

Daniel Nielsen, Arbitrator

In the Matter of the Arbitration of an Interest Dispute Between

PALOS HEIGHTS FIRE PROTECTION DISTRICT

and

**PALOS HEIGHTS PROFESSIONAL FIREFIGHTERS UNION,
LOCAL 4254, IAFF**

Case S-MA-12-389

Appearances:

Carmell, Charone, Widmer, Mathews & Moss, by **Ms. Lisa Moss**, Attorney at Law, One East Wacker Drive Suite 3300, Chicago, IL 60601, appearing on behalf of the Union.

Goldstine, Skrodski, Russian, Nemecek & Hoff, by **Donald Rothschild** and **Sara Spitler**, Attorneys at Law, 835 McClintock Drive, Second Floor, Burr Ridge, IL 60527-0860, appearing on behalf of the Fire Protection District.

ARBITRATION AWARD

The Palos Heights Fire Protection District (hereinafter referred to as the District or the Employer) and the Palos Heights Professional Firefighters Union, Local 4254 (hereinafter referred to as the Firefighters or the Union), selected the undersigned to serve as the arbitrator of a dispute over the terms of the collective bargaining agreement for sworn personnel. Hearing were held on October 22 and October 23, 2012 and January 10, 2013, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. Post-hearing briefs were submitted, which were exchanged through the undersigned. Briefing was finalized on March 25. The Union made an additional submission on May 31, and the District promptly responded.

Background

General

The District provides fire protection and emergency medical services to the people of Palos Heights in southern Cook County. It is headed by a Board of Trustees. Bernard Kay has been the President of the Trustees for the past 17 years. The District encompasses 4.5 square miles, with a population of 13,000 people. It operates two fire stations, staffed by 21 full-time bargaining unit members, a Fire Chief, a part-time Fire Inspector and a part-time secretary. The personnel at the stations function as jump companies, manning an engine or an ambulance, depending on the type of call. Prior to February 29, 2012, the Fire Chief was Jack Nagle. He was succeeded by Deputy Chief Timothy Sarhage.

The Union was certified as the bargaining representative for Firefighters and Lieutenants in 2003. Captains were added to the unit in 2009. The District had long employed part-time firefighters to supplement its full-time complement. The part-timers earned a lower hourly rate, and received no benefits. When the parties negotiated their first collective bargaining agreement, covering 2006 through 2008, they established minimum manning at five per shift, with at least one Officer and one Engineer at Station 1, and one full-time employee at Station 2.

In the second contract, which covered calendar year 2009, minimum manning was changed to six, with one Officer and four full-time employees per shift, and no specification as to how they were to be deployed. This language contemplated the continued use of part-time firefighters, since it specified minimum manning of six with a minimum of five full-time personnel. Because a piece of legislation commonly known as Senate Bill 834 had been enacted during the term of the first contract, prohibiting the use of part-time firefighters as substitutes for full-time employees in represented departments unless both sides agreed, language was included in the second contract stating that "Nothing in this Section shall constitute a waiver of any rights or obligations the parties may have

pursuant to the terms of Senate Bill 834, effective June 1, 2008.” The minimum manning levels and the SB 384 language were carried over into the third contract, covering 2010 and 2011.

During the second and third contracts, the District continued to use part-time firefighters to fill out the minimum manning on each shift. They routinely used one per shift. Beginning in 2009, they also used the Deputy Chief to count as an officer on some shifts for minimum manning purposes.

Bargaining and Grievance Activity

This is the fourth contract between the parties, and the first to go to arbitration. Negotiations over this contract did not go smoothly. At a labor-management meeting on September 25, 2011, Union President Dagys verbally advised Chief Nagle that they might raise concerns about the use of part-timers to supplement the shifts, and the use of the Deputy Chief as an Officer on shifts. The Union told Nagle that it had some ideas on restricting the Department, and the use of part-timers. Nagle said he think about it and get back to them within a couple of weeks. When he did not get a response, Dagys pressed the Chief, who said he needed to get a response from the Trustees, and promised to get back to him by the beginning of November. Eventually, Nagle told Dagys they would not be able to respond until the Trustees meeting in mid-December.

In mid-October, a reopener notice was sent to commence negotiations. The Union expressed frustration at the pace of discussions on manning issues, and told the Chief that they would probably bring in legal counsel. On November 14, Union counsel entered her appearance with the District, and also sent a letter to the FMCS advising them of the pending contract negotiations and the possible need for assistance. Such notice is necessary under Illinois law to insure that economic terms of a new contract will be retroactive. On November 15th a grievance was filed with the District against the use of part-timers and the Deputy Chief. The grievance demanded that the District cease using the part-timers and the Deputy Chief to man shifts, and make the Union whole.

The Union and the District met on December 20th without counsel. The District, as had been its normal practice, recorded the meeting. At the meeting they agreed to try and resolve the dispute over staffing, and Dagys acknowledged that the Union was not seeking to get rid of the part-timers, and that the grievance was a bargaining chip for the contract negotiations. Deputy Chief Sarhage pointed out the ramification of the grievance, possibly leading to the layoff of the part-time employees, and his demotion back to Captain so he could count towards the manning of the shifts. They agreed to meet again on December 27 and January 17, but a dispute arose because the Union objected to have the meetings tape recorded, so the December 27 meeting was cancelled.

On December 28, the Chief formally denied the Union's grievance. The Union advanced it to the arbitration step on January 3rd. The following day, the District terminated its 3 part-time firefighters, effective January 5th. The underlying grievance was not advanced since that time.

The parties had an extensive correspondence trying to identify dates for formally commencing negotiations. Given the schedule of Board President Kay, who ran a business and wanted to meet in the evening, and the Union's attorney who had limited evening availability, the bargaining teams were not able to meet with counsel present until January 17. In the meantime, in late December, Fire Chief Nagle unexpectedly announced that he would be leaving as of February 29. Given this, the District decided not to have him participate in negotiations. Deputy Chief Sarhage was named in his place, although his promotion to Chief was not yet assured.

The parties met for two hours on January 17. The Union proposed ground rules and offered 33 proposed changes to the contract. The District said it would review the proposals and respond. The parties were unable to immediately agree on another meeting date because of the District's preference for evening meetings and the Union's preference for afternoon sessions.

On January 24th, the District's attorney sent some proposed revisions to the ground rules to Union counsel, and said there would be a response to the proposals by February 17th. On February 17th, a response was sent, addressing primarily housekeeping matters, making three counter-proposals and advising that there might be flexibility on some proposals when the parties met again. The District did not present any proposals of its own at that time. On February 20th, the Union sent a letter advising the District that it was requesting mediation. The mediation was held on April 19. Due to schedule conflicts, the parties set aside two and a half hours for the mediation. The mediation began with a joint caucus, during which the Union summarized its proposals. The parties then broke into separate caucuses. At the conclusion of the two and a half hours, no further substantive proposals had been exchanged. The District thereafter proposed to meet for additional bargaining or mediation. The Union invoked interest arbitration.

Staffing After Termination of the Part-Timers

At the point at which the part-time firefighters were terminated, the District had 18 full-time personnel, including Lt. Howe – who was on a long term injury leave – and Deputy Chief Sarhage. It had no current eligibility list to hire from. Given a minimum manning of six per shift, and three shifts, this generated a considerable amount of overtime. In response, the District created an eligibility list to hire replacements for Howe (who retired) and Deputy Chief Sarhage, whose Captain position had not been filled after he was promoted. Those hires were made in April 2012. Sarhage's Deputy Chief's position was not filled after he was promoted to Chief.

The District also applied for a federal SAFER grant to hire three full-time firefighters to replace the part-timers. In applying for the grant, however, the District foreclosed itself from hiring full-time personnel until the grant determination was made, since that would have prevented it from proving the financial need necessary to receive funding. The grant was denied in September

2012, and the District hired three full-time firefighters to replace the part-timers. After that round of hiring, another firefighter suffered an on duty injury, and it is expected that he will need approximately nine to twelve months to return to work.

Interest Arbitration

The parties selected the undersigned as an interest arbitrator, and hearings were held on October 22 and 23, 2012, and January 10, 2013. The parties exchanged lists of issues on October 10 and final offers on October 15. Offers were modified thereafter, removing matters agreed, permissive topics, and matters withdrawn. As of the commencement of arbitration, the Union had a proposal for an across the board wage increase, while the District had a proposal on across the board wage increases, four proposals to change minimum manning, two proposals to change Work Reduction Days (Kelly Days), one proposal to institute a two tiered wage schedule, one proposal to institute a two tiered vacation schedule, and a proposal to change a prohibition on employees working more than 48 hours straight. The parties agreed to a duration of three years, covering calendar years 2012, 2013, and 2014.¹

¹ On January 8, 2013, the Union filed an unfair labor practice charge asserting that the District had failed to bargain in good faith by insisting to impasse on two permissive proposals, and by dilatory tactics in failing to make bargaining proposals until the eve of interest arbitration. The District denied the charges. On May 31st, the Executive Director of the Illinois Labor Relations Board issued a Complaint for Hearing on the charges, and a copy of the Complaint was forwarded to the arbitrator by the Union, with a request that it be made part of the record. The District objected to any consideration of the Complaint, as it intended to contest the Complaint on the merits and had not yet had an opportunity to do so. I agree with the District that the preliminary finding of the ILRB should be given no weight in the determination of this proceeding. It is not relevant to any of the criteria under the arbitration statute.

Issues and Offers

The parties have disputes over a large number of issues. Both have proposals for across the board wage increases for 2012, 2013 and 2014. While the Association's initial offer to the District contained dozens of proposed changes, its final offer is currently limited to wages.² The District has four proposals to change minimum manning, two proposals to change Work Reduction Days (Kelly Days), one proposal to institute a two tiered wage schedule, one proposal to institute a two tiered vacation schedule, and a proposal to change a prohibition on officers working more than 48 hours straight.

In summary form, the final offers are:

ECONOMIC ISSUES

Wages – Across the Board Increases

District:	2.0% across the board January 1, 2012 2.0% across the board effective January 1, 2013 3.0% across the board effective January 1, 2014 Delete the current contract language regarding the placement of employees who are promoted to the rank of Lieutenant and Captain at the appropriate step based on years of service.
Association:	2.5% across the board January 1, 2012 2.5% across the board effective January 1, 2013 3.0% across the board effective January 1, 2014

² The Union also proposed changes to the status quo on Promotions (Section 20.3) and Personnel Files (Section 3.6), asserting that aspects of the existing language were permissive. The District proposed to maintain the existing language. The Union filed unfair labor practice charges (see footnote 1, supra), and the parties agreed that the arbitrator should retain jurisdiction over these two issues, pending resolution of the charges.

Wages – 2nd Wage Tier for New Hires

District: For employees hired on or after January 1, 2013, a new wage schedule with rates 10% below the current rates (measured against the District’s across the board wage offer) through the 60th month (the current top rate), and two additional 5% steps at 72nd and 84th months to the top rate:

<u>Length of Service</u>	<u>Jan. 1, 2013</u>	<u>Jan. 1, 2014</u>
0-12 months	\$47,283.09	\$48,701.59
After 12 months	\$50,920.25	\$52,447.86
After 24 months	\$54,557.42	\$56,194.14
After 36 months	\$58,194.58	\$59,940.41
After 48 months	\$61,831.74	\$63,686.69
After 60 months	\$65,468.90	\$67,432.96
After 72 months	\$69,106.06	\$71,179.24
After 84 months	\$72,743.22	\$74,925.52

Promotional increases for employees hired after January 1, 2013 who are promoted to Lieutenant would 11% above the applicable Firefighter rate, and promotions to Captain would at 6% over the applicable Lieutenants rate.

Association: Status Quo

Minimum Manning – Language

District: Separate the minimum manning language into a new Section 8.11 and amend it to provide for one officer and five full-time bargaining unit personnel. Allow minimum manning to drop to five when necessary to accommodate mandatory training.

Association: Status Quo

Minimum Manning – Variance for Injuries

District: Allow minimum manning to be reduced from six to five on no more than 30 days per year to accommodate leaves due to injuries without the payment of overtime.

Association: Status Quo

Minimum Manning – Variance for Benefit Time

District: Allow minimum manning to be reduced from six to five on no more than 15 days per year to accommodate benefit time off without the payment of overtime.

Minimum Manning – Variance for Sick Leave

District: Allow minimum manning to be reduced from six to five on no more than 4 days per year to accommodate the use of sick leave without the payment of overtime.

Association: Status Quo

Work Reduction (Kelly Days) – Cancellation for On-Duty Injuries

District: Allow Kelly Days to be cancelled to maintain minimum manning in the face of duty related injuries.

Association: Status Quo

Vacation – 2nd Vacation Tier for New Hires

District: Establish a vacation schedule applicable only to persons hired on or after January 1, 2013:

After 12 months 2 days per year *[currently 5]*

After 24 months 5 days per year *[currently 7]*

After 60 months	7 days per year	<i>[currently 10]</i>
After 120 months	9 days per year	<i>[currently 12]</i>
After 180 months	10 days per year	<i>[currently 14]</i>
After 240 months	12 days per year	<i>[currently 15]</i>
After 300 months	15 days per year	<i>[currently 16]</i>

Association: Status Quo

NON-ECONOMIC ISSUES

48/Out Policy

District: Change the language to eliminate the provision making any employee who has worked 48 hours in a row ineligible for overtime, and to provide that employees held over past 48 hours will receive double time.

Association: Status Quo

Work Reduction (Kelly) Days Scheduling

District: Change the system of scheduling Kelly Days from one in which days are scheduled in the same manner as vacation, to one in which each employee will be scheduled for a Kelly Day on every 17th duty day.

Association: Status Quo

Statutory Criteria

Section 14(h) of the Illinois Public Labor Relations Act, 5 ILCS 315 provides the specific factors for an arbitrator to use when analyzing the issues in an interest arbitration dispute:

***[T]he arbitration panel shall base its findings, opinions, and order upon the following factors, as applicable:

- (1) The lawful authority of the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (A) In public employment in comparable communities.
 - (B) In private employment in comparable communities.
- (5) The average consumer prices for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
- (7) Changes in any of the following 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.

All of the criteria have been considered in arriving at this Award, although given the varying nature of the proposals, not every criterion is discussed.

Comparability

The parties have not been to arbitration before, and the only set comparables are the four that both have agreed on:

Northwest Homer Fire Protection District

Roberts Park Fire Protection District

Leyden Fire Protection District

Northlake Fire Protection District

The District states that it would be content with using only these four, but has also offered the Village of Alsip, the Village of Chicago Ridge, North Palos FPD, and the City of Oak Forest as proximate communities that are fairly comparable. For its part the Union offers Itasca FPD, North Maine FPD and Wood Dale FPD.

The District argues that geography and size are the most persuasive determinants of comparability, and that the four communities it proposes are preferable to those put forward by the Union on both counts. The Union argues that the District has proposed adding three municipalities, which is not a sensible mix, since municipalities have revenue streams that are substantially different from Fire Protection Districts. Moreover, the District's proposed comparables fall well outside of the acceptable range for measuring comparability. In contrast, the Union argues that its proposed comparables are all FPDs and all fall within the 50% plus or minus standard in all or almost all of the criteria commonly used for determining comparability.

The Union's proposed additions to the comparable pool are, indeed, statistically similar to the Palos Heights FPD. Each of them is also roughly 30 miles away, which is quite a substantial distance in the Chicago metropolitan area. This is not some isolated region, where the parties must search the horizons for potential comparables. The District's four proposed additions are geographically closer. The Union is correct that the three municipalities have different revenue streams than a fire protection district, in that they receive shares of sales taxes and income taxes, while the FPDs principally rely on

property taxes, with some additional income from ambulance fees. Municipal governments also face differing budget choices in allocating resources among the many services they provide and the functions that they fund. Unless there are not sufficient comparable entities available, it is not desirable to compare fire protection districts to municipalities.

Of the potential comparables the only one that has some persuasive value as an entity that the parties themselves might look to is the North Palos Fire Protection District. It is geographically proximate, with the same governing and taxing structure as the District. At the same time, as the Union notes, it is substantially larger than the District in terms of total number of employees, budget and population served.³ It is not as persuasive a comparable as the four stipulated communities, but it is entitled to some weight in this proceeding.

Economic Issues

Wages – Across the Board Increases

District: 2.0% across the board January 1, 2012
2.0% across the board effective January 1, 2013
3.0% across the board effective January 1, 2014
Delete the current contract language regarding the placement of employees who are promoted to the rank of Lieutenant and Captain at the appropriate step based on years of service.

Association: 2.5% across the board January 1, 2012
2.5% across the board effective January 1, 2013
3.0% across the board effective January 1, 2014

The parties' wage offers are not the principal focus of this dispute. The District offers 7% across the three years of the contract, while the Union seeks 8%

³ North Palos FPD has an intergovernmental agreement with Worth to provide fire protection services, and is paid a fee that is the equivalent of its tax rate for the protected properties. Thus in calculating population and EAV, Worth and North Palos FPD have to be considered a single entity.

across those three years.

The District ranks 2nd or 3rd among the 5 comparables at the benchmarks, and pays an above average wage. None of that changes, no matter which offer is selected. Neither is the use of comparable settlement data completely conclusive, but it is fair to say that it favors the Union:

Northwest Homer	2% – June 1, 2012
	2% – June 1, 2013
	2.5% – June 1, 2014
Roberts Park	3% - May 1, 2012
	3% – May 1, 2013
Leyden	2.5% - January 1, 2012
Northlake	3% - June 1, 2012
	2.5% - June 1, 2013
	3% - June 1, 2014
North Palos	3% - January 1, 2012
2012 Average	2.7%
2013 Average	2.5%

Roberts Park is somewhat overstated, in that the two years shown are the end of a backloaded deal, with a 0% in the first year. By the same token, North Palos is understated, as it is the last year of a frontloaded contract, with 4% in each of the first two years. Consideration of external comparability favors the Union's wage proposal as slightly below the average.

The District argues that the cost of living should have controlling weight over considerations of comparability. While cost of living figures have assumed a greater role in interest arbitration over the past several years as the settlements were roiled by the Great Recession, the fact is that these settlements were all reached after the economic crisis was fully realized. That is not to say that there is any lockstep uniformity to settlement rates. There remains great uncertainty about the course of the economy, and particularly the course of public sector

finances in Illinois. It is fair to say, though, that we are no longer in a situation where bargainers were caught unawares, or where the majority of the deals were made in vastly different economic times. Certainly the cost of living provides a reality check for offers, and certainly it is a free-standing criterion to be separately considered. To the extent that the District's offer does more closely track the CPI changes, it would be favored under that criterion, but I cannot say that it refutes the general trend of settlements in the nearby comparable districts.

The strongest argument that the District makes is that it is experiencing financial pressures, that it is landlocked and cannot expand, that all of the available land for large scale development has already been used, and that its EAV declined by 18% between tax year 2010 and tax year 2011, placing great pressure on its tax base. At the same time, the District does not claim an inability to pay the costs of the Union's offer,⁴ and remains in the black for its operations.

An ability to pay and an obligation to pay are two different things, and the District has made a good case that its economic outlook is not robust. It is not unique in that regard. The comparable districts all suffered declines in EAV in the same time period, ranging from 19% in Roberts Park to 3.5% in Leyden, with the average decline being 14.8%.⁵ As noted, their settlements on wages more closely track the Union's proposal.

The District also makes a reasoned argument that its total compensation package is more generous than that of other districts in some areas, ranking first in holidays and vacations and above average on wage rates. That argues for a more moderate wage package, one that does not increase the distance in overall compensation, but as observed the Union's proposal comes in somewhat below the average of settlements.

⁴ The difference between the two offers is \$35,000.

⁵ This is based on the Cook County Clerk's data.

On consideration of all of the statutory criteria, I conclude that the offer of the Union on wages is more fully supported than the offer of the District.⁶

Wages – 2nd Wage Tier for New Hires

The District proposes a two tiered wage schedule, with new hires being paid roughly 10% less than current employees through their first five years, 5% less in their sixth year, and parity in the seventh year. Employees hired before January 1, 2013 would remain on a five step schedule, reaching the maximum rate after their 60th month of employment. The District’s proposed schedule would carry the lower rate forward upon promotion to Lieutenant or Captain as well. The District’s proposed schedule is:

<u>Length of Service</u>	<u>Jan. 1, 2013</u>	<u>Jan. 1, 2014</u>
0-12 months	\$47,283.09	\$48,701.59
After 12 months	\$50,920.25	\$52,447.86
After 24 months	\$54,557.42	\$56,194.14
After 36 months	\$58,194.58	\$59,940.41
After 48 months	\$61,831.74	\$63,686.69
After 60 months	\$65,468.90	\$67,432.96
After 72 months	\$69,106.06	\$71,179.24
After 84 months	\$72,743.22	\$74,925.52

Promotional increases for employees hired after January 1, 2013 who are promoted to Lieutenant would 11% above the applicable Firefighter rate, and promotions to Captain would at 6% over the applicable Lieutenants rate.

The District explains its proposal as a modest step to address fiscal difficulties. The Union characterizes it as groundbreaking, unsupported and unwarranted.

⁶ The District did not fully explain its proposal to eliminate the language concerning placement of promoted employees on the Lieutenants’ and Captains’ wage scale. That change does not control my determination on this issue.

This proposal has no support under any of the statutory criteria. The current wages for the bargaining unit are not out of line with the wages paid to other firefighters in area communities. Even if they were, the more plausible answer would be to propose smaller increases, or no increases, to the wage schedule for current employees. That would have a more immediate effect, a larger effect, and a more permanent effect, without the divisiveness of a two tiered system. The District has not done that. Its general wage proposal raises wages for the unit by 7% over three years, as compared with 8% for the Union's proposal.

The District argues that the arbitrator's task is to adopt the more reasonable of the proposals before him, and that is true as far as it goes. But the arbitrator must approach that task with an eye to his role in the overall bargaining process. The arbitrator is a last resort, not a first resort, and if an arbitrator is to make basic changes in contract provisions, it must be because there is a genuine problem and the parties have exhausted their voluntary options for addressing the problem. This is a conservative process, and it must be a conservative process. Otherwise, parties have no reason to actually bargain with one another over difficult issues.

This raises the issue that overhangs this entire proceeding. These parties had a single general bargaining session in January, during which the Union made its initial proposal. They then had a two and a half hour long mediation session in April, during which no proposals were exchanged. They proceeded into interest arbitration. The first time any of the District's proposals were communicated to the Union was in October, roughly a week before the interest arbitration hearing commenced.⁷

The parties devoted a good deal of energy to accusing one another of sabotaging the collective bargaining process, and I do not propose to assign

⁷ The District did make a counter-proposal on cancelling Kelly Days for on-duty injuries, and that proposal is not the subject of this analysis.

responsibility in this Award. That is a job for the Labor Board, which has now issued a Complaint against the District. That will be sorted out in due course and in the proper venue. What is clear, though, is that no matter how tangled or even pointless the bargaining process may have seemed in January, February, March and April, it is the District that failed to make any substantive proposals until the eve of arbitration. There was never any contemplation of a two tiered wage system, much less any bargaining over the notion. There is no evidence that such a proposal ever surfaced in prior bargains. It comes before the arbitrator at roughly the same time as it comes to the Union for the first time.

A certain amount of gamesmanship is common in bargaining, and each party makes tactical decisions about which issues to push, which to revise, which to resurrect and which to drop. Final offers often do not mirror the precise language of proposals made across the table. All of that is to be expected. It is not for the arbitrator to second guess a party's tactics, or pass judgment on whether the bargaining process was effective or ineffective. Parties are free to conduct themselves as they wish within the confines of the law, and to mold their bargaining relationships as they will. There are, however, practical consequences to proceeding as the District has in this case.

Broadly speaking, the party proposing a significant change to the existing structure or language of a contract has a burden of proving that the change is needed due to unforeseen problems with the existing structure or language, that the change proposed will address the actual problem without undue harm to the other party to the contract, and that reasonable efforts have been made to secure the change in bargaining. Failure to disclose one's proposals until arbitration undercuts the showing of need,⁸ and completely prevents any finding that

⁸ At hearing, the arbitrator denied a Union demand that he bar the District from presenting its proposals for the first time in the arbitration proceeding. The arbitrator has no such authority. The arbitrator did, however, advise the District that the failure to raise a demand prior to arbitration would necessarily draw into question how seriously the proposal could be taken, citing the provisions of Section 14(h)8: ““(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,

reasonable efforts were made to secure the changes through bargaining.⁹ In practical terms, it turns a heavy burden of proof into an almost insurmountable burden.

In the case of the two-tiered wage schedule, the District has not satisfied any of the necessary elements – the salary schedule is not a problem, if it was a problem a two-tiered wage schedule is not a particularly effective means of answering it, and no effort at all was made to negotiate the change. Moreover a two tiered wage schedule is the epitome of a breakthrough proposal. It is a dramatic departure from the past. It creates a new and lesser class of employees. It has no support in the comparables, and no precedent that I am aware of in arbitration. Arbitration is not intended to be an innovative process, and if parties wish to plow entirely new ground, they should, if at all possible, do so voluntarily.

For all of these reasons, the District’s proposed change cannot be awarded.

Vacation – 2nd Vacation Tier for New Hires

District: Establish a vacation schedule applicable only to persons hired on or after January 1, 2013:

After 12 months	2 days per year	<i>[currently 5]</i>
After 24 months	5 days per year	<i>[currently 7]</i>
After 60 months	7 days per year	<i>[currently 10]</i>
After 120 months	9 days per year	<i>[currently 12]</i>
After 180 months	10 days per year	<i>[currently 14]</i>
After 240 months	12 days per year	<i>[currently 15]</i>
After 300 months	15 days per year	<i>[currently 16]</i>

arbitration or otherwise between the parties, in the public service or in private employment.” Whether in bargaining, mediation or arbitration, one would “normally or traditionally” expect an urgently needed change to the contract to be raised sometime within the first year following reopening of negotiations.

⁹ I would stress that these observations go to the unusual situation here, where no effort at all was made to advise the other party of the proposal, or even the general issue, before arbitration.

The District proposes to reduce the vacation schedule for new hires. Unlike the two tiered wage proposal, the vacation schedule has no provision for the new hires to ever catch-up with the existing employees. The District's rationale for this proposal is that the vacation schedule for its firefighters is the most generous among the comparables and the overall amount of benefit time available to employees cumulatively exceeds 365 days per year, insuring that overtime will be regularly required to meet minimum manning.

This, like the two tiered wage scale, is a proposal that radically alters the status quo, with no support in any comparable district, and no history of having ever been shared with the Union prior to arbitration. It seeks to reduce a benefit that the District believes is overly generous, but a benefit that was voluntarily agreed to and whose effects were fairly obvious when it was bargained. The precise formulation for the showing needed to support a major alteration of the status quo was articulated long ago by Arbitrator Nathan in his Will County Sheriff's Award.¹⁰ The proponent of the change must prove that:

- 1) The old system or procedure has not worked as anticipated when originally agreed to;
- 2) The existing system or procedure has created operational hardships for the employer or equitable or due process problems for the union; and
- 3) The party seeking to maintain the status quo has resisted attempts to bargain over the change (i.e., refused a quid pro quo).

As observed, the vacation schedule works exactly as it was intended to work, and there is no evidence that an effort was made to bargain this change, much less offer some inducement for the change. The District understandably wants to relieve the pressure on its staffing levels caused by the elimination of part-time employees and a progression of injuries to its personnel in recent years. Even assuming that this desire would meet the second criterion for a change – and that

¹⁰ Will County Board and Sheriff of Will County, Case No. S-MA-88-09 (Nathan, 1988)

goes to the question of actual need addressed in footnote 8 in the preceding section – the test for justifying the change requires more than that. The District has not satisfied its burden.

For all of these reasons, the District’s proposed change cannot be awarded.

Minimum Manning - Variances

The District proposes to make multiple changes to the minimum manning provision, including breaking it out into a separate Section in Article 8, updating the numbers to reflect only the use of bargaining unit personnel for minimum manning, and incorporating variances to allow manning to drop from six to five:

- Whenever necessary to accommodate mandatory training;
- Up to 30 times per year to accommodate absences due to injury leaves;
- Up to 15 times per year to accommodate the use of vacation days, personal days and Kelly Days;
- Up to four times per year to accommodate the use of sick leave.

The District’s language to accomplish these goals is:¹¹

Minimum Manning – Language

ARTICLE 8- HOURS OF WORK AND OVERTIME

Section 8.6 - Hold-Over

When an Employee is forced by the District to work additional time due to emergency calls, late personnel, or the inability to fill a vacancy from the available overtime list, immediately after the regular work shift without interruption, the Employee will be paid time and one-half for the hours worked at their basic hourly rate. If no one picks up the available time 72 hours (3 days) prior to the start of the holdover, the full-time Employee, according to the hold over selection list, shall be notified of the hold over.

There will be two lists regarding holdovers for all eligible full-time shift personnel. One list will be for the officers, the other list will be for the full-time firefighters. Whichever

¹¹ All of the minimum manning proposals are economic, aside from the idea of having a separate contract provision to address minimum manning.

rank cause the hold over will determine which list is applicable. The shift commander on duty shall be responsible for updating the holdover lists and notifying the employee who is being held over.

When a holdover is created the employee highest on the hold over list who is working the shift immediately preceding the holdover date will be held over. This employee must be eligible in order to be held over. In order for an employee to be eligible, an employee must meet all conditions stated in Sec. 8.5. This employee shall then be moved to the bottom of the hold over list regardless if the employee actually works the hold over hours or chooses to give the hold over hours away. If an employee chooses to give away the hold over hours, the employee must follow the hold over list. The employee who agrees to work the hold over hours shall be moved on the overtime list when the hours worked are in excess of six (6) hours.

When a hold over lasts more than two (2) hours due to late personnel, or the inability to fill a vacancy from the overtime list, the Employee has the option to stay until 1900 hrs or until the manning rectifies itself by an Employee coming in before 1900 hrs or at 1900 hrs.

Hold overs will also occur when **staffing falls below the minimum manning established in Section 8.11 of this Article.** ~~minimum manning falls below six (6) personnel, which at a minimum shall include five (5) full-time personnel consisting of one (1) Officer and four (4) full-time Employees.~~ In such event, the hold-over list will be followed to fill required minimum manning.

The District and the Union recognize the need to participate in auto aid training. This shall only occur two times per year for each auto aid department for each shift. If the training is less than six hours, an effort shall be made to call out available overtime. In the event that no personnel respond to the overtime call out, the affected shift shall be allowed to participate in the training. All other requests which would cause minimum manning to fall below six shall be approved by the Fire Chief. In the absence of the Fire Chief, requests may be submitted to the Deputy Chief for approval. An Employee with a scheduled vacation that begins at the end of his regularly assigned shift day shall be exempt from a hold over.

Nothing in this Section shall constitute a waiver of any rights or obligations the parties may have pursuant to the terms of Senate Bill 834, effective June 1, 2008.

Section 8.11 - Minimum Manning

The District and the Union agree that minimum manning for each shift shall be six (6) personnel which at a minimum shall include five (5) full-time personnel and one (1) Officer. Hold overs will occur when minimum manning falls below six (6) personnel. In such event the hold-over list will be followed to fill required minimum manning and other relevant provisions of Section 8.6 shall apply.

A hold over shall not be required when manning falls below the minimum manning set forth above by virtue of an on-duty employee attending mandatory training. In such circumstances minimum manning shall be

changed to five (5) personnel which shall include one (1) Officer.

Section 8.12 - Injury Variance

The District and the Union agree that (a) significant injury leave (meaning any injury leave by one full-time employee exceeding fifteen (15) calendar days) and/or (b) multiple overlapping injury leaves (meaning two or more full-time employees on the same shift being on injury leave concurrently) substantially impairs District's ability to meet minimum manning requirements and causes the District to pay substantial overtime wages. Where District's ability to satisfy minimum manning is compromised by injury leave meeting either of the circumstances set forth in (a) or (b) above, the parties hereto agree that the District shall be permitted up to thirty (30) variances per year where minimum manning may drop to five (5) personnel, of which one (1) must be an Officer. The Fire Chief shall have the sole discretion to determine whether and when to use such variances and shall provide immediate notice to the Union of the election to use such a variance.

In the event that all thirty variances are used in a year and the District's ability to satisfy minimum manning requirements continues to be compromised due to excessive or extended injury leave, District shall have the right to cancel work reduction days pursuant to Section 9.4 of this Agreement and such right shall be exercisable regardless of whether the injury leave is the result of an on-duty or off-duty injury.

Section 8.13 - Variance To Honor Benefit Days

District shall be permitted up to fifteen (15) variances per year where minimum manning may drop to five (5) personnel, of which one (1) must be an Officer, when necessary in order to honor scheduled benefit days off (i.e. vacation, personal days, and work reduction days).

Section 8.14 - Variance For Sick Time

District shall be permitted up to four (4) variances per year where minimum manning may drop to five (5) personnel, of which one (1) must be an Officer, when District's ability to satisfy minimum manning is compromised due to an employee taking a sick day.

The District's central focus in this proceeding is a need to address what it perceives as a critical situation created by the overtime necessary to cover shifts left vacant because of long term injury leaves, the use of accumulated benefit time, and the loss of the part-time firefighters formerly used to fill shifts. Its response is to propose to leave the minimum manning at 6, but to allow up to 49 variances each year to account for specific types of absence, and a general variance to account for training.

In support of its proposal, the District points out that a manning level of five on an occasional basis does not pose any significant risk to public safety or employee safety. Five was the agreed upon level until the last contract. Moreover, the District only has two structural fires per year, on average, and the practical effect of dropping to five is not to respond with too few personnel. It is to take an engine out of service, because policy forbids running an engine with fewer than three personnel. Downing an engine is a daily occurrence, when other duties require the absence of one of the employees.

In opposition to the proposal, the Union notes that the District's overtime problems are largely due to an unfortunate, and unusual, series of injuries. The District itself characterized these as "unprecedented" and it makes little sense to make permanent changes to the contract to address problems that are not enduring. The notion of a fiscal crisis brought on by overtime is inconsistent with the fact that the parties are only one percent apart on wages over three years.

Moreover, The Union asserts that there is no disagreement that a minimum manning level of five is not as safe as six, and this impacts both the public safety and employee safety. A smaller crew takes longer to control a fire, and this leads to greater risk of property loss, injury or even death. Reducing manning levels can also have a negative effect on ISO ratings, leading to increased insurance rates for District citizens and businesses.

Each of the District's proposals is a significant change in the status quo. Among the comparable districts, only North Palos has a variance provision, and that is limited to 5 per year for unusual situations.¹² Again, the long established test for whether a proposal to significantly change the status quo should be imposed by an interest arbitrator is:

¹² District Exhibit 2, Article XII, page 12, North Palos Fire Protection District CBA: "The District and the Union also agree that unusual circumstances may occur where a variance to this clause may be necessary. To allow for those circumstances both parties agree up to five (5) variances a year will be allowed where minimum manning may drop to two (2) personnel."

1. the old system or procedure has not worked as anticipated when originally agreed to;
2. the existing system or procedure has created operational hardships for the employer or equitable or due process problems for the union; and
3. the party seeking to maintain the status quo has resisted attempts to bargain over the change (i.e., refused a quid pro quo).

The District's argument is that the Union triggered the overtime woes by preventing the use of part-time firefighters, thereby changing the premise underlying the existing agreement. Minimum manning was set at 5 until 2009. The parties agreed to increase it to 6 in the last contract. Trustees' President Kay and Chief Sarhage both said it was increased on the understanding that the District would continue to have 3 part-time firefighters available. Former Union President Dagys denied that, and noted that the last contract contained explicit language to the effect that there was no waiver of the right to object to the use of part-timers under Senate Bill 834. President Kay testified that he was not aware of the no-waiver language, and there is no reason to disbelieve him. However, the language was negotiated and agreed. It appears in the same section of the contract, and on the same page, as the change to minimum manning. It is not open to misinterpretation, and it clearly contradicts the notion that the Union gave up its right to object to part-timers in return for the increase in minimum manning. That possibility was part and parcel of the prior agreement.

The District also suggests that it was the Union that resisted efforts to negotiate relief for the overtime problem. Certainly, it was the Union that brought the issue to the fore. At a labor-management meeting in late September 2011, as a prelude to negotiations, Dagys told Nagle and Sarhage that the Union might raise concerns about the use of counting part-timers and the Deputy Chief towards minimum manning. The District characterizes this as a hardball tactic to pressure the District in negotiations, and that may be a reasonable interpretation.

It is also reasonable, though, to say that the escalation of the suggestion to the level of a formal grievance was occasioned by Chief Nagle's reluctance or inability to respond to the Union on this issue. According to Dagens, Nagle promised responses by four different deadlines between September and November, and failed to meet any of them. Finally, on November 9th, he said he could not respond until after the Trustees met on December 15. The grievance followed on November 15th.

When the Union met with the Trustees on December 20, Dagens explicitly said that the Union was interested in increased manning and was not seeking to eliminate part-timers, and that the grievance was a bargaining chip for negotiations. Both parties left the meeting promising to make proposals on the issue. Nonetheless, at the beginning of January, after the grievance was denied by the Trustees and appealed to the arbitration step, the Trustees reacted by voting to eliminate the part-timers. Their rationale was that the grievance sought make whole relief, and that allowing it to linger unresolved would expose the District to significant on-going liability. However, neither before nor after the vote to eliminate the part-timers did the District propose variances, or any other means of avoiding this problem or addressing this issue. I am not saying this to criticize the Trustees or their actions, but to point out that it is simply not accurate to say that the Union frustrated the District's efforts to bargain on this issue.¹³

The arbitrator has no particular interest in the choices parties make in the process of bargaining. Whether their proposals to one another are reasonable or unreasonable is not my concern. It is also the case that the offers presented by the parties in arbitration are entirely up to them. The arbitrator's job is to judge

¹³ The District offers the explanation that it was taken by surprise by Chief Nagle's decision to leave, and was unable to meaningfully negotiate until it settled on a successor. Yet Nagle was described as providing operational advice to the Trustees in bargaining, and Deputy Chief Sarhage assumed that role after Nagle's announcement. Sarhage became Acting Chief on March 1st, the day after Nagle left, and was formally named Chief on March 12th, a month before the mediation. No other candidate for Chief was interviewed. Again, none of these proposals surfaced until seven months after a new permanent Chief was named.

the offers on their own merits in accordance with the statutory criteria and the established body of law governing interest arbitration. The test for supporting a significant change to the status quo is part of that established body of law, and for a quarter of a century it has required evidence that at some point, some effort has been made to secure the changes through negotiation. While the Will County Sheriff formulation characterizes it as a “reasonable” effort, trying to precisely weigh the offers and counter-offers to determine whether someone has been subjectively reasonable is a chancy proposition. The arbitrator cannot know the history of the parties or the dynamics of their relationship well enough to be sure whether an exchange of proposals was truly reasonable. Suffice it to say, however, that making no proposal at all on an issue of substance, and then proposing a significant change in the status quo on that issue for the first time at arbitration simply cannot meet the established test.

The District has good reasons for asking for some variances, just as the Union has good reasons for not wanting to accept variances. The District seeks at least ten times as many variances as are available in North Palos, the only comparable Fire Protection District with any variances to its minimum manning provisions. It seeks to obtain them without ever having asked the Union to consider or react to them.

For all of these reasons, the District’s proposed changes cannot be awarded.

Work Reduction (Kelly Days) – Cancellation for On-Duty Injuries

Kelly Days may be cancelled to account for absences of more than two weeks due to non-duty injuries. The District proposes that Kelly Days also be cancellable for absences of more than two weeks due to on-duty injuries. The District’s proposed language is:

ARTICLE 9 - VACATION

Section 9.4 — Work Reduction Days

In the event there is a shortage on a shift due to a full time employee being injured off duty **or on duty**, the employee(s) ~~with the least seniority who has/have an assigned work reduction day during that 27 day pay cycle will forfeit his work reduction day for~~ the time period the injured member is off **shall forfeit his/their work reduction day(s)**. Any member forfeiting ~~his a~~ work reduction day shall be entitled to at least twelve (12) hours of overtime paid at one-half (1/2) the employee's regular hourly rate or six hours of pay unless the employee calls in sick due to illness at which time he will forfeit the additional six hours of pay. There shall be a two week grace period before the employee is required to forfeit the work reduction day for pay in accordance with this Section. ~~In the event that an employee has multiple work reduction days in a single 27 day pay cycle, the employee shall only be compensated for 12 hours of half time.~~

The District explains that this proposal addresses an anomaly in the contract, in that Kelly Days may be cancelled for lengthy non-duty injuries, but not for lengthy on-duty injuries. Lengthy on-duty injuries are far more likely, and far more likely to place stress on the District's minimum manning capacity. The rationale for introducing Kelly Days in the contract in the last round of bargaining was that they would help reduce overtime. The District argues that it logically follows that, in situations where cancelling the Kelly Day reduces overtime, the original purpose of the language is being honored.

The Association argues that the cancellation of Kelly Days does not reduce overtime, since the structural overtime in the schedule of a firefighter will simply generate the costs that the Kelly Days were intended to reduce in the first place. The District is proposing to cancel all Kelly Days for all employees on the shift, for the duration of the injury absence. That is substantially beyond what is presently done, and will almost inevitably increase overtime expenses.

Unlike the rest of the District's proposals, the proposal to add "on duty" injuries was in fact tabled during bargaining, as part of the District's February 17th response to the Union's initial proposal.¹⁴ There is no citation to any

¹⁴ The District does not explain the reason for cancelling all Kelly Days for all employees for the duration of the absences, rather than the current cancellation of the least senior employee's Kelly Day.

comparable districts in support of the cancellation proposal, and a review of the contracts for the other districts shows that the existing system for cancelling Kelly Days for off-duty injuries is itself unique.

The District is likely correct that this proposal would reduce their overtime costs, at least for a time, since forfeiting a Kelly Day results in six hours' additional pay, while calling someone in on overtime for 24 hours results in twelve hours' additional pay. The Union's contention that cancelling all Kelly Days for all employees on the shift for the duration of all injuries beyond two weeks will quite likely build back in the overtime the Kelly Days are meant to reduce is not as persuasive, simply because, as discussed below, the Kelly Days are not scheduled in such a way as to actually reduce overtime costs.

The existing provision allowing the cancellation of Kelly Days for junior employees in the event of absences for non-duty injuries was negotiated as part of a package, and was a quid pro quo to secure the Kelly Days themselves. Obviously, since the parties specified non-duty injuries in their original negotiations, they must have contemplated the distinction between on-duty and off-duty injuries when they made their bargain. The District's rationale is that absences due to on-duty injuries are more likely, and more likely to be lengthy. This is true, but it means that the change greatly increases the likelihood of Kelly Days being cancelled for an entire shift for the bulk of the year.¹⁵ That is a very substantial diminution of a negotiated benefit. The proposed expansion of the right to cancel Kelly Days for all employees on the shift for all injury absences is not supported by any quid pro quo, and had no support in the comparable districts. While the District's reasons for wanting this change are obvious, it represents a very significant change in the negotiated status quo, without the requisite showings under the established tests for forcing significant changes in the status quo through interest arbitration.

¹⁵ The record shows, for example, that a firefighter broke his leg in the Fall of 2012 and is expected to miss 9 to 12 months. The effect of this language would be to cancel all Kelly Days for his shift for up to a year.

48 and Out Policy

The District proposes to eliminate the limitation against holding employees over for more than 48 hours if necessary to maintain minimum staffing levels. Those who volunteer to holdover past 48 hours will be paid time and a half. Those who are mandated to holdover will receive double-time. The District proposed modification to the contract is:

Section 8.5 - Overtime Distribution

Add the following language to the fifth paragraph: There must be one officer on duty in the District at all times excluding the Fire Chief. **In order to maintain the minimum staffing of one (1) Officer, Sections 2 and 4 of the above eligibility criteria will not apply for holdovers if it will result in no Officer being available to work. Any employee who is held over for an additional shift in excess of 48 hours in order to comply with the minimum staffing requirement shall be paid double time for all hours worked. Any employee who voluntarily takes the overtime in excess of 48 hours shall be paid the normal overtime rate of one and one half times their normal rate of pay.**

Section 8.6 - Hold-Over

Add the following language to the sixth paragraph:

This provision will not apply if it will result in no Officer being available to maintain the minimum manning set forth in Section 8.11 of this Article.

The District argues that there are only six officer positions, excluding the Fire Chief. The organizational design is for one Captain and one Lieutenant to be assigned to each shift. Because of injuries, retirement and Union challenges to the promotional process, the Department had had only two Captains and two Lieutenants in part of 2011 and all of 2012. Thus there was overtime required, and nearly 30% of the Department's overtime was attributable to officers. Since department members can only act up by one rank, a missing captain will create overtime for a Lieutenant, and if the available Lieutenant has already worked 48 hours, it is not possible to comply with the minimum manning requirement of one officer on duty at all times, and the cap of 48 consecutive hours. The District characterizes this as a modest change to the status quo, which has a quid pro quo built into it.

The Union observes that, in addition to not being sought in bargaining and having no support among the comparables, the District's proposal is unnecessary, unclear and makes no sense. The Chief could not identify any situation in which the proposed language would have been required in order to fill a shift, and acknowledged that any potential shortage of officers was due to the lack of a current promotional list for a period of time. Moreover, the District's proposed quid pro quo for working more than 48 hours is double time for those who are mandated. Someone who volunteers to do so receives time and one half. Thus, despite its asserted concern with overtime costs, the District is essentially guaranteeing that no officer will ever volunteer at the lower rate. The Union also points out that the language, in operation, would have officers working 96 hours straight, since, given three shifts, the 49th through 72nd hours would form a bridge through to their next scheduled shift. The language as presented and argued by the District applies to officers, but as written would apply to any employee, a point conceded by Chief Sarhage, who said "It's not specific to officers. It would apply to any personnel. But primarily, it would operationally occur with officers." The Union characterizes this proposal as completely inconsistent with the District's claimed concerns about reducing overtime costs and reducing workplace injuries.

This proposal seeks to address a problem of conflicts between the requirement of one officer per shift, and the ban on holding personnel over for more than 48 hours. I agree with the District that this raises a potential problem in the administration of the language, because the language as it stands does create conflicting obligations. I would note, though, that it is clear from the Chief's testimony that the problem has never actually arisen even though the Department has been operating with four officers rather than six. I also agree with the Union that, as written, it appears to go well beyond what is necessary. On its face, it starts by addressing the holdover of officers, but then allows a holdover of any employee beyond 48 hours. The Chief says this is intentional but that the holdover of anyone but an officer is unlikely, because of the larger pool of firefighters. The District's arguments in support of the proposal all focus on the

scheduling of officers, without mentioning the possible holdover of other employees.

The changes realized by accepting the District proposal go well beyond resolving the problem identified by the District as justifying the change. On balance, I conclude that the status quo does less damage than the broader than needed change.¹⁶

Work Reduction (Kelly) Days Scheduling

This District proposes to alter the system for scheduling Kelly Days. Kelly Days are currently scheduled in the same fashion as vacation days, and can be bunched together. The District argues instead to have them taken every 17th duty day. The District's proposal is:

ARTICLE 9- VACATION

Section 9.4 — Work Reduction Days

Every employee shall **be scheduled off every 17th duty day for a total of receive** seven (7) work reduction days per calendar year. ~~These days shall be selected by each employee in order of seniority starting on December 1 and ending on December 15th. In the event an employee does not submit the request by December 15th, the District shall assign the days to the employee.~~

Work reduction days may be traded only between employees on the same shift. **The assignment of the designated schedule for each employee's work reduction days shall be chosen on December 1st of the preceding calendar year by seniority. Each employee shall choose one of the seven possible work reduction schedules for the year.**

The District argues that Kelly Days were added in the last contract at the Union's request, on the grounds that they would reduce structural overtime. However, since they are not scheduled in conjunction with pay periods, they did

¹⁶ The District characterized the proposal as non-economic in intent, but with an economic component in the overtime quid pro quo. The language problem is with the portion identified as economic.

not achieve that result. They are simply seven additional vacation days. The District notes that all of the other districts in the comparable pool that have Kelly Days require that they be at regular intervals that actually do reduce overtime.

The Union argues that the ability to schedule Kelly Days in the same fashion as vacation days was part of a package in the last round of negotiations. The Union got the Kelly Days and got to schedule them, and in return the District got the ability to cancel them for non-duty injuries, and a lower across the board wage increase. The Union argues that the District has received the benefit of its side of the bargain, and now wishes to pull back the inducements on which the Union made the deal.

The ability to schedule Kelly Days as vacation days is an unusual and valuable benefit. The District is correct that there is no comparable that allows scheduling Kelly Days in this fashion. However, the Union identified specific concessions it made in order to secure this benefit, and the District does not deny the quid pro quo alleged. The scheduling of Kelly Days outside of the pay cycle obviously defeats the overtime reducing rationale for them. Yet they were introduced on that basis. The scheduling language is not something that was grafted on later as a mistake. It was all done at the same time.

It may be that trading Kelly Days with no limit on scheduling for the right to cancel them for injuries and a lower wage settlement was not a good bargain. That depends almost entirely on the difference between the wage settlement with the Kelly Days versus the wage settlement without the Kelly Days, and that information is not contained in the record. What is in the record is that that is the deal that was made. The lack of overtime relief from Kelly Days cannot be an unforeseen effect of the language if it was expressly part of the agreement that added Kelly Days. Given this, I cannot find that the District has carried its burden of proof on this item.

AWARD

On consideration of all of the statutory criteria, and the record as a whole, the 2010-2015 collective bargaining agreement shall incorporate the provisions of the predecessor agreement, as modified by the tentative agreements, and the wage provision proposed by the Palos Height Fire Fighters, to wit:

January 1, 2012: 2.5% across the board

January 1, 2013: 2.5% across the board

January 1, 2014: 3.0% across the board

The Arbitrator will retain the official record and jurisdiction over the Section 20.3 and Section 3.6 issues, pending the resolution of the nature of those proposals, as well as issues regarding the implementation of the Award.

Signed this 11th day of June, 2013:

Daniel Nielsen, Arbitrator