BEFORE
EDWIN H. BENN
ARBITRATOR

IN THE MATTER OF THE ARBITRATION **BETWEEN** **VILLAGE OF BARRINGTON** **AND** **ILLINOIS FOP LABOR COUNCIL**	**CASE NOS.:** S-MA-13-167, FMCS 14-02832-6 Arb. Ref.: 14.229 (Interest Arbitration)

OPINION AND AWARD

APPEARANCES:

For the Village: R. Theodore Clark, Jr., Esq.
Roxana M. Crasovan, Esq.
Lisa R. Callaway, Esq.

For the Union: Jeffery J. Burke, Esq.

Place of Hearing: Barrington, Illinois

Date of Hearing: October 17, 2014

Dates Briefs Received: January 26, 2015 (Village)
January 29, 2015 (Union)

Date of Award: February 18, 2015

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I. BACKGROUND

This is an interest arbitration proceeding between the Village of Barrington ("Village" or "Employer") and the Illinois Fraternal Order of Police Labor Council ("Union") pursuant to Section 14 of the Illinois Public Labor Relations Act, 5 ILCS 315/14 ("IPLRA"), to set the terms of the parties' May 1, 2013 to April 30, 2016 collective bargaining agreement ("2013-2016 Agreement")[1] The parties' last Agreement covered period May 1, 2010 to April 30, 2013 ("2010-2013" or "Predecessor Agreement").[2]

The Union represents police officers below the rank of sergeant.[3] There are approximately 17 officers in the bargaining unit.[4]

The parties have had seven prior Agreements dating back to August 1987.[5]

II. ISSUES IN DISPUTE

From the parties' final offers, the following issues are in dispute:

1. Wages;
2. Insurance;
3. Recall from layoff;
4. Wellness and fitness;

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[1] The parties have waived the statutory tri-partite panel established by Section 14 of the IPLRA. *See* Village Brief at 7.

[2] Village Exh. 6; Union Exh. 1.

[3] Union Exh. 1 and Village Exh. 5 at Section 1.1.

[4] Village Exh. 3; Union Brief at 1.

[5] Village Exhs. 4, 6.

5. Drug and alcohol testing;

6. Entire Agreement.

III. THE STATUTUORY FACTORS

Section 14(h) of the IPLRA lists the following factors for consideration in interest arbitrations:

> (h) Where there is no agreement between the parties, ... the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:
>
> (1) The lawful authority of the employer.
>
> (2) Stipulations of the parties.
>
> (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
>
> (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
>
> (A) In public employment in comparable communities.
>
> (B) In private employment in comparable communities.
>
> (5) The average consumer prices for goods and services, commonly known as the cost of living.
>
> (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, 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 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.

IV. RESOLUTION OF THE DISPUTED ISSUES

A. The Standards And Burdens

Before getting into the specifics for resolution of the disputed issues, the standards and burdens I have been using to decide interest arbitrations should be reiterated. Those were recently explained by me in detail in *Village of Lansing and Illinois Fraternal Order of Police Labor Council*, S-MA-12-214 (December 29, 2014) ("*Lansing*") and awards cited therein.[6]

First, interest arbitration is a very conservative process: [7]

> In simple terms, the interest arbitration process is *very* conservative; frowns upon breakthroughs; and imposes a burden on the party seeking a change to show that the existing system is broken and therefore in need of change (which means that "good ideas" alone to make something work better are not good enough to meet this burden to show that an existing term or condition is broken). The rationale for this approach is that the parties should negotiate their own terms and conditions and the process of interest arbitration – where an outsider imposes terms and conditions of employment on the parties – must be the *absolute* last resort. ...

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[6] The *Lansing* award is found at:
www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/S-MA-12-214.pdf
Awards cited in *Lansing* can also be found at the Illinois State Labor Relations Board's website:
www.state.il.us/ilrb/subsections/arbitration/IntArbAwardSummary.htm

[7] *Lansing* at 37-38 [emphasis in original].

Second, Section 14(h) of the IPLRA provides that my award "base its findings, opinions and order upon the following factors, *as applicable*" [emphasis added].

A factor listed in Section 14(h)(4)(A) of the IPLRA is external comparability. While I (like so many other interest arbitrators) previously gave practicably determinative weight to the external comparability factor, after the economic trauma of the Great Recession which began in 2008 and the shaky recovery which has slowly followed coupled with the lack of clear statutory guidance on how to use comparable communities in the analysis of offers made, for now, it does not make sense to me to continue to set wage and benefit levels in one community based so heavily on collective bargaining agreements in other communities whose experiences coming out of that economic period may have been far different than the experience of the community in dispute.[8]

My approach as set forth in *Lansing* and the awards cited in that matter shall therefore continue for this case:[9]

> From my perspective, because Section 14(h) provides that I look at "... the following factors, *as applicable* ..." [emphasis added], as far as I am concerned, we are just not yet there for the return of external comparability – where the experiences in one municipality can literally dictate the result in another municipality – as an "applicable factor" for these cases. For now, I continue as I have in the recent past. External

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8 *Id*. at 6-18.

9 *Id*. at 14, 17.

> comparability is not, in my opinion, an "applicable" factor for these cases.
>
> * * *
>
> Therefore, at the present time for this arbitrator, the more "applicable" factors that determine economic issues such as wages are cost of living as measured by the Consumer Price Index ("CPI"), internal comparability and overall compensation presently received.

Third, my overall goal in deciding these cases is to provide a road map and stability to parties so that they know going into these often lengthy and costly proceedings what they will most likely receive from the process and therefore avoid the interest arbitration process altogether and chart their own fates through give and take at the bargaining table. *Lansing, supra* at 16 [emphasis in original]:

> … As the parties tip-toe through the aftermath of the Great Recession, the wild-card external comparability factor is best kept out of the picture. The parties know what the cost of living is and what the economic projections show; they know what has happened or is going to happen internally in their communities; and they know the overall impact of the various wage and benefit offers on the bargaining units at issue and on other employees employed by the community. And they also know that the interest arbitrator (if doing the job correctly by consistently following his or her own prior decisions to provide stability) is not going to award a breakthrough or change the *status quo* either through establishing a new benefit or reducing an existing one unless there is a showing that the existing system is broken – which is a heavy burden to meet. And that means that through prior awards of the interest arbitrator, the arbitrator has effectively drawn a circle – an outer boundary – within which the parties can navigate and negotiate and if there are any major changes outside of that boundary, *the parties* will have to bargain and trade for those changes because an interest arbitrator is not going to give those changes to them.

B. The Merits Of The Parties' Positions

1. Wages

a. The Parties' Final Offers

TABLE 1

The Parties' Wage Offers

Effective	Village[10]	Union[11]
5/1/13	2.00%	2.25%
5/1/14	2.00%	2.25%
5/1/15	2.25%	2.25%
Total	6.25%	6.75%

b. Discussion

(1). Cost Of Living

Actual (non-forecasted) data as of the latest release from the Bureau of Labor Statistics ("BLS") on January 16, 2015 show the following for various contract periods for which real changes to the CPI are currently available:[12]

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[10] Village Final Offer at 2; Village Brief at 8.

[11] Union Final Offer at 2-3; Union Brief at 24.

[12] By accessing that website for the BLS data bases, the latest CPI comparisons can be made through designation of year ranges for U.S. All items, 1982-84=100 and retrieving the data. That website is:

http://data.bls.gov/cgi-bin/surveymost?cu

TABLE 2

Changes 2013 - 2014 All Urban Consumers (CPI-U)

Contract Year/Period	Begin	End	CPI Change
5/13 - 4/14	232.945	237.072	1.8%[13]
5/14 - 12/14	237.900	234.812	-1.3%[14]
5/13 - 12/14	232.945	234.812	0.8%[15]

From the above, several conclusions can be drawn.

First, for the contract year May 2013 - April 2014, the CPI increase (1.8%) is closer to the Village's offer of 2.0% than it is to the Union's offer of 2.25%.

Second, for that portion of the contract year May 2014 - April 2015 for which we have actual data (presently, the eight-month period May 2014 through December 2014, inclusive), the CPI *decreased* 1.3%, which again makes the CPI change closer to the Village's 2.0% offer than it is to the Union's 2.25% offer.

Third, for the first 20 months of the 36-month 2013-2016 Agreement for which we have actual data, the CPI only increased 0.8%, which makes that increase closer to the Village's 4.0% offer than it is to the Union's 4.5% offer for the first two years of the 2013-2016 Agreement.

Therefore, based on actual *known* data concerning changes to the CPI for periods covered by the 2013-2016 Agreement which have passed, the Village's wage

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[13] 237.072 - 232.945 = 4.127. 4.127/232.945 = 0.01771 (1.8%).

[14] 234.812 - 237.900 = -3.088. -3.088/237.900 = -0.01298 (-1.3%).

[15] 234.812 - 232.945 = 1.867. 1.867/232.945 = 0.00801 (0.8%).

offer far exceeds those changes in the CPI and is closer to those changes than is the Union's wage offer. For known data, the cost of living factor therefore favors the Village's offer.

There are also periods in the Agreement that must be looked at – January 2015 - April 2015 and May 2015 - April 2016 (the portion of the second year of the 2013-2016 Agreement and the third year of the Agreement) for which we do not yet have actual CPI data. Because we have no actual data yet for the full periods, the best that can be done is to look to the economic forecasters.

The recently released *First Quarter 2015 Survey of Professional Forecasters* (February 13, 2015) from the Federal Reserve Bank of Philadelphia shows forecasted increases in the CPI (Headline) for 2015 through 2016 as follows:[16]

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[16] www.philadelphiafed.org/research-and-data/real-time-center/survey-of-professional-forecasters/2015/survq115.cfm

The *Survey of Professional Forecasters* tracks two CPI forecasts – "Headline CPI" and "Core CPI". *Id.* "Headline" CPI data – which include more volatile indicators such as energy and food – are the more applicable measures for these cases because those are costs that employees must pay for with their wages. *Lansing*, *supra* at 21, note 33.

TABLE 3

CPI Forecasts

Calendar Year	Forecast	Village Proposed Increase In Effect As Of 1/1/15 (from 5/1/14 increase)	Union Proposed Increase In Effect As Of 1/1/15 (from 5/1/14 increase)	Agreed-Upon Wage Increase Effective 5/1/15
2015	1.1%	2.0%	2.25%	2.25%
2016	2.1%			

Based on the above, the economic forecasts show that for the remaining portion of the 2013-2016 Agreement for which no real CPI data exist, the Village's wage offer of 2.0% effective May 1, 2014 almost doubles the forecast for the remaining portion of the 2014 - 2015 contract year (January-April 2015) when it will be paying 2.0% more during a period when the forecasted CPI increase is 1.1%. Then, with the increase to 2.25% effective May 1, 2015, the Village's proposed increase goes far beyond the forecasted 1.1% CPI increase for the balance of 2015 (May-December 2015). That 2.25% increase effective May 1, 2015 will still exceed the forecasted 2.1% increase for 2016 (January-April 2016) until the 2013-2016 Agreement expires on April 30, 2016. The Union's wage offer for those periods (2.25% each contract year with 2.25% agreed for 2015-2016) will significantly and to

a greater extent than the Village's offer exceed the total of the forecasted increases for 2015 and 2016.

Putting this together, the Village's wage offer exceeds changes to the CPI for known and forecasted increases while the Union's wage offer outpaces the changes for known and forecasted increases to a greater extent. Given that the Village's offer substantially exceeds changes in the CPI in these periods and is closer to the actual and forecasted changes in the CPI for the relevant periods, the cost of living factor favors the Village's offer.

(2). Internal Comparability

For interest arbitrations involving police and firefighter bargaining units, the most relevant internal comparisons are to other police and firefighter units in the community in dispute.[17] The Village has collective bargaining agreements with its firefighters (represented by Local 3481 IAFF) and public works employees (represented by the Teamsters Local 700). Therefore, the only relevant internal comparable in this case is the firefighters unit.[18]

The current Firefighters Contract is for the term May 1, 2012 - April 30, 2015, with wage increases effective May 1 of each year.[19] Effective May 1, 2013 and

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[17] *Lansing supra* at 23.

[18] Village Exh. 17; Tr. 49.

[19] Union Exh. 3 (Collective Bargaining Agreements – Internal CBAs).

May 1, 2014 (the periods which overlap the 2013-2016 Agreement involved in this matter), the firefighters received 2.0% increases each year.[20]

Given that the Village's wage offer here effective May 1, 2013 and May 1, 2014 is 2.0% each year – which is the same as received by the firefighters unit – internal comparability favors the Village's offer.

(3). Total Wage Compensation – The Real Money

It is also helpful in analyzing these cases to look at the real money received by the employees, which fits into the overall compensation factor (for wages) as part of Section 14(h)(6) of the IPLRA.

First, flat percentage increases are misleading numbers. Even if no one moved on the salary schedule and assuming they are employed for the term of the Agreement, the officers will not receive 6.25% as offered by the Village or 6.75% as sought by the Union. The officers will receive more than the respective offers made on their behalf. That is because, like savings accounts, wage increases compound.

Assuming merit-based considerations are met, bargaining unit employees receive annual step increases for the first six years of employment.[21] Based upon

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[20] Firefighters Contract, *id*. at Article XV and Appendix C.

[21] 2010-2013 Agreement at Section 16.2 ("To qualify for a wage increase, an officer's work performances must meet minimum departmental standards. …") and Appendix C; Tr. 32; Village Exh. 29(A).

the parties' respective offers, the wage schedules for bargaining unit officers will be as follows:[22]

TABLE 4

The Real Money – Village Offer (6.25%)[23]

	4/30/13[24]	5/1/13 2.00%	5/1/14 2.00%	5/1/15 2.25%	Dif.	% Actual Inc.
Step 1 (start)	58,262	59,427	60,616	61,980	3,718	6.38%
Step 2 (after 1 yr.)	63,524	64,794	66,090	67,577	4,053	6.38%
Step 3 (after 2 yrs.)	68,611	69,983	71,383	72,989	4,378	6.38%
Step 4 (after 3 yrs.)	73,433	74,902	76,400	78,119	4,686	6.38%
Step 5 (after 4 yrs.)	77,814	79,370	80,958	82,779	4,965	6.38%
Step 6 (after 5 yrs.)	81,294	82,920	84,578	86,481	5,187	6.38%
Step 7 (after 6 yrs.)	83,627	85,300	87,006	88,963	5,336	6.38%

TABLE 5

The Real Money – Union Offer (6.75%)[25]

	4/30/13	5/1/13 2.25%	5/1/14 2.25%	5/1/15 2.25%	Dif	% Actual Inc.
Step 1 (start)	58,262	59,573	60,913	62,284	4,022	6.90%
Step 2 (after 1 yr.)	63,524	64,953	66,415	67,909	4,385	6.90%
Step 3 (after 2 yrs.)	68,611	70,155	71,733	73,347	4,736	6.90%
Step 4 (after 3 yrs.)	73,433	75,085	76,775	78,502	5,069	6.90%
Step 5 (after 4 yrs.)	77,814	79,565	81,355	83,186	5,372	6.90%
Step 6 (after 5 yrs.)	81,294	83,123	84,993	86,906	5,612	6.90%
Step 7 (after 6 yrs.)	83,627	85,509	87,433	89,400	5,773	6.90%

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[22] While the classification of corporal is covered by the Predecessor Agreement (the classification is below the rank of sergeant as provided in Section 1.1 with a rank differential provided in Section 16.2), there are currently no individuals in the bargaining unit holding that rank. Tr. 6-7; 39.

[23] *See* Village Exh. 29(A).

[24] This column is the wage rate in effect at the expiration of the 2010-2013 Agreement (*see* Appendix C).

[25] *See* Union Final Offer at 3.

Therefore, assuming an officer makes no step movements and because of the compounding nature of wage increases, under the Village's offer an officer does not receive 6.25%, but receives 6.38%. Similarly, under the Union's offer, an officer does not receive 6.75%, but receives 6.90%.

Second, while a number of officers have "topped out" at the highest step level, officers have made or will make step movements during the term of the 2013-2016 Agreement thereby increasing their total actual and percentage wage increases.

As set forth in the above salary schedules, the 2013-2016 Agreement provides for six annual steps after the start step, with officers topping out after six years. Taking the seniority list of the bargaining unit employees which shows their start dates, the following step movements with resulting *actual* wage and percentage increases occur during the term of the 2013-2016 Agreement:[26]

[26] Village Exh. 3(B); Tr. 39-40.

TABLE 6

Village Offer With Actual Step Movements

Step And Step Movements	No. of Step Move-ments	No. of Officers	4/30/13 (End of 2010-2013 Agreement) Or Applicable Rate[27]	4/30/16 (End of Agreement)	Total Increase	Actual Percentage Wage Increase
Step 7 - Step 7	0	12[28]	83,627	88,963	5,336	6.38%
Step 5 - Step 7	2	1[29]	77,814	88,963	11,149	14.33%
Step 2 - Step 5	3	2[30]	63,524	82,779	19,255	30.31%
Step 1 - Step 3	2	2[31]	59,427	72,989	13,562	22.82%

[27] Two officers started after the May 1, 2013 effective date of the 2013-2016 Agreement (*id.*), making their rate the rate in effect when they started.

[28] The hire dates of these 12 officers range from August 27, 1984 to September 10, 2004. Village Exh. 3(B). By the effective May 1, 2013 date of the 2013-2016 Agreement, all of these officers completed more than six years of service and therefore had topped out on the salary schedule at Step 7. These officers will make no step movements during the life of the 2013-2016 Agreement.

[29] This officer has a June 30, 2008 start date. *Id.* As of April 30, 2013 at the end of the Predecessor Agreement, this officer was therefore at Step 5 on the salary schedule (June 30, 2008 - Step 1; June 30, 2009 - Step 2; June 30, 2010 - Step 3; June 30, 2011 - Step 4; June 30, 2012 - Step 5). This officer makes two step movements during the life of the 2013-2016 Agreement until topping out at Step 7 (June 30, 2013 - Step 6; June 30, 2014 - Step 7).

[30] The hire date of these two officers is September 23, 2011. *Id.* As of April 30, 2013 at the end of the Predecessor Agreement, these officers were therefore at Step 2 on the salary schedule (September 23, 2011 - Step 1; September 23, 2012 - Step 2). These two officers make three step movements during the life of the 2013-2016 Agreement (September 23, 2013 - Step 3; September 23, 2014 - Step 4; September 23, 2015 - Step 5). The next step movement for these officers to Step 6 (September 23, 2016) will be after the 2013-2016 Agreement expires on April 30, 2016.

[31] There are two officers in this category with start dates of September 27, 2013 and March 27, 2014, respectively – *i.e.,* after the May 1, 2013 effective date of the 2013-2016 Agreement. *Id.* Because both started during the first year of the 2013-2016 Agreement (May 1, 2013 - April 30, 2014), their start rates are the same corresponding to the Step 1 rate for the first year of the 2013-2016 Agreement rather than the rate in effect on April 30, 2013 when the 2010-2013 Agreement expired and their number of step movements on the salary schedule during the life of the 2013-2016 Agreement will be the same.

At the hearing, the Village observed that these two officers are probationary officers and that they were excluded from the Village's presentation of the case. Tr. 39. I disagree with that approach. These officers should be included in the analysis of this matter.

[footnote continued on next page]

TABLE 7

Union Offer With Actual Step Movements

Step And Step Movements	No. of Step Move-ments	No. of Officers	4/30/13 (End of 2010-2013 Agreement) Or Applicable Rate	4/30/16 (End of Agreement)	Total Increase	Actual Percentage Wage Increase
Step 7 - Step 7	0	12	83,627	89,400	5,773	6.90%
Step 5 - Step 7	2	1	77,814	89,400	11,586	14.89%
Step 2 - Step 5	3	2	63,524	83,186	19,662	30.95%
Step 1 - Step 3	2	2	59,573	73,347	13,774	23.12%

From Table 6, during the life of the 2013-2016 Agreement, the actual dollar and percentage increases under the Village's offer range from $5,336 (6.38%) to $19,255 (30.31%) with 7 of the 17 officers (41% of the bargaining unit) receiving double digit percentage increases. From Table 7, under the Union's offer, the actual dollar increase is between $5,773 and $19,662 with an actual percentage wage increase between 6.9% to 30.95%, again with 41% of the bargaining unit receiving double digit percentage increases. As the actual numbers play out, the Village's offer is the more reasonable.

Although probationary officers, these two individuals are affected by this award – particularly, the monetary aspects. And as the Village noted, "… but of course, we do intend to give them a pay increase as well." *Id*. Further, under Section 1.2 of the 2010-2013 Agreement (which, from what I can tell, the parties have not changed), "[t]he probationary period shall be fifteen (15) months." Thus, if they successfully complete their probationary periods, these two officers will be full-fledged bargaining unit members at some point during the term of the 2013-2016 Agreement. They should therefore be included in the analysis.

(4). Conclusion On The Wage Offers

Circling back to the cost of living which shows 0.8% actual CPI increase for the period May 2013 through December 2014 (Table 2) and projections of 1.1% for 2015 and 2.1% for 2016 (Table 3), the Village's total wage increase offer – which as shown by Tables 4 and 6, amounts to actual dollar increases of between $5,336 (6.38%) and $19,255 (30.31%) – far outpaces changes in the CPI. The Village's wage offer also parallels the internal comparable Firefighter Contract for the overlapping contract years. When compared to the Village's wage offer and as demonstrated by Tables 3, 5 and 7, the Union's wage offer – while only .5% greater than the Village's offer over the life of the 2013-2016 Agreement but nevertheless playing out with $5,773 (6.9%) and $19,662 (30.95%) actual increases – goes further beyond changes to the CPI (actual and forecasted) as well as the internal comparable Firefighter Contract for overlapping contract years.

The Village's wage proposal is the more reasonable and is therefore adopted.[32]

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[32] The parties' final offers read differently on retroactivity. According to the Union "[t]he Union's wage proposal is for full retroactivity to May 1, 2013, on all hours compensated to current and former bargaining unit members." Union Final Offer at 2, note 2. According to the Village, "[i]ncreases shall apply to all current, eligible bargaining unit members (and shall include those who have retired or resigned in good standing or been promoted during the term of this successor agreement"). Village Final Offer at 2. At the hearing, the Village stated "Retro is no an issue here …." Tr. 83.

Even though worded differently, if retroactivity is an issue, the parties can address that issue in the first instance when they put the contract language together (*see* discussion *infra* at VI) and if there is a dispute, that matter can be brought back to me for resolution. *Id.*

2. Insurance

a. The Parties' Final Offers

The Village seeks to add the following language to the insurance coverage provisions found in Section 18.1:[33]

> **Section 18.1. Coverage:** …
>
> * * *
>
> Notwithstanding anything to the contrary in this Article, the Village may make changes it reasonably believes to be necessary so such coverage will (1) comply with the Affordable Care Act ("ACA") and any other federal or state healthcare laws; (2) not result in the imposition, directly or indirectly, of an excise tax for high-cost coverage ("Cadillac Tax") under the ACA or any similar state or federal legislation or regulation; or (3) ensure the Village is not subject to any penalties or fees because employees are eligible to obtain insurance through a health insurance exchange in accordance with the ACA or any federal or state healthcare law(s). If such changes are deemed reasonably necessary by the Village, the Village will provide the Union with written notice and an opportunity to discuss the changes before they are implemented. Changes made pursuant to this paragraph shall not trigger the re-opener bargaining obligation mentioned in the following paragraphs.
>
> * * *

The Union seeks to maintain the *status quo*.[34]

b. Discussion

As the Village notes, the "… 'Cadillac Tax' … is effective on the first day of a health insurance plan year in 2018 … [and s]ince the Village's health insurance

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[33] Village Final Offer at 3; Village Brief at 24.

[34] Union Brief at 29-31; Tr. 70-74.

plan year runs from July 1 to the following June 30, the effective date of the Cadillac Tax for the Village of Barrington is July 1, 2018."[35] This Agreement expires April 30, 2016 – more than two years prior to the effective date of the Cadillac Tax. Given the very conservative nature of interest arbitration and the need of the moving party to show that an existing condition is broken before the *status quo* is changed, *at this time,* the Village's concerns are really hypothetical, at best. No doubt this issue *could* cause problems down the road, but as the Union correctly points out, "[i]t is simply too soon to bargain over health insurance in 2018, since no one knows what the landscape will be then."[36] If for some reason bargaining for the next Agreement drags on as the Village points out may happen, then if the Cadillac Tax becomes an issue, the parties will have to address any ramifications when the issue becomes (or is closer to becoming) ripe. For now, the Village's concerns are hypothetical and not sufficient to cause a change in the *status quo*.

The Union's proposal to maintain the *status quo* is adopted.

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[35] Village Brief at 25.

[36] Union Brief at 30-31.

3. Recall From Layoff

a. The Parties' Final Offers

The Village seeks to change the recall from layoff provisions in Section 10.2 by providing for a specified period of recall rights:[37]

> **Section 10.2. Recall**. Employees who are laid off shall be placed on a recall list for a period of eighteen (18) months from the effective date of the layoff. ~~the period required by law~~. …

The Union seeks that "… the status quo be maintained …."[38]

b. Discussion

According to the Village, for recall from layoff, "[t]here is no recall period in the law" and thus the language "the period required by law" should be removed from Section 10.2.[39] The Union argues for the "status quo maintained …" and asserts that under the Board of Fire and Police Commissioners Act, 65 ILCS 5/10-2.1-18 ("BFPC Act"), "[t]here is indeed a 'period required by law' and it is forever … the employer is required to put laid off officers on a recall list, and keep them there."[40]

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[37] Village Final Offer at 1; Village Brief at 30.

[38] Union Brief at 27. The Union did not address the issue in its final offer, but at the hearing the Union stated that it did not desire to change the existing language ("We don't have a proposal to change it in our final offer "). Tr. 79.

[39] Tr. 76.

[40] Union Brief at 27-29. The Village argues that the Union proposed a three-year recall period. Village Brief at 30-31. At the hearing, the Union stated "Well, I have not been able to find a period required by law … but there is something here that suggests there's a 3-year period provided by ILCS, ILCS 5/10-2.1." Tr. 77. However, the Union emphasized at the hearing that "[w]e don't have a

[footnote continued on next page]

Because the Village seeks to change the *status quo*, the burden is on the Village to show the existing language is broken and in need of a change. The Village cannot meet that burden.

The BFPC Act provides (65 ILCS 5/10-2.1-18 [emphasis added]):

* * *

> If any positions which have been vacated because of reduction in forces or displacement and abolition of positions, are reinstated, such members and officers of the fire department or of the police department as are furloughed from the said positions shall be notified by the board by registered mail of such reinstatement of positions and *shall have prior right to such positions if otherwise qualified, and in all cases seniority shall prevail*. Written application for such reinstated position must be made by the furloughed person within 30 days after notification as above provided and such person may be required to submit to examination by physicians of both the board of fire and police commissioners and the appropriate pension board to determine his physical fitness.

* * *

Thus, I cannot say with certainty that the Village is correct that "[t]here is no recall period in the law." In the above-quoted section of the BFPC Act, there is a provision governing recall, but no limiting time period is clearly stated – which supports the Union's reading of the BFPC Act that no limit was intended.

However, I need not decide the issue of whether there is a statutory "… recall period in the law."

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proposal to change it in our final offer ." Tr. 79. That position was underscored in the Union's brief by arguing for the "… status quo maintained …." Union Brief at 27. The Union therefore did not specifically propose, as the Village argues, that the recall language be changed and that recall rights should be for three years.

First, that is not my function as an interest arbitrator. Outside of what is required of me by the IPLRA in Section 14, arbitrators do not interpret statutes – that is a task reserved to the courts. *See Lansing, supra* at 43 where the Union made an argument that provisions of the IPLRA concerning residency conflicted with provisions of the BFPC Act, which the Union wanted me to resolve in that proceeding. I declined to do so:[41]

> … I cannot resolve conflicts between the residency provisions of the Fire and Police Commissioners Act and the IPLRA. If there are conflicts, sorting out those conflicts is a task for the courts – not for me as an interest arbitrator. My authority as an interest arbitrator is limited by the provisions of the IPLRA. If there are conflicts between the IPLRA and the Fire and Police Commissioners Act, some forum other than this one will have to sort that all out.

See also, Alexander v. Gardner-Denver, Co., 415 U.S. 36, 57 (1974) (in discussing the role of arbitrators and courts, the Supreme Court stated that "… the resolution of statutory or constitutional issues is a primary responsibility of courts ...."). Further, *see* my award in *Village of Oak Lawn and Oak Lawn Firefighters Local 3405, IAFF (Supplemental),* S-MA-13-033 (January 26, 2015) at 18 ("If there are conflicts between the exercise of my authority under the IPLRA and the Illinois Wage Payment and Collection Act, some forum other than this one will have to sort that all out.").[42]

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[41] *Id.*

[42] The *Oak Lawn Supplemental Award* is found at:

[footnote continued on next page]

Therefore, the courts must ultimately determine the statutory question whether "[t]here is no recall period in the law."[43]

Second, putting the above statutory interpretation concerns aside, there is no reason to change the *status quo*. There was a brief layoff in the past (in 2009) with a quick recall.[44] No officers are now on layoff and thus, there are no employees to be recalled. Further, as the Union points out, the 2013-2016 Agreement will expire less than 18 months from now on April 30, 2016 and with no officers on layoff and (so far) no announced layoffs prior to that expiration date, there are actually no officers who could be recalled beyond the Village's proposed 18-month recall

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www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/S-MA-13-033-02.pdf

[43] The language in 65 ILCS 5/10-2.1-18 which refers to recall but does not provide for a period of time can be read to support the Union's position that the language "the period required by law" in Section 10.2 has meaning. Again, in the end, the courts will have to sort that out. However, this is not a case like my first award in *Village of Oak Lawn and Oak Lawn Firefighters Local 3405, IAFF,* S-MA-13-033 (July 7, 2014) at 83-85 (discussed with the parties at the hearing – Tr. 77-78) where I removed language from the contract at the employer's request because the language was clearly meaningless.

In the July 7, 2014 *Oak Lawn* award, at issue was a benefit which applied only to certain employees "… hired before January 1, 1979" while those hired after that date got "[n]one". Because no employees in 2014 were "… hired before January 1, 1979", no current or future employee could be governed by the language and entitled to the benefit. I therefore removed the language from the contract (*id*. at 84-85):

> … Because any employee hired "[o]n or after January 1, 1979" gets "[n]one" and because all of the employees were hired after that date, this language is like the washing machine that does not and will not work. It is "broken". The language shall therefore be removed.

That award is found at: www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-13-033.pdf

[44] Tr. 78:

> MS. CALLAWAY: In 2009 there was a layoff of 2 officers; within a month or 2 of that layoff, those officers were recalled. One came back and one chose not to.

period.[45] Therefore, there does not appear to be a real problem with the recall provisions. The problems are hypothetical.

At best, this issue falls into the "good idea" category of needing to be addressed in clear concise contract language. But a "good idea" does not amount to showing that an existing condition is broken to require that I change the *status quo*.

The Union's proposal to maintain the *status quo* is adopted.

4. Wellness And Fitness

a. The Parties' Final Offers

The Union seeks to change the Wellness and Fitness language in Section 14.1 as follows:[46]

> **Section 14.1. Physical Fitness Requirements**. ~~In order to maintain efficiency in the Police Department, to protect the public, and to reduce insurance costs and risks, the Village shall establish as its physical fitness requirements for employees hired after August 15, 1987 the State of Illinois Physical Fitness Training Standards. Such employees are required to make a good-faith effort to meet such fitness standards.~~ The Employer agrees to provide annually a Power Test/Wellness Program during the month of October for employees who wish to participate. Failure to take or pass the test will not subject the employee to discipline, and will not be a factor in determining whether the employee will receive a merit raise. ~~Employees who fail to record an overall composite score of 95 percent of the minimum standards for such test(s), shall be subject to the following discipline~~:

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[45] Union Brief at 27-28.

[46] Union Final Offer at 1; Union Brief at 16-21.

> ~~(a) For the first such failure, the employee shall be retested on the section(s) failed previously, after sixty (60) days or more, at the Employer's discretion, and if the employee is successful on such retest, no further action shall be taken by the Employer. If the employee fails the retest, he shall be given a one (1) day suspension without pay and be given a further test no sooner than thirty (30) days after the last test;~~
>
> ~~(b) Employees who have failed the second retest in accordance with section (a) above, shall receive an additional two (2) day suspension without pay, and no further test shall be required of the employee for the remainder of the testing year.~~
>
> ~~The Employer shall not require an employee who has passed the test to submit to physical fitness standards testing more than once during each year of this Agreement, and employees disciplined under the terms of this section shall not be disciplined more than as provided in paragraphs (a) and (b) above, for failure to pass the physical fitness standards test, during the testing year. However, the first suspension under Section 14.1(a) above shall not be used against the employee for merit pay, promotion or evaluation purposes if not followed by any further discipline under this Article. A second suspension under this Article may be used against the employee for merit pay and/or evaluation purposes.~~

The Village seeks to maintain the *status quo*.[47]

b. Discussion

Again, because the Union is the party seeking to change the *status quo*, the Union has the burden to demonstrate the existing language is broken. The Union cannot meet that burden.

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[47] Village Final Offer at 2; Village Brief at 33-38.

The Union explains that its "… proposal is essentially to make the [annual physical fitness] test[s] voluntary for the employees."[48] According to the Union:[49]

> The contract's fitness testing requirement is a failed system. When the parties negotiated its inclusion with the contract, they agreed to a stated purpose … for having it: (1) maintaining efficiency, (2) protecting the public, and (3) reducing insurance costs and risks. There is no evidence that it has accomplished any of these goals, and in fact, the opposite is true.
>
> First, there is no evidence that annual fitness testing and subjecting the employees to discipline helps maintain efficiency. … [T]here is not a shred of evidence to show a nexus between an annual Power Test and improved efficiency.
>
> Second, an annual Power Test does not protect the public. …
>
> Lastly, and most demonstrably a failure, the annual test mandate does not reduce insurance costs and risks. …

The Union argues that "[t]he Employer's interpretation of the contract language is completely wrong … [i]t is disregarding the contract's plain language … by requiring officers to record a score of 95% of minimum standards for each component of the test … [when] the contract language reads as follows … '[e]mployees who fail to record an overall composite score of 95% of the minimum standards for such test(s) shall be subject to the following discipline ...'"[50] The Union then gave a specific example of an officer in 2012 who was not considered as

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[48] Union Brief at 16.

[49] *Id*. at 18-19.

[50] *Id*. at 20.

a pass when the officer's composite score exceeded 95%, although the officer scored less than 95% in one component.[51]

The Union also pointed to another specific example of an injured-on-duty officer who was required to take the test upon returning to work in the spring when the language provides for a test in October.[52] According to the Union, the Village "… made her take a retroactive fitness for duty test, for a year that she was undeniably unfit for duty because of her on-the-job injury."[53]

According to the Village, the physical fitness language has evolved since the 1987-1990 Agreement, with no change after the 1998-2001 Agreement.[54] Further, according to the Village, "… the Union's final offer that would eliminate the pre-existing physical fitness requirements is not only not a good idea, it is a bad idea as "… '[t]here can be no serious question that physical fitness standards for first responders are of major importance.'"[55]

There is no reason to change the *status quo*. The Union has not shown the existing condition is broken. The current language is long-standing and the examples raised by the Union are really contract interpretation issues which the

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[51] *Id*.

[52] *Id*. at 20-21.

[53] *Id*. at 21.

[54] Village Exh. 65; Village Brief at 34-35.

[55] Village Brief at 37, quoting *Village of Western Springs and Metropolitan Alliance of Police*, S-MA-09-019 (Meyers, 2010) at 85. That award is found at:
www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Western%20Springs%20&%20MAP,%20S-MA-09-019.pdf

grievance procedure is designed to sort out. Indeed, for one the examples cited by the Union as a basis for needing a change of language, (the officer required to take the test upon her return to duty after being out for injury-on-duty) the following exchange occurred at the hearing:[56]

> ARBITRATOR BENN: Did she pass?
> [THE OFFICER]: I did.

The Union's problem with the testing language for that officer is therefore moot.

At best, after so many years, the Union does not now like the way the language reads. That is not a showing of a broken system in need of repair by an interest arbitrator. As cited by the Village, *see* my award in *City of Naperville and FOP*, S-MA-92-96 (1994) at 40-41:[57]

> There have been no problems with this language and no practical reason exists to justify the change the Union seeks. I am unwilling to upset language that exists as the result of mutual agreement because down the road one party in hindsight does not like how the language presently looks. To permit a change on that kind of theory would open the door to challenges to long existing language because one party now thinks it was a bad deal. Notions of stability in bargaining relationships would then call only for lip service. The balance of bargaining power dictated the deal in this case that resulted in Article 27. This

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[56] Tr. 25.

[57] Village Brief at 37. *Naperville* is found at: www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Naperville%20&%20FOP,%20S-MA-92-098.pdf

> process has been referred to [as] an extension of the bargaining process. I cannot change the deal.

The Village's proposal to maintain the *status quo* is therefore adopted.

5. Drug And Alcohol Testing

a. The Parties' Final Offers

Sections 15.3 and 15.5 of the 2010-2013 Agreement provide:

> **ARTICLE XV**
> **EMPLOYEE ALCOHOL AND DRUG TESTING**
>
> * * *
>
> **Section 15.3. Drug And Alcohol Testing Permitted.** Where the Village has reasonable suspicion to believe that an employee is acting in violation of Section 15.2, above, the Village shall have the right to require the officer to submit to alcohol or drug testing as set forth in this Agreement.
>
> * * *
>
> **Section 15.5. Test To Be Conducted.** In conducting the testing authorized by this Agreement, the Village shall:
>
> * * *
>
> (h) Require that with regard to alcohol testing, for the purpose of determining whether the officer is under the influence of alcohol, test results showing an alcohol concentration of .050 or more based upon the grams of alcohol per 100 millimeters of blood be considered positive, and results showing an alcohol concentration of .030 or less shall be considered negative. The foregoing shall not preclude the Village from attempting to show that test results between .050 and .031 demonstrate that the officer was impaired, but the Village shall bear the burden of proof in such cases.

The Union seeks to add the following language at the end of Section 15.3:[58]

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[58] Union Final Offer at 2; Union Brief at 20-23.

> Additionally, an employee may be subject to drug and alcohol testing when involved in an on-duty motor vehicle crash that results in distorted extremities, severely bleeding wounds, and any injury that would require injured persons to be removed by emergency personnel.

The Union also seeks to reduce the alcohol concentration levels for positive tests from .050 to .040.[59]

The Village seeks to change the alcohol testing provisions, but only for the concentration cutoff levels yielding a positive result. The Village seeks that level to be .03 for a positive result and less than .02 for a negative result.[60]

b. Discussion

(1). The Concentration Cutoffs

First, the concentration cutoffs in Section 15.5(h).

Consistent with the above discussion of the parties' offers, the Village observed at the hearing that "[i]t does not seem like either party is sitting on the status quo here."[61]

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[59] *Id*.

[60] Village Final Offer at 2-3; Village Brief at 39. The Village's initial final offer also had language concerning substituting "… unable to perform his duties properly …" to replace "impaired" in Section 15.5(h). Village Final Offer at 3. However, that proposed language change has been removed by the Village. Village Brief at 39, note 22. *See also*, Tr. 79:

> MS. CRASOVAN: … The Village has offered a point 03 percent. Just to clarify, there is a section in the Village's final offer, Section 15.5 towards the end of the provision, that reads "unable to perform his duties properly." The Village would be willing to drop this language just to get that on the record and then go to status quo in terms of that piece. So we would be willing to just talk about the percentages.

The dispute for Section 15.5(h) therefore is only about the concentration cutoff levels.

Arguing internal comparability, the Village points to Section 18.1(E) of the Firefighters Contract which has a lower concentration cutoff than the .03 concentration cutoff the Village seeks in this case:[62]

> E. Alcohol Abuse or Being Under the Influence of Alcohol shall be defined for these purposes as a blood alcohol content of .02 or more. A blood alcohol content of less than .02 shall not preclude the Employer from acting to prove that the employee was unable to perform his duties properly.

The parties agree that this is a non-economic issue.[63] Because the final offer provisions of the IPLRA only apply to economic issues and because this is a non-economic issue, I am not statutorily required to accept one of the final offers made by the parties, but I can fashion a provision different from those offered by the parties.[64]

My authority concerning non-economic issue means that not only can I fashion a provision different from the parties' final offers, but I can reject both parties' offers and leave the *status quo* in place – and that is what I choose to do for this issue. That is because this dispute is over an issue that does not have an

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[61] Tr. 79-80.

[62] Village Brief at 40; Union Exh. 3 (Collective Bargaining Agreements – Internal CBAs).

[63] Tr. 28:
ARBITRATOR BENN: And the parties are in agreement this is a noneconomic issue?
MS. CALLAWAY: Yes.
MR. BURKE: Yeah.

[64] Section 14(g) of the IPLRA provides 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)" [emphasis added].

underlying problem – much less a broken condition – and therefore does not need to be fixed by an interest arbitrator.

The following exchange occurred at the hearing with the parties recognizing that for non-economic issues that have no problems, interest arbitrators are not compelled to change the *status quo* just because the parties could not agree on new language:[65]

> ARBITRATOR BENN: Have there been any officers -- has there been a problem with alcohol tests and officers showing up impaired?
>
> MR. BURKE: I don't believe anybody has been alcohol tested or suspended for showing up intoxicated in recent memory, no. So nobody has been PC [probable cause] or reasonable suspicion tested and nobody has been suspended to our knowledge in the recent past.
>
> * * *
>
> ARBITRATOR BENN: … And if it's not broken and it's ambiguous and it's noneconomic I don't have to take either of the parties' offers.
>
> MS. CALLAWAY: Correct.
>
> MR. BURKE: Right.
>
> * * *
>
> MS. CRASOVAN: … The fact of the matter is the parties have bargained this issue, and as you can see neither the Village nor the Union want to sit on the status quo. Since it's a noneconomic issue you have the authority to choose one or the other or somewhere in the rates as you see fit.
>
> ARBITRATOR BENN: Or choose none?
>
> MS. CRASOVAN: Sure.

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[65] Tr. 27-28, 79-81.

> ARBITRATOR BENN: Again, it's not that I don't want to help the parties out. It's the function of an interest arbitrator. It's not to do something that the parties could not do. It's to force the parties to make these kind of decisions. I take it again, we have not had problems here with officers drinking or officer testing positive on breathalyzer as they show up for duty. That's fair?
>
> MS. CALLAWAY: Yes.
>
> MR. BURKE: Yes.

Because there is no demonstrated problem causing a broken condition, this is also not an issue that is in need of a solution from this very conservative process which only makes changes to conditions that are broken. Unless it becomes a problem of that magnitude, the parties will have to work this out at the bargaining table. The concentration cutoffs shall remain unchanged. [66]

(2). Added Language For Testing

The Union's proposal to add the language "[a]dditionally, an employee may be subject to drug and alcohol testing when involved in an on-duty motor vehicle crash that results in distorted extremities, severely bleeding wounds, and any

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[66] The Union also argued (Union Brief at 23):

> … The Union's proposal should be adopted as a quid pro quo for its Article XIV proposal. Should the Arbitrator not adopt the Union's Article XIV proposal, Section 15.5(h) should remain at status quo since there is no compelling need to change it. The parties could negotiate over any changes upon expiration of the contract.

As earlier discussed, I rejected the Union's proposal for changes to Article XIV concerning Wellness and Fitness. *See* discussion *supra* at IV(B)(4). However, I have *not* left the provisions of this non-economic alcohol testing issue at *status quo* because the Union tied its proposed change to acceptance of its Wellness and Fitness proposal which by its argument was a condition for the Union's willingness to move off the *status quo* on this issue. Because there is not even an underlying problem in this case much less a broken condition, no changes are required for the testing issue. The Union's attempt to tie proposals together is moot and is not the basis for retaining the *status quo* on this issue.

injury that would require injured persons to be removed by emergency personnel" to Section 15.3 has the same problem as the parties' proposed changes to the concentration levels for Section 15.5. There is no reason in this record showing why that kind of language should be added to the drug and alcohol testing provisions of the Agreement. The Union's proposed change is therefore rejected.

In sum then, the *status quo* for Article XV is maintained.

6. Entire Agreement

a. The Parties' Final Offers

The Union seeks to modify the Entire Agreement language in Article XXVI as follows:[67]

> This Agreement constitutes the complete and entire Agreement between the parties, and concludes collective bargaining between the parties for its term. This Agreement supersedes and cancels all prior practices and agreements, whether written or oral, which conflict with the express terms of this Agreement. If a past practice is not addressed in this Agreement, it may be changed by the Employer as provided in the management rights clause, Article IV. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law or ordinance from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. ~~The Council specifically waives any right it may have to impact or effects bargaining for the life of this Agreement.~~

[67] Union Final Offer at 3-4.

The Village seeks to maintain the *status quo*.[68]

b. Discussion

With the exception of changing the reference to the Union from "Lodge" in the parties 1987-1990 Agreement to "Council" in the parties' 1992-1994 Agreement, the language the Union now seeks to remove from Article XXVI has remained unchanged over the parties' entire relationship.[69] No reason has been presented requiring a change to that language for the 2013-2016 Agreement.

The Village's proposal to maintain the *status quo* is adopted.[70]

V. PREVIOUSLY REACHED TENTATIVE AGREEMENTS

Previously reached tentative agreements during negotiations and at the hearing in this matter are incorporated into this award.

VI. DRAFTING OF LANGUAGE AND RETENTION OF JURISDICTION

This matter is now remanded to the parties for the drafting of final contract language consistent with this award. With the consent of the parties, I will retain jurisdiction to resolve disputes which may arise concerning the drafting of that language or any other disputes agreed upon by the parties for submission.

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[68] Village Final Offer at 2; Village Brief at 42-43.

[69] Village Exhs. 6, 76.

[70] My adopting the Village's proposal to maintain the existing language moots the Village's argument that the Union waived its ability to challenge whether the sentence the Union seeks to remove is a permissive subject of bargaining because the Union failed to file a petition for a declaratory ruling with the Illinois Labor Relations Board's General Counsel. Village Brief at 43.

VII. AWARD

1. Wages

(Village proposal):

Effective	Percentage
5/1/13	2.00%
5/1/14	2.00%
5/1/15	2.25%
Total	6.25%

2. Insurance

(Union proposal):

Status quo.

3. Recall from layoff

(Union proposal):

Status quo.

4. Wellness and fitness

(Village proposal):

Status quo.

5. Drug and alcohol testing

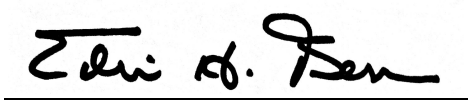
(Both proposals rejected):

Status quo.

6. Entire Agreement

(Village proposal):

Status quo.



Edwin H. Benn
Arbitrator

Dated: February 18, 2015