executive officer ..."). The City further argues that "[t]he position of Captain is considered a chief executive officer ... [because l]ike the Chief and Deputy Chief, the Captain only goes on fire calls for the larger calls, such as a structural or building fire or box alarm call ... oversees the fire prevention bureau, which entails overseeing apartment inspections, training, and reviewing building plans for new buildings ... [and] oversees ... three lieutenants ... [who are] in charge of each shift."[9] However, notwithstanding those duties, in the chain of command the rank of Captain is third down (below Chief and Deputy Chief) and the first position out of the bargaining unit (above Lieutenant).[10] The exclusion found in (ii) of the FDPA is for "Superintendent, Chief, or other *chief* executive officer ...." [emphasis added]. Given that chain of command with the rank of Captain third down on the ladder, this rank of Captain cannot be considered to be a "... *chief* executive officer ..." on the level of "Superintendent [or] Chief ...." [emphasis added].

Fifth, the City next points to the exclusion in (v) of the FDPA ("... an administrative rank immediately below the Superintendent, Chief, or other chief executive officer of an affected department, provided such rank shall not be held by more than 2 persons and there is a promoted

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[7] *See* Article 17.2 of the Agreement.

[8] Article 1.1 of the Agreement. *See also*, City Brief at 1 ("Lieutenant is the most senior rank included in the bargaining unit.").

[9] City Brief at 2.

[10] Agreement at Article 17.2.

rank immediately below it") and argues that "even if Captain is not considered to be a chief executive officer pursuant to subsection (ii), it is an administrative rank immediately below another chief executive officer, the Deputy Chief ... [and] there is only one person holding the rank of Captain, and there is a promoted rank immediately below Captain, namely Lieutenant."[11]

That position is also not persuasive. The exclusion in (v) is for "... an administrative rank *immediately* below the Superintendent, Chief, or other *chief* executive officer ...." [emphasis added]. The "... chief executive officer" in the Department is the Chief. The "... rank immediately below ..." the Chief's position is the rank of Deputy Chief — not Captain.[12] Therefore, the exclusion in (v) does not apply to the rank of Captain. The underpinning for the City's argument is that the Deputy Chief is a "chief executive officer" within the meaning of (v). Given the chain of command in the Department, the "chief executive officer" is not the Deputy Chief, but is the Chief.

Sixth, the City states that it "... has not included the position of Captain in its proposal because the City is going to eliminate the position upon the retirement of the current Captain."[13] The potential elimination of the position does not change the result. Should the City eliminate the position, the above discussion is perhaps moot because there will be no vacant position available for promotion. However, the position existed when this dispute was joined and if the position needs to be filled in the future, the question of promotional entitlements for the bargaining unit must be resolved.

In sum, the Union's position is adopted. The rank of Captain shall be included as a rank required to be part of the promotional process.

B. Eligibility

The Union seeks the following eligibility language:[14]

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[11] City Brief at 2.

[12] Agreement at Article 17.2.

[13] Attached to the City's Brief is a proposed amendment to Title 6, Chapter 238, Section 8 of the City Code, providing, in pertinent part, that "[u]pon the retirement of the current full-time Captain from the position of full-time Captain of the Oak Forest Fire Department, the position of full-time Captain shall be abolished, but the two part-time positions of Captain shall remain in effect."

[14] Union Proposal at Section 19.3; Union Brief at 7-8.

> For promotion to the rank of Engineer, the candidate must be employed full-time by the Oak Forest Fire Department as a Firefighter and have a minimum of one (1) year of full-time active duty service with the Oak Forest Fire Department. For promotion to the rank of Lieutenant, the candidate must be employed full-time by the Oak Forest Fire Department as an Engineer or be certified as a Fire Officer I and have a minimum of five (5) years of full-time active duty service with the Oak Forest Fire Department. For promotion to the rank of Captain, the candidate must be employed full-time by the Oak Forest Fire Department as a Lieutenant or be a full-time employee certified as a Fire Officer II and have a minimum of ten (10) years of full-time active duty service with the Oak Forest Fire Department.

The City proposes the following:[15]

> All members of the next lower rank are eligible to take a promotional examination in accordance with Section 15(d) of the Fire Department Promotion Act without any further eligibility requirements.

In its Brief, the City clarified its proposal seeking the language found in Section 15(d) of the FDPA ("[a]ll examinations for promotions shall be competitive among the members of the next lower rank who meet the established eligibility requirements and desire to submit themselves to examination.").[16]

Article 19 of the prior Agreement provides:

> **ARTICLE 19**
> **VACANCIES AND PROMOTIONS**
>
> Vacancies within the bargaining unit, created as a result of death, resignation, retirement, or discharge for just cause, and all subsequent vacancies shall be filled within one-hundred twenty (120) days as per the City of Oak Forest Fire and Police Commission Rules. Promotions which are required to fill vacancies shall be made from established lists resulting from promotional examinations given to the classification immediately below the vacancy and any full time personnel certified as Fire Officer I and with a minimum of 5 years full time active duty service with the Oak Forest Fire Department shall be allowed to test for the position of Lieutenant. Employees who have achieved equal exam scores shall be listed in priority for promotion according to their seniority.

The Board of Fire and Police Commissioners Rules and Regulations provide:[17]

> <u>Section E-3</u> <u>Eligibility for Promotion</u>
>
> No person shall be examined for promotion in the Classified Service until he has served at least one (1) year in the rank from which promotion is sought. The Commission may waive or reduce the one (1) year minimum service requirement when in their opinion such waiver or reduction is for the good of the service. For the purpose of this section the one (1) year probationary period shall not be counted in determining time of service in the lowest rank.

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[15] City Proposal at Section 19.3.

[16] City Brief at 3.

[17] Union Exh. 6 at 19-20. *See also*, City Exh. B.

* * *

Section E-6 Promotional Examinations

... All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination. ...

* * *

Section 10(e) of the FDPA provides:

Sec. 10. Applicability

* * *

(e) Local authorities and exclusive bargaining agents affected by this Act may agree to waive one or more of its provisions and bargain on the contents of those provisions, provided that any such waivers shall be considered permissive subjects of bargaining.

Section 15 of the FDPA provides:

Sec. 15. Promotion Process

(a) For the purpose of granting promotion to any rank to which this Act applies, the appointing authority shall from time to time, as necessary, administer a promotion process in accordance with this Act.

* * *

(d) The appointing authority shall provide a separate promotional examination for each rank that is filled by promotion. All examinations for promotion shall be competitive among the members of the next lower rank who meet the established eligibility requirements and desire to submit themselves to examination. ...

* * *

Taking the prior Agreement and the Board of Fire and Police Commissioners Rules and Regulations together, the *status quo* is as follows:

1. Vacancies shall be filled as per the Board of Fire and Police Commissioners Rules and Regulations;

2. Promotions shall be made from the classification immediately below the vacancy;

3. Any full time personnel certified as Fire Officer I and with a minimum of 5 years full time active duty service with the Department shall be allowed to test for the position of Lieutenant; and

4. No person shall be examined for promotion until he/she has served at least one year (non-probationary) in the rank from which promotion is sought, which period can be waived or reduced if it is for the good of the service.

The Union argues that the City is seeking to change the *status quo* asserting that "[t]he City seeks to substantially modify the current contract requirements with respect to promotions, narrowing who may apply for the position of lieutenant and removing any minimum service requirements."[18] While the City's proposed language can be read that way, with the filing of its Brief and

[18] Union Brief at 8-9.

the clarifying language, I do not read the City's position that way.

By adopting the language of Section 15(d) of the FDPA, the City does not appear to eliminate all eligibility requirements and merely permit anyone in the next lower rank to be eligible, but appears to seek to maintain the *status quo* ("[a]ll examinations for promotions shall be competitive among the members of the next lower rank *who meet the established eligibility requirements* and desire to submit themselves to examination" [emphasis added]).[19] There would be no need to use the phrase "... who meet the established eligibility requirements ..." if the City did not intend that there be eligibility requirements. Rather, it is the Union that seeks to change the *status quo* by adding Engineer to Fire Officer I for eligibility for promotion to Lieutenant and seeking to impose a 10 year requirement with a certification as Fire Officer II for promotion to Captain — eligibility requirements which did not previously explicitly exist under either Article 19 of the prior Agreement or the Board of Fire and Police Commissioners Rules and Regulations.

The burden is on the party seeking to change the *status quo*. While there may be good ideas to change the *status quo*, I have no evidence before me on this issue to justify *any* change to the current *status quo*. Therefore, no change with respect to eligibility shall be required — the *status quo* shall be maintained.[20]

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[19] City Brief at 3. In its Proposal, the City proposed that "[a]ll members of the next lower rank are eligible to take a promotional examination in accordance with Section 15(d) of the Fire Department Promotion Act without any further eligibility requirements." City Proposal at Section 19.3. Given that Section 15(d) of the FDPA contains the phrase "... who meet the established eligibility requirements ..." and the prior Agreement as well as the Board of Fire and Police Commissioners Rules and Regulations specify certain eligibility requirements, I cannot read the City's position to be that no eligibility requirements should exist. The City's position, as I read it, is that it does not seek to *add* any eligibility requirements which do not already exist.

[20] Given that it appears that the City is arguing for maintenance of the *status quo* and that there do not appear to be changes to the eligibility requirements as previously specified by the Board of Fire and Police Commissioners Rules and Regulations, the City's position that it "... declines to waive this provision of the Act as allowed in Section 10(e) ('[l]ocal authorities and exclusive bargaining agents affected by this Act may agree to waive one or more of its provisions and bargain on the contents of those provisions, provided that any such waivers shall be considered permissive subjects of bargaining')" is moot. *See* City Brief at 3.

C. Rating Factors And Weights

The parties seek to make changes to certain portions of the rating factors and weights on the promotional examinations:[21]

Portion	Current	City	Union
Written Exam	55%	55%	60%
Oral Interview	30%	n/a	n/a
Assessment Center	n/a	15%	10%
Ascertained Merit	10%	15%	15%
Seniority	5%	10%	10%
Chief's Points	n/a	5%	5%
Minimum Passing Score	70	70	None

The parties therefore differ on the weights to be given for the written exam and assessment center and they further differ on a requirement for a minimum passing score. Those factors will be separately addressed.

1. Written Examination

The Union proposes a 60% weight for the written exam, while the City proposes 55%.[22]

Currently, the written examination is given a 55% weight.[23] Because the Union seeks to increase that percentage to 60%, it has the burden to show why the change in the *status quo* should be granted. The Union cannot make that showing.

The Union argues that "... the objectivity of a written examination is more assured than the evaluations to be performed; the Union's percentage favors even greater objectivity than the City's."[24] The City counters that argument asserting that "... allotting further points to this portion would place too much emphasis on 'paper' responses, when most of the job requirements require an immediate response of action rather than submitting paperwork."[25]

There is no evidence that the 55% weight currently utilized for the

[21] Union and City Proposals at Section 19.4; Union Brief at 10; City Brief at 3. The "current" weights for the written exam, ascertained merit and seniority are found in the Board of Fire and Police Commissioners Rules and Regulations at Section E-6. The minimum passing score is found *id*. at Section E-7 ("No person's name shall be entered upon a promotional eligible register whose general average is less than 70% of all subjects of an examination or less than the minimum fixed by previous unanimous decision of the Commission.").

[22] Union and City Proposals at Section 19.4; Union Brief at 11-12; City Brief at 4.

[23] Board of Fire and Police Commissioners Rules and Regulations at Section E-6.

[24] Union Brief at 12.

[25] City Brief at 4.

written examination — *i.e.*, the *status quo* — is not working and must be changed. The Union's argument may be a good idea, but the City's argument that the promotion process should not be geared to select candidates who are better at paperwork than the actual fighting of fires and responding to emergencies is equally, if not more compelling. In any event, the Union has the burden to show that the 55% weighting should be changed because it is not working. Facts are not present to support that position.

The City's position to have a 55% weighting for the written examination is adopted.

2. Assessment Center

The Union seeks to have a weight of 10% on the assessment center portion while the City seeks a 15% weighting.[26]

Consistent with its argument concerning the written examination, the Union sees a 10% weight for the assessment center portion as giving more objectivity to the process.[27] The City's position is that the assessment center portion "... is a practical examination that incorporates physical ability tests with oral situational questions to test leadership, judgment and communication [and b]ecause it incorporates more than just an oral examination, it should be allotted more than the previous 10% given to oral examinations."[28]

Given that the parties are now agreeing to utilize the assessment center concept, which was not used before, there is no *status quo*. The City describes the assessment center as "... a practical examination that incorporates physical ability tests with oral situational questions to test leadership, judgment and communication."[29] Again, the City's argument that the promotional process should not be geared to select candidates who are better at paperwork than the actual fighting of fires and responding to emergencies is compelling. And, given that the City's position concerning the weighting for the written examination has been adopted (55%) and the parties have agreed upon the other weights to be given (if I adopted the Union's proposal, the percentages

[26] Union and City Proposals at Section 19.4; Union Brief at 11-12; City Brief at 4.

[27] Union Brief at 12.

[28] City Brief at 4.

[29] *Id.*

would not add up to 100% — as required by Section 5 of the FDPA ("... all components shall be added to produce a total score based on a scale of 100 points")), 15% for the assessment center portion is reasonable and will be adopted.

The City's position to have a 15% weighting for the assessment center portion is adopted.

3. Minimum Passing Score

The City seeks a 70% minimum passing score.[30] The Union proposal is one "... omitting the minimum passing score ...."[31] The City's proposal shall be adopted.

First, Section 30 of the FDPA provides, in pertinent part:

> **Sec. 30. Promotion examination components.**
>
> ... If the appointing authority establishes a minimum passing score, such score shall be announced prior to the date of the promotion process and it must be an aggregate of all components of the testing process. ....

Thus, as the City correctly argues, "... the City has the authority to establish a minimum passing score."[32] The City seeks to exercise that authority. It should be allowed to do so.

Second, the *status quo* provides for 70% as a minimum passing score.[33] By seeking to omit the passing score, the Union therefore seeks to change the *status quo*. The burden thus falls on the Union to demonstrate why the *status quo* should be changed. The Union has not carried that burden.

The Union's argument is that "[t]he City's proposal is ambiguous at best, making unclear whether it would require a passing score of 70% on each separate component of the examination or on the total score obtained as a result of adding the candidate's score on each of the components."[34] But, with respect to the passing score, the Board of Fire and Police Commissioners Rules and Regulations at Section E-7 make it clear that the passing score is a "... *general* average ..." of "... 70% of *all subjects* of an examination ...." [emphasis added]. That score must also be interpreted in light of Section 30 of the FDPA which states the score "... must be an *aggregate* of *all components* of

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[30] City Proposal at Section 19.4; City Brief at 4.

[31] Union Brief at 11-12.

[32] City Brief at 4.

[33] Board of Fire and Police Commissioners Rules and Regulations at Section E-7.

[34] Union Brief at 11.

the testing process." Finally, the City states in its Brief that it desires "... to establish a minimum passing score of 70 based upon *all* components of the examination ...." [emphasis added].[35]

The City's position to set a minimum passing score of 70% is therefore adopted.

D. Test Components

1. Written Examination

With the exception of the underscored word "independent" (which is sought by the Union), the parties' proposals concerning the written examination are identical:[36]

> **19.5 Test Components.**
>
> 1. Written Exam. The written exam shall be given in accordance with the Promotional Act. The examination shall be based only on the contents of the written materials that the City has identified and made readily available to potential examinees at least 90 days before the examination is administered. The written examination shall be administered after the determination and posting of the seniority list, ascertained merit points and Chief's points. The test shall be administered by a[n] independent testing agency contracted and paid for by the Fire and Police Commission.

The Union seeks inclusion of the word "independent" before "testing agency".[37] The City's proposal does not contain that word.

In their proposals, the parties have agreed to follow the FDPA ("[t]he written exam shall be given in accordance with the Promotional Act."). In pertinent part, the FDPA provides:

> **Sec. 25. Monitoring.**
>
> (a) All aspects of the promotion process, including without limitation the administration, scoring, and posting of scores for the written examination and subjective evaluation and the determination and posting of seniority and ascertained merit scores, shall be subject to monitoring and review in accordance with this Section and Sections 30 and 50.
>
> (b) Two impartial persons who are not members of the affected department shall be selected to act as observers by the exclusive bargaining agent. The appointing authorities may also select 2 additional impartial observers.
>
> (c) The observers monitoring the promotion process are authorized to be present and observe when any component of the test is administered or scored. Except as otherwise agreed to in a collective bargaining agreement, observers may not interfere with the promotion process, but shall promptly report any observed or suspected violation of the requirements of this Act or an appli-

[35] City Brief at 4.

[36] Union and City Proposals at Section 19.5.

[37] *Id.*

cable collective bargaining agreement to the appointing authority and all other affected parties.

(d) The provisions of this Section do not apply to the extent that they are inconsistent with the provisions otherwise agreed to in a collective bargaining agreement.

Sec. 30. Promotion examination components.

Promotion examinations that include components consisting of written examinations, seniority points, ascertained merit, or subjective evaluations shall be administered as provided in Sections 35, 40, 45 and 50. ...

Sec. 35. Written examinations.

(a) The appointing authority may not condition eligibility to take the written examination on the candidate's score on any of the previous components of the examination. The written examination for a particular rank shall consist of matters relating to the duties regularly performed by persons holding that rank within the department. The examination shall be based only on the contents of the written materials that the appointing authority has identified and made readily available to potential examinees at least 90 days before the examination is administered. The test questions and material must be pertinent to the particular rank for which the examination is being given. The written examination shall be administered after the determination and posting of the seniority list, ascertained merit points, and subjective evaluation scores. The written examination shall be administered, the test materials opened, and the results scored and tabulated.

(b) Written examinations shall be graded at the examination site on the day of the examination immediately upon completion of the test in front of the observers if such observers are appointed under Section 25, or if the tests are graded offsite by a bona fide testing agency, the observers shall witness the sealing and the shipping of the tests for grading and the subsequent opening of the scores upon the return from the testing agency. Every examinee shall have the right (i) to obtain his or her score on the examination on the day of the examination or upon the day of its return from the testing agency (or the appointing authority shall require the testing agency to mail the individual scores to any address submitted by the candidates on the day of the examination); and (ii) to review the answers to the examination that the examiners consider correct. The appointing authority may hold a review session after the examination for the purpose of gathering feedback on the examination from the candidates.

(c) Sample written examinations may be examined by the appointing authority and members of the department, but no person in the department or the appointing authority (including the Chief, Civil Service Commissioners, Board of Fire and Police Commissioners, Board of Fire Commissioners, or Fire Protection District Board of Trustees and other appointed or elected officials) may see or examine the specific questions on the actual written examination before the examination is administered. If a sample examination is used, actual test questions shall not be included. It is a violation of this Act for any member of the department or the appointing authority to obtain or divulge foreknowledge of the contents of the written examination before it is administered.

* * *

According to the Union, the use of the word "independent" before "testing agency" "... expresses the

concept that the testing agency be separate and disinterested, a concept that finds support in the language and the spirit of the FDPA."[38] But as logical and desirable as the Union's position is, the problem is that the parties agreed that "[t]he written exam shall be given in accordance with the Promotional Act" and the FDPA as quoted above does not contain a *specific* requirement for "an *independent* testing agency".[39] The City's use of a non-"independent" testing agency might raise suspicion, grievances and court challenges and it would seem to be in the City's best interest to totally disassociate itself from the process. On the other hand, inclusion of the word "independent" may be tinder for the same suspicion, grievances and court challenges as well because that word is not defined. But the underlying principle is that the written exam be fair and free from bias or influence and whether the word "independent" appears in the Agreement may well be an academic point. The parties have agreed that "[t]he written exam shall be given in accordance with the Promotional Act" and the FDPA does not have the wording the Union seeks. In this case, it is not my function to insert language into the FDPA which does not exist.

The City's language for the written examination shall therefore be adopted.

2. Assessment Center

The Union's proposal for the assessment center portion provides:[40]

19.5 Test Components

* * *

3. Assessment Center: Evaluators will be hired by the testing company and will not be current or past employees of the City of Oak Forest. A list of seven (7) individuals will be submitted to the Union from which the parties will alternately strike one name at a time until there are three (3) names remaining on the list. The striking order shall be determined by the flip of a coin. The remaining 3 individuals shall conduct the assessment center evaluations.

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38 Union Brief at 14.

39 Indeed, the FDPA appears to briefly touch on the subject in Section 50(b) where it permits observers established pursuant to Section 25 to witness the sealing, shipping and subsequent opening of scores "... if the tests are graded offsite by a *bona fide* testing agency ...." [emphasis added]. If the drafters of the language intended an "independent" or "bona fide" testing agency to administer all aspects of the written exam, they could have easily and clearly so stated.

40 Union Proposal at Section 19.5.

The City's proposed language is silent on the specific selection process for the assessment center. However, the City states in its Brief:[41]

> ... [T]he test is administered by an independent third party, which removes any possible bias (as the oral examination was previously conducted by the Police and Fire Commissioners, who are appointed by the Mayor.) Also, the Assessment Center examinations are conducted by fire professionals, rather than by Commissioners who may not have any fire-related experience.

The FDPA at Section 50(a) refers to assessment centers as one of the methods for subjective evaluations, but gives no guidance concerning selection.

Contrary to the written exam language where the City did not specifically address the Union's request for an "independent" testing agency, here the parties appear to be in agreement that the assessment center is an outside objective entity. In this award, I have directed the parties to draft language consistent with the award and I have retained jurisdiction for disputes concerning that language.[42] The specific selection process for the assessment center shall be made part of that drafting procedure. The parties should have the first opportunity to address the specific language. If the parties cannot agree upon the language and it is brought to my attention, and on an expedited basis, I will write the language.

3. Ascertained Merit

The Union proposes the following point breakdown for ascertained merit:[43]

Position/Achievement	Points
Engineer	
Associate's Degree	15
Bachelor's Degree	15
Fire Officer I	10
Fire Officer II	20
Fire Investigator	10
Fire Prevention Officer I	10
Fire Apparatus Engineer	20
Lieutenant and Captain	
Associate's Degree	15
Bachelor's Degree	15
Fire Officer II	20
Fire Investigator	15
Fire Instructor II	15
Fire Prevention Officer I	15
Fire Apparatus Engineer	5

The City proposes the following point breakdown for ascertained merit:[44]

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[41] City Brief at 4.

[42] *See infra* at III.

[43] Union Proposal at Section 19.5; Union Brief at 15-21.

[44] City Proposal at Section 19.5; City Brief at 5-7. The City further states that for the positions, the employees must be currently certified by the State of Illinois to be awarded the merit point. *Id.*

Degree/Position	Points
Associate's Degree	20
Bachelor's Degree	
with Associate's Degree	20[45]
without Associate's Degree	40
Provisional Fire Officer I	5
Fire Officer I	
if Provisional Fire Officer I	5[46]
if not Provisional Fire Officer I	10
Provisional Fire Officer II	5
Fire Officer II	
if Provisional Fire Officer II	5[47]
if not Provisional Fire Officer II	10
Provisional Fire Officer III	15
Fire Prevention Officer I	15
Fire Apparatus Engineer	5
Fire Arson Investigator	5

a. Captains

With respect to the Union's proposal for Captain (which mirrors its proposal for Lieutenant), because I have included that position for promotional eligibility as requested by the Union (*see* II(A) *supra*) and because the City did not agree to inclusion of that rank, the City has not had the opportunity to present its position concerning ascertained merit for that position. It would therefore be unfair for me to now assign ascertained merit points for the Captain's position. Given that the Captain's position is outside the bargaining unit and further given the greater responsibility that position holds, unlike promotions to the bargaining unit positions, there may be factors and points unique to a Captain's promotion which should be considered for ascertained merit. Because the parties should have the ability in the first instance to resolve that matter, the question of points for ascertained merit for promotion to the rank of Captain is remanded to the parties. If the parties are unable to resolve that issue — and if requested to do so — I will determine those points on an expedited basis.

b. Bargaining Unit Promotions

Section 45 of the FDPA provides:

> **Sec. 45. Ascertained Merit.**
>
> (a) The promotion test may include points for ascertained merit. Ascertained merit points may be awarded for education, training, and certification in subjects and skills related to the fire service. The basis for granting ascertained merit points, after the effective date of this Act, shall be published at least one year prior to the date ascertained merit points are awarded and all

[45] In addition to 20 points given for Associate's Degree.

[46] In addition to 5 points given for Provisional Fire Officer I.

[47] In addition to 5 points given for Provision Fire Officer II.

> persons eligible to compete for promotion shall be given an equal opportunity to obtain ascertained merit points unless otherwise agreed to in a collective bargaining agreement.
>
> (b) Total points awarded for ascertained merit shall be posted before the written examination is administered and before the promotion list is compiled.

Thus, if ascertained merit is used (which the parties have agreed to do), the points "... may be awarded for education, training, and certification in subjects and skills related to the fire service." However, the FDPA gives no specifics on how to allocate those points.

The parties' approaches are different. As shown by the above charts showing the point allocations sought by the parties, the Union seeks to separate those seeking promotions to Engineer from those seeking promotion to Lieutenant and Captain while the City makes no similar differentiation. Putting aside the Union's desire to separate the Engineers from the other promotions, there are some areas of agreement (*e.g.*, Fire Officer I, Fire Prevention Officer I, Fire Apparatus Engineer). However, for the most part, the parties are in disagreement as to the approach and the points to be allocated. Given that disagreement, and coupled with the fact that the FDPA gives little guidance in the assignment of these points, the task of assigning points is not easy.

1. The Approach

As noted, the Union seeks to separate promotions to different ranks. The City seeks no similar distinctions.

The FDPA provides no guidance on this question. The FDPA merely states in Section 45(a) that "[t]he promotion test may include points for ascertained merit [and a]scertained merit points may be awarded for education, training, and certification in subjects and skills related to the fire service."

Given the lack of guidance, the decision on how to approach this issue must be grounded in fundamental arbitral concepts. The question here really concerns the assessment of the qualifications, skills and abilities of employees seeking promotion. Traditionally, and absent any specific guidance from the FDPA (or the terms of a collective bargaining agreement), that function has always been a managerial prerogative, subject to challenge not on the basis of whether the decision is correct, but

on the limited ground of whether the decision is arbitrary or capricious:[48]

> It is a well established principle of Arbitration Law that the determination of whether or not an employee is qualified to perform the duties of a particular job is initially a judgment of Management ... and Management's decision in this regard will not be upset unless found to be unreasonable, arbitrary, capricious, discriminatory, or made in bad faith.

That concept is long-established in arbitration law.[49]

The Union argues that the point allocations should be different depending on the ranks at issue for promotion because qualifications for the different ranks require different skills.[50] However, as well-framed as those arguments may be, they do not rise to the level for me to find that the City's position of not awarding different points for ascertained merit depending on the position under consideration for promotion is arbitrary or capricious. At best, the Union's arguments make the issue debatable. But that is not enough. The Union must show that the single approach taken by the City for all promotional positions is arbitrary or capricious. The Union has not done that. With the exception for Captain previously noted at II(D)(3)(a), the City's single approach shall therefore be adopted.

2. Point Allocations

Given the long-established concept that promotions are managerial prerogatives, subject to arbitral review on the limited ground of whether the decision is arbitrary or capricious, the same deference and standard utilized in the analysis for the parties' approach discussed *su-*

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[48] *Shenango Furnace Co.*, 46 LA 203, 208 (Klein, 1966).

[49] *See* Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 841 ("Arbitrators have frequently held that, where the agreement makes 'fitness and ability' a factor to be considered along with seniority .... but is silent as to how and by whom the determination of qualifications is to be made, management is entitled to make the initial determination, subject to challenge by the union on the ground that management's decision was unreasonable under the facts, or capricious, arbitrary, or discriminatory."). *See also,* "Seniority and Ability", Proceedings of the 9th Annual Meeting of the NAA, 45-46 (BNA, 1956):

> ... [T]he determination of ability must be made by the management, and the issue should not be one of the arbitrator's judgment versus that of the management but whether the company's determination was arbitrary, capricious ... or discriminatory. ... [I]t is a managerial responsibility to make the determination and initiate the action, that there is an area of latitude for judgment and discretion, and that within this area ... the employer's decision should not be overruled on grounds that the arbitrator might have reached a different conclusion.

[50] Union Brief at 17-18.

pra at II(D)(3)(b)(1) must also be applied to the specific point allocations. Given that standard, the City's allocation of points appears reasonable, with one exception — education.

As shown by the charts, the Union seeks a total of 30 points for education (15 for an Associate's Degree and 15 more for a Bachelor's Degree). The City seeks to apply a total of 40 points for education (20 for an Associate's Degree and 20 more for a Bachelor's Degree).

"... [A]ction is arbitrary when it is without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse."[51] The City's allocation of so many points to education is lacking in a rational basis or justification.

First, in theory, a candidate for promotion who holds a Bachelor's of Arts Degree in 17th Century French Literature but who is lacking in skills related to the fire service could receive more points than a candidate who excels in fire related skills, but who has only obtained an Associate's Degree. In a fire or emergency situation — and for good reason — the public would have more confidence in the skills of the individual with the Associate's Degree. Placing up to 40 points on education is just not rational.

Second, and again using the example of the candidate with a Bachelor's of Arts Degree in 17th Century French Literature, Section 45 of the FDPA places emphasis on "... education, training, and certification in subjects and skills *related to the fire service*" [emphasis added]. The City's blanket awarding of such a high percentage of the total possible points for ascertained merit on education which may be wholly unrelated to the fire service is not rational and is contrary to the FDPA.

Third, as noted in the discussion concerning the weights for the written exam discussed *supra* at II(C)(1), the City persuasively took the position that "... allotting further points to this portion would place too much emphasis on 'paper' responses, when most of the job requirements require an immediate response of action rather than submitting paperwork."[52] That same logic must apply here. In the City's words, "... most of the job require-

[51] *South Central Bell Telephone Co.*, 52 LA 1104, 1109 (Platt, 1969).

[52] City Brief at 4.

ments require an immediate response of action rather than submitting paperwork." That must be the standard. The City has overemphasized education to the detriment of skills related to the fire service — *i.e.*, "... immediate response of action ...."

Therefore, 40 possible points for education is excessive, not rational and therefore arbitrary. The Union's position of allocating only up to 30 points for education is reasonable and gives better balance to points for ascertained merit.

Adopting the City's approach which does not differentiate between positions for promotion; the Union's position concerning education (up to 30 points); and allocating those 10 points taken from the City's education allotment to "... training, and certification in subjects and skills related to the fire service", which, in my opinion require increases in the City's allocations in the categories of Fire Officer II and Fire Apparatus Engineer; and further considering the areas where the parties are in agreement, the point allocations for ascertained merit shall be as follows [changes noted with strike-through]:[53]

Degree/Position	Points
Associate's Degree	~~20~~ 15
Bachelor's Degree	
with Associate's Degree	~~20~~ 15[54]
without Associate's Degree	~~40~~ 30
Provisional Fire Officer I	5
Fire Officer I	
if Provisional Fire Officer I	5[55]
if not Provisional Fire Officer I	10
Provisional Fire Officer II	~~5~~ 10
Fire Officer II	
if Provisional Fire Officer II	~~5~~ 10[56]
if not Provisional Fire Officer II	~~10~~ 15
Provisional Fire Officer III	15
Fire Prevention Officer I	15
Fire Apparatus Engineer	~~5~~ 10
Fire Arson Investigator	5

These changes have been required because the City, in my opinion, overemphasized education

[53] Redistribution of the points is required. *See* Section 5 of the FDPA ("Each component of the promotional test shall be scored on a scale of 100 points."). My redistribution of the points totals 100 (Education (30) + Fire Officer I (10) + Fire Officer II (15) + Provisional Fire Officer III (15) + Fire Prevention Officer I (15) + Fire Apparatus Engineer (10) + Fire Arson Investigator (5)).

[54] In addition to 15 points given for Associate's Degree.

[55] In addition to 5 points given for Provisional Fire Officer I.

[56] In addition to 10 points given for Provisional Fire Officer II.

to the point of being arbitrary. The parties are obviously free, through agreement, to redistribute the 10 points taken from education in a fashion different from the manner I have chosen. Should they fail to do so, however, the above allocations shall stand.

4. Chief's Points

The Union proposes the following for Chief's points:[57]

> Candidates shall be evaluated by the Fire Chief. The score shall be applied after Seniority points and Ascertained Merit points are applied and before the Assessment Center and Written Examinations are administered. The evaluation will be based upon the following factors: the candidate's ability to handle supervisory tasks, management responsibilities, and previous job performance.

The City's proposes the following for Chief's points:[58]

> Candidates shall be evaluated by the Fire Chief. The score for this component shall be based on one hundred (100) points. Chief review points shall be applied after Seniority points and Ascertained Merit points are applied and before the Assessment Center and Written Examinations are administered. The evaluation will be based upon the following factors: the candidate's ability to handle supervisory tasks, management responsibilities, and previous job performance.

The Union sees the only difference as the City's reference to 100 points as repetitive because of Section 5 of the FDPA's requirement that "[e]ach component of the promotional test shall be scored on a scale of 100 points."[59]

The parties are on the same wavelength with respect to substance of the provision. However, I disagree with the Union that the specific reference is repetitive. The bargaining unit members and management should know what is involved. To make that clear, the language shall read as follows [new language as proposed by the City underscored, with changes deleted]:

> Candidates shall be evaluated by the Fire Chief. As required by the Fire Department Promotion Act, ~~T,~~ and as weighted in accord with Article 19.5 of this Agreement, the score for this component shall be based on one hundred (100) points. Chief review points shall be applied after Seniority points and Ascertained Merit points are applied and before the Assessment Center and Written Examinations are administered. The evaluation will be based upon the following factors: the candidate's ability to handle supervisory tasks, management responsibilities, and previous job performance.

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[57] Union Proposal at Section 19.5.

[58] City Proposal at Section 19.5.

[59] Union Brief at 21-22.

E. Order Of Selection

The City proposes the following for order of selection:[60]

> Whenever a promotional rank is created or becomes vacant due to resignation, discharge, promotion, death, or the granting of a disability or 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. 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 remediable, no person who is the highest ranking person on the list at any 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 with the grievance procedure in Article XVIII of this Agreement.

The City states that its position is the statutory language found in Section 20(d) of the FDPA.[61]

The Union argues that the City's position is not completely consistent with the FDPA because the FDPA limits the period of time that the City may review the ability of an employee to perform the duties of the rank in order to deny a promotion to a particular individual, which is not contained in the City's proposal.[62]

Section 20(d) of the FDPA provides, in pertinent part:

> Whenever a promotional rank is created or becomes vacant due to resignation, discharge, promotion, death, or the granting of a disability or 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 promotion 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 remediable, no person who is the highest ranking person on the list at any 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 with any grievance

[60] City Proposal at Section 19.6.

[61] City Brief at 7.

[62] Union Brief at 23-24.

> procedure in effect covering the employee.
>
> * * *

The Union is correct. Section 20(d) of the FDPA places a limit on the period when work performance or misconduct can be considered in order to deny a promotion — "... since the posting of the promotion list." That limitation makes sense. Any shortcomings or misconduct of a candidate for promotion should be factored into the scores as those scores are formulated and the list is prepared. The City's proposal does not contain that limit.[63] The provision shall therefore read consistent with the FDPA as follows [added language underscored]:

> Whenever a promotional rank is created or becomes vacant due to resignation, discharge, promotion, death, or the granting of a disability or 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 <u>since the posting of the promotion list</u>. 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 remediable, no person who is the highest ranking person on the list at any 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 with the grievance procedure in Article XVIII of this Agreement.

<u>F. Maintenance of Promotional Lists</u>

The City proposes the following for maintenance of promotional lists:[64]

> Final eligibility lists shall be effective for a period of three (3) years. The City shall take all reasonable steps to ensure vacancies are filled not later than 120 days after the occurrence of the vacancy. If for any reason the vacancy is not filled within 120 days, the Promotional Act as to temporary appointments shall apply.

The Union proposes for the following:[65]

> Final eligibility lists shall be effective for a period of three (3) years. The City shall take all necessary steps to

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[63] As the Union further points out, the City has followed time limits in the past, limiting merit and efficiency ratings "[b]ased on previous 12 month service". Union Brief at 24; Board of Fire and Police Commissioners Rules and Regulations at Section E-6.

[64] City Proposal at Section 19.8; City Brief at 8.

[65] Union Proposal at Section 19.7; Union Brief at 24-25.

> ensure that the Fire Department maintains in effect current eligibility lists so that promotional vacancies are filled not later than 120 days after the occurrence of the vacancy.

The Union's position obligates the City to "... take all necessary steps to ensure that the Fire Department maintains in effect current eligibility lists ...." The City's position contains no similar requirement.

The City argues that it is "... acting within the statute in waiting until a vacancy occurs before conducting a promotional examination ... [and] maintaining eligibility lists at all times would put a tremendous financial burden upon the City because these tests are very costly to administer, and due to the small size of the department vacancies in the higher ranks do not occur very often."[66]

The Union argues that the City's position would result in an odd disparity in that the Agreement would limit vacancies to 120 days at most, but allow for temporary appointments of 180 days, noting that the "temporary" process is not specified in detail in the FDPA.[67] The Union further argues that its proposal more closely aligns with the sprit of the parties' agreement and the FDPA, particularly because the "... 'shall'-type language more closely parallels the language and intent of the FDPA in setting a hard and fast deadline on vacancies and period of time without an active promotional list."[68] The Union also argues that the FDPA is silent on the "how's and why's" for temporary appointments, which the Union sees as a conflict with the agreed-upon 120 day time period, thereby requiring rejection of the City's proposal.[69] The Union finally argues that the City's position seeks to deviate from the settled language, thereby placing the burden on the City for demonstrating why its position should be adopted.[70]

As the City correctly points out, the FDPA contains no requirement that current promotion lists always be maintained or that the City is required to "... take all necessary steps to ensure that the Fire Department maintains in effect current eligibility lists ..." as the Union seeks.[71] The FDPA specifically

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[66] City Brief at 8.

[67] Union Brief at 25.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] City Brief at 8.

contemplates that current promotion lists may *not* be in effect. Section 5 of the FDPA provides in the definition of "Final adjusted promotion list" that "[i]f there is no final adjusted promotion list in effect for the position ... the affected department shall not make a permanent promotion until a new final adjusted promotion list has been prepared ... but may make a temporary appointment to fill the vacancy ... not to exceed 180 days." The possibility that a current promotion list may not be in effect is again found in Section 20(e) of the FDPA with the provision that "[i]f a promotion list is not in effect, a successor list shall be prepared and distributed within 180 days after a vacancy ...." Moreover, Section 15(a) of the FDPA only requires that "... the appointing authority shall *from time to time, as necessary*, administer a promotion process ..." [emphasis added]. Given that statutory language, I therefore cannot mandate, as the Union requests, that "[t]he City shall take all necessary steps to ensure that the Fire Department maintains in effect current eligibility lists ...." There is no statutory requirement for the Union's request and there is no evidence before me which can compel the imposition of such a requirement.

The Union's arguments may well point out holes in the statutory scheme or raise questions that may be the basis for future grievances if current promotion lists are not in effect when vacancies occur. But at most, the Union's arguments make the point that it is perhaps in the City's best interest to do its best to maintain current promotion lists in case a vacancy arises so that these kinds of potential disputes will be cut off before they arise — disputes which may prove to be more costly to resolve than the cost of maintaining current lists. However, given the statutory language, there is no requirement that the City do so.

The City's position on maintenance of the promotion lists is therefore adopted.[72]

III. CONCLUSION

The disputed issues are resolved as set forth in II of this award. In sum, those resolutions are as follows:

A. Whether the rank of Captain should be included as

[72] The City also states that it does not waive this provision under Section 10(e) of the FDPA. City Brief at 8. In light of the result, that position is moot.

a rank subject to the promotional procedures under the Agreement?:

Union's position - include.

B. Eligibility for promotion:

Status quo.

C. Rating factors and weights:

City's position:

Portion	Weight
Written Exam	55%
Assessment Center	15%
Ascertained Merit	15%
Seniority	10%
Chief's Points	5%
Minimum Passing Score	70

D. Test components.

1. Written Examination:

City's language.

2. Assessment Center:

Parties directed to draft selection language with retention of jurisdiction for disputes.

3. Ascertained Merit:

With the parties' having the ability to: (a) agree whether different factors and point allocations should be given for promotions to Captain; and (b) with respect to the other promotions to agree to redistribute 10 points:

Degree/Position	Points
Associate's Degree	15
Bachelor's Degree	
with Associate's Degree	15[73]
without Associate's Degree	30
Provisional Fire Officer I	5
Fire Officer I	
if Provisional Fire Officer I	5[74]
if not Provisional Fire Officer I	10
Provisional Fire Officer II	10
Fire Officer II	
if Provisional Fire Officer II	10[75]
if not Provisional Fire Officer II	15
Provisional Fire Officer III	15
Fire Prevention Officer I	15
Fire Apparatus Engineer	10
Fire Arson Investigator	5

4. Chief's points:

Language added to show 100 point total and appropriate weighting.

[73] In addition to 15 points given for Associate's Degree.

[74] In addition to 5 points given for Provisional Fire Officer I.

[75] In addition to 10 points given for Provisional Fire Officer II.

E. Order of selection:

> Union's position adding language for consideration of shortcomings in work performance or misconduct limited to "since the posting of the promotion list."

F. Maintenance of promotional lists.

> City's language.

The parties are now directed to draft language and take other action consistent with this award, which shall be accomplished within 30 days from the date of this award unless extended by agreement of the parties. With the parties' consent, I will retain jurisdiction for disputes, if any, which remain as a result of this award.

Edwin H. Benn
Arbitrator

Dated: September 26, 2005