VILLAGE OF ELMWOOD PARK,	)	
	)	*Cap on Accumulated Sick Time &*
Employer,	)	*$200 Stipend for Physical Fitness Test*
	)	
and	)	*Case No. S-MA-10-192*
	)	
ELMWOOD PARK FIREFIGHTERS	)	
ASSOCIATION,	)	*Marvin Hill*
	)	*Arbitrator*
Union.	)	
	)	

Appearances:

For the Village:

MICHAEL K. DURKIN, Esq.
MELISSA A. MIROBALLI, Esq.
THOMAS J. HALLERAN, Esq.
STORINO, RAMELLO & DURKIN
9501 West Devon Avenue, Suite 800
Rosemont, Illinois 60018
(847) 318-9500
mdurkin@srd-law.com

For the Firefighters:

DAVID T. ARENA, Esq.
DI MONTE & LIZAK, LLC
216 West Higgins Road
Park Ridge, Illinois 60068
(847) 698-9600
darena@dimontelaw.com

Preliminary Statement

Pursuant to Section 14(c) of the Illinois Public Labor Relations Act ("IPLRA" or "Act"), the parties submitted two (2) unresolved economic issues for resolution in connection with the parties' negotiations for a successor collective bargaining agreement. Prior to the hearing, the parties agreed to certain ground rules and stipulations, including an agreement that the requirement set forth in Section 14(d) of the Illinois Labor Relations Act that the hearing begin within fifteen (15) days following the appointment of the Arbitrator, had been waived. (Jt. Ex.

4, ¶2). The parties also waived the provisions of Section 14(b) of the Act with regard to the appointment of delegates by the employer and exclusive representative, and mutually agreed that the case would be decided by the neutral Arbitrator. (JX 4, ¶3). A hearing was held before the undersigned Arbitrator at the Elmwood Park Public Safety Building, 7420 Fullerton Avenue, Elmwood Park, Illinois, on May 18, 2010. The parties appeared through their representatives and entered exhibits and testimony. Post-hearing briefs were filed on July 19, 2010, and exchanged through the offices of the Arbitrator. The record was closed on that date.

I. BACKGROUND, FACTS AND STATEMENT OF JURISDICTION

The Village of Elmwood Park, population 24,052, is a home-rule jurisdiction and employs approximately 121 full-time employees and approximately 78 part-time employees. Of the 25 sworn employees who work in the Fire Department, 23 are members of the bargaining unit represented by the Elmwood Park Firefighters Association, including captains, lieutenants and firefighters. The Village has two other bargaining units. One unit consists of police officers, represented by the Illinois Fraternal Order of Police Labor Council, Lodge #48 (FOP). The other bargaining unit consists of public works employees, represented by Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union (Teamsters), IBT Local No. 705. (EX 6).

The parties' first collective bargaining agreement was executed in 1987. Since then, the parties have negotiated seven (7) successor collective bargaining agreements. This arbitration/negotiations will result in the parties' ninth collective bargaining agreement. Significantly, this is the first time the parties have had to resort to interest arbitration to conclude an agreement.

The parties' most recent bargaining agreement expired on April 30, 2009 (EX 6). Negotiations for a successor collective bargaining agreement began on March 5, 2009. The parties participated in six (6) different bargaining sessions, including one mediation session, which was held on June 29, 2009. In addition, the Union submitted an additional proposal by mail. (EX 9, insert 10/13/09). **The parties reached tentative agreement on all issues, except for Article 11, Section 6, dealing with the cap on sick leave accrual, and Article 27, dealing with the physical fitness testing stipend. These two economic issues were submitted to the undersigned Arbitrator, pursuant to Section 14 of the Act.**

The Parties' Proposals Regarding the Sick-Leave Cap (Article 11) and Physical Fitness
Testing Stipend (Article 27) for the 2009 - 2012 Successor Fire Contract

1. Sick Leave

The Village is seeking a cap on the accrual of sick leave, in concert with its agreement to make a higher payout for accrued sick leave, if a firefighter retires at age 50 or later. This

higher payout, at a rate of 75%, rather than 50%, is the same payout which the Village had previously agreed to make to its police unit. However, the police unit has a "hard cap" on sick-leave accrual of 130 days (1,040 hours), with no payments to those officers for any sick leave earned after an officer reaches the maximum accrual.

The Village has agreed to the Union's proposal to increase the sick-leave payout to 75% for retirements occurring at or after the age of 50 (EX 8), but argues that it needs to limit its exposure to such higher payout. The Village is willing to pay out at a rate of 75% for accrued sick leave at retirement, rather than the current rate of 50%, but has proposed a cap of 1300 hours, which is in excess of the cap applicable to the police unit. In addition, no police officer may exceed the 130 days/1040 hours cap. However, the Village's proposal provides that a firefighter who already had accrued more than 1,300 hours of sick leave could continue to earn unlimited sick leave, thus exposing the Village to a much higher payout at the 75% rate.

The Union predicates its proposal for an 1,800-hour cap on the theory that it is losing between $5,000 and $48,000 in lifetime benefits. (R. 8). The Union's reasoning is as follows:

> [By Mr. Arena]: And what I mean by that is a Firefighter accrues sick time at the rate of $10 – or ten hours a month for a maximum of 120 hours a year. If you take that over the 30-year career of a Firefighter, that's 3,600 hours that can accrue for sick time. And this accrual is significant because at retirement it's paid out.
>
> * * *
>
> Right now the collective bargaining agreement that expired provides that Firefighters receive a 50-percent cash disbursement on retirement, 50 percent of their then-currently hourly rate. And the Firefighters have grown to recognize that this as a – as a retirement benefit. It banks money for them so when they retire.
>
> * * *
>
> So the Firefighters, in choosing to take a position in Elmwood Park, count this as part of their compensation package. Now, when they negotiate it, they count that as part of their compensation package. (R. 5-6).
>
> * * *
>
> What the Firefighters are saying is: We will cap the hours at 1,800 hours, not 1,300. So this is what we're looking at. We're looking at the difference between 1,300 and 1,800 hours and we want the $200 stipend. (R. 7).

Under the provisions of the current collective bargaining agreement, which expired on April 30, 2009, in addition, after one year of employment, any bargaining-unit member who had accumulated at least 840 hours of sick leave could receive 50% of his/her pay for sick leave accumulated in excess of 840 hours. (As pointed out by the Administration, in effect, this benefit would have been available only to employees who had been employed at least seven (7) years, assuming no sick leave had been utilized during such period, *i.e.* 10 hours per month x 12 months x 7 years = 840 hours).

2. Physical Fitness Requirements

With regard to the physical fitness issue, from the commencement of negotiations the Village sought to have the members of the Fitness Committee review the fitness standards and propose modifications, if necessary. Ultimately, the Firefighters proposed different standards, and the Village agreed to those revised standards. Later, the Firefighters initiated a proposal to increase the compensation for passing the fitness exam, an exam that only serves to benefit the employees utilizing such tool, in the Administration's view. Although the Union had previously reduced its proposal for this new stipend from $200 to $100, it has now reversed course and has made a proposal for a new $200 stipend at arbitration. The Village asserts that this is evidence of bad-faith bargaining.

II. ISSUES FOR RESOLUTION

The parties submitted two (2) economic issues for resolution. (Jt. Ex. 4, ¶7). Those items were regarding Article 11, Section 6, dealing with the cap on sick leave accrual and the percentage of payout for days earned beyond the maximum accrual, and Article 27, dealing with the physical fitness testing and, in particular, the stipend for employees who meet or exceed the minimum standards. (*Id.*). With respect to the issues regarding Section 6 of Article 11, the final offers submitted by the parties demonstrate that the parties are in agreement with respect to the sub-issue regarding the percentage of payout for sick days earned beyond the sick leave cap. Therefore, this sub-issue regarding the sick leave issue is no longer in dispute. (JX 3, 4). Significantly, the parties agreed that each of the items before the Arbitrator are economic issues, within the meaning of Section 14 (g) of the Act. (JX 4).

III. THE PARTIES' FINAL OFFERS

The day before the interest arbitration hearing, the parties exchanged final offers regarding the provisions for sick leave and the physical fitness stipend. The parties' final offers are illustrated in black-lined side-by-side format, in the chart below:

VILLAGE'S FINAL OFFER	UNION'S FINAL OFFER
Article 11. Section 6. Sick Leave. Sick leave is allowed only in case of necessity when the employee is actively sick or disabled in pay status. Commencing May 1, 1987, all Association members shall accumulate sick leave at the rate of ten (10) hours for each month worked. Sick leave may be accumulated from year to year. ~~After an Association member has been employed for a period of one (1) year or has accumulated at least eight hundred forty (840) hours of sick leave, at the employee=s option, he shall be entitled to receive one-half (½) of his hourly rate of pay for each hour of sick leave accumulated in excess of eight hundred forty (840) hours.~~ Any Association member who has less than thirteen hundred (1300) hours of sick time accumulated as of May 1, 2010 will not be allowed to accumulate more than thirteen hundred (1300) hours of sick leave. Such employee shall receive compensation at fifty percent (50) of his hourly rate of pay for each hour of sick leave earned in excess of ~~eight hundred forty (840)~~ thirteen hundred (1300) hours, or, at the employee's option, such payments shall be deposited into a Retirement Health Savings plan established for such employee.	**Article 11. Section 6. Sick Leave.** Sick leave is allowed only in case of necessity when the employee is actively sick or disabled in pay status. ~~Commencing May 1, 1987, all Association members~~ Employees shall accumulate sick leave at a~~the~~ rate of ten (10) hours for each month worked. ~~Sick leave may be accumulated from year to year.~~ Any employee as of May 1, 2009, who has less than 1,800 hours of sick time accumulated, will not be allowed to accumulate more than 1,800 hours of sick leave and shall be entitled to receive fifty percent (50) of his hourly rate of pay for each hour of sick leave accumulated in excess of 1,800 ~~eight hundred forty (840)~~ hours on an annual basis. ~~After an Association member has been employed for a period of one (1) year or has accumulated at least eight hundred forty (840) hours of sick leave, at the employee=s option, he shall be entitled to receive one-half (½) of his hourly rate of pay for each hour of sick leave accumulated in excess of eight hundred forty (840) hours. Such employee shall receive compensation at fifty percent (50) of his hourly rate of pay for each hour of sick leave earned in excess of eight hundred forty (840) hours, or, at the employee's option, such payments shall be deposited into a Retirement Health Savings plan established for such employee. Employees shall further be entitled to receive one-half (½) of their hourly rate of pay for the accumulated sick leave remaining upon their retirement.~~
Any member who has thirteen hundred (1300) or more hours of sick time accumulated as of May 1, 2010 may continue to accrue sick time. Employees shall further be entitled to receive one-half (½) of their hourly rate of pay for the accumulated sick leave remaining upon their retirement.	Any member as of May 1, 2009 with more than 1,800 sick hours shall be allowed to continue to accrue sick time. At the employee's option, he can choose to cap his sick time at his current amount and receive payment at a rate of fifty percent (50) of his hourly rate of pay for every hour of sick time earned over the employee's voluntary cap.
At the employee=s option, accumulated sick leave may also be used to extend creditable length of service toward retirement, in lieu of half-pay. The rate of pay will be based on the then current salary for said employee. When an employee elects the option to	At the employee=s option, accumulated sick leave may also be used to extend creditable length of service toward retirement, in lieu of ~~half pay~~financial compensation. The rate of pay will be based on the then current salary for said employee. When an

extend his creditable length of service toward retirement in lieu of half pay, the employee shall receive one (1) day credit without pay for each accumulated day of sick leave.	employee elects the option to extend his creditable length of service toward retirement in lieu of ~~half-pay~~financial compensation, the employee shall receive one (1) day credit without pay for each accumulated day of sick leave.
By May 1st of each year, for the term of this Agreement, an employee may request in writing up to forty-eight (48) hours of accumulated sick leave be converted to personal time, and, in addition, any covered employee having in excess of eight hundred forty (840) hours of sick time may opt to convert up to one hundred twenty (120) hours into compensatory time. This written request shall be tendered to the keeper of time records and the Fire Chief for approval. Any sick time converted to compensatory time must be used by the employee before the following April 30, or shall be forfeited. If circumstances arise that prohibit the requesting employee from utilizing the time off, all converted hours shall be returned to the sick time ledger.	By May 1st of each year, for the term of this Agreement, an employee may request in writing up to forty-eight (48) hours of accumulated sick leave be converted to personal time~~, and, in addition, any covered employee having in excess of eight hundred forty (840) hours of sick time may opt to convert up to one hundred twenty (120) hours into compensatory time~~. This written request shall be tendered to the keeper of time records and the Fire Chief for approval. Any sick time converted to personal time~~compensatory time~~ must be used by the employee before the following April 30, or the personal time shall be forfeited~~. I~~; if circumstances arise beyond the employee's control that prohibit the requesting employee from utilizing the time off, all converted hours should be~~shall~~ be returned to the sick ~~time~~ ledger.
	Section 5. Post-Retirement Option. Employees who retire in good standing with the Village at age fifty (50) or later shall be permitted to deposit the dollar value of all accrued and unused vacation time, personal time, compensatory time and seventy-five percent (75) of accumulated sick leave, in lieu of the cash pay-out pursuant to Section 6 of Article 11 of this Agreement, into the VantageCare Retirement Health Savings Plan, to be established by the Village as soon as practicable. The Village shall not be required to pay any costs for administration of such Plan, but rather all such costs shall be borne by the employees participating in such Plan. If an employee chooses to *[sic]* a cash payout of accumulated sick leave upon retirement pursuant to Section 6 of Article 11, the employee shall be entitled to receive fifty percent (50) of the then current hourly rate of pay for each hour of sick leave accumulated.
Article 27. Physical Fitness Requirements Section ~~3~~4. Results of Evaluations. A. A member who meets or exceeds the minimum standard shall be exempt from further evaluation for one (1) year, or until the date of the next	**Article 27. Physical Fitness Requirements** Section 4. Results of Evaluations. A. A member who meets or exceeds the minimum standards shall be exempt from further evaluation for one (1) year or until the next date of annual fitness

annual fitness evaluation, and be compensated with two (2) hours E.T.O. time. B. A member who is unable to meet the minimum standard ~~as set forth above~~ shall be re-evaluated in September of the same year~~, or six (6) months after the initial evaluation~~. A member who meets the minimum standard on the second attempt shall be exempt from further testing until the next annual evaluation, and be compensated the two (2) hours E.T.O. time. C. A member who is unable to meet the minimum standard on the second attempt ~~but demonstrates an improvement time over the initial attempt, shall be exempt from further testing until the next annual evaluation~~ shall agree to consult a physician of his choice and will be compensated with zero hours E.T.O. and shall spend four (4) thirty (30)-minute sessions with a member of the Fitness Committee to encourage personal fitness improvement. ~~D. A member who fails to meet the minimum standard on the second attempt, and does not demonstrate an improved time over the initial attempt, shall choose one (1) of the following options:~~ ~~(i) forfeit two (2) hours of E.T.O. time; or~~ ~~(ii) spend four (4), thirty (30) minute sessions with a member of the Fitness Committee to encourage personal fitness improvement.~~	evaluation, and be compensated with two (2) hours of E.T.O. time and a Two Hundred Dollar ($200.00) stipend. B. A member who is unable to meet the minimum ~~standard~~guidelines shall be re-evaluated in ~~September, or six (6) months after the initial evaluation~~ the same year. A member who meets the minimum standards of the second attempt shall be exempt from further testing until the next annual evaluation, and be compensated with two (2) hours of E.T.O. time and a Two Hundred Dollar ($200.00) stipend. C. A member who is unable to meet the minimum ~~standard~~guidelines on the second attempt ~~but demonstrates an improvement time over the initial attempt, shall be exempt from further testing until the next annual evaluation~~ shall agree to consult a physician of his choice and shall spend four (4), thirty (30) minute sessions with a member of the fitness committee to encourage personal fitness improvement. A member who fails to meet the minimum standard on the second attempt shall not be entitled to receive E.T.O. and shall not receive a stipend for participating in the physical fitness testing. ~~D. A member who fails to meet the minimum standard on the second attempt, and does not demonstrate an improved time over the initial attempt, shall choose one (1) of the following options:~~ ~~(i) forfeit two (2) hours of E.T.O. time; or~~ ~~(ii) spend four (4), thirty (30) minute sessions with a member of the Fitness Committee to encourage personal fitness improvement.~~

(See, *Brief for the Village* at 7-8).

In summary, the Village's final offer regarding sick leave consisted of offering a sick-leave cap of 1,300 hours, *with a 50% payout for hours earned after the cap was reached*. The proposal also provided an exemption from the cap for any member who had already accrued 1,300 hours by May 1, 2010; such employees could continue to accrue sick time. The Union's final proposal was for a sick-leave cap of 1,800 hours, with a 50% payout for hours accrued after 1,800 hours was reached, and the same exemption from the cap for members who have accrued over 1,800 hours by May 1, 2010. The final proposals for both parties regarding the 50% payout and the exemption from the cap for members attaining the cap as of May 1, 2010, mirror each other. Only the level of the sick- leave cap remains to be resolved.

With respect to Section 4 of Article 27 concerning the physical fitness stipend, the Village proposed the *status quo,* which provides for compensation of two (2) hours earned time off (ETO) for each member who passes the physical fitness test on the first or second attempt. The Union proposes, in addition to the two hours of earned time off, a *new stipend* of $200, to be paid to each member who passes the physical fitness test on the first or second occasion.

IV. POSITION OF THE ADMINISTRATION

The position of the Administration, as outlined in its post-hearing *Brief*, is summarized as follows:

A. THE ARBITRATOR SHOULD AWARD THE VILLAGE'S FINAL OFFERS BECAUSE THEY COME CLOSEST TO WHAT THE PARTIES WOULD HAVE AGREED TO AT THE BARGAINING TABLE AND THEY FULLY COMPORT WITH THE FACTORS OUTLINED IN SECTION 14 OF THE IPLRA

The Administration first points out that arbitrators have long acknowledged that the principal goal of interest arbitration is to attempt to predict what agreements the parties would have reached, if the bargaining process had not broken down. See, *Village of Elk Grove*, at page 40 (Aug. 16, 2005) (Hill, Arb.) and *Village of Franklin Park*, at 8 (Aug. 2, 1993) (Perkovich, Arb.). Therefore, it becomes the Arbitrator's mission in this case to predict which proposals come closest to those on which the Village and the Union would have reached agreement, if they had mutually resolved their differences at the bargaining table. This mission is to be accomplished by utilizing the applicable factors which are required by Section 14(h) of the Act to be applied to this arbitration process. (*Brief for the Employer* at 14-15).

To this end the Village has gathered economic data from comparable jurisdictions on firefighters' sick-leave accruals and payouts, as well as any stipends paid for passing an annual physical fitness standard test. The Village also points to the relevant provisions of the contracts covering other organized Village employees, as internal comparables. In addition, the Village points to the proposals which were either withdrawn or abandoned by the Union during the course of negotiations, as relevant "predictors" of what resolution the parties would have reached at the bargaining table. In the Employer's view, its proposals most closely reflect those factors set forth in Section 14 (h) of the Act, which are required to be applied in cases such as this. (*Brief* at 15).

B. STATUTORY FACTORS USED FOR EVALUATING AND <u>CONSIDERING FINAL OFFERS</u>

Section 14 (g) of the Act reads, in pertinent part, that "[a]s to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in subsection (h)."

Section 14 (h) of the Act provides that the Arbitrator shall base his findings and decision upon the factors set forth therein, as applicable. The eight factors specified by Section 14 (h) 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.
(5) The average consumer prices for goods and services, commonly known as the cost of living.
(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, 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 parties, in the public service or in private employment. [5 ILCS 315/14(h)].

Section 14(h) requires that the Arbitrator apply the above factors "as applicable." *City of Kewanee, Illinois (Employer) and Illinois Association of Firefighters, Local 513 (Union),* at pp. 3-4, (Dec. 19, 2002)(Hill, Arb.). Accordingly, certain factors may not be relevant or controlling, and should be considered and applied within the context of the parties' bargaining relationship. (*Id.* at 4). Depending upon the issues, certain factors are undoubtedly more important than others. (*Id.*). As this Arbitrator has stated, the general charge to the 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." *City of Kewanee*, p. 4; *Village of Niles, Illinois (Employer) and International Brotherhood of Teamsters, Local 726 (Union)*, p. 4, (April, 7, 2004)(Hill, Arb.). Indeed, the eighth factor in Section 14 (h), which allows an arbitrator to consider "other factors," reinforces the discretion of the arbitrator to bring to bear both his experiences and any other equitable factors in resolving the disputed issues. (*Id.*).

C. EXTERNAL COMPARABILITY FACTORS SUPPORT THE VILLAGE'S FINAL OFFERS ON EACH OF THE ISSUES

In evaluating the parties' final proposals, the Village asserts that it is recognized by arbitrators that the salaries and benefits paid to employees in comparable jurisdictions are among the most significant statutory factors to be considered. Included among the factors deemed relevant for selecting comparable jurisdictions are geography, population, taxation, equalized assessed valuation and household income. *City of Waterloo and Illinois Fraternal Order of Police Labor Council*, p. 5 (Nov. 16, 1999) (Perkovich, Arb.). Indeed, the undersigned Arbitrator has found "six (6) criteria noteworthy in selecting comparables: travel distance, population, number of sworn personnel, per capita income, general fund revenue/capita, and sales tax/capita." *City of Decatur and the IAFF*, p. 11 (Sept. 19, 2008) (Hill, Arb.). This Arbitrator also credits "EAV as an important criterion in selecting comparables." (*Id.*).

1. The Arbitrator Should Select the Village's Comparable Jurisdictions, Because the Village's Proposed Comparables More Closely Resemble the Demographic and Economic Status of the Village

This Arbitrator, submits the Administration, has specifically recognized the significance of analyzing external factors in resolving an interest arbitration dispute, and has cited the following observation of Arbitrator Harvey Nathan, in *Village of Rock Falls & IAFF Local 3291* (1995), that external factors may be the most important criterion in assessing the reasonableness of final offers:

> It has been suggested that external comparability is the most significant of the factors to be considered by the arbitration panel. The appropriateness of one offer over another is often not apparent without some measurement of the marketplace. The addition or deletion of many terms and/or practices, or the precise increase in remuneration, can often be best determined by analyzing the collective wisdom of a variety of other employees and unions in reaching their agreement. **Every case has its own known facts but the determination of the appropriate result can be better gauged by the struggles of those with similar characteristics and circumstances** (*Id.* at 20-21, footnote omitted; emphasis added by Arb. Hill).

(*City of Niles, Illinois (Employer) and International Brotherhood of Teamsters, Local 726 (Union)*, p. 39 (April 7, 2004)(Hill, Arb.)) (*Brief* at 18-19).

a. The Village selected its comparable communities based on a <u>rational and objective methodology</u>

The Village selected six (6) comparable bench-mark communities. These jurisdictions are listed in Village Exhibit 13, and are as follows:

Village of Bellwood
Village of Brookfield
Village of Maywood
Village of Melrose Park
Village of Morton Grove
Village of Villa Park

(*Brief* at 19).

b. The Union has failed to provide a rational basis for the <u>selection of its comparable communities</u>

The Union has proposed only three (3) communities for the purposes of comparability – the City of Park Ridge, the Village of River Forest and the Northlake Fire Protection District. (UX 12). Management asserts that in offering these communities as comparable to Elmwood Park, the Union offered no objective methodology for its selection, but simply offered information in Union Exhibit 18, without citing its sources, or the criterion utilized in its selection of its three comparables. Rather than establishing any benchmarks which each municipality must reach in order to survive the cut, the Union has simply chosen communities with collective bargaining agreements that it considers favorable to its position. (UX 12). This type of "cherry-picking" should not be encouraged, in the Employer's view. (*Brief* at 20).

Moreover, an analysis of the history of cases decided by this Arbitrator reveal that an analysis of comparable *municipalities* are considered when dealing with interests arbitration issues of another municipality. *Village of Skokie, Illinois and Skokie Firefighters, IAFF 3033*, (Mar. 9, 2009)(Hill., Arb.); *Town of Normal, Illinois, and International Association of Firefighters, Local 2442*, (Apr. 4, 2008)(Hill, Arb.); *Village of Palatine, Employer, and Illinois Fraternal Order of Police Labor Council, Lodge No. 158, Union*, (May 26, 2006)(Hill, Arb.); *City of Kewanee, Illinois (Employer) and International Association of Firefighters, Local 513 (Union)*, (Dec. 19, 2002)(Hill, Arb.); *Village of Niles, Illinois (Employer) and International Brotherhood of Teamsters, Local 726 (Union)*, (Apr. 7, 2003)(Hill, Arb.); *Illinois Fraternal Order of Police Labor Council, Union, and Village of Carol Stream,. Employer*, (Apr. 3, 1998)(Hill, Arb.); *City of Batavia and Batavia Firefighters Association, IAFF Local 3436*, (Mar. 23, 1995)(Hill, Arb.)(*Brief* at 22-23).

In *Village of Libertyville and FOP*, this Arbitrator suggested an analysis on how to select comparable communities, specifically stating that a "rational method" must be chosen" in

formulating an analysis for making comparisons of communities. *See Village of Niles, Illinois (Employer) and International Brotherhood of Teamsters, Local 726 (Union)*, (Apr. 7, 2003)(Hill, Arb.); *citing Village of Libertyville and FOP*, S-MA-93-148 (1995). Within this perspective of a rational method, the comparables in the present case should be limited to comparable municipalities and exclude fire protection districts, such as the one proposed by the Union. Accordingly, only the Village's proposed comparable communities should be considered by this Arbitrator. (*Brief* at 23).

c. A comparison of the Union and Village's comparable communities <u>demonstrates that the Village's list more closely resembles the Village</u>

The Village asserts in selecting comparable jurisdictions, the Arbitrator should compare how close an employer's economic and demographic status comes to the proposed comparable jurisdictions. While the Village's proposed comparable jurisdictions are not perfect, they at least come within the ballpark of the Village in the traditional economic and demographic categories, unlike the Union's. As a first step, population excludes all three of the Union's proposed comparable communities. Each municipality offered as a comparable by the Village is not only within a 10-mile radius, but also has a population within +/- 25% of Elmwood Park's population.

To this end, none of the Union's proposed comparable communities fit within that population parameter of +/- 25%. Moreover, an examination of the *per capita* income for those communities proposed as comparable communities by the Village discloses that each of those municipalities are within 40% of the Village of Elmwood Park's per capita income. Additionally, taking instruction from interest arbitration awards issued by this Arbitrator, the Village provided economic data that is relevant in the analysis of the proposed comparable communities. This data included general fund revenue/capita, sales tax revenue/capita and EAV. (EX 18). An analysis of this economic data provided by the Village demonstrates that the Village's proposed comparable communities are also similar from an economic standpoint. (EX 18).

Contrary to the Village's methodology in determining comparable communities, the Union's lack of a rational and reasonable selection methodology makes it difficult to justify selecting the Union's comparable communities under any circumstances.

2. The External Comparable Data Supports Acceptance of the <u>Village's Final Offers over the Union's Final Offers</u>

a. <u>Sick Leave Accrual</u>

The Village's final offer with respect to sick-leave accrual is favorable when compared with that provided by the Village's proposed comparable communities. **The Village's offer would cap the amount of sick leave hours that a firefighter can accumulate at 1,300 hours.**

(JX 3). Once that cap has been reached, an employee shall be paid 50% of his current rate of salary for any hours earned over 1,300 hours. (*Id.*). In addition, upon retirement from employment with the Village, each employee shall receive 50% of his current rate of pay for his remaining accumulated sick leave. (*Id.*). (However, the parties also reached a tentative agreement on Section 5, "Post-retirement Option," of Article 14, that employees who retire at age 50 or later, shall receive a payout for accumulated sick leave of 75% of their rate of pay, but such payout must be deposited into a retirement health savings plan. (EX 8).) **Furthermore, employees who had more than 1,300 hours of accumulated sick leave on May 1, 2010, may continue to accrue sick time with no limit. (JX 3)(more on this later)(Brief at 26).**

Citing Employer Exhibit 22 (reprinted, *infra* at 25), the Administration's compensation package regarding sick leave compares favorably to the sick-leave payouts provided by the Village's proposed comparable communities.

Moreover, even a comparison to the Union's proposed external comparables shows the fairness of the Village's final offer.

In addition, during the course of negotiations, the Village has already provided to the Union a *quid pro quo* for its proposed cap on sick leave. That *quid pro quo* was the agreement to pay 75% for accumulated sick leave at the time of retirement, rather than 50%, as evidenced by the tentative agreement reached by the parties on April 22, 2009, regarding Section 5 of Article 14. (EX 8). Since the Village's payout would now increase from 50% to 75%, the Village needed to rein in the additional expenditure by imposing a cap on the number of days for which it would be required to pay the higher payout. Therefore, the Village proposed caps on the accumulation of sick leave, giving rise to the prolonged negotiations on the issue before this Arbitrator. The Union has accepted its side of the *quid pro quo* (the 75% payout). The Village should receive the cap which it proposed, in exchange for the higher payout. Otherwise, the Village will be required to pay the additional 25% payout for 500 more hours, the difference between the Union's proposed cap of 1800 hours, and the Village's proposed cap of 1300 hours.

b. Physical Fitness Test Stipend

Similar to the sick-leave issue, the Administration submits that the external comparable data does not support the payment of a $200 stipend for passing an annual physical fitness test. (*Brief* at 30).

The Union has proposed that the employees be compensated with a new $200 stipend for passing an annual physical fitness evaluation, in addition to the current 2 hours earned time off (ETO)(JX 2). **The Village's final offer is the *status quo* of the two (2) hours of earned time off. (JX 3).**

A review of the Village's proposed comparable jurisdictions reveals that only two of the six municipalities (Morton Grove and Villa Park) utilize an annual physical fitness evaluation. (EX. 20, 24). Of those two communities, only one, Morton Grove, provides any compensation to employees who pass the evaluation. That compensation comes in the form of one floating holiday. Therefore, the Village's proposal of two (2) hours of Earned Time Off is similar in nature to the compensation provided by Morton Grove. The other comparable communities proposed by the Village do not require a physical fitness evaluation.

The Village's final offer constitutes the *status quo* and the Union has not met its heavy burden of demonstrating sufficient justification to change the *status quo*. There is a presumption that what the parties did in the past regarding contractual language should not be upset by an interest arbitrator, absent some compelling reason for so doing. *Village of Skokie, Illinois, and Skokie Firefighters, IAFF 3033*, p. 33, (Mar. 9, 2009)(Hill, Arb.). This Arbitrator has found the requirements set forth by Arbitrator Harvey Nathan in *Will County Board and Sheriff of Will County and AFSCME Local 2961*, ILRB Case No. S-MA-88-9 (1989), particularly useful in order for a party to obtain a departure from the *status quo* through interest arbitration:

> (1) That the old system or procedure has not worked as anticipated when originally agreed to;
> (2) That the existing system or procedure has created operational hardships for the employer (or inequitable or due process problems for the union); and
> (3) That the party seeking to maintain the status quo has resisted attempts at the bargaining table to address these problems. (*Brief* at 30-31).

Indeed, it is the party seeking the change that must persuade the neutral that there is a need for its proposal which transcends the inherent need to protect the bargaining process. *Village of Skokie, Illinois, and Skokie Firefighters, IAFF 3033*, p. 33, (Mar. 9, 2009)(Hill, Arb.); *citing City of Alton*, (Fletcher, Arb.). In this case, the comparable data does not support the Union's final offer and the Union has not met its burden of persuasion justifying the change.

The Union subsequently proposed revised fitness standards. (UX 9). The record reflects that the Village's May 13, 2009 offer adopted the standards proposed by the Union without any alterations, and thereafter, the parties' proposals focused solely on the issue of what compensation an employee would receive if he passed such test. During mediation, the Union was seeking a $100 stipend. Now, suddenly, the Union's final offer has ballooned to $200. This retreat is not attributed to "more onerous" standards, and should be rejected. (*Brief* at 31).

D. <u>The Internal Comparables Support the Village's Final Offers</u>

The Village's internal comparables for police and public works employees also support the awarding of the Village's final offers regarding the sick-leave cap and accrual payout, as well

as the compensation regarding physical fitness requirements. (EX 12A (Police), 12B (Public Works))(*Brief* at 32).

With respect to sick leave, the police department has a cap of 130 days, equivalent to 1040 hours. (EX 12A)(*Brief* at 32). This cap on sick leave is a "hard cap," in that once the police officers reach the maximum accrual of 1,040 hours, they are capped and do not receive any payout for any sick leave earned thereafter. The Village has offered the firefighters a "soft cap" of 1,300 hours, allowing the firefighters to continue to get paid for hours accumulated above 1,300 hours. Police officers have the same payout of 50%, unless at retirement, they put the money into an RHS plan at 75%. In addition, no police officers may exceed the cap, whereas the Village has proposed that firefighters who had more than 1,300 hours on May 1, 2010, can continue to accumulate sick leave. In short, the police had a cap, plus the ability to increase their payout from 50% to 75%. The Union wants the increased payout, but seeks a much higher cap than that of the police.

With respect to physical fitness, the police contract provides that police officers who participate in the physical fitness test receive will be paid two (2) hours of overtime for the time spent in taking the test. It should be noted that the police contract provides that taking the test is considered additional work time that will be done off-duty, unlike the firefighters, who may take the test while on-duty (since firefighters work 24 hour shifts). The police are not entitled to two (2) hours earned time off, but simply receive a $200 stipend if they successfully pass the testing requirements. (*Brief* at 32).

With respect to the physical fitness stipend, time expended by police off-duty to take the test is not equivalent to the time during the workday in which a firefighter would complete the test. The Union has also failed to meet its burden of persuasion in altering the *status quo* of the compensation previously agreed to in the previous contract.

Public Works

The public works contract also provides the bargaining unit with a 130 days, or 1,040 hours, sick leave cap. (EX 12B). This cap is also a "hard cap" on sick leave accrual, with a maximum payout of 50% depending on years of service. There is no payout at 75% upon retirement at age 50 for public works employees. Clearly, this internal comparable also illustrates the Village's proposal to the firefighters is advantageous to the firefighters. The public works bargaining agreement does not contain a provision regarding physical fitness requirements.

E. ANALYSIS OF PROPOSAL HISTORY AND UNION REGRESSIVE BARGAINING TACTICS

An analysis of the Union's proposals reveals that the Union undertook regressive bargaining tactics that prevented the parties from ultimately resolving the economic issues of their own accord and without the intervention of an Arbitrator. (EX 9). Such conduct is a

violation of the Union's duty to bargain in good faith, as provided in Section 10(b)(4) of the Illinois Public Labor Relations Act ("IPLRA.")(*Brief* at 33-35).

In addition, in *Southern Illinois University at Carbondale Faculty Association and Board of Trustees of Southern Illinois University at Carbondale*, 19 PERI 85 (2003), the IELRB's executive director found that the union violated Section 14(b)(3) of the IELRB, by engaging in regressive bargaining. Moreover, in *International Union of Operating Engineers Local 520 and City of Collinsville*, 16 PERI 2026 (2000), the Labor Board noted, in footnote 13, that the employer did not have the right to use the union's proposal as an excuse to "go back to square one," and that such regressive bargaining tactics were indicative of bad faith, citing *Village of Maywood*. (*Brief* at 35).

These regressive bargaining tactics undertaken by the Union, both with respect to sick leave and the physical fitness stipend, discredit the Union's entire proposal and accordingly should not be granted any merit. *See Village of Skokie, Illinois, and Skokie Firefighters, IAFF 3033*, (Mar. 9, 2009)(Hill, Arb.). As such, this Arbitrator should adopt the Village's final offer, with respect to the sick leave cap and physical fitness compensation (*Brief* at 36).

F. INCLUSION OF A NEW ISSUE IN ITS FINAL OFFER DISCREDITS THE UNION'S PROPOSAL

The Union seeks to add language in "Section 5" of, presumably, Article 11, regarding a post-retirement payout. (*See* JX 2, Union's Final Offer). At this juncture, it is inappropriate for this Arbitrator to entertain this issue, the Administration argues. Not only is the new proposal interjected by the Union inapposite to the Ground Rules and Stipulations submitted by the parties, (see JX 4, ¶7), but this issue has previously been resolved, pursuant to a tentative agreement reached by the parties. (EX 8). During the course of negotiations, the parties reached a tentative agreement on an issue proposed by the Union regarding the percentage payout for sick leave upon retirement at age 50. *Id*. For the reasons set forth earlier in this brief, the Village has agreed to the increased payout at 75% as the *quid pro quo* for obtaining a cap on sick leave. This is a settled issue, as evidenced by the tentative agreement. *Id*.

Moreover, the Union's proposed post-retirement payout is not authorized by the Internal Revenue Code, with regard to the desire to make such payments tax-free. Even if this issue were properly before this Arbitrator, the Village's hands would appear to be tied (*Brief* at 36-37).

Section 14(g) of the Act provides that with respect to each economic issue, the arbitrator is limited to adopting the last offer of settlement of one of the parties. Since the Union's last offer on sick leave includes an issue which was not submitted by the parties to the Arbitrator, and which, on its face, modifies an issue which was previously resolved by the parties, the Arbitrator cannot adopt the Union's final offer on sick leave.

* * *

For the above reasons, the Administration submits that its final offer on both issues be awarded.

V. POSITION OF THE FIREFIGHTERS

The position of the Firefighters, as outlined in its post-hearing *Brief*, is summarized as follows:

A. Background – the Village is Attempting to Reduce a Current Benefit

The Firefighters initially point out that this dispute between the parties exist because the Village wants to decrease and limit a benefit the Firefighters currently receive. The Firefighters submit they are not looking for a betterment as to the major issue in dispute. Currently, there is no cap on a Firefighters ability to accumulate sick time from year to year, and cash out the accumulated hours at retirement. During the instant negotiation, the Village has requested a cap of 1,300 hours on the accumulation of sick time. The Firefighters are willing to accept a cap of 1,800 hours, which is fifty percent (50%) of the current possible accrual during the career of a Firefighter. Under either scenario, the Firefighters will experience a loss of benefits. As stated below, the Village's proposed cap imposes a cut in benefits to each individual Firefighter of between $11,000 and $64,000.

The Village has failed to justify the need for such an extreme cut in benefits. This is especially true in light of the fact that the Village's position throughout negotiations is that the need for a cap has nothing to do with the Village's ability to pay.

The second issue in dispute – the physical fitness stipend – is compensation to the Firefighters for meeting the new more rigorous physical fitness testing. Under the existing collective bargaining agreement, the Firefighters receive two (2) hours of ETO annually for passing the physical fitness testing. The Village has requested the Firefighters create a more rigorous physical fitness test, and the parties have reached a tentative agreement on the new standards. In return, the Firefighters requested that in addition to the two (2) hours of ETO the Firefighters currently receive, the Firefighters request a $200 stipend for passing the new physical fitness test. The Firefighters' request is in line with the Village provides to the Elmwood Park Police Department officers for passing their physical fitness testing.

B. The Relevant Terms of the Expired Collective Bargaining Agreement

Article 11 of the labor agreement addresses a Firefighters' compensation. Section 6 deals with sick leave and provides that Firefighters "shall accumulate sick leave at the rate of ten (10) hours for each month worked. Sick leave may be accumulated from year to year." After a

Firefighter accumulated 840 of sick leave, the Firefighter has the right to be paid fifty percent (50%) of his then current hourly rate of pay for each hour of sick leave earned in excess of 840 hours on an annual basis. However, the Firefighters are entitled to receive fifty percent (50%) of their then current hourly rate of pay for the accumulated sick leave remaining upon retirement. "The rate of pay will be based on the then current salary for said [Firefighter]." Accordingly, **there is currently no limit on the amount of sick time which may be rolled over and accumulated.**

The Firefighters have a starting wage of $17.00 an hour. Depending on projected wage increases of 2.5% or 3.5% over a thirty (30) year career, the hourly wage at year thirty (30) is either $57.58 or $73.37, respectively. Accordingly, if a Firefighter cashes out sick time in excess of 840 accumulated hours after the first year, that Firefighter is going to be paid fifty percent (50%) of $17.00 per hour for each sick hour cashed out. Conversely, if the Firefighter does not cash out accumulated sick time until retirement at year thirty (30) that Firefighter will receive fifty percent (50%) of between $57.58 or $73.37 per accumulated sick hour. **As testified by the Firefighters, Mike Durkin, Tim Heneghan and Dennis Argyrakis, the Firefighters look to the ability to accumulate sick time, and cash it out at retirement as retirement benefit.**

C. <u>The Parties Positions Regarding the Accrual of Sick Time</u>

A Firefighter accrues sick time at the rate of ten (10) hours per month or 120 hours per year. Over a thirty-year career, a Firefighter can accumulate a maximum of 3,600 hours. In general, the Village is requesting that the Firefighters place a cap of 1,300 hours of sick time which may be accumulated. Any sick time earned over 1,300 hours must be paid out to the Firefighters on an annual basis at fifty percent (50%) of the Firefighters current hourly rate. The Firefighters, on the other hand, have agreed to place a cap on their ability to accumulate sick time at 1,800 hours, which is fifty percent (50%) percent of the current possible accumulation of sick time.

The Union submits that there was some confusion during the arbitration as to how the Firefighters are paid out on accumulated sick time upon retirement. Specifically, Article 14, Section 5 of the collective bargaining agreement provides that Firefighters who retire at age 50 or later are permitted to deposit all accrued and unused vacation time, personal time, compensatory time, and seventy-five percent (75%) of accumulated sick leave into a health retirement account (HRA). This article provides that if the Firefighter chooses to cash out accumulated sick leave upon retirement pursuant to Section 6 of Article 11, the Firefighter is entitled to receive fifty percent (50%) of the then current hourly rate for each hour of sick leave accumulated. There is no dispute between the Firefighters or the Village as to this retirement provision. The Firefighters included the provision of Article 14, Section 5 in its final offer

because the two (2) sections go hand-and-hand. However, the only issue in dispute between the parties is the cap on the ability of the Firefighters to accumulate sick time.

In addition, as noted by counsel for the Village during the arbitration hearing, the Firefighters' final offer fails to include a provision that the Firefighters may accumulate sick time from year to year. While this provision is implied in the Firefighters' final offer (because such offer provides that a Firefighter may accumulate up to 1,800 hours of sick leave and it would take more than one (1) year in order to do so), this provision, in the Union's view, should be inserted into the final language of the successor collective bargaining agreement to be entered into between the parties.

D. Analysis of the Firefighters' Proposal Favors its Position Relative to the Village's Final Offer

The Union points out that Firefighter Dennis Argyrakis' analysis of the Firefighters' proposal and the Firefighters' existing benefits under the expired collective bargaining agreement favors its position.

Addressing the Village's argument that with a lower cap, the Firefighters are able to receive an annual payout of sick hours accumulated over the cap as if this was a betterment to the Firefighters, the Union argues this is not a benefit because the accumulated sick hours over the cap are paid out at the then current hourly rate. That means the sooner the Firefighter is cashed out on sick hours, those sick hours are paid at a lower rate then if the Firefighter receives a distribution in later years or upon retirement.

E. The Firefighters Have Not Participated in Regressive Bargaining

The Firefighters dispute they participated in regressive bargaining or any other unfair labor practice. The Firefighters maintain that their position during the negotiations and in their final offer are extremely reasonable especially in light of the Village's failure to articulate any legitimate reason for the Firefighters to receive a cut in benefits. Indeed, the Village is not demanding that the Firefighters receive a cut in benefits because the Village is experiencing financial difficulty. This is not an economic issue for the Village, in the Union's view.

F. The Only Comparable the Arbitrator Should Consider is the Village of Elmwood Park Police Department

During negotiations, the only comparable the Village provided to the Firefighter was that of the Elmwood Park Police Department. In addition, on October 13, 2009, counsel for the Firefighters requested that the Village provide their comparables and information used to support the Village's position, and the only comparable that the Village produced was that of the Elmwood Park Police Department. The balance of the comparables relied on by the Village at arbitration were not produced until two (2) business days before the arbitration. As conceded by

the Village, the Village did not even consider any other comparable except the Elmwood Park Police Department during its negotiations with the Firefighters.

There is a general duty on both sides of a labor dispute to provide and share relevant information with each other in order for the parties to perform their respective bargaining roles. *County of Cook v. The Illinois Local Labor Relations Board, General Service Employees Union, Local 73*, SEIU, AFL-CIO, 266 Ill.App.3d 53, 57, 639 N.E.2d 187, 191 (1st Dist. 1994). It is common knowledge that the parties negotiating the terms of a collective bargaining agreement have a duty to negotiate in good faith. It is not reasonable for the Village to propose that the Firefighters agree to significant reduction in their compensation package, fail to provide the Firefighters with any justification for the loss in benefits except for the Village's internal comparable CBA with the Police Department and then days before the arbitration produce multiple other comparables for the arbitrator to consider. The Village did not consider these external comparables during its negotiation with the Firefighters. In fact, the Village did not start looking to comparables until two (2) weeks before the arbitration. It is unreasonable for the Village to now ask the arbitrator to consider something that the Village itself never considered while negotiating with the Firefighters.

Looking at the total compensation package for the Elmwood Park Police Officers, the Police Officers are allowed to accumulate to retirement a total of 1,040 sick hours (calculated at 130 days times 8 hours) as well as 600 hours of vacation time and 120 hours of personal time. Accordingly, the Police Officers can accumulate a total of 1,760 hours of time to retirement. Provided the Police Officers have twenty (20) years of experience, the Police Officers can cash out at fifty percent (50%) of their then current hourly rate. Viewing what compensation benefits the Village provides to the Police Department, the Firefighters' proposal of an 1,800 hour cap on the accrual of sick time is more reasonable than the Village's proposal of 1,300 hours.

G. The Firefighters' Request for a $200 Stipend for Meeting the <u>More Onerous Physical Fitness Requirements is Reasonable</u>

Acknowledging the Village was critical of the existing physical fitness testing requirements, and requesting that the Firefighters come up with a more stringent proposal, the Firefighters argue that it created a more rigorous testing standard (relative to the existing standard) that is focused more on actual job related, day-to-day fire scenarios. Based on this new testing standard, the Firefighters have asked for two (2) hours of earned time off ("ETO") along with a $200 stipend. The Firefighters have previously received the two (2) hours of ETO for meeting the physical fitness testing requirements. The only difference in benefits the Firefighters are seeking is for the $200 stipend. The physical fitness testing is conducted annually. With the twenty-three (23) Firefighters employed by the Village, if all Firefighters pass the physical fitness test this amounts to $4,600/year.

In looking at the benefits the Village provides to the Police, the Union maintains the Police Officers receive two (2) hours of ETO and a $200 stipend for meeting their minimum physical fitness requirements. The Firefighters are seeking nothing more from the Village than

what it provides to its own Police Officers. Accordingly, the Firefighters' request for a $200 stipend in addition to the hours of ETO for meeting the more rigorous physical fitness testing requirements is reasonable.

* * *

For the reasons set forth above, the arbitrator should direct the parties to draft a collective bargaining agreement which provides for a cap on the Firefighters' ability to accumulate sick hours till retirement of 1,800 hours and to provide for a $200 stipend in addition to two (2) hours of ETO for each Firefighter who successfully passes the physical fitness testing requirements on an annual basis.

VI. DISCUSSION

A. External Bench-Mark Comparables

Unfortunately, the parties are *not* in agreement regarding the selection of *external comparables* for the two issues in dispute.

As noted, the Administration selected the following bench-mark jurisdictions as comparables: Bellwood (population 18,973; sworn personnel, 25); Brookfield (18,077; 25); Maywood (25,035; 43); Melrose Park (21,853; 56); Morton Grove (22,478; 39) and Villa Park (22,198; 25)(EX 15 & 18). Asserting that the Village did not start looking at outside comparables until two (2) weeks prior to arbitration (*Brief for the Union* at 11), the Union submits that the only relevant comparable is the Village's Police Department. It is unreasonable for the Village to now ask the Arbitrator to consider something that the Village itself never considered while negotiating with the Firefighters, the Union argues (*Brief* at 11). At the same time, the Union proposed three external comparables at the hearing: the City of Park Ridge, the Village of River Forest and the Northlake Fire Protection District (UX 12). The Village, of course, takes issue with the Union's comparables, especially Northlake, since it is a fire protection district.

* * *

Arbitrator Edwin Benn, in *Village of Algonquin & Metropolitian Alliance of Police*, S-MA-95-85 (1996), had this to say regarding the problem of selecting comparables for external analysis:

> One of the most difficult tasks facing an interest arbitrator in Illinois is to select "comparable communities" as required by the Section 14(b)(4)(A) of the IPLRA. Aside from using the phrase "comparable communities," the statute gives absolutely no guidance on how to select those "comparable communities."

In Village of *Libertyville and FOP*, S-MA-93-148 (1995), I suggested an analysis on how to select comparable communities. I stated (*Id.* at 3-4)[footnotes omitted]:

> Section 14(h)(4) of the IPERLA identifies examination of comparable communities as a factor for selecting the appropriate offer. The selection of comparables for examination is a most difficult task in large part because the IPLRA offers no guidance as to what [the] legislature intended when in Section 14(h)(4)(a) it directed interest arbitrators to examine 'comparable communities.'
>
> Because comparability plays such a major role in these cases, rational approaches must be taken. In *Naperville*, *supra* at 20, I suggested a method for making an analysis:
>
>> The task then is to formulate an analysis for making the comparisons. The Act gives no guidance, so therefore a "rational" method must be chosen.
>>
>> The parties have agreed that the part of the relevant universe of comparables must include Skokie, Schaumburg, Evanston and Arlington Heights. I am therefore bound by that agreement– indeed, the Act requires that I abide by "stipulations of the parties." See §14(h)(2). The fact that the parties have agreed upon those municipalities as being comparable to Naperville allows for a conclusion that they intended that any other municipality which sufficiently falls within the range established by the set of agreed-upon comparables requires a finding that such a municipality is also comparable to the agreed-upon set of municipalities.
>>
>> The analysis shall therefore take the following steps:
>>
>> First, agreed upon comparable communities shall be identified . . . [T]hose agreed upon communities shall form a range of agreed upon comparables for various factors to be used for comparison purposes to determine whether the municipalities upon which the parties could not agree are also comparable.
>>
>> Second, the appropriate factors for making the comparisons shall be identified. If the parties disagree on certain factors, a determination will be made as to whether those factors are appropriate measuring tools for comparison purposes.

> Third, the municipalities shall be ranked within the appropriate factors (through tables and charts).
>
> Fifth, comparisons will be made for the contested communities to determine how they compare with the range of agreed upon comparables within the appropriate factors.
>
> *It is important to stress that this process of selection of comparables is not a mechanical one. This process is only a method for organizing the data and arguments offered by the parties in order to be able to rationally make certain judgments. This process is not one of merely counting factors or rigidly applying cutoffs. This process places great emphasis on the agreements based upon these agreements–a process that appears consistent with the mandate of Section 14(h)(2) of the IPLRA that I consider the "stipulations of the parties."* *Id.* at 3-4 (emphasis mine).

A number of arbitrators have recognized that the most significant factor in awarding wage offers is a need to "catch up," and, at least, maintain a rough average among external comparables. In *Elgin and Local 439, IAFF*, S-MA-97-33 (Fleischli, 1997), arbitrator George Fleischli found that external comparables were most significant in the case of fire fighters. In his words:

> While it is not possible to draw comparisons to the salaries paid and increases granted to other City employees and rely on those comparisons to produce reasonable and competitive salary ranges in the short run, an employer cannot allow its police and firefighter salaries to fall behind those paid by comparable communities. Even if it does not produce significant turnover or recruiting problems, it will have an adverse impact on morale and performance of these vital functions.

Id. at 38. Noting that none of this is "an exact science," this same reasoning applies in this case. See, *Algonquin*, S-MA-95-81 (Benn), at 8 n. 14 ("But, this is not an exact science.").

The Village selected its comparable communities by applying the following criteria, in successive steps:

1. Those municipalities located within the same labor market, reflected by a 10 mile radius from the center of the Village (EX 15).

2. Any of those municipalities with a population within ± 25% of the Village's population, based upon the U.S. Census Bureau, 2008 Population Estimates (EX Exs. 16, 17).

3. The exclusion of any of those municipalities that either did not have a municipal fire department, or who did not have a fire union (EX 16, 17). Thus, Bensenville (population 20,138) is excluded because it does not have a municipal fire department (but is covered by a fire protection district). Hinsdale (18,439) was likewise excluded because its fire personnel are non-union (EX 16).

4. The Village of Niles (population 28,666) is excluded based upon the following economic factors:

   a. Niles' general fund revenue is more than double Elmwood Park's; the other comparable communities are +/- 100% of Elmwood Park's ($0 - $32,094,162).
   b. Niles' EAV is more than 2.5 times Elmwood Park's; the other comparable communities are +/- 100% of Elmwood Park's ($0 - $1,196,897,970).
   c. Niles' sales tax revenue is more than 10 times Elmwood Park's, and more than double the second highest municipality (Melrose Park).

See, *Brief for the Administration* at 19, citing EX 17, 18.

Management argues that in offering the three communities as comparable to Elmwood Park, the Union submitted no objective methodology for its selection, but simply offered information in Union Exhibit 18, without citing its sources, or the criterion utilized in its selection of its three comparables. "This type of 'cherry-picking' should not be encouraged," according to the Employer (*Brief* at 20).

To this end, I find significant the following table, complied by counsel for the Administration and included in its *Brief* at 24:

LIST OF 2008 CENSUS POPULATION ESTIMATE
OF UNION AND VILLAGE COMBINED COMPARABLE MUNICIPALITIES

Municipality	Population	Percentage Compared to Elmwood Park	Overall Population Rank
Park Ridge	37,775	63%	1
Maywood	25,035	4%	2
Elmwood Park	**24,052**	**0%**	**3**
Morton Grove	22,478	-7%	4
Villa Park	22,198	-8%	5
Melrose Park	21,853	-9%	6
Bellwood	18,973	-21%	7
Brookfield	18,077	-25%	8
Northlake	11,878	-51%	9
River Forest	11,635	-52%	10

F1: Union's Proposed Comparable Communities are italicized.

Significantly, and as pointed out by the Administration, none of the Union's proposed comparable communities fit within that population parameter of +/- 25% (*Brief for the Employer* at 24). Based on this information, it is clear that the Union's comparables require widening the range to at least 60% in order to include its proffered three. On this criterion alone, the Administration makes the better case. When other economic criteria are examined, such as general fund revenue/capita, sales tax revenue/capita and EAV (EX 18), management's comparables are more on point than the Firefighters' three comparables.

To this same end, I agree with the Administration's argument that a fire protection district (FPD) should not be compared to a municipality because of the differences in their revenue sources and other financial structures. As such, Bensenville (FPD) and Hinsdale, the later being non-union, are accordingly not relevant as bench-mark comparable jurisdictions.

Finally, I am particularly hesitant to adopt comparable bench-mark jurisdictions with a small sample size. As I reasoned in *City of Batavia & IFOP No. 224*, S-MA-95-15 (1996):

> Assuming all other factors are equal, a large sample is more reliable than a small sample. A restricted sample is unreliable in that it may capture only the mathematical extremes. On the other hand extremes at both ends of the range will tend to balance out if the sample is large enough.

What of the Firefighters' argument that the Administration was only concerned with comparables days prior to the arbitration, and that the most important comparable is

that of the Elmwood Park Police Department?

Counsel for the Union maintains that on October 13 he asked the Village to provide him with their comparables and the information they were using to support their position. Apparently, the only comparable the Union received was that of the Elmwood Park Police Department, "and this information wasn't produced or arguably made available until Friday, May 14th (R. 89). As such, the Union made a running objection to the fact that the Administration brought "new" information i.e., comparables, in at the hearing (R. 89).

Management responded that the Union's request was for the Village to do some research to put together comparable compensation packages for the Union. Mr. Durkin responded that the Village was under no obligation to provide that information to the Union (R. 90). Mr. Durkin went on to explain:

> Back in October the Village had never even attempted to start looking at who its comparable communities were going to be to offer to the Arbitrator. We did start doing that in earnest the week before last. Last week we finally were in a position to present who our comparable communities would be at this arbitration hearing.

Mr. Durkin went on to note that he "offered on Thursday to exchange comparable community information with Mr. Arena on Friday. That request went unanswered. And then yesterday I advised him [Arena] who my comparable communities were going to be." (R. 90-91).

I find no contractual or legal infirmity regarding management's conduct in generating comparables. To the extent the Firefighters believed that they were disadvantaged regarding the timeliness of the information provided by Mr. Durkin, a postponement could have been requested. In addition, the parties had ample time to file post-hearing briefs. In its *Brief* the Firefighters had sufficient opportunity to address any infirmities it found in the Administration's comparables. I see no reason to limit the City to one internal comparable, that of the Police Department.

For the above reasons, the bench-mark jurisdictions proposed by the Administration are accepted for comparable analysis in this proceeding.

B. An Examination of the External Bench-Mark Comparables Favors the Administration's Final Offer on the Sick-Leave Accrual Issue – a 1,300-hour cap – as Opposed to the Firefighters' Offer of an 1,800-hour Cap

As noted, the Village's final offer caps the amount of sick leave hours that a Firefighter can accumulate at 1,300 hours (JX 3). Once that cap has been reached, a Firefighter shall be paid 50% of his current rate of salary for any hours earned over 1,300 hours (JX 3). In addition,

upon retirement from employment with the Village, each employee shall receive 50% of his current rate of pay for his remaining accumulated sick leave (JX 3). Employees who have more than 1,300 hours of accumulated sick leave on May 1, 2010, may continue to accrue sick time *with no limit* (JX 3). Thus, any Firefighter reaching that cap will be paid out at 50 percent of his current rate of pay when he hits that cap for any hours that he accumulates over that cap. In essence, the Village's proposal allows officers to be paid that payment sooner than the Union's proposal because the Village proposes Firefighters being able to receive that payment after 1,300 hours. What those Firefighters do with those funds is completely up to them (R. 65).

A particularly telling exhibit is Village Exhibit 22, which outlines with specificity the various sick leave caps in the comparable jurisdictions:

SUMMARY OF SICK LEAVE ACCRUAL CAP AND PAY-OUT AT TERMINATION FOR RELEVANT BENCH-MARK JURISDICTIONS

MUNICIPALITY	SICK-LEAVE ACCRUAL CAP AND PAY-OUT AT TERMINATION
Bellwood	No cap. Upon separation, employees paid for all unused, accumulated sick leave days up to a maximum of 20 days (480 hours) at 50% of the value of each day. [Only up to 480 hours at 50%]
Brookfield	Sick leave accrual is capped at 1,383 hours. Upon termination from employment, employees with between one (1) year and 25 years of service shall receive compensation for *50% of all accumulated sick leave up to 984 hours*. Employees with between 25 and 30 years of service shall receive compensation for 60% of all accumulated sick leave up to 964 hours. Employees with over 30 years of service shall receive compensation for 75% of all accumulated sick leave up to 964 hours. [Various percentages up to 964 hours; amount of compensation is correlated to the number of years of service]
Maywood	Employees receive three days (72 hours) sick leave/year. At the end of the year, employees shall be compensated for each full 24 hour unused sick leave day, no fractional days. There is no accumulation of sick leave days from year to year. [No annual accumulation of sick-leave hours from year to year]
Melrose Park	Employees shall receive a day off on any day that they are unable to work due to illness or injury. There is no sick leave accrual, and no pay out of unused sick leave. [No annual accumulation of sick leave or payout at termination for unused sick

days].

Morton Grove	For each unused sick leave shift each year, employees shall receive a credit of 50% of each shift day (24 hours per shift day) until an accrual of 75 calendar days (at 8 hours per calendar day, 600 hours maximum). Upon retirement employees shall be paid at their latest rate of pay for all days accumulated (maximum of 600 hours). [Employees can accumulate up to 600 hours of sick leave at 100% of employee's rate of pay at time of separation; equivalent to an accrual of 1,200 hours paid out at 50% for those who retire at age 50 or later].
Villa Park	Sick leave days shall accrue on a monthly basis at the rate of one half day/month worked (six shift days/year). Maximum annual cap is 85 days (2,040 hours). Upon termination, sick leave buyout at a rate of 50% pay for all sick days accumulated, not to exceed 52 twenty-four hour days (1,248 hours). [Up to 1,248 hours at 50%].

Compared to the relevant bench-mark jurisdictions, the Village's proposal for a cap of 1,300 sick-leave hours (with no cap for employees who exceeded that amount on May 1, 2010) is well beyond the benefits applicable among the comparables. Noteworthy is this: In each of the comparables the payout at retirement is less than the 1,300-hour cap the Village is proposing.

I also find the Village's proposal to pay 75% for accumulated sick leave at the time of retirement, rather than 50%, as evidenced by the tentative agreement reached by the parties on April 22, 2009 regarding Section 5 of Article 14, noteworthy and supporting the Village's proposal relative to the comparables (See, *Brief for the Employer* at 29; EX 8). Since the Village's payout would now increase from 50% to 75%, the Administration's argument that it needed to impose a cap on the number of days for which it would be required to pay the higher payout is well taken *Id*. The Village should receive the cap which it proposed, in exchange for the higher payout. *Id*.

C. An Analysis of Internal Comparables Also Favors the Administration's <u>Final Offer Regarding the Sick-Leave Cap</u>

The two internal comparables – police and public works – favors the Village's sick-leave cap relative to the Firefighters' final offer.

The evidence record indicates that the police unit has a cap of 130 days, equivalent to 1,040 hours. Moreover, the cap is a "hard cap," meaning that once a police officer reaches the maximum accrual of 1,040 hours, he is "capped" and does not receive any payout for any sick leave earned thereafter. Unlike the police contract, the Administration's final offer is for a "soft cap" of 1,300 hours, allowing a Firefighter to continue to get paid for hours accumulated above 1,300 (unless, at retirement, the money is placed into a RHS plan at 75%.

In addition, no police officer may exceed the cap, while Firefighters who had more than 1,300 hours on May 1, 2010, can continue to accumulate sick leave. As pointed out by the Employer: "The Union wants the increased payout, but seeks a much higher cap than that of the police." (*Brief* at 32). It is clear that the Firefighters have the better deal regarding sick-leave pay.

Addressing public works, the record indicates that the Village provides the unit with 130 days for a sick-leave cap, or 1,040 hours (EX 12B). This cap is also a "hard cap" on sick-leave accrual, with a maximum payout of 50% depending on years of service. There is no payout at 75% upon retirement at age 50 for public works employees.

With respect to both bench marks, the Village's final offer is more in line internally than the Firefighters' offer.

D. The Parties' Bargaining History Indicates Some Instances of <u>Regressive Bargaining Regarding the Sick Leave Issue</u>

The Administration has devoted significant text in support of its argument that the Firefighters have engaged in regressive bargaining, making a resolution of the matter impossible without the intervention of an outside Arbitrator (*Brief* at 33-36).

What of this argument?

I find it noteworthy, but not dispositive of the charge, that on May 13, 2009, the Union proposed a sick-leave cap of 1,300 hours, with a 150% payout for hours earned over 1,300. The proposal exempted members already vested with 1,300 hours of accumulated sick time from the cap, but gave those members the option to cap their sick time at the current amount of hours earned and to immediately receive payouts at 150% of hours earned thereafter (*Brief for the Employer* at 34). The response of the Administration (*Brief* at 34):

> The proposal to pay at 150% could not have been offered in good faith, since the Village would be payin

The Firefighters' next proposal, made on June 29, 2009, offered the same sick-leave cap of 1,300 hours and a 75% cash payout for hours accrued over 1,300. As noted by the Employer, at this juncture the Village was at a cap of 1,200 hours (with exceptions) and a payout of 50%. In the Employer's words (*Brief* at 34-35):

> Although seemingly moving in the right direction at mediation, the Union later regressed by making a subsequent proposal by mail on October 13, 2009, offering a sick-leave cap of 1,800 hours, with a 100% payout for hours earned over 1,800. The Union's offer regressed, both with respect to the sick-leave cap and the amount of payout for hours

accrued beyond the cap.

> The Union has now presented its final proposal for sick leave cap of 1,800 hours with a 50% payout for hours accrued above the cap (JX 3). As evidenced by the history of the proposals presented by the Union, it is clear that the Union engaged in regressive bargaining tactics that only moved the parties further apart on the issues regarding sick leave.

The Administration has also argued that the Firefighters employed the same regressive bargaining tactics regarding the issue of compensation for passing the physical fitness testing requirements (*Brief* at 35). The Firefighters refute this (R. 82). [1]

As to the allegation of regressive bargaining, the Firefighters respond that in the case of *International Union of Operating Engineers Local 520 v. City of Collinsville*, 16 Pub. Employee Rep. of Illinois § 2026 (April 18, 2000), the Court stated that a party may lawfully withdraw a contract proposal before it is accepted without such being considered bad faith. Specifically, the Court stated, "[u]ntil ratification occurs and is communicated to the other party, no binding contract exists and the other party may withdraw its assent to the contract proposal. *Id*. at 5. In the words of the Firefighters:

> Here, the Firefighters' final offer differs from the offer made by the Firefighters during mediation. However, this is not regressive bargaining for two (2) significant reasons. First, there was no tentative agreement reached during the mediation on the sick hour cap. Therefore, under the *Collinsville* case, the Firefighters are free to withdraw any proposal. Second, the Firefighters' proposal during mediation was to place a cap of 1,300 hours on a Firefighters ability to accumulate sick leave. However, the Firefighters would be able to cash out annually any accumulated sick hours over the cap at 75% of the current hour rate. As such, the change in the Firefighters' position from mediation to their final proposal is actual a betterment for the Village and not a detriment. Accordingly, there was no regressive bargaining. Finally, after the arbitration hearing, the Village withdrew its charge of unfair labor practice against the Firefighters and that charge has been dismissed.
>
> (*Brief for the Union* at 9).

While, technically, the Union is correct regarding withdrawing proposals before they are formally accepted, the Employer's concerns regarding the direction that the sick-leave cap took during bargaining are not easily dismissed, notwithstanding *Operating Engineers Local 520 v.*

---

[1] Durkin: "There's no dispute that the union at one point in time was four hours ETO and 100 dollars, then in mediation they went down to two hours ETO and 100 dollars, and then following mediation they jumped up to $200 with two hours of ETO. There's no dispute that the parties had a fluid bargaining position. The Village's concern was instead of getting closer together, the union's proposal on October 13th took the parties further apart. (R. 83)."

City of Collinsville, supra. The 150% sick-leave buy-back proposal would give anyone pause.[2]

E. <u>The IRS Issue Associated with the Firefighters' Proposal</u>

The Administration has raised a serious concern with respect to the Union's proposal. As outlined by Mr. Durkin at the hearing:

> The Internal Revenue Service has determined that those payouts into a Retirement Health Savings Plan must be mandatory for the group. It cannot be optional. And for those payments to be made into the Retirement Health Savings Plan must be mandatory for the group. It cannot be optional. And for those payments to be made into the Retirement Health Savings Plan, everybody in that group, which is now defined as retiring at age 50 or over, has to put their money into that Retirement Health Savings Plan.
>
> * * *
>
> But the Village doesn't care where that money goes. But what the Village cares about is complying with the IRS regulations that we cannot set up a Retirement Health Savings Plan that says, some Firefighters who ate ago 50 can take cash and others can put in into the RHS. The IRS specifically will not allow that. Either the parties all get cash or they all put it into the Retirement Health Savings Plan. There can't be a middle ground or an optional ground. (R. 73-74).
>
> * * *
>
> Mr. Arbitrator: All right. My understanding is Mr. Durkin is saying that on your final offer , as contained in Exhibit No. 2, that part of this is impermissible.
>
> Mr. Durkin: That's what I'm saying (R. 74).

---

[2] I have been serving as an interest arbitrator starting in Iowa in 1976, and probably arbitrated over 100 interest cases in education, police, fire, transportation, streets and sanitation, etc. The Elmwood Park Firefighters' proposal for a 150% sick-leave buy-back proposal is unique in my experience. It would take some special circumstances for it to be considered as a serious proposal for inclusion in a successor collective bargaining agreement.

The Act restricts an 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," [3] or "fixing" a final offer to eliminate ambiguity or potential IRS problems. The ambiguity regarding the legality of the Firefighters' offer favors the Administration's position.

F. Additional Considerations – Accumulated Sick Time as of May 7, 2010

An examination of the data regarding Firefighters with less than 1,300 hours *versus* those Firefighters with 1,300 hours and above, reveals eight (8) Firefighters included in the Village's proposal that will not have any maximum accumulation. The Village has proposed that those 1,300 hours that those Firefighters earn can grow to whatever number they can accumulate throughout their career (EX 24; R. 94). In contrast, the Union's proposal for an 1,800-hour cap cuts off three of those Firefighters (Kucera, Flaherty and Piraimo). Thus, they would be capped at 1,800 hours, whereas under the Village's final offer the three will be able to continue to accumulate sick leave without a cap.

It is noteworthy that those Firefighters under 1,300 hours, the closest that a Firefighter is to the 1,300-hour cap is at 1,004 hours. As additional 300 hours may be accumulated by that Firefighter and those below will be able to accumulate significantly more before they would be "capped out."

It is also noteworthy (as already explained) that what is at issue here is a "soft cap," which will provide a payout one a Firefighter hits 1,300 hours, unlike the police and public works employees (R. 95). The Village's proposal allows officers to be paid that sooner than the Union's proposal because the Village proposes that Firefighters will be able to receive that payment after 1,300 hours.

G. The Firefighters' $200 Demand for Meeting the Physical Fitness Requirement

The Firefighters have noted that based a new testing standard – a standard asked for by the Village – the Union has asked for two (2) hours of earned time off ("ETO") along with a $200 stipend. The Village's final offer is for the *status quo* of two hours of earned time off (*Brief* at 30; R. 64). The stipend is an increase from the existing benefit. There is no decrease being sought by the Village with respect to that issue (R. 64).

---

[3] *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.'"

The Firefighters submit the Firefighters' bargaining unit has previously received two (2) hours of ETO for meeting the physical fitness testing requirements. The only difference in benefits the Firefighters are seeking is for the $200 stipend. With the twenty-three (23) Firefighters employed by the Village, if all Firefighters pass the physical fitness test this amounts to only $4,600 a year (*Brief for the Union* at 11-12).

In support, the Firefighters point out that the police unit currently receives two (2) hours of ETO and a $200 stipend for meeting their minimum physical fitness requirements. As such, the Firefighters are seeking nothing more from the Village than what it provides Police Officers.

While the Administration submits that only two of the comparable bench-mark jurisdictions (Morton Grove and Villa Park) utilize an annual physical fitness evaluation (EX 20, 24), only one, Morton Grove, provides any compensation to employees who pass the evaluation, and that compensation comes in the form of one floating holiday. Thus, the Village's proposal of two hours of Earned Time Off is similar in nature to Morton Grove (*Brief* at 30).

Furthermore, the Village maintains that the police unit is not entitled to two (2) hours earned time off (ETO), but simply receives a $200 stipend if an employee successfully passes the testing requirements (*Brief* at 32; R. 85). As outlined by counsel for the Administration:

> It should be noted at the bottom of page 27 that this contract provides that police officers who participate in the test get two hours of overtime pay when they're taking the test. They have to take the test. It's considered work hours. They are paid two hours of overtime. Unlike the Firefighters who may be taking the test while on duty, since they work 24 hours, the police have to have a provision in their contract that they get paid for that work time, the contract provides it's at the overtime rate. That is not two hours of earned time off. Police officers simply receive a $200 stipend if they successfully pass the testing requirement. (R. 85-86).

Also, the Village submits: "With respect to the physical fitness stipend, time expended by police off-duty to take the test is not equivalent to the time during the workday in which a Firefighter would complete the test." (*Brief* at 33).

I view the *status quo* of two hours earned time off as equivalent to the police contract of $200 when an officer successfully passes the test. Given that the externals favor the Administration's final offer (four do not have a physical fitness program, two have a program, but only Morton Grove makes a payout which is a floating holiday; Villa Park does not pay a stipend), the Administration advances the better argument regarding the $200 stipend requested by the Firefighters.

For the reasons stated above, the following award is issued:

VII. AWARD

The Administration's final offer on the level of the sick-leave cap (1,300 hours) and physical fitness stipend (*status quo*) is awarded.

Dated this 24th day of July, 2010
at DeKalb, IL 60115

_____
Marvin Hill,
Arbitrator