

IN THE MATTER OF ARBITRATION)
)
Between) **Marvin Hill, Jr.**
) **Arbitrator**
VILLAGE OF MARKHAM, IL)
)
– and –) **Hearing Dates: March 1, March 20,**
) **April 13, May 4 & 9, 2007**
)
IBT LOCAL No. 726 (Union)) **Case No. S-MA-07-1100 (2007)**
)
)
_____)

Appearances:

For the Administration: Steven R. Miller, Esq.
City Attorney
17508 S. Carriageway Drive, Ste “C”
Hazel Crest, IL 60429

Michael McGrath
Odelson & Sterk, Ltd.
3318 West 95th Street
Evergreen park, IL 60805

For the IBT: James W. Green, Jr., Esq.
Counsel, Local 726 IBT
230 West Monroe Street, Ste 2600
Chicago, Illinois 60603

I. BACKGROUND, FACTS, AND STATEMENT OF JURISDICTION

Most of the underlying facts giving rise to this interest arbitration and stipulated award are not in dispute.

The City of Markham and Teamsters Local 726, AFL-CIO, are parties to a collective bargaining agreement that expired on April 30, 2005 (Jt. Ex. 1). To date they have been unable to conclude a successor collective bargaining agreement, which the parties agree will, with one exception, employee insurance contribution, be retroactive to May 1, 2005 (R. 116, V. II).¹

On March 1, 2007, the undersigned Arbitrator conducted a preliminary hearing at the Police Station, Administrative Offices, 16313 Kedzie Avenue, Markham, IL 60428-5690. On that date ground rules were agreed to. Evidentiary hearing were subsequently held on March 20, April 13, and May 4 & 9, 2007. With assistance of the Arbitrator, on May 9th the parties entered into the following stipulated award:

STIPULATED AWARD, APRIL 9, 2007

A. ECONOMIC ISSUES

WAGES	4%/yr for 2005, 2006, 2007 & 2008 (full retroactivity) ²	
SHIFT DIFFERENTIAL (Union Proposal)		Withdrawn
SICK-LEAVE BUY BACK (Union Proposal)		Withdrawn
EASTER HOLIDAY (Union Proposal)		Withdrawn

¹ During its case on residency, the Union made it clear that it was seeking full retroactivity on *all* issues. In counsel's words:

The Union is asking you that all of these terms and conditions to be made retroactive and effective May 1st of 2005, and just in the event the employer raises some issue of unfairness pertaining to that matter, I just want to make it clear that we put the employer well on notice all along. For the record, I just want to make it clear that we are proposing that all of these provisions be made effective on May 1st of 2005, the first day of the contract, and that the employer has been put on notice of that all along, and was also put on notice at the commission (R. 116-117, V. II).

Except with respect to insurance, where the parties reached a stipulated settlement, and minimum manning (discussed *infra*), full retroactivity is mandated in this proceeding on all economic and non-economic issues. Residency, of course, is included in this order. The parties have indicated, and I concur, that the three police officers terminated subsequent to the expiration of the prior contract but prior to this award for residency violations (Max Evans, Courtney Howell-White and Nicole Wilkins), will come under the umbrella of the expanded residency provision.

² See attached salary schedules and relevant language (to be incorporated in the successor collective bargaining agreement).

UNIFORM ALLOWANCE (Union Proposal to replace quartermaster system) Withdrawn

INSURANCE 80/20 contribution split for all four categories – employee cost retroactive to May 1, 2006

B. NON-ECONOMIC ISSUES

TERM OF AGREEMENT Four (4) years, 2005 through 2008

GRIEVANCE PROCEDURE Parties agree to adopt Union's proposal (Union Ex. 2), to read as follows:

GRIEVANCE PROCEDURE

Step 1 Appeal to Chief

With after seven (7) calendar days of the grievance being filed, the grievant, steward, representative of Local 726 and the Chief will discuss the grievance at a mutually agreeable time. If no agreement is reached in such discussion, the Chief will give his answer in writing within seven (7) calendar days of the discussion.

Step 2 Appeal to Mayor

If the answer of the Chief is not acceptable, the grievant may within seven (7) calendar days, request a hearing by the Mayor or his designee with the steward, Local 726 representative and grievant present. The Mayor or his designee can have present other persons whom he deems appropriate. If there no agreement is reached at Step 2, the Mayor or his designee shall give his answer within seven (7) calendar days (Union Ex. 2).

* * *

DISCIPLINE AND DISCHARGE Parties agree to adopt Union's proposal (Union Ex. 2), to read as follows:

DISCIPLINE AND DISCHARGE (Revised Article VI)

A. Discipline in the Police Department shall be progressive and corrective, designed to improve behavior, not merely to punish. Disciplinary actions instituted by the Employer shall be for reasons based upon the employee's failure to fulfill his responsibilities as an employee. Where the Employer believes just cause exists to institute disciplinary action, the Employer shall assess the following penalties:

1. Oral Reprimand
2. Written Reprimand
3. Suspension
4. Discharge

Any disciplinary actions of measure imposed upon an employee may be appealed through the grievance procedure.

B. The Employer agrees that employees shall be disciplined and discharged only for just cause. A copy of all suspension and discharge notices shall be provided to the Union. Disciplinary action resulting in a verbal reprimand, written reprimand, suspension or discharge may also be subject to appeal

through the grievance procedure provided in Article VII of this Agreement. Any incident resulting in a suspension or discharge shall immediately proceed to Step two (2) of the grievance procedure. The parties agree that the grievance procedure in Article VII and the hearing process by the Board of Fire and Police Commissioners are mutually exclusive, and a form containing such specific waiver shall be executed by the Union and the involved employee before arbitration may be invoked under the grievance procedure of this Agreement. Employees initially seeking review by the Board of Fire and Police Commissioners who subsequently elect to file a grievance within the appropriate time limits may only do so prior to any hearing before the Board. Employees so filing a grievance shall immediately withdraw their requests and waive any and all rights to additional hearing(s) before the Board. The parties intend remedies set forth above to be mutually exclusive.

- C. Any employee found to be unjustly suspended or discharged shall be reinstated with full compensation for all lost time and with full restoration of all other rights, benefits and conditions of employment without prejudice unless a lesser remedy is agreed upon as a grievance settlement or deemed appropriate by an arbitrator.
- D. Disciplinary actions recorded by the employee's personnel files shall be removed after twelve (12) months if the employee has not received discipline for a related offense.
- E. The Employer shall conduct disciplinary investigations when it receives complaints or has reason to believe an employee has failed to fulfill his responsibilities as an employee and just cause for discipline exists. Employees shall be entitled to have a Union representative present at all meetings with the Employer that could lead to the discipline of the employee.
- F. Prior to taking any final disciplinary action and concluding its investigation, the Employer shall notify the employee of the contemplated measure of discipline to be imposed and shall meet with the employee involved and inform him of the reason(s) for such contemplated disciplinary action and copies of pertinent documents. The employee shall be entitled to Union representation and shall be given the opportunity to rebut the reasons for such discipline (Union Ex. 2).

RETIREMENT HEALTH SAVINGS ACCOUNT

The parties agree to include the following language in the successor collective bargaining agreement:

The City agrees to meet with an Insurance Committee consisting of two (2) representatives designated by the Union and the Employer to review and evaluate the offering of a benefit whereby a retired employee can contribute a portion of wages or benefits toward the cost of health insurance or health costs upon retirement from the force. The parties will make their best efforts to reach an agreement no later than December 31, 2007, with an implementation date of January 1, 2008 (Union Ex. 2).

RECOGNITION (Article I)(Employer proposal)	Withdrawn
DRUG TESTING (Section 18.6) (Employer proposal)	Withdrawn
TELECOMMUNICATIONS (Section 20.10)(Employer proposal)	Withdrawn
DUTY TO REPORT (Section 20.11)(Employer Proposal)	Withdrawn

The parties agreed to submit final position statements on Wednesday, May 16, 2007 with respect to two unresolved issues: residency and minimum manning.

II. UNRESOLVED ISSUES FOR RESOLUTION

Two issues remain for resolution: Residency (non-economic) and Minimum Staffing (economic). All other issues were resolved as part of a stipulated award (*supra* at 2-4).

III. POSITION OF THE UNION

A. Residency

The Union's position is that the successor collective bargaining agreement contain no provision for residency. In counsel's words: "The Union has proposed and our official position on the table is to eliminate residency." (R. 7).³

In support of its position, the Union submits that the relevant external comparables mandates a no- residency restriction. The relevant data indicate the following:

MARKHAM POLICE DEPARTMENT 2007 INTEREST ARBITRATION RESIDENCY COMPARABLES

Jurisdiction	2005	2006	2007	2008
Burr Ridge	N/A	N/A	N/A	N/A
Calumet Park	Officers must live in	Officers must live in	*	*

³ Significantly, the Union, on May 31, 2006, filed a Motion to Dismiss with the Board of Fire and Police Commissioners requesting that any action to terminate the employment of three police officers, Max Evans, Courtney Howell-White and Nicole Wilkins, be dismissed because the rule which the officers are charged with violating was currently the subject of negotiations with the Union. In the Union's words:

Since the parties are bargaining for a new contract which expired on April 30, 2005, and since all revised terms would be made retroactive effective May 1, 2005, and the charges are filed based on the terms of the prior contract, the Board cannot possibly rule on the charges as they stand. If the parties agree in bargaining to, or if an arbitrator orders a less restrictive residency requirement, the Commission could be put in the position of issuing a decision based on an erroneous rule (Union Ex. 23).

For reasons unknown, the Fire and Police Commissioners denied the Motion and proceeded to dismiss the three officers.

	Will or Cook County	Will or Cook County		
Country Club Hills	Live within 15 miles. New officers have one year to move within city limits	Live within 15 miles. New officers have one year to move within city limits	*	*
Flossmoor	20 miles measured from outermost boundaries	20 miles measured from outermost boundaries	N/A	N/A
Frankfort	Live within 25 miles of intersection of Rt. 45 & 30		*	*
Greenwood	None	None	N/A	N/A
Hazelcrest	Various boundaries	Various boundaries	Various boundaries	contract expires 4/30/08
Hickory Hills	None	None	None	None
LaGrange	None	None	*	*
Lemont	None	None	None	None
Lyons	None	None	None	None
Markham	7 miles	+	+	+
Midlothian	Various boundaries	Various boundaries	N/A	N/A
Palos Heights	None	None	None	None
Palos Hills	None	None	N/A	N/A
Richton Park	None	None	*	*
Riverdale	None	None	N/A	N/A
Western Springs	None	None	*	*
Worth	None	None	None	None

* current contract expires 4/30/07

+ negotiations since 2005

Source: Union Ex. 56 (5-4-07)

Virtually none of the external comparables have a residency requirement "or have a residency requirement that is more generous than the seven-mile radius of the Markham Police Department." (R. 11).

With respect to internal considerations, the Union points out that the Markham Firefighters' residency provision provides that a Firefighter live within 25 miles of the border of the City and within the State of Illinois (Article XIX; Union Ex. 9 at 22). This, says the Union, is much more favorable relative to the seven-mile limit imposed on the police unit (R. 7). Moreover, Public Works, represented by AFSCME, has no residency requirement (R. 29; R. 73, V. II).

The Union also asserts that the command personnel of the police and fire departments, meaning officers above the rank of sergeant, have no residency requirements (R. 7-8). "At least the deputy chiefs have no residency requirement at all for the police officers." (R. 8).

Further, the Union maintains that up until this time last year, while there has been a residency requirement written into the terms of the contract, "that requirement has never been enforced up until March of the last year or attempted to be enforced." (R. 8; 10). In the Union's opinion, any residency requirement "has been mooted by the actions of the city, and if the city wants to institute a residency requirement, it will be their burden to prove the need for that." (R. 10).

B. Minimum Staffing

The Union's position on minimum staffing is that the following language be included in the successor collective bargaining agreement:

A shift shall consist of one Sergeant or a full-time officer designated as OIC of that shift and four (4) full-time sworn officers. Non-sworn personnel, which includes but is not limited to part-time officers, shall not be used to perform full-time officers' duties.

The Union points out that the City is already employing four full-time officers per shift with a sergeant in charge. The Union also maintains that there are problems with part-time officers performing the duties of full-time officers, thus the need for the limiting language.

IV. POSITION OF THE ADMINISTRATION

A. Residency

The Administration's position at the hearing is that there be no change in the current collective bargaining agreement regarding residency. In its view, the seven-mile limitation is not overly restrictive relative to the bench-mark comparables (R. 32). Subsequently, at the last day of hearing, the Administration changed its position to that of 25 miles, and within the State of Illinois (R. 6-7, V. IV)("That would be the City of Markham's position [on residency], that it's an internal

comparable, that it's appropriate for the police department. I would add that the police department would request that the 25 miles be within the State of Illinois."(R. 7, V. IV)(see also, *City of Markham Position Statement* at 3-4, May 24, 2007).

Addressing the different residency restrictions, counsel points out that the City is dealing with three different sets of fact patterns with respect to negotiations with three unions. Various matters were of more importance to different unions, and, accordingly, one cannot simply compare one contract to another without reference to quid-pro-quo in bargaining (R. 32). "At the time the negotiations took place, in some of those instances you might have had a situation in which wages might have been more important than holidays. Insurance may have been more important than holidays." (R. 32-33).

With respect to the Union's non-enforcement argument, the Administration denies that this is the case. The City asserts that there were cases that were scheduled for hearing, but because the employees resigned, no formal decisions were issued. In counsel's words:

[By Mr. Miller]: Mr. Green has stated on several occasions that there has never been any case of enforcement with respect to residency, and that's not true. We've had at least one case that was brought before the Board. However, it was summarily terminated because the officer resigned prior to the hearing. There was another situation which was being investigated by at least one other officer, and he, as well, from my understanding resigned. So there have been at least a couple of cases which were prepared to be brought; however, never went to decision only because the officers for whatever their reasons, decided to resign. So that's not necessarily a true statement, and that may be before his time but not before mine, and that has not – that's not necessarily the case. (R. 31).

B. Minimum Manning

The Employer's initial position is that there be no change in the current collective bargaining agreement regarding minimum manning. Similar to residency, on the last day of the hearing, after a mediation session, the Employer changed its position. Counsel articulated this position as follows:

The City's position would be that it would be fine to have minimum staffing as far as four officers. However, they would ask that in many occasions there are more than one supervising officers on duty or during the same shift, and that in the event that one of the scheduled patrol officers calls in sick or something comes up or he cannot arrive for duty, that one of the supervising officers can step in and become . . . one of the four officers. Which is something new to be put into the contract as far as minimum staffing (R. 8, V. IV).

See, *City of Markham Position Statement* at 4-5.

VI. DISCUSSION

A. Background: Focus of the Interest Neutral in Formulating Recommendations and/or Interest Awards

What should be the focus of the interest neutral when formulating a fact-finding or arbitration award? Should the award reflect the evidence-record facts or should it reflect the position the parties would have reached had they been permitted to engage in economic warfare?

Where both parties have come to the bargaining and arbitration table with extreme positions, one arbitrator found that the proper focus is to formulate an award based on "a position which both parties would have come to had they been able to reach an agreement themselves."⁴ In another case, the arbitrator rejected the fact-finder's "recommendations based on compromise in an attempt to gain the parties' support for an intermediate solution."⁵ In the arbitrator's words, "this is a legitimate strategy for a Fact Finder, but not for an Arbitrator."⁶ Management advocate R. Theodore Clark of Seyfarth Shaw, Chicago, Illinois, has argued that the interest arbitrator should not award more than the employees would have been able to obtain if they had the right to strike and management had the right to take a strike.⁷

I am on record as noting that arbitrators and advocates are unsure whether the object of the entire interest process is simply to achieve a decision rather than a strike, as is sometimes the case in grievance arbitration, or whether interest arbitration is really like mediation-arbitration, where, as noted by one practitioner, "what you do is to identify the range of expectations so that you will come up with a settlement that both sides can live with and where neither side is shocked at the

⁴ *County of Blue Earth v. Law Enforcement Labor Serv., Inc.*, 90 LA 718, 719 (1988) (Rutrick, Arb.); see also *City of Clinton v. Clinton Firefighters Ass'n, Local 9*, 72 LA 190 (1979) (Winton, Arb.) (the fact-finder declared "consideration was given to what the parties might have agreed to if negotiations had continued to a conclusion. In the final analysis, however, the Fact Finder must recommend what he considers to be RIGHT in this City at this time. . . ." *Id.* at 196.).

⁵ *City of Blaine v. Minnesota Teamsters Union, Local 320*, 70 LA 549, 557 (1988) (Perretti, Arb.).

⁶ *Id.*

⁷ R.T. Clark, Jr., Interest Arbitration: Can the Public Sector Afford It? Developing Limitations on the Process: II. A Management Perspective, in *Arbitration Issues for the 1980s*, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators (J.L. Stern & B.D. Dennis, eds) 248, 256 (BNA Books, 1982). Clark referenced another commentator's suggestion that interest neutrals "must be able to suggest or order settlements of wage issues that would conform in some measure to what the situation would be had the parties been allowed the right to strike and the right to take the strike." *Id.*

See also *Des Moines Transit Co. v. Amalgamated Ass'n of Am., Div.*, 441, 38 LA 666 (1962) (Flagler, Arb.) "It is not necessary or even desirable that he approve what has taken place in the past but only that he understand the character of established practices and rigorously avoid giving to *either party* that which they could not have secured at the bargaining table." *Id.* at 671.

result.”⁸ While I do not advocate that interest neutrals issue decisions that surprise both parties (i.e., decisions outside the “range of expectations” or “outliers”), there is much to be said for attempting to determine whether the parties would have found themselves with the strike weapon at their disposal. At times this would favor a large union and at other times the employer. The job of an interest neutral, however, is not to equalize bargaining power, or to do “what is right” or act like a “circuit rider,” dispensing his own notion of economic justice but, rather, to render an award applying the statutory criteria. At the same time, if the process is to work, “it must not yield substantially different results than could be obtained by the parties through bargaining.”⁹ In this regard Arbitrator Harvey Nathan, in a 1988 arbitration under the Illinois statute, outlined the better view of an arbitrator's function as follows:

[I]nterest arbitration is essentially a conservative process. While, obviously, value judgments are inherent, the neutral cannot impose upon the parties contractual procedures he or she knows the parties themselves would never agree to. Nor is it the function to embark upon new ground and create some innovative procedural or benefit scheme which is unrelated to [the] parties' particular bargaining history. **The arbitration award must be a natural extension of where the parties were at impasse. The award must flow from the peculiar circumstances these particular parties have developed for themselves. To do anything less would inhibit collective bargaining.**¹⁰

It is from this perspective that the instant award is formulated.

B. Comparative Bench-Mark Jurisdictions

The Union submits that the following jurisdictions are relevant for comparative purposes:

Burr Ridge, Calumet Park, Country Club Hills, Flossmore, Frankfort, Glenwood, Hazelcrest, LaGrange, Lemont, Lyons, Midlothian, Palos Heights, Palos Hills, Richton Park, Riverdale, Riverside, Western Springs, and Worth (Union Ex. 1). These jurisdictions are within 20 miles (approximately) of Markham.

⁸ See, Berkowitz, *Arbitration of Public-Sector Interest Disputes: Economics, Politics and Equity: Discussion, in Arbitration—1976*, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators (B.D. Dennis & G.C. Somers, etd) 159, 186 (BNA Books, 1976).

⁹ *Arizona Pub. Serv. Co. v. Int'l Bhd. of Elec. Workers, Local 387*, 63 LA 1189, 1196 (1974) (Platt, Arb.).

¹⁰ *Will County Bd. and Sheriff of Will County v. AFSCME Council 31, Local 2961*, Illinois State Labor Relations Board. (Nathan, Chair., Aug. 17, 1988) (unpublished).

See generally, Hill, Sinicropi and Evenson, Winning Arbitration Advocacy (BNA Books, 1998)(Chapter 9)(discussing the focus of the interest neutral).

The Administration failed to submit its own list of comparables. Noting that Burr Ridge and LaGrange may not be valid bench-marks (although they may be valid labor markets relative to Markham), absent any other list submitted in this proceeding the Union's comparables were admitted into the evidence record and duly considered in evaluating the parties' offers.

C. Relevance of Internal vs. External Comparisons

Both parties have advanced arguments with respect to internal and external criteria, with the Administration asserting that internal comparisons should be given more weight than external comparisons, especially with respect to residency. How significant is internal and external comparability as criteria in interest proceedings? Is one necessarily more important than the other?

In *Elk Grove Village & Metropolitan Alliance of Police (MAP)* (Goldstein, 1996), Chicago Arbitrator Elliott Goldstein noted that "the factor of internal comparability alone required selection of the Village's insurance proposal." Arbitrator Goldstein stressed that arbitrators have "uniformly recognized the need for uniformity in the administration of health insurance benefits." Similarly, in *Will County, Will County Sheriff & AFSCME Council 31* (Fleischli, 1996)(unpublished), Wisconsin Arbitrator George Fleischli observed that when an employer has established and maintained a consistent practice with regard to certain fringe benefits, such a health insurance, it "takes very compelling evidence" in the form of external comparisons to justify a deviation from that past practice.

While recognizing that comparisons are sometimes fraught with problems, and that one should not use comparisons as the single determinant in a dispute (the statute precludes this result), Arbitrator Carlton Snow nevertheless noted the value of relevant comparisons in *City of Harve v. International Association of Firefighters, Local 601*, 76 LA (BNA) 789 (1979), when he stated:

Comparisons with both other employees and other cities provide a dominant method for resolving wage disputes throughout the nation. As one writer observed, "the most powerful influence linking together separate wage bargains into an interdependent system is the force of equitable comparison." As Velben stated, "The aim of the individual is to obtain parity with those with whom he is accustomed to class himself." **Arbitrators have long used comparisons as a way of giving wage determinations some sense of rationality. Comparisons can provide a precision and objectivity that highlight the reasonableness or lack of it in a party's wage proposal.** *Id.* at 791 (citations omitted; emphasis mine).

Other considerations equal, I agree with those arbitrators who, with rare exceptions, find internal comparability equally or more compelling than external data. To this end, I find merit in the City's position that internal comparisons favor a uniform residency proposal in the protective services (see discussion on residency, *infra* at 15-16).

D. Statutory Criteria

This dispute involves one economic issue – minimum shift manning, and one non-economic issue, residency. The Act restricts the Arbitrator’s discretion in resolving economic issues to the adoption of the final offer of one of the parties. 5 ILCS 315/14. There is no Solomon-like “splitting of the child.”¹¹ As to non-economic issues, however, the Arbitrator’s discretion is not so limited. Section 14(g) of the Illinois Public Labor Relations Act (the “Act”), reads:

As to each economic issue, the arbitrator panel shall adopt the last offer of settlement which, in the opinion of the arbitrator panel, more nearly complies with the applicable factors prescribed in subsection (h). The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in subsection (h).

5 ILCS 315/14.

In ruling on this dispute, the Arbitrator is guided by criteria established by Section 14(h) of the Act. The eight factors specified by the Act for arbitrator guidance are as follows:

- (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.

¹¹ Cf. 1 Kings 3, 24-27. “And the king said, ‘Bring me a sword.’ When they brought the king a sword, he gave this order, ‘Divide the child in two and give half to one, and half to the other.’ Then the woman whose son was alive said to the king out of pity for her son, ‘Oh, my lord, give her the living child but spare its life.’ The other woman, however, said, ‘It shall be neither mine nor yours. Divide it.’ Then the king spoke, ‘Give the living child to the first woman and spare its life. She is the mother.’”

- (5) The average consumer prices for goods and services, commonly known as the costs 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, 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 in private employment.

Section 14(h) requires only that the Arbitrator apply the above factors “as applicable.”

The Act’s general charge to an arbitrator is that Section 14 impasse procedures should “afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes” involving employees performing essential services such as fire fighting. Enumeration of the eighth factor, “other factors,” in Section 14(h) reinforces the discretion of an arbitrator to bring to bear his experience and equitable factors in resolving the disputed issue.

E. Analysis of Positions

1. Residency

a. Introduction

Arbitrators and courts have long held that residency requirements, if necessary to serve some legitimate business interest, are a legitimate exercise of management’s authority. See, e.g, Hill & Sinicropi, *Management Rights: A Legal and Arbitral Analysis* 191-193 (BNA Books, 1986). To this end, in determining a person’s true residence arbitrators’ decisions mirror those of the courts.¹² Thus, physical presence for a long period of time is not dispositive of “residence;”

¹² Courts have uniformly upheld residency requirements in the face of challenges based on the right to interstate travel and due-process-equal protection under the 14th amendment. *McCarthy v. Philadelphia Civil Serv. Comm’n*, 424 U.S. 645 (1976); *Detroit Police Officers Ass’n v. City of Detroit*, 385 Mich. 519, 190 N.W.2d 97, 78 LRRM 2267 (1971). The court of appeals for the Seventh Circuit has held that once it is determined that a public employee is in violation of a residency rule, the Village of Markham & IBT Local #726
2007 Interest Arbitration

other factors include: where one votes; where one receives mail; the address on one's driver's license; where one keeps clothes; whether one owns property in the claimed area of residence; and where one banks.

Based on the evidence record before me, there is no question that the Union advances the better case with respect to residency.

b. The Testimony

Sergeant Charles Schultz testified that as part of his duties he conducts residency investigations for the City, specifically Chief Crawford (R. 75, V. II). He conducted a residency investigation regarding Officer Courtney Howell-White. (Union Ex. 20).

Deputy Chief James Knapp testified that he is not required to comply with the residency provision because it does not apply to all officers. The appointees are exempt (R. 80, V. II). Asked if he knew of officers that lived outside the seven-mile limit, Mr. Knapp answered in the affirmative (R. 81, V. II; Union Ex. 21). None of the officers on Union Ex. 21¹³ were ever investigated for residency violations, although all lived outside of seven miles (R. 82, V. II). Further, no charges were ever brought against them. (*Id.*). In an exchange with union counsel, Officer Knapp maintained that the residency requirement was never enforced:

Q. Now, throughout your employment here, was the residency requirement ever enforced?

A. No.

Q. Have you ever enforced the residency requirement as a deputy chief?

A. I have not, no.

Q. Even as a sergeant, have you ever – since you just admitted or stated that a lot of these people did live outside of the seven-mile requirement, did you ever mention

employee's job status is that of an "at-will employee." *Brockert v. Skornicka*, 711 F.2d 1376, 1387 (7th Cir. 1983). See, Hill & Sinicropi, *Management Rights: A Legal and Arbitral Analysis* (BNA Books, 1986) at 191 n. 2.

¹³ The listed police officers are: Merlin Newkirk (Glenwood, IL); John Granat (Frankfort, IL); Thomas Griffin (Chicago, IL); David Juliani (Glenwood, IL); Iseano McDonald (Chicago, IL); David Shaffer (Chicago, IL); Joe White (Chicago, IL); Enrique Perez (Chicago, IL); Mark Sanders (Richton Park, IL); Courtney Howell-White (Chicago, IL)(see, Union Ex. 21).

The Union produced an exhibit citing the names of eight police officers who currently reside outside of the seven-mile limit: Merlin Newkirk (Chicago, IL); John Granat (Frankfort, IL); Thomas Griffin (Chicago, IL); Font Hankle (Chicago, IL); David Juliani (Glenwood, IL); Iseano McDonald (Chicago, IL); David Shaffer (Chicago, IL); and Enrique Perez (Chicago, IL)(Union Ex. 22).

that to the deputy chief or anybody that some of these officers are in violation of the residency requirement?

A. These addresses are posted throughout the station. It was just common knowledge.

Q. So, in your opinion, was it common knowledge throughout the Department that officers for a period – if you look at the dates of the employment of these officers and some going back to 1989, 1991 – for a period of about 15 years were violating that requirement?

* * *

A. Yes, it was.

Q. And also in your opinion, was it common knowledge that the residency requirement wouldn't be enforced against officers who lived outside of the seven-mile limit?

A. That's correct. (R. 82-82, V. II).

Officer Knapp voiced an opinion that he believed the Administration enforced the residency requirement against Officer Courtney Howell-White, Officer Wilkens and Officer Max Evans in order to get rid of Courtney Howell-White. "To get rid of one officer." (R. 86, V. II).

Markham Chief of Police Paschal Crawford testified he had been chief twice, the first time in 1991, the second time in 2005. Acknowledging that he was familiar with the residency provision, Chief Paschal maintained he did not keep up with the residencies of the officers listed in Union Ex. 21 (R. 104, V. II). In an exchange with Union counsel, Chief Paschal declared:

Q. During your term as chief, you never instigated an investigation to determine whether any of these individuals other than the last one, Courtney Howell-White – the last two, Courtney Howell-White and Max Sanders – isn't it true you never initiated an investigation on any of these other individuals to determine whether or not they lived within the –

A. No, I did not. (R. 104, V. II).

According to Chief Paschal, an investigation of the residency of Officer White was prompted by a citizen complaint (R. 105, V. II). He conceded that officers beyond the rank of sergeant and patrol officers are not required to live within the seven-mile residency (R. 107, V. II).

Former Chief of Police Eric Lymore, called by the Union, testified that during his tenure as chief he never enforced the residency provision:

Q. You're aware that there is a provision in the collective bargaining agreement pertaining to residency of officers?

A. Yes.

Q. And isn't it true that during your tenure as chief, you never enforced that provision?

A. That's correct. (R.11-12, V. III).

c. Decision on the Merits

This evidence record supports a decision on all accounts for the Union on residency. Externally, few of the bench-mark jurisdictions cited by the Union have any residency requirement (Union Ex. 56, *supra*). Internally, I find no rational basis why management classifications are exempted from a residency requirement. Indeed, I can take judicial-type notice that the trend is the opposite. Management is generally included in the residency umbrella. The fact that the City has been lax in enforcing a residency requirement (see, Union Ex. 21 & 22) also favors the Union's position.

Also favoring the Union is the notion or principle that police (as well as all public employees) have a substantial liberty interest in free choice of residence. Residency is a basic personal decision. Where one lives has an important impact on family and social relationships. It also fixes the choices for social services such as education and health care. It affects less tangible, but significant, personal lifestyle choices. In today's day and age, liberty interests of this weight will usually outweigh a municipality's asserted justifications for a residency requirement. Arbitrator Herb Berman made this point in his lengthy and well-reasoned decision on residency in *Town of Cicero*, as follows:

In modern American society it seems an anachronism, a vestige of patronage or race or ethnic based politics, to compel the in-town residence of municipal employees of a geographically small town with limited housing opportunities and crowded schools. A residency restriction may make sense (and be less onerous) in Chicago, with its wide choice of neighborhoods, housing, cultural opportunities and schools; it makes less sense in Cicero.

Town of Cicero, ISLRB No. S-MA-98-230 (Berman, 1999) at 42. Accord City of Blue Island, Case No. S-MA-00-0138 (Perkovich, 2001) at 2.

Moreover, the City did not prove operational or community needs sufficient to justify differential residency requirements. There was no showing that a seven-mile residency requirement for police has any bearing on how quickly the Department can respond to an emergency. Further evidence of this point is that the City does not require its management officers to live within the City limits. See, Town of Cicero, *supra*, (existence of cooperation among fire protection districts mitigated concern about ability of employer to fight fires without residency requirement).

Having said this, there is merit in having the protective services under the same constraint. Given efforts made in mediation, and the give-and-take of the parties on the entire package, for this

contract I award the police unit the same constraint applicable to Firefighters, 25 miles, although this evidence record cries out for a no-residency provision, the initial position of the Union.

2. Minimum Manning

a. The Testimony

Patrol Officer and Union Steward Ramon Davis testified that part-time officers were first hired two years ago (R. 16, V. III). Prior to that time there were no part-time officers. Several grievances were filed when the part-time officers were doing the work of full-time officers (R. 17, V. III). "They were filed because they were taking away jobs that should have gone to full-time Markham police officers." *Id.* In an exchange with counsel, Mr. Davis outlined the Union's objective:

Q. And what is the Union seeking in terms of this proposal?

A. We're seeking that if the part-time officers are going to be used, that they will not be used in place of full-time police officers. They would only be used to complement the existing full-time positions.

* * *

Q. Now, there's also a reference to minimum staffing. Can you talk a little bit about what the staffing proposal means?

A. That there be four full-time police officers on the street and a full-time supervisor, which would be a sergeant, that there would be a senior officer that would be in charge.

Q. Is that what's referred to as an OIC or officer in charge?

A. Yes.

Q. And the sergeants are in the unit?

A. Yes, they are.

Q. So this would be four full-time sworn patrol officers?

A. Yes.

Q. So the minimum, would that include part-time employees?

A. No.

Q. What, if any, concerns do you have about part-time employees filling those minimums?

A. Well, you know, a lot of the part-time officers, they may have previous experience with universities and other agencies, but quite often most of them are not really trained in

regular working the streets law enforcement. So they do require a lot of – a lot of them do require a lot of training when they come here. It's not exactly like they had been hired and they just came off the street someplace, and it's just a matter of them learning their way around Markham. They really – a lot of them really need a lot of training when they get here, which, you know, could be a safety concern for the officers that are already here. (R. 19-20, V. III).

Mr. Davis also asserted that the Department currently employs minimums, "but no one has told me directly." (R. 20, V. III). Asked what his understanding of the minimums were, he indicated that it was "a minimum of four full-time officers on the street . . . And a sergeant or officer in charge." (R. 20-21, V. III).

Asked on cross examination how he came to the understanding of minimum manning in the Department, Mr. Davis stated "I have not been told that directly by anybody in charge. However, I have seen that. Recently [in the past month or so] that has been the standard for the department." (R. 36, V. III). Davis acknowledged that there has never been anything in writing of what the minimum standards were (R. 37, V. III). He also conceded that full-time officers work schedules on a calendar, and so far they are not missing any scheduled days based upon the use of any part-time employees (R. 38, V. III).

Mr. Davis also testified on cross that there have not been any documented problems with safety using part-time officers (R. 41, V. III).

Patrol Officer Lynette Freeman testified that the City is divided into three areas called "zones," (i.e., designated geographic areas) which are #34, #35 and #36. An officer is primarily responsible for his or her assigned zone – one car per zone (R. 47, V. III). Discussing current staffing patterns, Freeman asserted that she was informed by Deputy Chief Genius "that he wants a minimum of four patrol officers and a sergeant or an officer in charge per shift." (R. 48, V. III):

Q. And do you know when he advised you of that?

A. He told me – he spelled it out for me last week. I came back to work in March, and it had been told to me through various channels that that's what he wanted, but he explained to me last week.

Q. And you had a conversation with him?

A. Yes.

Q. And where was that?

A. That was in the sergeant's office. They had a sick call for the midnight shift, and I thought three would be enough. It was the middle of the week. He said he wants four patrol officers every shift and an officer in charge or a supervisor.

Q. So did he direct you, then, to call somebody in?

A. Yes, he did.

Q. And did you do that?

A. Yes, I did (R. 47-49, V. III)

Officer Freeman asserted that she was aware of the Union's minimum staffing proposal, and that it was the same as the staffing she was currently working on that Deputy Genius ordered her to follow (R. 50, V. III). She went on to explain the utility of having four officers cover the zones:

Well, if you have a least four, given that county is broken into three geographic zones, you have a cover car or an assault unit – at least one assist unit. Unfortunately, when we were not basically ordered to have a minimum of four, we've had days when there have been calls holding for any amount of time. We've had situations where we had nobody to respond to a call and businesses have been burglarized. People have been victimized. Because you had no one else to call. You had nobody to clear. You only had three people.

Q. So under the current staffing, you have three zones covered, plus what you call a cover car?

A. Yes. (R. 51, V. III).

Officer Freeman went on to document some problems she had with part-timers:

We had a situation where it was a family fight. Officers called in for assistance. We assigned a unit to respond to assist. He happened to be a part-timer. He didn't know where he was going (R. 53, V. III).

* * *

Q. Now, currently if – under your current directions from Deputy Chief Genius, if you don't have four officers – say an officer calls off sick or for some other reason is not available – can you fill that with a part-timer, or do you have to fill it with a full-timer?

A. First, we would like to fill it with a full-timer, and if none are available, then we go to the part-timers (R. 54, V. III).

During cross examination Freeman acknowledged that she received no written direction from the current chief as to minimum staffing, “just the verbal order from the deputy chief.” (R. 59, V. III).

Discussing the training of new hires, Freeman explained that new hires ride along with officers until they get acclimated with the streets and addresses and locations within the city (R. 61, V. III).

Q. So you would agree that there's a certain period of time that new officers have to get acclimated with the streets and addresses and locations within the city?

A. Yes.

Q. And that would be the same for part-timers?

A. Yes. (R. 61, V. III).

* * *

Q. Are you aware of any lawsuits that were filed or citizen complaints that went to court or any type of adjudicated hearing based upon the lack of having four full-time officers on the street?

A. I wouldn't have access to that information.

Q. Does the department also use the services of the surrounding police department as backup on calls?

A. In major emergency situations, yes. We do have the mutual aid agreements.

Q. What type of calls do you receive backup to?

A. Large scale fights, if there's a huge fight involving weapons or sticks or bats or anything like that. If we had to call in a surrounding community, that's part of the mutual aid agreement that all communities have. You would receive the backup (R. 62, V. III).

b. Decision on the Merits – Minimum Manning

In an exchange with the Arbitrator, Officer Freeman made her case that the Union's proposal is similar to the parties' current practice:

Q. [By the Arbitrator]: So your proposal – the Union's proposal – is one sergeant?

A. [By Mr. Green]: Yes.

Q. And four full-time officers on each shift?

A. [By Ms. Freeman]: Yes.

Q. And these four officers cover three zones?

A. Yes.

Mr. Green: And the cover car.

Q. [By the Arbitrator]: So there's three zones?

A. And a cover car, an assist unit.

Q. And a cover car.

So I would take it that there four officers are all in squads?

A. Yes.

Q. Is that how it words. So we have four officers in squads?

A. Yes.

Q. Covering four zones? I'm sorry, three zones?

A. Yes.

Q. And according to your testimony now, the current practice with the city with respect to minimum staffing?

A. One sergeant or officer in charge, four patrol officers per shift.

Q. And your argument is that you're just reducing to writing what is already the practice now?

A. Yes. (R. 66-67, V. III).

Officer Freeman's testimony with respect to minimum manning and the use of part-time officers is unrebutted by the Administration. I find no infirmities in including a current practice, albeit recently adopted, in the collective bargaining agreement. It is accordingly to be included in the successor labor contract, subject to the understandings noted in this award (*infra* at 22).

VI. AWARD

A. Residency

The residency provision is changed to reflect the same provision contained in the Firefighters' contract (Union Ex. 9) as follows:

ARTICLE XIX – RESIDENCY

All employees covered by this Agreement shall reside (that residency defined as the street address of that residence) within twenty-five (25) miles of the border of the City of Markham and within the State of Illinois (Union Ex. 9 at 22).

Similar to all other provisions (except when specifically noted), full retroactivity is awarded.

B. Minimum Manning

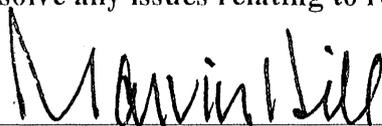
The Union's provision on manning, already reflective of the current practice, is awarded as follows:

A shift shall consist of one Sergeant or a full-time officer designated as OIC of that shift and four (4) full-time sworn officers.¹⁴ Non-sworn personnel, which includes but is not limited to part-time officers, shall not be used to perform full-time officers' duties.¹⁵

The minimum manning provision is effective 30 days from the date of this award.

Jurisdiction is retained on both issues to resolve any issues relating to retroactivity.

Dated this 25th day of May, 2007
at DeKalb, Illinois, 60115.



Marvin Hill, Jr.
Arbitrator

¹⁴ As indicated, Markham is divided into three police zones, each of which is covered by one patrol officer. The fourth officer will serve as a cover officer, who will assist any of the three zone officers. The intent of this provision is if one of the scheduled officers calls off for any reason (i.e., unable to report to duty), the fourth position is to be handled or assigned to a supervisor working on that shift, *as long as there is more than one supervisor working that shift*. This will avoid calling in another officer to fill the fourth patrol officer's position, thus reducing overtime costs to the City.

¹⁵ The intent of this last sentence is that non-sworn personnel, which includes but is not limited to part-time officers, will be used in a *supplementary* basis only. Part-timers will not be used to supplant or replace full-time police officers.