

IN THE MATTER OF ARBITRATION)	
)	
Between)	Marvin Hill
)	Arbitrator
DEERFIELD BANNOCKBURN FIRE PROTECTION DISTRICT, EMPLOYER)	FMCS 140729-02901-6
)	ILRB Case S-MA-13-269
-- and --)	
)	Pre-trial: October 23, 2014
DEERFIELD BANNOCKBURN FIREFIGHTERS' ASSOCIATION, LCOAL 4632, IAFF, UNION)	Hearing: Nov. 7, 2014
)	

Appearances:

For the Administration:	Karl R. Ottosen, Esq. OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD. 1804 North Naper Boulevard, Suite 350 Naperville, Illinois 60563 (630) 682-0085
-------------------------	---

For the Union:	Lisa Moss, Esq. & Susan Matta, Esq. Carmell Charone Widmar Moss & Barr, Ltd. One East Wacker Drive, Ste 3300 Chicago, IL 60601 (312) 236-8033
----------------	--

I. BACKGROUND, FACTS AND STATEMENT OF JURISDICTION

On November 17, 2014, the undersigned Arbitrator presided over a hearing between the Deerfield-Bannockburn Fire Protection District (“District,” “Employer” or “Administration”) and the Deerfield-Bannockburn Firefighters Association, Local 4632, IAFF (“Union” or “Firefighters”). Pursuant to the agreement of the parties and their ground rules, the parties waived a tripartite panel (R. 12). All tentative agreements (Tab 14) are incorporated into this award (R. 12).

The population of the District, comprising the Village of Deerfield north of Lake-Cook Road and Bannockburn, a portion of Riverwoods, and areas of unincorporated Lake County covering approximately 8.3 square miles, is approximately 23,000. Because of corporate and merchant industry, the population almost doubles during the daytime hours (R. 5). The District is governed by three trustees, President Phil Bettiker, Secretary Jeff

Hansen and Treasurer Kim Barkemeyer. The trustees serve staggered three-year terms and are appointed by the Lake County Board (R. 5-6).

The District maintains two fire stations: Station No. 20, located on Waukegan Road, which houses the majority of the Administration. It is the only station on the North Shore that had a built-in training safety house where children learn fire safety. It is also used by the bargaining-unit employees for search and rescue. Station 20 houses two ALS ambulances, two ALS engines, and one ladder truck (R. 6). The second Station, Station No. 19, is located in Bannockburn on Half Day Road. Station 19 houses one ALS ambulance, one ALS engine, and one rescue squad (R. 6).

The Administration of the Department includes a Fire Chief, Ian Kazian, and two Deputy Chiefs, Messrs. Zemke and Larson, all of whom are excluded from the bargaining-unit.

The Department runs a typical 24-hour on/48 hour-off shift (24/48) with three shifts, A, B and C, or red, gold and black, respectively. There is a Battalion Chief on each shift. They, too, are excluded from the bargaining unit (R. 7).

The parties executed their first collective bargaining agreement in November 2010, effective May 1, 2010, through April 20, 2013. However, wages covered 2008 and 2009. The parties have agreed that I have jurisdiction to provide retroactive wages to May 1, 2013.¹

The parties are at impasse with respect to the following issues:

1. Section 12.2 Health Insurance Cost
2. Section 13.8 Shift Trades
3. Section 15.3 Vacation and Holiday Selection
4. Section 17.6 Light Duty²
5. Section 18.4 Compensatory Time
6. Section 18.5 Working Out of Classification
7. Appendix E Salary Schedule (See Note 1, *supra*).

¹ Asserting that the Administration's proposal failed to address retroactivity, Union advanced Article 18, Section 18.1 (Salaries) and Appendix E (Salary Schedule) as an impasse item (See, *Brief for the Union* at 54-62). The Union asserts that its proposal updates the parties' status quo language on retroactivity and provides for retroactive salary increases hour for hour on all paid hours consistent with what the parties agreed to for all prior years except 2008 (*Brief* at 61). While the Administration represented at the hearing that its proposal has always been for retroactivity on wage increases, the Union argues otherwise. According to the Union: "The District's proposal is fatally flawed because it removes all retroactivity language and contains no provision regarding when retroactivity wages will be paid." (*Brief* at 61). Without further discussion, my award provides for full retroactivity on the parties' agreed-upon wage increases.

² After the exchange of final offers, the Union withdrew its issue of Light Duty for *status quo* (R. 16). At the hearing the Administration proceeded on Article 17.6 (Light Duty) as its own issue, even though it failed to identify it as a District issue (R. 57-58). The Union objected on the basis that it was withdrawn as a Union issue and never identified as a District issue (R. 58-63; *Brief for the Union* at 7). I ruled that the District could pursue this issue as its own (R. 6-3-64). More on this later.

The parties exchanged final offers on November 7, 2014. The parties both proposed the same percent of wage increase and the same duration (four years, May 1, 2013 to April 30, 2017) of the collective bargaining agreement (R. 16). The Union's proposal provides and maintains the *status quo* with respect to when retroactive wages are paid and what they are paid on (R. 18).³

The parties have agreed to wages and duration after a pre-hearing conference held on October 23, 2014 at the offices of Ottosen Britz, *et al.* The District accepts the Union's rounding of the wages and its language regarding retroactive application of the wage increases to remain as in the current contract. After the pre-trial, the parties agreed on the following seven (7) comparables: Addison, Bartlett, Bloomingdale, Darien-Woodridge, Huntley, Lincolnshire-Riverwoods, and Pleasantview (R. 33).

At the pre-hearing conference questions arose over the existence of on-the-record proposals. Management submits that the Union's attorney's confusion over bargaining history is due to the Union switching attorneys after 12-18 months of negotiations. That current Union counsel is not well versed in the bargaining history should not be held against the Employer. The District's counsel provided opposing Union counsel with copies of the Union's on-the-record proposals without receiving any explanation as to why they could not obtain copies from any of the at least five members of the Union's bargaining team. Every member of each side's negotiating team received copies of all proposals. Thus, according to the Administration, there is no reason to claim uncertainty over proposals on the open items. Indeed, the Union's attorneys asserted all mediation proposals were off-the-record despite clear evidence to the contrary. The Union expressly identified its proposals as on or off-the-record as it deemed appropriate. Any proposal not specifically stated as "off-the-record" must be held as an on-the-record proposal.

II. RELEVANT STATUTORY PROVISIONS

As in all interest arbitration cases involving protective service bargaining units in Illinois, the Arbitrator's findings and decisions must be based upon the requirements set forth in Section 14 of the *Act*, as applicable. *See, Town of Cicero v. Illinois Association of Firefighters Local 717*, 338 Ill. App. 3d 364; 788 N.E.2d 286; 272 Ill. Dec. 982 (1st

³ By the Arbitrator: So there's retroactivity across the board?

Mr. Ottosen: Yes.

By the Arbitrator: In terms of salary and benefits but also in terms of any contributions?

Mr. Ottosen: Yes, sir.

By the Arbitrator: All right.

Mr. Ottosen: That's our proposal. Always has been.

By the Arbitrator: Are you okay with that?

Ms. Moss: No, because we will obviously be arguing against the Employer's proposal on insurance.

By the Arbitrator: Okay.

Ms. Moss: It ties into the retroactive issue. But I want to – I want to alert you to the fact that unlike the current Appendix E, and although not noted in the Employer's final offer, they have deleted out the timeframe for paying retro and what it's paid on. (R. 19).

Dist., 2003) (“*Town of Cicero II*”). The following provisions of Section 14 of the *Act*, 5 ILCS 315/14(g) & (h), are relevant to these proceedings:

(g) At or before the conclusion of the hearing held pursuant to subsection (d), the arbitration panel shall . . . direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue.

(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:

In public employment in comparable communities.

In private employment in comparable communities.

(5) The average consumer prices for goods and services, commonly known as cost of living;

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received;

(7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings;

(8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

5 ILCS 315/14(h)

* * * *

(j) Arbitration procedures shall be deemed to be initiated by the filing of a letter requesting mediation as required under subsection (a) of this Section. The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this Act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation awarded by the arbitration panel may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced either since the initiation of arbitration procedures under this Act or since any mutually agreed extension of the statutorily required period of mediation under this Act by the parties to the labor dispute causing a delay in the initiation of arbitration, the foregoing limitations shall be inapplicable, and such awarded increased may be retroactive to the commencement of the fiscal year, any other statute or charter provisions to the contrary, notwithstanding. At any time the parties, by stipulation, may amend or modify an award of arbitration.

5 ILCS 315/14(h) and (j).

In addition, it is well settled that, where one or the other of the parties seeks to obtain a substantial departure from the parties' *status quo*, an "extra burden" must be met before the Arbitrator resorts to the criteria enumerated in Section 14(h) of the Act.

The oft-cited standards regarding this "extra burden" has been articulated by numerous arbitrators. Chicago Arbitrator Harvey Nathan, in *Sheriff of Will County and AFSCME Council 31, Local 2961*, declared:

[I]nterest arbitration is essentially a conservative process. While obviously value judgments are inherent, the neutral cannot impose upon the parties' contractual procedures he or she knows that parties themselves would never agree to. Nor is his function to embark upon new ground and to create some innovative procedural or benefits scheme which is unrelated to the parties' particular bargaining history.

The arbitration award must be a natural extension of where the parties were at impasse. The award must flow from the peculiar circumstances these particular parties have developed for themselves. To do anything less would inhibit collective bargaining.

Will County Board and Sheriff of Will County (Nathan, 1988), quoting *Arizona Public Service*, 63 LA 1189, 1196 (Platt, 1974); Accord, *City of Aurora*, S-MA-95-44 at 18-19 (Kohn, 1995).

. . . The well-accepted standard in interest arbitration when one party seeks to implement entirely new benefits or procedures (as opposed to merely increasing or decreasing existing benefits) or to markedly change the product of previous negotiations

is to place the onus on the party seeking the change. . . . In each instance, the burden is on the party seeking the change to demonstrate, at a minimum:

(1) that the old system or procedure has not worked as anticipated when originally agreed to or

(2) that the existing system or procedure has created operational hardships for the employer (or equitable or due process problems for the union) and

(3) that the party seeking to maintain the status quo has resisted attempts at the bargaining table to address these problems.

Without first examining these threshold questions, the Arbitrator should not consider whether the proposal is justified based upon other statutory criteria. These threshold requirements are necessary in order to encourage collective bargaining. Parties cannot avoid the hard issues at the bargaining table in the hope that an arbitrator will obtain for them what they could never negotiate themselves.

Sheriff of Will County at 51-52 (emphasis mine); See, also, *Sheriff of Cook County II*, at 17 n.16, and at 19.

III. DISCUSSION

A. District Issues Nos. 1 & 7, Article 12, Section 12.2 (Health Insurance Cost) and Appendix C (Summary of Medical/Prescription Insurance Benefits)

The parties' current contract language reads as follows:

Section 12.2. Cost. The District agrees to contribute 100% of the premium cost of the least expensive hospitalization, medical and dental coverage program offered by the District for the employee and of the least expensive hospitalization and medical coverage program offered by the District for the employee's spouse and dependants. The medical coverage's shall include eye and prescription drug plans. It is agreed that the least expensive plan shall be Plan C, with Plan B's prescription drug coverage (a summary of which is attached as Appendix C, and incorporated herein). Employees electing coverage through alternative plans which may be offered to employees shall pay the difference in cost through payroll deductions.

APPENDIX C
SUMMARY OF MEDICAL/PRESCRIPTION INSURANCE
BENEFITS

[REFENCE SECTION 12.2]

Blue Cross Blue Shield	PPO Plan C
------------------------	------------

Lifetime Maximum	\$3,000,000
Individual Deductible In Network Out of Network	\$500 \$1000
Family Deductible In Network Out of Network	\$1000 \$2000
Individual Out of Pocket Limit In Network Out of Network	\$1000 \$2000
Family Out of Pocket Limit In Network Out of Network	\$2000 \$4000
Inpatient Hospital In Network Out of Network	80% 60%
Hospital Emergency Room	\$75 copay, then 100% (waived if admitted)
Physician In Network Out of Network	80% 60%
Office Visit	\$20 copay, 100%
Well Care Benefit	\$750 annual calendar year maximum
Other Covered Services	80%
Prescription Drug Generic Brand Non-formulary Brand	PPO Plan B \$10 \$15 N/A

Mail Order	\$5
Dental Coverage	
Annual Dental Coverage	\$1500 calendar year maximum
Annual Orthodontic Coverage	\$750 calendar year maximum (x 2 benefit periods)
Deductible – Primary (Basic) and Major Services	\$50; \$150 per family per year; waived for Preventive and Orthodontics
Coverage Category	Coverage Percent
Preventive	100% (Usual & Customary)
Primary (Basic)	80% (Usual & Customary)
Major	50% (Usual & Customary)
Orthodontia	50% (Usual & Customary)

(UX 1, Tab 9 at 51-52).

1. Position of the Administration

The District proposes the following language:

Section 12.2. Cost

The term “premium cost” as used in this Article includes costs assigned by the provider for said coverage plus any mandatory federal and state fees and taxes.

For the period during which coverage described in Section 12.1 is provided, members shall contribute the percentages identified in Appendix C to the premium cost of that coverage, with the District contributing the balance of the premium cost of the least expensive hospitalization, medical and dental coverage program offered by the District for the employee and of the least expensive hospitalization and medical coverage program offered by the District for the employee's spouse and dependents. The medical coverages shall include vision and prescription drug plans. The District reserves the right to designate a plan as the “base plan” for all purposes, including PSEBA benefits. The current base plan is a High Deductible Health Plan (HDHP) with a Health Savings Account (HSA). Employees selecting any level of coverage with the base plan shall contribute the percentages identified in Appendix C to the premium cost of the plan. Employees electing coverage through alternative plans which may be offered to employees shall pay the difference in cost through payroll deductions.

During the term of this Agreement the insurance plans shall be reviewed annually by the District in advance of the open enrollment period. The annual review process shall include, but not be limited to, the current policy coverages and

benefits, increases and/or decreases in the renewal premium rates, effects on the District finances, and any changes or substitutions in current policy proposed by the provider or required by law. The District will discuss any potential changes in the current policy with the Insurance Committee as further described in this Article.

Employees participating in the District insurance program shall annually be provided the plan summary description and corresponding premium costs for plan(s) offered in advance of the enrollment period.

The District agrees to make contributions into individual employee's Health Savings Account (HSA) at the following levels:

- Calendar year 2014 - \$5,000 for employees electing dependent coverage and \$2,500 for employees electing individual coverage.
- Calendar year 2015 - \$5,000 for employees electing dependent coverage and \$2,500 for employees electing individual coverage.
- Calendar year 2016 - \$4,500 for employees electing dependent coverage and \$2,250 for employees electing individual coverage.
- Calendar year 2017 - \$4,500 for employees electing dependent coverage and \$2,250 for employees electing individual coverage.

In the event that the implementation of the Affordable Care Act (ACA) results in the loss of the current type of District group health insurance, dental, prescription, or vision policy, or results in significant plan changes, cost increases or a luxury penalty tax by the federal government, the District or Union shall have the right to reopen Article 12 and Appendix C of this Agreement and negotiate changes to the health insurance plan and employee contributions. Either party, by written notice to the other within 30 days of receipt of the proposed renewal options and costs for the next plan year, may trigger this re-opener provision.

(UX 1, Tab 21; Appendix A in Union's *Brief*)

* * * *

In support of its proposal the Administration advances the following arguments:

Management points out that until December 1, 2013, the District's health insurance benefits were provided through a co-op of several fire districts. When the cooperative disbanded effective December 1, 2013, the District first purchased a one-month PPO policy and then on January 1, 2014, switched to a high deductible health plan (HDHP) with a health savings account (HSA)(For ease of reference, the current plan will simply be referred to as an HSA.) The summary of benefits for the defunct co-op plan was included as Appendix C to the current contract (UX 1, Tab 9). Because of the plan changes, the parties have proposed significant revisions to Section 12.2.

In addition to differences in employee contributions to premium costs and funding of the HSA to cover deductible expenses, the Union's proposal does not: (1) contain annual plan review with employee input before renewal; (2) address whether Affordable Care Act (ACA) fees and taxes are part of premium costs; or (3) address potential need for reopening of this section in the event the ACA causes loss of plan availability, cost increases result in luxury tax, or significant plan benefit changes. Each of these issues is clearly addressed by the District's final offer, which alone is cause to award the Employer's final offer on this issue.

Further supporting the District's final offer is the Employer's contributions to each employee's HSA. All comparable districts have HDHP with employer-mandated contributions. Even though the District's employees' wages and total compensation far exceed the averages and median of the comparables, the Union proposes no deductibles for the life of the Agreement. This ignores the fact the employees through December 31, 2013 had annual deductibles of \$500 for single and \$1,000 for dependent coverage, plus doctor office visit and prescription drug co-pays.

The Employer's final offer fully funds the HSA deductibles of \$2,500/\$5,000 (single/dependent) during 2014 and 2015. For 2016 and 2017, the Employer proposes to contribute \$2,250/\$4,500 leaving the employees with \$250/\$500 deductibles and no co-pays. Thus, the employees actually gained in total compensation by a reduction in out of pocket deductibles totaling \$1,500/\$3,000 from 2014-2017. Additional savings are garnered through the elimination of office visit and prescription drug co-pays.

The District's proposed 2.5% premium contribution retroactive to May 1, 2013 is off-set by the retroactive salary increase to the same date, as well as the reduced deductible and co-pay exposure. Indeed the annual increase in premium cost to the employees with dependent coverage in 2013-2014 fiscal years is \$324.64 but the deductible exposure is reduced by more than that amount. The same is true for the Employer's proposed 5% contribution effective May 1, 2014. Truly there is no impact on the employees until May 1, 2016 when the proposed 7.5% of premium will possibly exceed the savings from a \$3,000 reduction in deductible exposure during the life of the Agreement. The total premium contributions are not expected to equal the \$3,000 deductible savings.

Therefore, the Union's final offer with no deductibles and no premium contributions in light of the reduced deductibles and elimination of co-pays cannot withstand scrutiny. The minimal flat dollar contributions delayed until the start of the third year of the Agreement is untenable, and definitely not supported by the comparables. In particular, the last page of Employer Exhibit 8 sets forth the comparable districts' employer contributions to HSA deductibles. Throughout the Agreement's term, the District's contributions exceed that of comparable districts making the employees' out of pocket cost less than any of the comparables.

Because the District's final offer nets out to be at least cost neutral to the employees, the Union's attempts to show a negative impact to the employees' wage

increases is misleading. Ms. Moss acknowledged that the Union's calculations did not take into account the \$3,000 savings in deductible exposure, nor the elimination of office visit and prescription drug co-pays (R. 129). Instead of a reduction in wage increase due to the minor \$325/2.5% premium contribution, with a \$1,000 reduction in deductible during each of 2014 and 2015 the employees have a net gain above the 2% wage increase.

Based on the above, the Employer's final offer on health insurance is more appropriate than that of the Union's final offer.

2. Position of the Union

The Union's Insurance Cost proposal is as follows:

Section 12.2 Cost. The District agrees to contribute 100% of the premium cost of the least expensive hospitalization, medical and dental coverage program offered by the District for the employee and of the least expensive hospitalization and medical coverage program offered by the District for the employee's spouse and ~~dependants~~ dependents. The medical coverage~~s~~ shall include ~~eye vision~~ and prescription drug plans. It is agreed that the least expensive plan shall be Plan C, with Plan B's prescription drug coverage (a summary of which is attached as Appendix C, and incorporated herein). Employees electing coverage through alternative plans which may be offered to employees shall pay the difference in cost through payroll deductions.

Beginning on December 1, 2013, (or the applicable date it took effect), the District shall offer a High Deductible PPO Plan, which shall include vision and prescription drug plans, and which shall be the base Plan. The District reserves the right to make changes to the Plan so long as such changes result in substantially similar benefits and coverage that existed as of December 1, 2013 (or the applicable date the High Deductible PPO Plan took effect). The District agrees to make available a Health Savings Account (HSA) and to fund the HSA as follows: beginning January 2, 2014, employees will be provided \$5,000.00 annually for eligible family, employee + child(ren) and employee + spouse coverage, or \$2,500.00 annually for employee only coverage. Beginning January 2, 2015, and on each January 2nd thereafter, the District shall fund the HSA as follows: employees will be provided 100% of the maximum HSA deductible annually for eligible employee only, employee + spouse, employee + child(ren) and family coverage.

Effective May 1, 2015, bargaining unit employees will contribute the following amounts toward premium costs for the High Deductible PPO Plan for eligible employee only, employee + spouse, employee + child(ren), or family coverage, with the District contributing the remaining balance of the premium for the Plan:

Effective May 1, 2015:

Employee	\$25.00/month
Employee + Spouse	\$50.00/month
Employee + Child(ren)	\$45.00/month
Family	\$70.00/month

Effective May 1, 2016:

Employee	\$45.00/month
Employee + Spouse	\$70.00/month
Employee + Child(ren)	\$65.00/month
Family	\$90.00/month

The District shall establish an IRC 125 Plan for the deduction of employee contributions toward insurance coverage. Monthly contributions shall be deducted twice per month in even increments for the employee's contribution.

Appendix C shall be updated on an annual basis.

(UX 1, Tab 20; *Brief* at 15-16).

In support of its proposal, the Firefighters advance the following arguments:

The District's Proposal Seeks to Implement Entirely New Benefits and Procedures and Fails to Account for Seven Months of the Successor Agreement (*Brief for the Union* at 16). The Union asserts that, previously, the District participated in a fire department employee benefit co-op and the District paid 100% of the premium costs. The summary of the PPO plan provided through the co-op is located in Appendix C of the Agreement. The co-op ceased to exist as of November 30, 2013, and, beginning December 1, 2013, the District went to a High Deductible Plan ("HDP") with a Health Savings Account ("HSA"). Upon implementation of the HDP, the District contributed \$2,500 for single coverage or \$5,000 for family coverage, as applicable, to each employee's HSA.

Notably, the District's proposal is defective on its face as it fails to account for the seven-month period from May 1, 2013 (the effective date of the successor contract that is the subject matter of this proceeding) through November 30, 2013 (when the co-op ceased to exist). Rather, the District deleted the current contract language, which is maintained in the Union's final offer, which addresses the coverage for this time period (*Brief* at 16-17).

In the Union's view, the Administration's proposed changes do not merely seek to achieve employee cost sharing. Rather, such changes drastically alter the entire landscape of health-insurance benefits. "Research of arbitral case law indicates that the

presumption is to leave any non *de minimis* changes in long-time benefits, especially insurance, to the parties themselves.” *Tri-State Fire Protection District and Tri-State Professional Firefighters Union, Local 3165*, ILRB Case No. S-MA-13-299 (Hill, 2014) at 78. The Union asserts that such a provision constitutes a significant change to the *status quo* and should be negotiated between the parties, not imposed through interest arbitration. Indeed, this Arbitrator the Union points out held that where an employer presents a reasonable proposal “with some reasonable *quid pro quo*, and the Union stonewalls such, it would appear to do so at its own peril.” *Id.* The District offered neither justification for such drastic changes, nor a *quid pro quo* in exchange for such changes. Further, the evidence demonstrates that the Union is doing anything but stonewalling the District, as the Union is advancing a proposal that requires employees to share the costs of health insurance. Accordingly, there is no basis for such a radical departure from the status quo and the District’s proposal must be rejected on its merits, as well as for its failure to account for the co-op insurance that was in place for the first seven months of the parties’ successor agreement (*Brief* at 18).

The Practical Implementation of the District’s Proposal Renders it Fatally Flawed for Additional Reasons (*Brief* at 18). In addition to the fatal flaw discussed above, the Union asserts that it is important to note that the parties signed a tentative agreement on changes to Article 12, Section 12.1 (Coverage). The parties agreed to add the following language to Article 12, Section 12.1:

In the event of **dramatic** change to group health, hospitalization, dental, prescription, and vision coverage plans presently in effect, the District shall advise the Local of such changes as soon a (sic) possible, and shall refer resolution or clarification of coverage to the Insurance Committee, further described in this Article 12.

(*Id.*; emphasis added). Article 12, Section 12.6 (Insurance Committee), however, limits the role and authority of the Insurance Committee, as it provides that the Committee:

will be established to research and recommend to the District’s Board of Trustees options for expanding insurance opportunities for well care and health savings accounts. . . . Recommendations will require a simple majority approval by the Committee to be forwarded to the Board of Trustees for consideration.

(UX 1, Tab 9 at 20). Thus, not only is the Insurance Committee’s authority limited to conducting research and making recommendations, the subject matter of the Insurance Committee’s authority is limited to well care and health savings accounts. (*Id.*).

The parties stipulated that all tentative agreements shall be incorporated into the arbitration award, which means that I am required to consider the tentative agreement on Article 12, Section 12.1 as part of the successor collective bargaining agreement. Thus, when the District’s proposal on Article 12, Section 12.2, is read in conjunction with the tentative agreement on Article 12, Section 12.1 and the status quo language in Article 12,

Section 12.6, the District's proposal is an open door for grievances as it is impossible to reconcile what changes can be made under what circumstances, and whether the changes are subject to a reopener or review by the Insurance Committee.

The parties have already reached agreement regarding the manner in which "dramatic" changes to health insurance benefits will be handled. Yet, the District's proposal on Article 12, Section 12.2 contains two different provisions addressing changes to health insurance. The third paragraph of the District's proposal gives the District the right to annually review the insurance plans, noting that the:

[A]nnual review process shall include, but not be limited to, the current policy coverages and benefits, increases and/or decreases in the renewal premium rates, effects on the District (sic) finances, and any changes or substitutions in current policy proposed by the provider or required by law. The District will discuss any potential changes in the current policy with the Insurance Committee as further described in this Article.

(UX 1, Tab 21). Importantly, the second paragraph of the District's proposal also includes deletion of the Summary Plan Description contained in Appendix C. (*Id.*). **By proposing to remove the Summary Plan Description, while at the same time proposing to have the right to annually review and make changes to the health insurance plans, the District is attempting to gain the unfettered right to make changes to health insurance during the term of the agreement.** The fact that such changes will be discussed with the Insurance Committee or will be resolved through the Insurance Committee is of no consequence, as the Insurance Committee has no authority to prevent the District from making whatever changes it so desires under the District's proposal. Thus, the District's proposal operates as a waiver of the Union's right to negotiate changes to health insurance during the term of the agreement. Waivers of such important terms and conditions of employment should be negotiated, not imposed by arbitrators. Indeed, the Union's proposal includes language that allows the District to make changes so long as the changes result in substantially similar benefits and coverage. Granting the District's proposal will not place the parties in the position they would have been in if left to their own devices.

Furthermore, paragraph 6 of the District's proposal provides for a reopener in the event that implementation of the ACA results in "significant plan changes, cost increases or a luxury penalty tax." Yet, the tentative agreement reached on Article 12, Section 21.1 allows the District to make changes in the event of "dramatic" changes. "Dramatic" is defined as sudden and exciting or unexpected, whereas "significant" is defined as noteworthy, important or consequential. Oxford American Dictionary and Thesaurus 435, 1411 (2d ed. 2003). Conceivably, the manner through which the parties address health insurance changes resulting from the implementation of the ACA could be addressed through either the agreed upon language in Article 12, Section 12.1 or the language in the District's proposal. Thus, adoption of this proposal will result in numerous grievances because the language is inconsistent and confusing. It is not the

role of this Arbitrator to award proposed language knowing it will result in a multitude of grievances because the intent of the language is unclear (*Brief* at 19-20).

The Economic Impact of the District’s Proposal is Significant (*Brief* at 21). The Union maintains the District’s proposal must be rejected because its economic impacts are multi-faceted. First, the District is proposing that, for the first time ever, employees not only contribute toward health insurance premium costs, but that such contributions are on a percentage basis. Second, the District is seeking retroactive employee contributions. Third, the District is seeking to reduce the amount of HSA contributions it provides during the life of the agreement. Such changes have a significant economic impact that cannot be overlooked.

Bargaining-unit employees have never paid for health insurance contributions, according to the Union. Furthermore, since the inception of the HDP, the District has fully funded employee HSA accounts under the HDP. The evidence demonstrates that the District experienced significant savings when it switched to the HDP. Initially, for 2015, there was a projected 23% increase in insurance. However, unfortunately, the primary driving force of the District’s insurance premiums was one employee who is now deceased. As a result, the projected insurance renewal rate dropped to a 14.91% increase. Regardless, the evidence demonstrates that the District saved a significant amount of money by switching to the HDP:

2013 ANNUAL INSURANCE RATES PER EMPLOYEE

Individual Coverage	\$7,168.32
Family Coverage	\$23,484.36

2014 ANNUAL INSURANCE RATES PER EMPLOYEE

Individual Coverage	\$5,131.08
Family Coverage	\$15, 475.92

2015 ANNUAL INSURANCE RATES PER EMPLOYEE

Individual Coverage	\$5,655.72
Family Coverage	\$17,594.16

2016 ANNUAL INSURANCE RATES PER EMPLOYEE

Individual Coverage	\$6,498.99
Family Coverage	\$20,217.45

(R. 104; UX 3, Tabs 4, 6). Accordingly, even with the *status quo* 100% District contribution to the cost of health insurance, the District has experienced significant savings related to health insurance when it switched to the HDP.

Despite these savings, the District is now seeking percentage contributions from bargaining-unit employees that are both retroactive and that prospectively increase during the life of the agreement. The District is proposing retroactive employee insurance contributions of 2.5% for the period of May 1, 2013 through April 30, 2014, retroactive employee insurance contributions of 5.0% for the period of May 1, 2014 through April 30, 2015, 5.0% employee insurance contributions for the period of May 1, 2015 through April 30, 2016 and 7.5% employee insurance contributions for the period of May 1, 2016 through April 30, 2017. Indeed, the District’s proposal would require employees to retroactively and prospectively contribute as follows:

<u>FISCAL YEAR</u>	<u>INDIVIDUAL</u>	<u>FAMILY</u>
2013	\$179.21	\$587.11
2014	\$256.55	\$773.80
2015	\$532.79	\$1,379.71
2016	\$737.42	\$2,016.31

(UX 3, Tabs 6 at 3, 9).

The District offered very little in the way of justification for its proposal. The District noted that the co-op ceased to exist, and that bargaining unit employees are amongst the highest paid amongst the comparables. Claiming that its proposal was a “soft-landing” with “very little out-of-pocket difference to the employees” the District argues that employees had more out-of-pocket expenses under the co-op plan than they do under the HSA. However, this is irrelevant because, as noted by the District, the co-op ceased to exist and the HSA is the *status quo*. The fact remains that the *status quo* is that employees have never paid any amount of health insurance contributions and have had their HSA fully-funded by the District since its inception. Now, the District is proposing a drastic departure from the *status quo* by seeking employee contributions on an increasing percentage basis while, at the same time, reducing the District’s HSA contributions during the last two (2) years of the agreement. It is reasonable to assume that health insurance premiums will continue to increase, rather than decrease. Thus, the District’s proposal leaves the potential for a more significant reduction in the level of compensation in the future.

Taking the *status quo* on health insurance and the agreed-upon percent wage increases, the net percentage growth is 9% over the life of the agreement, as indicated:

STATUS QUO

<u>Single</u>	<u>Agreed to General Wage Increase</u>	<u>Top Base Wages (FF/PM)</u>	<u>Net \$\$ Increase</u>	<u>Addt’l Cost to Insurance (Prem. + Ded.)</u>	<u>Employee Net Gain</u>	<u>Net Top Base (Base – New Ins. \$\$)</u>	<u>Net % Growth</u>
2013	2.00%	\$88,107.67	\$1,727.60	\$0	\$1,727.60	\$88,107.67	2.00%
2014	2.00%	\$89,869.82	\$1,762.15	\$0	\$1,762.15	\$89,869.82	2.00%
2015	2.50%	\$92,116.57	\$2,246.75	\$0	\$2,246.75	\$92,116.57	2.50%

2016	2.50%	\$94,419.48	\$2,302.91	\$0	\$2,302.91	\$94,419.48	2.50%
Total	9.00%		\$8,039.41		\$8,039.41		9.00%

<u>Family</u>	Agreed to General Wage Increase	Top Base Wages (FF/PM)	Net \$\$ Increase	Addt'l Cost to Insurance (Prem. + Ded.)	Employee Net Gain	Net Top Base (Base – New Ins. \$\$)	Net % Growth
2013	2.00%	\$88,107.67	\$1,727.60	\$0	\$1,727.60	\$88,107.67	2.00%
2014	2.00%	\$89,869.82	\$1,762.15	\$0	\$1,762.15	\$89,869.82	2.00%
2015	2.50%	\$92,116.57	\$2,246.75	\$0	\$2,246.75	\$92,116.57	2.50%
2016	2.50%	\$94,419.48	\$2,302.91	\$0	\$2,302.91	\$94,419.48	2.50%
Total	9.00%		\$8,039.41		\$8,039.41		9.00%

(UX 3, Tab 7).

Under the District’s proposal, the net percent growth drops to 8.20% for employees with single coverage and 6.80% for employees with family coverage:

DISTRICT’S PROPOSAL

<u>Single</u>	Agreed to General Wage Increase	Top Base Wages (FF/PM)	Net \$\$ Increase	Addt'l Cost to Insurance (Prem. + Ded.)	Employee Net Gain	Net Top Base (Base – New Ins. \$\$)	Net % Growth
2013	2.00%	\$88,107.67	\$1,727.60	\$179.21	\$1,548.39	\$87,928.46	1.79%
2014	2.00%	\$89,869.82	\$1,762.15	\$256.55	\$1,505.60	\$89,613.27	1.92%
2015	2.50%	\$92,116.57	\$2,246.75	\$532.79	\$1,713.96	\$91,583.78	2.20%
2016	2.50%	\$94,419.48	\$2,302.91	\$737.42	\$1,565.49	\$93,682.06	2.29%
Total	9.00%		\$8,039.41	\$1,705.97	\$6,333.44		8.20%

<u>Family</u>	Agreed to General Wage Increase	Top Base Wages (FF/PM)	Net \$\$ Increase	Addt'l Cost to Insurance (Prem. + Ded.)	Employee Net Gain	Net Top Base (Base – New Ins. \$\$)	Net % Growth
2013	2.00%	\$88,107.67	\$1,727.60	\$587.11	\$1,140.49	\$87,520.56	1.32%
2014	2.00%	\$89,869.82	\$1,762.15	\$773.80	\$988.36	\$89,096.03	1.80%
2015	2.50%	\$92,116.57	\$2,246.75	\$1,379.71	\$867.04	\$90,736.86	1.84%
2016	2.50%	\$94,419.48	\$2,302.91	\$2,016.31	\$286.61	\$92,403.18	1.84%
Total	9.00%		\$8,039.41	\$4,756.92	\$3,282.49		6.80%

(UX 3, Tab 9).

Under the Union’s proposal, although the net percent growth drops, the drop is much more reasonable as demonstrated below:

UNION’S PROPOSAL

<u>Single</u>	Agreed to General Wage Increase	Top Base Wages (FF/PM)	Net \$\$ Increase	Addt’l Cost to Insurance (Prem. + Ded.)	Employee Net Gain	Net Top Base (Base – New Ins. \$\$)	Net % Growth
2013	2.00%	\$88,107.67	\$1,727.60	\$0	\$1,727.60	\$88,107.67	2.00%
2014	2.00%	\$89,869.82	\$1,762.15	\$0	\$1,762.15	\$89,869.82	2.00%
2015	2.50%	\$92,116.57	\$2,246.75	\$300.00	\$1,946.75	\$91,816.57	2.17%
2016	2.50%	\$94,419.48	\$2,302.91	\$540.00	\$1,762.91	\$93,879.48	2.25%
Total	9.00%		\$8,039.41	\$840.00	\$7,199.41		8.41%

<u>Family</u>	Agreed to General Wage Increase	Top Base Wages (FF/PM)	Net \$ Increase	Addt’l Cost to Insurance (Prem. + Ded.)	Employee Net Gain	Net Top Base (Base – New Ins. \$\$)	Net % Growth
2013	2.00%	\$88,107.67	\$1,727.60	\$0	\$1,727.60	\$88,107.67	2.00%
2014	2.00%	\$89,869.82	\$1,762.15	\$0	\$1,762.15	\$89,869.82	2.00%
2015	2.50%	\$92,116.57	\$2,246.75	\$840.00	\$1,406.75	\$91,276.57	1.57%
2016	2.50%	\$94,419.48	\$2,302.91	\$1,080.00	\$1,222.91	\$93,339.48	2.26%
Total	9.00%		\$8,039.41	\$1,920.00	\$6,119.41		7.83%

(UX 3, Tab 8).

With respect to the District’s comparability argument, the Union notes that although employees in six (6) of the seven (7) comparable communities pay a percentage for contributions toward health insurance, one (1) of the comparables, Addison, provides for 100% employer-funded health insurance for employees and their dependents and funds the entire HSA contribution for employees until January 1, 2015, at which time the employer-funded HSA contributions amounts decrease over the life of the agreement pursuant to a reopener. Bartlett, Bloomingdale, Darien-Woodridge, Huntley, Lincolnshire-Riverwoods, and Pleasantview contribute the majority of funding for both single and family HSA contributions, with no reduction in said contributions during the life of the agreement. However, the fact that the majority of the comparables provides for percentage employee contributions and do not fully fund the HSA contributions, alone, is insufficient to justify the drastic changes the District is seeking to accomplish.

Simply stated, the District’s health insurance proposal seeks drastic changes to the *status quo*. “It is well settled that, where one or the other of the parties seeks to obtain a substantial departure from the parties’ *status quo*, an ‘extra burden’ must be met before the Arbitrator resorts to the criteria enumerated in Section 14(h) of the Act.” *Tri-State Fire Protection District, supra* at 10. The District neither presented evidence nor argument that the *status quo* health insurance system or procedure is “broken.” Rather,

the District argued that “the days of a hundred percent employer-funded health insurance are, you know, significantly over ...” (R. 44). While that may be true, that does not equate to arbitral acceptance of drastic departures from the *status quo*.

Importantly, the District offered no *quid pro quo* in exchange for such drastic changes. Not only are the agreed-upon wage increases modest, the District never took the position that such modest wage increases are offered as a *quid pro quo*. The fact that the District is seeking significant changes, coupled with the retroactivity of health insurance contributions and the ability to change coverage and benefits during the life of the agreement, renders the District’s proposal completely unreasonable.

The District’s Proposal is Inextricably Intertwined with its Wage and Retroactivity Proposal (*Brief* at 29). The District linked its wage, retroactivity and health insurance proposals together by proposing to include them all in Appendix C. Currently, the Agreement provides for separate health insurance and wage information, and it is only wages and retroactivity provisions that are contained together in Appendix E. However, the District’s proposal includes deleting Appendix C, which is the summary of health benefits, and deleting Appendix E, which is the salary schedule, and placing the salary schedule and employee health insurance contributions in a new Appendix C. Furthermore, the District’s proposal includes deletion of all retroactivity language. **Thus, if this Arbitrator were to grant the Union’s proposal on Article 18, Section 18.1 and Appendix E, then the Union’s health insurance proposal must also be granted, as the District linked the two proposals together and they cannot be separated.**

The District’s Proposal Includes Redundant and Unnecessary Language Regarding the Designation of the Base Plan and Employee Contributions (*Brief* at 30) Lastly, the District’s proposal includes the following language that is redundant, and, therefore, unnecessary:

The District reserves the right to designate a plan as the “base plan” for all purposes, including PSEBA benefits. The current base plan is a High Deductible Health Plan (HDHP) with a Health Savings Account (HSA). Employees selecting any level of coverage with the base plan shall contribute the percentages identified in Appendix C to the premium cost of the plan.

(UX 1, Tab 21 at 1).

The parties reached tentative agreement on Article 12, Section 12.1 (Coverage). Under the *status quo* language, as set forth in the tentative agreement, the District “reserves the right to deem a plan to be the base plan for purposes of full payment by the District as well as for continuing coverage requirements of state or federal law.” Thus, there is no need for the District’s proposed change as outlined above, as it is already covered in Section 12.1.

The Union's proposal is reasonable because it takes responsibility for the cost of health insurance, beginning in 2015, by contributing a flat dollar amount that increases a reasonable amount in 2016. As noted above, the District saved a significant amount of money when the co-op ceased to exist and it moved to the HDP. In fact, the bargaining unit employees will be contributing toward their healthcare at a time when the District's premium costs are less than when the District, under the co-op, paid 100% of premiums. Certainly the District cannot in good faith argue that the Union's proposal is unreasonable when the District asked for no contributions when it was paying 100% of higher premiums.

The Union's proposal allows the District to make changes to health insurance coverage and benefits during the life of the agreement, so long as the changes result in substantially similar benefits and coverage. The Union's proposal also provides for an IRC 125 Plan for the pre-tax deduction of employee contributions toward insurance coverage. The District's proposal is devoid of any mechanism for pre-tax deductions, resulting in even higher insurance costs to the bargaining-unit employees than those contemplated in the Union's cost analysis. The Union's proposal constitutes the least significant departure from the status quo, and also recognizes the reality that fully funded health insurance is, more or less, a thing of the past.

For all of these reasons, the evidence demonstrates that the District's proposal must be rejected, as it is a significant departure from the status quo and the District utterly failed to satisfy the heightened burden of demonstrating the need for such drastic changes. The Union's proposal, on the other hand, is reasonable and most closely satisfies the statutory criteria. Therefore, the Union's proposal should be adopted (*Brief* at 32).

3. Focus of an Arbitrator in an Interest Dispute

As I pointed out in numerous arbitration decisions, arbitrators and advocates are unsure whether the object of the entire interest process is simply to achieve a decision rather than a strike, as is sometimes the case in grievance arbitration, or whether interest arbitration is really like mediation-arbitration, where, as noted by one practitioner, "what you do is to identify the range of expectations so that you will come up with a settlement that both sides can live with and where neither side is shocked at the result." See, Berkowitz, *Arbitration of Public-Sector Interest Disputes: Economics, Politics and Equity: Discussion*, in *Arbitration – 1976, Proceedings of the 29th Annual Meeting, national Academy of Arbitrators* (B.D. Dennis & G.C. Somers, eds) 159, 186 (BNA Books, 1976).

A review of case law and the relevant literature indicates that arbitrators attempt to issue awards that in theory reflect the position the parties would have reached if left to their own impasse devices. Recently, one Arbitrator/Mediator traced the genesis of this concept back to Arbitrator Whitley P. McCoy who, in the often-quoted *Twin City Rapid Transit Company* decision, 7 LA (BNA) 845, 848 (1947), stated the principle this way:

Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon consideration of policy, fairness, and expediency, of the contract rights ought to be. In submitting . . . to arbitration, the parties have merely extended their negotiations, having agreed upon . . . [T]he fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntarily agreed to? . . . [The] endeavor is to decide the issues as, upon the evidence, we reasonable negotiators, regardless of their social or economic theories, might have decided them in the give and take process of bargaining.

See, *City of Galena, IL*, Case S-MA-09-164 (Callaway, 2010).

Similarly, Chicago Arbitrator Harvey Nathan, in *Sheriff of Will County and AFSCME Council 31, Local 2961*, Case S-MA-88-9 (1988), declared that the award must be a natural extension where the parties were at impasse:

[I]nterest arbitration is essentially a conservative process. While obviously value judgments are inherent, the neutral cannot impose upon the parties' contractual procedures he or she knows that parties themselves would never agree to. Nor is his function to embark upon new ground and to create some innovative procedural or benefits scheme which is unrelated to the parties' particular bargaining history. The arbitration award must be a natural extension of where the parties were at impasse. The award must flow from the peculiar circumstances these particular parties have developed for themselves. To do anything less would inhibit collective bargaining." *Will County Board and Sheriff of Will County v. AFSCME Council 31, Local 2961* (Nathan, Chair, 1988), quoting *Arizona Public Service*, 63 LA 1189, 1196 (Platt, 1974); Accord, *City of Aurora*, S-MA-95-44 at p.18-19 (Kohn, 1995).

. . . The well-accepted standard in interest arbitration when one party seeks to implement entirely new benefits or procedures (as opposed to merely increasing or decreasing existing benefits) or to markedly change the product of previous negotiations is to place the onus on the party seeking the change. . . . In each instance, the burden is on the party seeking the change to demonstrate, at a minimum:

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

Without first examining these threshold questions, the Arbitrator should not consider whether the proposal is justified based upon other statutory criteria. These threshold requirements are necessary in order to encourage collective bargaining. Parties cannot avoid the hard issues at the bargaining table in the hope that an arbitrator will obtain for them what they could never negotiate themselves.

Sheriff of Will County at 51-52 (emphasis mine), as cited in *City of Danville*, S-MA-09-238 (Hill, 2010); See also, *Sheriff of Cook County II*, at 17 n.16, and at 19. See generally, Marvin Hill & A. V. Sinicropi, *Winning Arbitration Advocacy* (BNA Books, 1998)(Chapter 9)(discussing the focus of interest neutrals).

Chicago Arbitrator Elliott Goldstein had it right and said it best: “Interest arbitrators are essentially obligated to replicate the results of arm’s-length bargaining between the parties, and to do no more.” *Metropolitan Alliance of Police, Chapter 471, FMCS 091103-0042-A (2009)*.⁴

There is no question that interest arbitrators, operating under the mandates of the Illinois statute, *supra*, apply the focus as articulated by Arbitrator Goldstein and others. Interest arbitration is not the place to dispense one’s own sense of industrial justice similar to the former circuit riders in the United States, especially in the public sector.⁵ Careful attention is required regarding adherence to the evidence record put forth by the parties and, however difficult, coming up with an award that resembles where the parties would have placed themselves if left to their own devices. There is indeed a presumption

⁴ See also, *City of East St. Louis & East St. Louis Firefighters Local No. 23*, S-MA-87-25 (Traynor, 1987), where the Arbitrator, back in 1987, recognized the task of determining where the parties would have landed had management been able to take a strike and the union able to withhold its services. In Arbitrator Traynor’s words:

Because of the Illinois law depriving the firefighters of the right to strike, the Union has been deprived of a most valuable economic weapon in negotiating a contract with the City. There seems to be little question that if the firefighters had been permitted to strike, and did so, insisting on increased wages, public pressure due to the lack of fire protection would have motivated the City Council to settle the strike by offering wage increases.

Id. at 11.

Management advocate and author R. Theodore Clark has argued that the interest arbitrator should not award more than the employees would have been able to obtain if they had the right to strike and management had the right to take a strike. R. Theodore Clark, Jr., *Interest Arbitration: Can The Public Sector Afford It? Developing Limitations on the Process II. A Management Perspective*, in *Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators* (J.D. Stern & B.D. Dennis, eds) 248, 256 (BNA Books, 1982). Clark referenced another commentator’s suggestion that interest neutrals “must be able to suggest or order settlements of wage issues that would conform in some measure to what the situation would be had the parties been allowed the right to strike and the right to take a strike.” *Id.* Accord: *Des Moines Transit Co. v. Amalgamated Ass’n of Am. Div.*, 441, 38 LA (BNA) 666 (1962)(Flagler, Arb.) (“It is not necessary or even desirable that he approve what has taken place in the past but only that he understand the character of established practices and rigorously avoid giving to either party that which they could not have secured at the bargaining table.” *Id.* at 671.

⁵ In the United States, the act, once undertaken by a judge, of traveling within a judicial district (or circuit) to facilitate the hearing of cases. The practice was largely abandoned with the establishment of permanent courthouses and laws requiring parties to appear before a sitting judge. Source: <http://www.answers.com/topic/circuit-riding>

that the bargains the parties reached in the past mean something and, thus, are to be respected.

4. The Parties' Health Insurance Proposals

California Arbitrator Ronald Hoh, in *Black Hawk County, IA & IBT 238, PERB CEO #783/Sector 2* (2003) observed the problems that surface in insurance arbitrations:

It has unfortunately become virtually axiomatic in interest arbitration cases that employers and employees are faced with double digit (and sometimes high double digit) percentage increases in health insurance costs, and that bargaining table decisions regarding how those increases are to be met involve substantial economic impact upon both employers and employees alike. In such circumstances, the parties have little alternative other than to either seek new insurance cost bids for coverage they can live with, and/or to closely monitor costs claimed by medical providers to assure that the parties receive the highest possible “bang for the (insurance) buck.” It is hoped that both the County and all of its unions work together to assure that such a result occurs given the significant increased costs involved.

That being said, it is the criteria for arbitrator awards set forth in the Act which must provide the framework here for the arbitrator's determination of the “most reasonable” of the parties' final offers.

The Union points out that the District's proposal constitutes a significant departure from the *status quo* for several reasons, as it: (1) defines “premium cost” to include mandatory federal and state taxes and fees; (2) requires employees to pay a percentage of the insurance premium cost on a retroactive basis; (3) removes the summary plan description from the agreement; (4) includes redundant and unnecessary language regarding the designation of a base plan and employee contributions; (5) gives the District the unfettered right to review and make changes to the insurance plans on an annual basis; (6) reduces the District's HSA contributions during the life of the agreement; and (7) includes a reopener provision in the event the Affordable Care Act (“ACA”) is implemented and results in significant plan changes, cost increases or a luxury penalty tax (See, *Brief* at 16-17; UX 1, Tab 21). The Union further asserts that (8) “the District offered neither justification for such drastic changes, nor a *quid pro quo* in exchange for such changes.” (*Brief* at 17). In the Union's world, “there is no basis for such a radical departure from the *status quo* and the District's proposal must be rejected on its merits, as well as for its failure to account for the co-op insurance that was in place for the first seven months of the parties' successor agreement.” (*Brief* at 18). Finally, the Union submits that (9) the District's final offer “is an open door for grievances as it is impossible to reconcile what changes can be made under what circumstances, and whether the changes are subject to a reopener by the Insurance Committee (described in Article 12).” (*Brief* at 19). In a nutshell, (10) “the District's proposal operates as a waiver of the Union's right to negotiate changes during the term of the agreement.” (*Brief* at 20).

A close call but overall, the Union advances the better case. In support of this conclusion, I offer the following considerations:

1. As noted by the Union, the parties' tentative agreement reached on Article 12, Section 21.1 allows the Administration to make changes in insurance in the event of "dramatic" changes (UX 1, Tab 15 at 27-28; *See, Brief for the Union* at 20). In contrast, the Administration's proposal provides for a reopener in the event that implementation of the ACA results in "significant plan changes, cost increases or a luxury penalty tax." (UX 1, Tab 21). I find a difference (and potential conflict) between the proposals, with one listing "drastic" as the operative criterion and the other citing "significant plan changes" as the operative event. The Administration's proposal will arguably cause confusion and presumptively grievances over any changes. The Union's point on this is well taken (*See, Brief* at 20-21).

2. Citing economic considerations, the Union argues that the Administration's insurance offer should be rejected, in part, because it is proposing for the first time ever that employees contribute toward their health care on a percentage basis (*Brief* at 21). The Union also has a problem with the retroactive contributions the District seeks from the bargaining-unit. *Id.* Finally, it cites the Administration's efforts to reduce the contributions it provides for the life of the agreement. *Id.*

For the record, I have no problem conceptually with any of the Administration's proposals. Gone are the days when employees pay nothing for their health insurance and/or have HAS plans full-funded by their employer. Indeed, the comparability criterion favors the Administration's proposal, to an extent (where employees in six of the seven comparable districts pay on a percentage basis)(*See, UX 2, Tab 1* at 49, 2 at 43, 3 at 17, 4 at 50, 5 at 34, 6 at 23, and 7 at 18; EX 5 &).

Minnesota Arbitrator Christine D. Ver Ploeg, in *Burlington IA Municipal Waterworks & IBT Local 238*, PERB CEO #99/Sector 3 (2003), refused to order a change in the *status quo* health insurance language (where employees paid nothing for single and family insurance), and reasoned that this is an issue traditionally left to bargaining by the parties. In so holding, she concluded as follows:

I have reviewed the Employer's proposed change and find that it may well represent a better plan for many employees than they are currently provided. Nevertheless, the issue of medical coverage is such overriding concern to most employees – and it certainly is to these employees – that many arbitrators (including myself) entertain a strong presumption that parties should be left to negotiate for themselves significant changes to an existing package. Although that presumption can be overcome with compelling evidence of financial exigency and strong comparability data, the evidence presented at the hearing that supports unilaterally imposing this change upon these employees does not rise to that level. It may be possible that given time and other employees' experience with the new plan, these employees will themselves prefer

to come within its provisions. However, now is not the time to force them to do so. (*Ver Ploeg* at 7-8)

Significantly, Arbitrator Ver Ploeg was writing in 2003, long before the “great recession” and an explosion in health care costs.⁶

Likewise, Arbitrator Kim Hoogeveen, in *Cedar Rapids Professional Firefighters, Local 11 & City of Cedar Rapids, IA* (2005), acting as a fact finder, stressed the partnership angle with respect to health insurance and the obligation of employees to eventually assume some of the costs:

With respect to health insurance, a partnership between the Union and the City should exist, as each has an interest in securing the greatest possible bang for every dollar expended. Yet to state the obvious, it is the employees, and not the City, who benefit from health insurance, and as such employees must be prepared to assume a portion of the risk and to share in at least a fraction of the increased cost. As health insurance costs continue to rise, employees have no reason to expect that their partner will bear 100% of cost increases while they retain all the benefits. The collective bargaining agreement should not be used to shield employees from an obligation to fund an equitable portion of the benefits they enjoy. (*Hoogeveen* at 13).

There is no question the day is near when the Firefighters will contribute a percentage of premiums or costs toward their health insurance. Add to this any possible mandates looming that have been brought about by the Affordable Health Care Act (ACA), pressure for premium sharing and overall total reduction will continue. See, e.g., *Guthrie County, IA & IBT Local 238, PERB 936/1* (Nathan, 2006)(concluding: “Employee contributions are here to stay. The cost of insurance must be borne by both sides if there is to be a prudent utilization of resources. Employees must have a stake in the risks because the Employer can no more control utilization than can individual employees vis-à-vis the group as a whole.” *Nathan* at 10); *City of Independence, IA & IBT Local 238, PERB Case CEO #860, Sector 2* (Graham, 2004)(“Only a person with their head in the sand could be oblivious to the very different situation caused by the substantial increase in health insurance premiums. The problem

⁶ See, e.g., Michael Lewis, *The Big Short* (2011), dealing with the impending financial crisis of 2008 and who knew before the financial crisis that a silent crash in the bond market and the real estate derivatives market was about to implode, resulting in a world-wide economic “crash.” Lewis discusses what led up to the darkest days of the crisis, helping the average, non-financial expert to see how the great financial storm developed. The so-called “great recession” had a profound effect of local and state governments, who by law are required to balance their budgets, unlike the federal government, who continues to accumulate record deficits and can simply print money to operate. The fallout from 2008 and the imploding derivative markets, resulting in numerous bank failures starting in 2009, is still being felt by governments, not just in the states, but world wide.

My point is this: Although the District has recovered from the 2008 “recession hole” and has not entered an inability to pay defense, it is not out of line in urging caution with respect to expected health care costs, and its goal of making employees participate via making a percentage contribution toward premiums. Simply because the District is financially healthy does not mean it cannot deal with the subject of health care in a measured way. Consistent with the above-cited arbitrators (Graham, Ver Ploeg, Dorby, and Perry), my view is the day is just around the corner when the adm will achieve some percentage sharing of premiums.

being confronted by employers and employees, public and private sector alike, has proved intractable and not susceptible of resolution.” *Graham* at 6.). One Arbitrator (from Warren, Michigan) described the health insurance system in the United States as “broken.” *See, City of Davenport, IA & Union of Professional Police*, PERB Case CEO 196/3 (Dorby, 2000)(“For those of you who have not yet figured out that the health care system is broken, here is a wake up call. The problem here is that health care costs are out of control.” *Dorby* at 9). *Accord: City of Davenport, IA & Association of Professional Firefighters, IAFF Local 17*, PERB 190/3 (Dworkin, 2003)(“Next to wages, this [health insurance] is a most fundamental and diverse issue. There are no pretty solutions.” *Dworkin* at 11, quoting Arbitrator Dorby in a 2001 fact finding). Mr. Dorby may not be wrong (as Congress has yet to realize with respect to Medicare and Medicaid).

Adopting the *dicta* offered by Arbitrator Perry in *City of Cherokee, IA, supra*, during the next round of negotiations, if the Administration advances a reasonable proposal, perhaps with less of a jump than is now on the table, to require these employees to bear part of the cost of this important but increasingly costly benefit on a percentage basis, with some reasonable *quid pro quo*, and the Union stonewalls such, it would appear to do so at its own peril. *See, Perry* at 5. *Accord: City of Danville & PBPA, Unit 11*, ILRB Case No. S-MA-12-330 (Finkin, 2014)(rejecting employer’s proposal for movement from a fixed to a percentage sharing basis of health premiums, reasoning that “shift from a schedule of fixed payments to one of a percentage contribution is best dealt with by the parties directly, not by an arbitrator.” *Id.* at 21).

To its credit, the Union has not put its head in the sand and offered the *status quo* on insurance. It is, as characterized by Union Counsel Moss, “getting its feet wet by contributing a flat dollar amount starting in 2015 and 2016, increasing those flat dollar amounts.” (R. 105). Specifically, under the Union’s proposal the net percent growth drops but on a reasonable economic basis (where the impact is less than the Employer’s proposal)(*See, Brief for the Union* at 26-27, reprinted *supra*). Its “phase in” (gradual to be sure) for cost sharing is noteworthy and favors its case. At the same time, and as pointed out by the Union, bargaining-unit employees will be contributing toward healthcare costs at a time when the Administration’s premium costs are less than when the District paid 100% of premiums (*See, Brief for the Union* at 31).

3. As noted by the Union, historically the District paid mostly above the CPI-U without any employee health-insurance contributions. Under both parties’ proposals the Administration will be paying employees less than the CPI-U with employee health insurance contributions. The CPI-U for the effective dates of the agreement is 9.17%. A review of the agreed-upon percent wage increases compared with the Union’s health insurance proposal demonstrates that the Union’s proposal places the bargaining unit at an 8.12% increase over the life of the agreement, which is clearly well below the CPI-U. However, the District’s proposal causes the bargaining unit to plummet to a 7.50% increase over the life of the agreement, almost 2% below the CPI-U. Here again, the Union makes the better argument.

4. A final note on insurance is in order. In *City of Aurora & IAFF 99* (Kohn, 1995), S-MA-95-44, Arbitrator Lisa Salkovitz Kohn considered Aurora’s proposal to increase the length of time in the first two steps of the salary structure for firefighters hired *after* the effective date of the contract. The record indicated that the Aurora firefighters’ maximum base salary was “approximately average for the comparison group, although they have the lowest starting rate.” *Id.* at 18. In rejecting the City’s final offer, Arbitrator Kohn had this to say regarding the City’s burden when requesting a change in benefits:

When one party proposes to modify a benefit, that party bears the burden of demonstrating a need for a change. *Village of Elk Grove & Elk Grove Firefighters Association, Local 2298, IAFF, supra* at 67. Here, the City offered no reason to lengthen the time period for Steps A and B from six months to 1 year, other than the fact that its police officers have accepted this change, albeit only for the duration of the current contract, and the City, having imposed it on their executive and exempt employees, now intends to seek this extension from all other bargaining units. **However, a “break-through” of this sort is best negotiated at the bargaining table, rather than being imposed by a third-party process.** *Kohn* at 19 (emphasis in bold mine).

The lesson here is this: Arbitrator Kohn rejected Aurora’s offer, reasoning that “a breakthrough is best negotiated at the bargaining table,” a position endorsed by the better weight of arbitral authority.

In one sense what the Administration proposes is a “breakthrough” regarding how health-insurance costs are shared, although it can be argued that traditional “breakthrough analysis” is really out the door when both parties propose to amend a long-standing benefits provision. Whatever the analysis – breakthrough or otherwise – the better course is to award the Union’s proposal, albeit modest, as opposed to Management’s final offer.

* * * *

For the above reasons, the following award is entered:

The Union’s insurance proposal is awarded.

B. District Issue No. 2, Article 13, Section 13.8 (Shift Trades)

The parties’ current language reads as follows:

Section 13.8. Shift Trades. Shift trade is a privilege that shall not interfere with the operations of the District or result in the payment of overtime or additional acting pay. Any employee may be granted shift trade if approved, with full normal pay, for any working day(s) on which that employee is able to secure another employee of comparable status to work in his place. Trades must be rank for rank, except that

Lieutenants may trade with Battalion Chiefs. There shall be no trades with or involving probationary employees unless it involves extenuating circumstances and approved by the Fire Chief.

Shift personnel may request to trade duty hours subject to the approval of the Battalion Chief's office. Employees may have no more than five (5) non-paid-back duty trades at any one time. Requests for shift trades will be done following the instructions on the duty trade form, a sample of which is included as Appendix D attached hereto and incorporated herein, which must be turned into the Battalion Chief for approval no later than 1600 hours of the duty shift prior to the first affected trade shift. This time limit may be waived at the discretion of the Fire Chief for extenuating circumstances. A request shall be considered complete and approved when the Battalion Chief enters it on the leave calendar and not before. Trades of one hour or less during the first and last hour of the shift will not require advance notice, but proper paperwork must still be filed for documentation of the trade.

It will be the responsibility of the employees involved in the shift trade to keep their own records. Employees seeking to trade shifts must work the assigned shift if they are unsuccessful in obtaining an approved trade. Once approved, the accepted hours become an official duty assignment of both parties to the trade. Employees who have agreed to trade shifts with another employee shall be responsible to work their traded partners shift as their official duty assignment. All trades shall be repaid within twelve (12) months of the date of the first affected shift.

(UX 1, Tab 9 at 23-24).

1. Position of the Administration

The Administration's proposal is as follows:

Section 13.8. Shift Trades. Shift trade is a privilege that shall not interfere with the operations of the District or result in the payment of overtime or additional acting pay. The District retains the right to deny any shift trade for operational purposes. Any employee may be granted shift trade if approved, with full normal pay, for any working day(s) on which that employee is able to secure another employee of comparable status to work in his place. Trades must be rank for rank, except that Lieutenants may trade with Battalion Chiefs. Lieutenants who trade with Battalion Chiefs will be eligible for working out of classification pay as outlined in Section 18.5 only when the Lieutenant is trading away a day that the Lieutenant was scheduled to fill the Shift Commander position on the Lieutenant's regularly assigned shift day. Working out of classification pay for this type of trade will only be awarded to the Lieutenant when the Battalion Chief has worked the traded shift day for the Lieutenant in the Shift Commander position and the day worked occurred within a reasonable amount of time from the date that the Lieutenant worked for the Battalion Chief.

There shall be no trades with or involving probationary employees unless ~~if the~~ situation involves extenuating circumstances and the trade is approved by the Fire Chief.

Shift personnel may request to trade duty hours subject to the approval of the Battalion Chief, or his or her designee. Requests for shift trades must be turned into the Battalion Chief, or his or her designee, for approval no later than 1600 hours of the duty shift prior to the first affected trade shift. This time limit may be waived at the discretion of the Fire Chief, or his or her designee, for extenuating circumstances. A request shall be considered complete when approved by the Battalion Chief, or his or her designee. Trades of one hour or less during the first and last hour of the shift will not require advance notice, but proper paperwork must still be filed for documentation of the trade.

It will be the responsibility of the employees involved in the shift trade to keep their own records. Employees seeking to trade shifts must work the assigned shift if they are unsuccessful in obtaining an approved trade. Once approved, the accepted hours become an official duty assignment of both parties to the trade with the following caveats:

[1] in the event the person who agreed to work cannot fulfill the trade due to (a) death, (b) retirement, or (c) voluntary or involuntary termination of employment and there is more than 72 hours until the start of the trade, the trade is officially cancelled and it becomes the responsibility of the original assigned employee to find coverage for that shift;

[2] in the event the person who agreed to work cannot fulfill the trade due to an on the job injury or illness and there is less than 72 hours until the start of the trade, it becomes the responsibility of the District to provide coverage for that shift;

[3] in the event the person who agreed to work cannot fulfill the trade for any reasons not detailed in [1] and there is more than 72 hours until the start of the trade, it becomes the responsibility of the person who agreed to work the trade to find coverage for that shift;

[4] in the event there is less than 72 hours until the start of the trade, it becomes the responsibility of the District to provide coverage for that shift; and,

[5] Any previously approved and scheduled shift trades secured by an employee, where the employee would be receiving coverage and the receiving employee is off on a duty related injury will be cancelled.

In the event the responsible person does not secure a replacement to cover the shift and the District incurs overtime, the District shall deduct one and one-half

hours of paid time off as noted below for each shift hour for which coverage was not secured from the person responsible for securing the replacement, in the following sequence:

- (a) accrued compensatory time, if any, when not qualified for sick leave,
- (b) accrued vacation or holiday time, if any, when not qualified for sick leave,
- (c) accrued sick leave, but only if the reason would qualify for use of sick leave,
- and
- (d) payroll deduction if insufficient paid time off exists.

(UX 1, Tab 21).

* * * *

In support of its position on shift trades, the Administration advances the following arguments:

In the Administration's view, the parties have experienced several problems with the current contract's Section 13.8 involving shift trades. While the Employer's final offer addresses the difficulties experienced by the parties, the Union's proposed *status quo* position completely ignores them. Given the number of issues and the amount of time spent attempting to resolve problems with the current contract language, the Arbitrator is urged to adopt the Employer's final offer.

The Administration asserts that some of the issues the Union's final offer ignores are the following:

1. A grievance contending the Employer could not deny a shift trade even though if granted the three least senior employees would have been on shift together. The Union's November 28, 2012 Memo to Chief Kazian advises the Union will not seek to arbitrate the issue but "Our hope is to clarify the CBA shift-trade language in upcoming negotiations to avoid future misinterpretation." (EX 9).

2. A January, 2012 request to trade shifts on December 24, 2012 which the parties discussed during Labor-Management Committee meetings. The District expressed concern – Re: the almost 12-month-advance-trade and the potential to have such a shift trade cause overtime if the person agreeing to work for another employee that far into the future retires, quits, is terminated, is promoted, gets injured or becomes ill precluding him from being able to work on the date previously agreed.

3. A March 2012 instance in which a firefighter who had agreed to work another employee's shift got injured the day before he was to work the trade. No other employee agreed to take the trade in place of the injured employee, but one agreed to work and receive overtime pay.

Management asserts that its final offer reasonably addresses these issues and others. According to the Employer, (1) it eliminates the restriction of a maximum five

(5) unpaid trades; (2) addresses concern of lieutenants trading and losing out on acting Battalion Chief pay; (3) addresses approval procedures to ensure consistency; (4) eliminates the form from the contract because the District anticipates enacting an electronic scheduling system; and (5) sets forth responsibility for ensuring coverage in the event someone cannot work a trade as agreed with a 72-hour demarcation. The five different examples of coverage issues and delineating responsibility of the employees or District to obtain coverage are all reality based. Each has occurred during the life of the Agreement and has created coverage issues for the District and employees. Shift trades are supposed to be for the employees' convenience and are not to cause overtime exposure to the Employer. The *status quo* has been conclusively shown to be in need of modification. As such, the Employer's proposal which reasonably remedies noted deficiencies in the current language and practices must be awarded.

2. Position of the Union

The Union proposes to maintain the *status quo* on shift-trade language.

(UX 1, Tab 20; *Brief* at 35).

In support of its *status quo* position, the Union makes the following arguments:

The District proposes substantial changes to the *status quo* language, yet fails to satisfy the burden placed on a party seeking such changes (*Brief* at 35). The District's proposal contains the following changes: (1) gives it the right to deny shift trades for operational reasons; (2) addresses situations involving Lieutenants who trade with Battalion Chiefs; (3) eliminates employees' ability to have five (5) non-paid-back duty trades at any one time; (4) eliminates the duty trade form found in Appendix D; (5) and includes extensive criteria regarding what happens in the event the person who agreed to work cannot fulfill the trade and/or secure a replacement. Notably, although the District's proposal includes deletion of Appendix D, the shift trade form, the District did not include in its proposal a separate and actual deletion of Appendix D. Thus, the District's proposal is fatally flawed. Furthermore, although the District offered several justifications for these changes, none of the justifications or evidence satisfies its burden of proof (*Brief* at 35-36).

The Union points out that in February and April, 2012, during two separate labor management meetings, the parties addressed an issue that had arisen with a shift trade for which approval had been delayed. During the February meeting, the parties agreed that the contract language would be followed and the District would track the five (5) non-paid-back shift trades. During the April meeting, the parties clarified their issues with respect to the meaning and application of the language regarding the five (5) non-paid-back duty trades. Thus, although the parties addressed isolated issues that arose with the language, they were able to quickly and easily resolve those issues. Then, in October, 2012, the Union filed a grievance over the denial of Firefighter Crawford's shift trade

request. In its response to the grievance, the District stated that Firefighter Crawford was not denied the ability to trade the particular shift, but rather, he was told he had to trade with another employee of comparable status and failed to exercise that option. The Union declined to pursue the grievance beyond Step 3. One grievance, that never proceeded past Step 3, fails to qualify as evidence that the system is broken, or that it creates a hardship for the District. This is the only documentary evidence that was presented in support of the District's proposal (*Brief* at 36).

According to the District, there was one instance wherein an employee could not find coverage for a trade, and one of the bargaining unit employees who had declined the request to trade later accepted it as overtime. However, the District failed to mention when this incident occurred or the circumstances surrounding how much later the overtime was accepted. In March, 2012, a bargaining-unit employee was injured the day before he was supposed to work a trade and, according to the District, no one stepped up to cover that trade and the District had to call someone in for overtime. The District also claimed that in 2013, there were three (3) instances of sick use on trades and six (6) instances of such in 2014. However, no evidence was presented to support this bald assertion and the District did not claim that overtime was incurred in these instances.

Finally, the District claimed there was a grievance filed over the denial of a shift trade that would have put the three (3) least senior employees on duty at the same time, however, no such grievance was presented as evidence and no assertion was made that the Union pursued the grievance to arbitration.

These justifications, assuming they occurred, are utterly inadequate to demonstrate that the system is broken and needs to be fixed. Further, these proffered issues demonstrate that the District has not experienced any operational hardship, and there is no evidence that the Union resisted efforts to address the problem at the bargaining table. Indeed, the so-called on the record proposals demonstrate the opposite. Although the handwriting is difficult to read, it appears that the Union's April 12, 2013, proposal indicates a willingness to clarify the shift-trade language. Later, the Union's May 9, 2013 proposal offers *status quo* on shift trades. Then, in its May 21, 2013 proposal, the Union offered to maintain the *status quo* except agreed to add bona fide reasons for denials of shift trades. Although the District claims the parties "spent a lot of time negotiating over issues surrounding shift trades" and that the Union's proposal "to maintain the *status quo* language has caused problems for the parties," the evidence demonstrates that the parties spent very little time or effort engaging in on the record negotiations concerning shift trades. The Union was willing to make one modification to the shift-trade language, however, the Union otherwise maintained its position on *status quo* language, and the District completely failed to present sufficient evidence justifying the need for a departure from the *status quo* and failed to demonstrate that any quid pro quo was offered in exchange for such changes. Notably, history dictates that any genuine issue concerning shift trades has been voluntarily worked out in Labor-Management meetings. This is where it should remain, the Union argues. There is no justification for the District's attempts to obtain such drastic changes (*Brief* at 37-38).

The Union further maintains that in addition to the fact that the District failed to satisfy its burden of making such drastic changes to the status quo, the comparables simply do not support the District's proposal (*Brief* at 38). Six (6) out of the seven (7) comparables have shift-trade or duty-trade language. Of those six (6), two (2) provide that shift trades cannot be unreasonably denied or withheld. None of these six (6) comparables have language that is remotely similar to the language the District is seeking to add in the fourth paragraph of Article 13, Section 13.8.

In summary, the Union argues that its proposal for the *status quo* is reasonable and reflects where the parties would have ended up if left to their own devices. The evidence demonstrates that, while the Union was willing to agree to a minor modification of the language, the Union was not willing to accept the drastic changes proposed by the District. Moreover, when the District has addressed a problem, the parties were able to work it out, as they should, in a Labor-Management Committee meeting as provided for in Article 9, Section 9.1 of the Agreement.

For all of the foregoing reasons, the Union asserts that its proposal should be adopted (*Brief* at 38-39).

3. Decision and Analysis

I see no infirmity in the District's position that it ought to be able to deny a shift trade for *bona fide* operational reasons. A decision to the contrary would turn on its ear the common-sense and rational view that operational reasons in a Department trump the individual preferences of Firefighters.

I also credit the Employer's argument that extensive criteria should be known regarding what happens in the event the person who agreed to work cannot fulfill the trade and/or secure a replacement. Clear and simple, the Administration has proffered language designed to address a pressing issue and current problems associated therewith – that of shift trades. The Union's belief that the Administration has fallen short in its burden is without merit, and I so hold. I do not see the Union's *status quo* solution as operationally viable, given the arguments regarding past cases advanced by the Administration. Any comparability argument made by the Union (*Brief* at 38) will, like its position on health insurance costs, take a back seat to rationality and problem solving. Bottom line: If a shift trade is supposed to be a convenience between the employees, it should not cause overtime to the District. I credit the Employer's argument that it is simply looking for some protection in the shift trade sections to address some of the issues that Management experienced during the life of the parties' collective bargaining agreement (R. 48). Finally, I also find significant and reasonable that if a person who agreed to work cannot fulfill the trade due to health, death, retirement and termination, and there is more than 72 hours until the start of the trade, it should be cancelled as

Management's discretion, and it is the responsibility of the original-assigned employee to find coverage (R. 48). It is a shared responsibility approach (R. 49).⁷

For the above reasons, the Administration's position on Shift Trades is awarded.

C. District Issue No. 3, Article 15, Section 15.3 (Vacation and Holiday Selection)

The current language on Vacation and Holiday Selection reads as follows:

Section 15.3. Vacation and Holiday Selection. The vacation/holiday selection process shall begin on November 1st of the calendar year previous to the year for which vacation and holiday time is being selected. An employee who begins working on a 24-hour shift after November 1st shall select such leave to which he is entitled from the open days on the schedule. Vacation will be chosen based first on rank and then by length of continuous service time in that rank on the department. Vacation selections will happen in the first round. Any vacation not taken in the first round may be taken as holiday time in the third round. After every member of the shift has picked their vacation time in the first round, the calendar will return to the Battalion Chief for the start of second round, during which holiday selections are made based first on rank and then by length of continuous service time in that rank on the department. After the second round of selections is complete, the calendar will return to the Battalion Chief for the third and final round of selections. In the third round, individuals will select for remaining not used holiday or vacation days. In making the selection, the member will be allowed to split one holiday into segments not less than 8 hrs. All vacation and holiday selections must be completed by the third round of picks: an employee shall forfeit the ability to advance schedule any days not selected by the end of the third round.

After the vacation/holiday calendar is established, employees may schedule any additional vacation or holiday time on a first come, first served basis. If multiple requests are received on the same day, seniority shall be used as the tie breaker and the more senior employee shall receive the day off if multiple requests cannot be accommodated by the schedule. These additional selections must be submitted in writing to the Battalion Chief.

Three (3) members of the shift, including Battalion Chief, will be permitted to be on vacation, compensatory time, or holiday leave at one time. At no time will there be more than one officer on vacation, comp time, or holiday leave. If there are more vacation/holiday days to be selected than slots available in the foregoing

⁷ To this same end, in the event that the responsible person does not secure the replacement, whether it is the individual who is originally assigned or it is the individual who agreed to work the shift, if they do not find a replacement, the Administration will deduct one and one-half hours of paid time off for the coverage hours that were required in overtime by the Administration (R. 49-50).

selection procedure, then to the extent necessary to accommodate vacation/holiday selection and as determined by the Fire Chief, more than three employees (or two employees and an officer) may, on a seniority basis by shift, select the same day off.

Once an employee has received notice that it is his turn to select days, he or she shall make such selection before 1800 hours on his duty shift day following such notice if not sooner, or else he or she shall forfeit the selection for that round. Employees will receive notice of their turn to select while on duty. The selection clock will begin when they return to shift. If failure to timely select days occurs in the second round of picks, the employee involved shall not select his or her days until all other employees on the shift have selected.

An exception to the above forfeiture of selection provision will be made if the employee is off on holiday, vacation, sick leave or workers' comp. Reasonable efforts will be made to contact that employee and let him know it is his turn for vacation or holiday selection. The employee will be given reasonable additional time if contact is made in order to make their selections using the online vacation/holiday calendar. If no contact is made a message will be left for the employee to contact the shift officer in order to receive notice.

(UX1, Tab 9 at 27-28).

1. Position of the Administration

The Administration proposes the following language:

Section 15.3. Vacation and Holiday Selection.

The vacation/holiday selection process shall begin on November 1st of the calendar year previous to the year for which vacation and holiday time is being selected. An employee who begins working on a 24-hour shift after November 1st shall select such leave to which he is entitled from the open days on the schedule. Vacation will be chosen based first on rank and then by length of continuous service time in that rank on the department. Vacation selections will happen in the first round. Any vacation not taken in the first round may be taken as holiday time in the third round. After every member of the shift has picked their vacation time in the first round, the calendar will return to the Battalion Chief for the start of second round, during which holiday selections are made based first on rank and then by length of continuous service time in that rank on the department. After the second round of selections is complete, the calendar will return to the Battalion Chief for the third and final round of selections. In the third round, individuals will select for remaining not used holiday or vacation days. In making the selection, the member will be allowed to split one holiday into segments not less than 8 hrs. ~~All vacation and holiday selections must be~~

~~completed by the third round of picks: an employee shall forfeit the ability to advance schedule any days not selected by the end of the third round.~~

All vacation and holiday selections must be scheduled and taken by the end of the calendar year.

After the vacation/holiday calendar is established, employees may schedule any additional vacation or holiday time on a first come, first served basis. If multiple requests for an available shift are received on the same day, seniority shall be used as the tie breaker and the more senior employee shall receive the day off if multiple requests cannot be accommodated by the schedule. These additional selections must be submitted in writing to the Battalion Chief. Further, should a previously scheduled vacation or holiday day off become available, it shall be offered on a first come first served basis. **The shift Lieutenant, or Executive Board member or steward shall ensure of notification to all members of the dropped and now open day.** If multiple requests for an available shift are received on the same day, seniority shall be used as the tie breaker and the more senior employee shall receive the day off if multiple requests cannot be accommodated by the schedule. These additional selections must be submitted in writing to the Battalion Chief.

When a member is off due to an on duty injury or illness, any previously scheduled vacations and holidays held by this member are not eligible for selection by other members.

~~Three~~ Except as otherwise provided in this Agreement, three (3) members of the shift, including Battalion Chief, will be permitted to be on vacation, compensatory time, or holiday leave at one time. At no time will there be more than one officer on vacation, comp time, or holiday leave. If there are more vacation/holiday days to be selected than slots available in the foregoing selection procedure, then to the extent necessary to accommodate vacation/holiday selection and as determined by the Fire Chief, more than three employees (or two employees and an officer) may, on a seniority basis by shift, select the same day off.

Once an employee has received notice that it is his turn to select days, he or she shall make such selection before 1800 hours on his duty shift day following such notice if not sooner, or else he or she shall forfeit the selection for that round. Employees will receive notice of their turn to select while on duty. The selection clock will begin when they return to shift. If failure to timely select days occurs in the second round of picks, the employee involved shall not select his or her days until all other employees on the shift have selected.

An exception to the above forfeiture of selection provision will be made if the employee is off on holiday, vacation, sick leave or workers' comp. Reasonable efforts will be made to contact that employee and let him know it is his turn for vacation or holiday selection. The employee will be given reasonable additional

time if contact is made in order to make their selections using the online vacation/holiday calendar. If no contact is made a message will be left for the employee to contact the shift officer in order to receive notice. Battalion Chiefs can defer to the Bargaining Unit to contact a member, and enforce a schedule, starting with the Shift Steward, then an Executive Board Member.

(UX 1, Tab 21).

* * * *

In support of its proposal, the Administration advances the following arguments:

Management submits that the Arbitrator is asked by the Union to preserve the *status quo* even though in negotiations both sides sought to change the language to resolve known problems. The Employer's final offer contains a Union-sought change to eliminate the requirement that employees preselect all vacation by the end of the three-round-selection process. The Employer's final offer includes a modification allowing employees to schedule vacation not pre-selected on a first-come, first-served basis with ties broken by seniority (R. 56-57).

In addition, the Employer's proposal eliminates a major concern of the District. Current language and practice allows vacation slots to open up and be taken by other employees whenever an employee is injured or becomes ill due to an on-duty event. For example, in May 2013, Firefighter Sean Wilson was injured and remained off of work for eight months. During the vacation selection process he scheduled vacation time for all ten of his July 2013 work days. Once his injury was known to cause him to be off work during these previously selected vacation days, other employees were able to take vacation time on the missed shifts even though it cost the District over \$16,000 in overtime and forced other employees to work the shifts. **According to the Administration, no comparable district's collective bargaining agreement allows vacation slots to open up due to work-related injuries or illnesses (EX 11).**

The District has demonstrated the current contract's language needs to be changed in order to address an issue. The Union's proposed *status quo* is unacceptable due in part to its failure to address a problem the parties jointly recognize as one which should be remedied.

For the above reasons the Employer's final offer should be awarded.

2. Position of the Union

Once again the Union proposes to maintain the *status quo*.

(UX 1, Tab 20; *Brief* at 41).

In support of its *status quo* position, the Union advances the following arguments:

The District began its presentation on this proposal by claiming that the “first change was one that the Union sought that changed the vacation and holiday selections (sic) must be completed by a third round of picks.” (R. 56). The Union’s so-called on the record mediation proposal of May 21, 2013 provides that Kelly days be picked first, vacation days second and holidays third. In an undated proposal labeled as a “clarification,” the Union proposed to strikethrough the language providing for three (3) rounds of picks. However, the District presented no evidence as to the date of this proposal, so there is nothing to indicate if it was submitted before or after the May 21, 2013 proposal. Regardless of whether the Union sought this change, the District cannot escape the fact that its proposal is confusing and contains a very significant change to the *status quo* (*Brief* at 42).

The *status quo* language already addresses instances in which multiple requests are received for days scheduled after the initial selections are made, with requests being granted on a first come, first served basis, or by seniority in the event multiple requests are received and cannot be accommodated.

The Agreement already limits the number of employees who can be scheduled off at one time, and when a member is off due to an on duty injury or illness, those days become available on the calendar for selection by others. Inexplicably, the District proposes to add language to the second paragraph in order to address previously scheduled days that become available, and uses the exact same procedure already in place for scheduling available slots. The second paragraph of Article 15, Section 15.3 clearly addresses all situations for which there is any amount of open slots available, regardless of the reason. There is simply no need to re-state the procedure that will be used for days that are available that had been previously unavailable. Indeed, the District offered no evidence demonstrating that there was any confusion about this process or problem with the current procedure. The District’s proposal also provides language addressing how members will be notified, but the District failed to demonstrate that the current notification system is broken or causes the District a hardship.

To further add to the confusion of the District’s proposal, the Administration is also proposing to “change past practice” pertaining to days that become available because a member who had previously scheduled days is off on a duty-related injury or illness. The District represented that the reason for proposing additional language to paragraph two was to address situations involving previously scheduled days that become available because of injury, disability or retirement. Yet, the District is also proposing to eliminate the current practice of allowing such days to become eligible for selection by other employees. Moreover, “[J]ust because a system is costly does not mean that the system is broken and must be changed by an interest arbitrator in this very conservative process.” *Village of Oak Lawn and Oak Lawn Professional Firefighters Association, Local 3405, IAFF*, ILRB Case No. S-MA-13-033 (Benn, 2014) at 60. This is especially true when, as in the instant case, proof that the system is broken is limited to a single isolated example. Thus, the fact that a negotiated provision costs the District money is insufficient to justify

departure from the *status quo* language, especially when the evidence demonstrates that the District's proposal is both confusing and a significant departure from the *status quo*. Simply stated, the evidence presented by the District falls short of its burden of proof (*Brief* at 43-44).

Addressing the comparables, the Union maintains that none of the comparable contracts contain any language prohibiting previously-scheduled days that become available due to an on-duty injury or illness from becoming open and available for selection. Furthermore, the bargaining history between the parties demonstrates that the Union was not willing to agree to such a provision, as the Union actually proposed to add language that reflected the *status quo* past practice (*Brief* at 44).

For the above reasons, the Union argues the District's proposal should be rejected in favor of maintaining the status quo language and the corresponding past practice.

3. Decision and Analysis

I find Management satisfied its burden of demonstrating that the current language is deficient and its proposals are reasonably designed to rectify the problems.

The Administration's proposal is awarded.

D. District Issue No. 9, Article 17, Section 17.6 (Light Duty)

The current contractual provision reads as follows:

Section 17.6. Light Duty. A Return to Work form will be completed by the attending physician that outlines the follow-up treatment required for the particular injury and any work restrictions. This form must be returned to the Fire Chief.

The Fire Chief in his sole discretion will determine if the employee will be assigned to restricted duty (which may also be referred to as light duty). An individual who has been injured on the job and who has been certified by his or her physician as being medically fit for return to work on a limited basis shall report to the Fire Chief or designee. The Fire Chief may decline to offer a restricted duty assignment, or may provide a restricted duty assignment commensurate with District needs and the employee's medical limitations per the physician's certification. An employee serving in a medically-limited restricted duty assignment shall work on a shift prescribed by the Fire Chief commensurate with District needs and the employee's medical limitations per the physician's certification. Nothing in this policy is to be construed as establishing any form of permanent or continuing restricted duty program for the District. Individuals will be eligible for restricted duty assignments only during periods of

recuperation from on- duty injuries and only if medically certified to perform such restricted duty.

(UX 1, Tab 9 at 34).

1. Position of the Administration

The Administration proposes the following provision:

Section 17.6. Light Duty

Permanent restricted duty assignments shall not be made. Any restricted duty assignment that is required due to an employee's inability to perform the duties required of their position shall be limited to no more than the equivalent of one calendar year from the date of incapacity. The District is not under any obligation to provide restricted duty assignments for employees who have non-duty related injuries or illnesses.

A Return to Work Form will be completed by the attending physician. The form shall that outlines the projected length of disability, specific work restrictions, physical limitations, date of the next appointment and the follow-up treatment required for the particular injury, and any work restrictions. It is the employee's responsibility to return this form must be returned directly to the Fire Chief.

The Fire Chief in his sole discretion will determine if the employee will be assigned to restricted duty (which may also be referred to as light duty) provided a physician clears the employee to perform such work. The District reserves the right to require an employee be examined by a District designated physician, at the District's cost, to determine whether the employee is able to perform the limited duty assignment pursuant to Section 16.1(F).

The Fire Chief may decline to offer a restricted duty assignment, or may provide a restricted duty assignment commensurate with District needs and the employee's medical limitations. An employee serving in a restricted duty assignment shall work on a shift prescribed by the Fire Chief commensurate with District needs and the employee's medical limitations. Nothing in this policy is to be construed as establishing any form of permanent or continuing restricted duty program for the District. Individuals will be eligible for restricted duty assignments only during periods of recuperation from on-duty injuries and only if medically certified to perform such restricted duty.

It shall be the employee's responsibility to provide weekly medical status updates directly to the Fire Chief. Additionally, the employee shall provide the Fire Chief with the Department's Return to Work Form completed after each injury related evaluation or physician's visit. The Return to Work Form is the only form that

will be accepted and shall contain all the items previously described in this Section.

If an employee is not medically released for a restricted duty assignment, the physician shall outline the specific limitations preventing the restricted duty assignment on the department Return to Work Form. During the time that the employee is unable to perform any restricted duty assignment, if not hospitalized, the employee shall convalesce and shall not work or be employed in any other capacity per state statute or engage in activities that are not consistent with the employee's convalescence or the physician restrictions resulting from the condition causing the disability. The employee shall not engage in any activity which could impede the recuperative process.

When an employee is assigned to perform a restricted duty assignment under this Section, the employee's schedule will become a 40-hour work schedule. Restricted duty will not be permitted before 7 A.M. or after 5 P.M. and shall not be assigned on Saturdays, Sundays, or any District holidays, unless agreed to by the employee.

As reasonably approved by the Fire Chief, an employee may use vacation or other appropriate accrued benefit leave while on restricted duty. Upon assignment to restricted duty, all previously scheduled approved leave will not be released as an open slot for other employees on the leave calendar and will remain as a place holder on the leave calendar which will count towards the maximum allowable employees off as outlined in Article 15. Such approval shall be contingent upon the needs of the District and the leave not interfering with the employee's recuperation.

(UX 1, Tab 21).

* * * *

In support of its proposal the Administration advances the following arguments:

This section illustrates the Union's unwillingness to address real issues in an appropriate and responsible manner. After nine (9) grievances this is truly the most contentious issue between the parties. It is also the one which is most in need of the Arbitrator's input. Yet the Union withdrew its final offer and at the hearing claimed the Arbitrator had to accept the current contract language because it had labeled the issue a Union issue. Indeed, the Union steadfastly has demanded the contract be changed to provide light duty to be scheduled on the employee's normal 24/48 work shift.

Contrary to the Union's attorney's assertion that before 2011 there had been no light duty, the District has a long-standing policy and practice of light duty. Indeed, between 2010 and 2014 several light duty assignments were made; all were assigned to days and 40-hour work weeks (EX 12). Since at least 1989 employees on light duty have

been assigned to 40 hour work weeks (R. 67; EX 12, Ordinance 89-O-146). In 2001 the District updated its Policy Manual and Section 4.11 on page 105 of the manual provides that light-duty work schedule shall be on a Monday through Friday, 8:00 a.m. to 4:00 p.m. schedule.

The current collective bargaining agreement (UX 1, Tab 9) provides in Section 13.2 “The normal work day for employees assigned to 24-hour shifts shall be 24 hours and 7 minutes of work (one shift)...” This section also states, “The District reserves the right to establish positions with different work shifts and work schedules.” The current light-duty provision definitively states: “The Fire Chief in his sole discretion will determine if the employee will be assigned to restricted duty... An employee serving in a medically-limited restricted duty assignment shall work on a shift prescribed by the Fire Chief...”

Management submits that despite the clear language of the contract, nine (9) grievances have been filed since the parties entered into the current Agreement. Until current counsel started representing the Union, the grievances were not pursued to arbitration. Instead, the Union asserted it would address the issues during successor contract negotiations.

Initially, the District proposed *status quo* because its consistent position has been that the current contract does not provide for light duty on the 24-48 shift schedule sought by the Union. The District flatly refused to accept light duty be on a 24-48 schedule. No comparable district has 24-48 light duty (EX 13). Ironically, and telling, the Union has not grieved the District’s assignment of employees to 40-hour work weeks in other situations. It did not grieve the assignment of Firefighter McCarthy to light duty on a 40-hour work week. Other employees have been assigned 40-hour work shifts without incident for training and education purposes.

The Administration’s light-duty proposal addresses some concerns experienced with the current contract’s language. It expressly provides one week’s notice to the employee before initiating a 40-hour schedule and allows flexibility for the Fire Chief and employee to agree to the actual work hours given the medical restrictions and employee’s personal situation. Moreover, there have been problems with employees manipulating a light-duty assignment by having their doctors include revised work releases that interfere with reasonable scheduling.

The Union urges the Arbitrator to maintain the *status quo* and allow another arbitrator to determine if the current contract allows for light-duty work assignments. However, the issues experienced during the life of the current contract are not limited to the work hours. The District’s final offer seeks to resolve multiple issues that have arisen in the past four years. Further, the Union consistently expressed a desire to have this section modified rather than pursue the schedule issue to arbitration. It is inappropriate to now refuse to negotiate the issue on advice of new counsel who prefers to litigate rather than negotiate. That tactic should not be rewarded. The parties have clearly desired to

have the issues over light duty resolved through successor contract negotiations and impose resolution procedures.

For the above reasons, it is respectfully requested that the Arbitrator not leave the parties to the *status quo* and award the District's final offer on light duty.

2. Position of the Union

The Union proposes to again maintain the *status quo*.

(UX 1, Tab 22; *Brief* at 46).

In support of its proposal, the Union advances the following arguments:

Although initially identified as a Union issue, the Union subsequently withdrew its light-duty proposal in favor of the *status quo*. Over the Union's objection, the District was allowed to proceed on this issue as its own issue, and the District, therefore, has the burden of proving that its proposal should be adopted.

According to the Union, the Administration's proposal is fundamentally flawed because it seeks numerous and significant changes to the *status quo*. The District was simply unable to provide evidence demonstrating that the system is broken, that the *status quo* language results in a hardship, or that it offered a *quid pro quo*.

The crux of the dispute between the parties regarding light duty is whether the District has the right to assign light duty based on a forty-hour work week. The District relies upon Ordinance No. 89-0-146 in support of its contention that light duty assignments have always been based on a forty-hour work week. Notably, this unilaterally adopted Ordinance took effect in 1989, long before this bargaining unit was certified by the Board in 2008. The District also relies upon its Policy Manual, which was unilaterally adopted in 2001. Thus, it is inappropriate for the District to rely upon these documents because they pre-date the Agreement by almost twenty (20) years and ten (10) years, respectively. Article 15 of the Act explicitly provides that, in the event of a conflict between the Act and any other law, executive order or administrative regulation concerning wages, hours and terms and conditions of employment, the Act takes precedence. 5 ILCS 315/15. Further, Article 4 (Management Rights), Section 4.3 (Entire Agreement) clearly and unequivocally cancels and supersedes all prior practices and agreements unless expressly stated in the Agreement. Simply stated, there is no language in the Agreement demonstrating that the parties agreed to allow the District to continue to assign employees to light duty based on a forty-hour work week, and the Act takes precedence over the Ordinance (*Brief* at 47).

The District also relies upon the fact that nine (9) grievances were filed during the life of the Agreement challenging the District's conduct of assigning employees to a forty-hour light-duty schedule. However, the District acknowledged that the Union has

maintained during the life of the Agreement, and throughout negotiations for the successor agreement, that light duty schedules must be based on a 24/48 work schedule. Accordingly, it is clear that the system is not broken. Rather, the parties have different interpretations of the existing language. Thus, the resolution of this issue is for grievance, not interest arbitration. In fact, the District admitted that there are currently two grievances pending arbitration on the issue of light duty, and that one is scheduled to be heard on February 11, 2015, while the other has not yet been scheduled for hearing.

Importantly, the evidence demonstrates that the parties have consistently disputed whether the *status quo* contractual language gives the District the right to assign employees to a non-24 hour shift. Shortly after the Agreement was signed, a dispute arose regarding the assignment of employees to 12-hour shifts in conjunction with shift transfers. The parties resolved the issue by entering into a Variance Agreement that allowed the District to vary the terms of Article 13, Section 13.2 providing for 24 hour shifts by assigning bargaining-unit employees to 12 hour shifts in order to effectuate a shift transfer. The Union points out that with regard to light duty assignments, prior to Chief Kazian's appointment, one individual was placed on light duty resulting from an on duty injury in 2010. It was not until after Chief Kazian was appointed, in December 2011, that there were any substantial light duty assignments. Even then, there was only one (1) light-duty assignment resulting from an on-duty injury in 2012. However, in 2013 and 2014, the Chief made five (5) light-duty assignments and (2) light-duty assignments, respectively. In total, there have been nine (9) light-duty assignments for on-duty injuries, and grievances were filed over each of these light duty assignments. The Union's position has remained consistent that under the current contract language, the District does not have the right to make light-duty assignments based on a forty (40) hour work week.

All of the documentation regarding this issue demonstrates that the parties have a dispute as to the meaning of the existing contract language. The Union is seeking to maintain the *status quo* language, whereas the District is seeking substantial changes to the existing language in an attempt to both remedy the current dispute between the parties and gain additional significant changes to the existing language. However, before contractual rights can be modified, an interest arbitrator must understand what those rights entail. It is not the role of an interest arbitrator to interpret the parties' existing language, as that is the role of a grievance arbitrator. Rather, the role of the interest arbitrator is to determine where the parties would have ended up had they been left to their own devices. Thus, it is the Union's position that this cannot be resolved through interest arbitration, as the parties' grievance procedure is the appropriate method for resolution of this dispute (*Brief* at 47-49).

Addressing bargaining history (*Brief* at 49), the only on-the-record proposals submitted by the parties demonstrate they were nowhere near agreeing to the language contained in the District's proposal. The Union's April 12, 2013 proposal includes light duty and is consistent with the Union's position of a 24/48 light duty schedule. Notably, both the Union's and the District's May 9, 2013 proposals provide for *status quo* on light duty. On May 21, 2013, the Union's proposal listed light duty as being on hold, whereas

the District's May 21, 2013 proposal was for *status quo*, except to change the Section heading to Restricted Duty. Finally, in an undated proposal, the Union proposed language that would allow employees to choose between a forty (40) hour schedule and a 24/48 schedule and that would also allow for light duty for off-duty injuries. Thus, the District's only on-the-record proposals with regard to light duty were to maintain the *status quo*, while the Union's only on-the-record proposals included a 24/48 hour schedule. Clearly, the District was willing to maintain the *status quo* just as the Union has proposed.

The District's proposal, therefore, is also regressive, as it is a drastic departure from the position it took on the record and contains far more restrictions and requirements than previously proposed. The first paragraph of the District's proposal is primarily repetitive, as it contains language that is already included at the end of paragraph 2 of the Agreement, except that it limits light-duty assignments to one calendar year from the date of incapacity. The second paragraph of the District's proposal requires employees to submit very specific information about their disability, restrictions and required follow-up treatment. The Union points out that the District provided absolutely no explanation for this change, other than to state that the "Return to Work Form has been an issue in that it needs to be the employee's responsibility to return the form directly to the Chief." The status quo language provides that the form must be returned to the Fire Chief, and the District failed to provide any explanation as to how or when this was a problem. Moreover, the District offered only meager justification as to why it needs the specific information outlined in this paragraph, claiming that it wants one form to ensure both consistency and that a sufficient amount of information is provided. Yet, the District failed to provide any evidence demonstrating that the forms received were somehow inconsistent or failed to contain a sufficient amount of information. Requiring an employee to provide information detailing follow-up treatment is overly intrusive and unnecessary, especially in light of the fact that the District is also proposing the right to receive weekly medical status updates and a completed Return to Work form after each injury related evaluation or physician visit.

The most significant change would be that the proposal allows the District to require employees to be examined by a District physician to determine whether the employee is able to perform light duty. The *status quo* language explicitly provides that an "individual who has been injured on the job and who has been certified by *his or her physician* as being medically fit for return to work on a limited basis shall report to the Fire Chief or designee." The District claims that "Section 16.1(F) gives the District the right under any circumstance to send employees out to a fitness for duty evaluation." This argument is insincere at best. Article 16.1 addresses sick leave and provides for a specific procedure regarding fitness for duty determinations. Article 17.6 clearly and unequivocally provides that it is the employee's physician who determines whether they are cleared for light duty (*Brief* at 51).

In support of its attempt to secure such drastic changes to the *status quo*, the District claims that some attending physicians have been reluctant to release employees to light duty until they are released to full duty. The District provided a mere two

examples (Wilson & Schmid) where they believed the employees' doctors were "manipulating" the system. Furthermore, these two examples of alleged abuse on the part of the employees' physicians fail to demonstrate that the language is broken or that the District suffered a hardship. If anything, the evidence demonstrates that it is the bargaining-unit employees that suffer a hardship. Many firefighters have spouses who work, and those firefighters often handle childcare duties when they are not on duty. It is incredibly disruptive to firefighters' lives when they sustain an on-duty injury and are then required to work a forty (40) hour work week, as this impacts child care and their spouses' work schedules. In the case at bar, of the thirty (30) total spouses of bargaining-unit employees, twenty-two (22) work, and there are fifty-eight (58) school-aged children or younger amongst these bargaining unit employees. The District offered absolutely no evidence of hardship.

Finally, the District argued that the Union's former counsel agreed to the one year limitation on light-duty assignments, and that the comparables support the District's position. First, the alleged agreement on the part of Dale Berry was made in his capacity as counsel for the Elburn Professional Fire Fighter's Association, Local 4749, which is irrelevant and not a comparable community. Secondly, there is no evidence that such an agreement was reached with respect to these parties, and Mr. Berry is no longer counsel to the Union. Third, there is no evidence that a question concerning whether light duty assignments are, or should be, permanent has ever been addressed between these two parties. Lastly, although none of the comparables contain language providing for a 24/48 light-duty schedule, none of them contain any of the language the District is seeking to add.

For all of the above reasons, the Union's proposal to maintain the *status quo* language is reasonable and satisfies the statutory requirements. The District offered no quid pro quo in exchange for these substantial alterations to the status quo, and the evidence demonstrates that the Union was never willing to give up the *status quo* right to have the employee's own physician determine whether the individual is fit to work restricted duty. The District's proposal does not reflect where the parties would have ended up if left to their own devices. Indeed, the evidence demonstrates that the only on the record proposals made by the District on the issue of light duty were to maintain the status quo. Maintaining the *status quo* language will place the parties where they would have been if left to their own devices, and allow the parties to resolve their dispute through the appropriate contractually-agreed-to grievance mechanism (*Brief* at 53-54).

3. Decision and Analysis

This is, perhaps, the most contentious issue submitted. According to Management: "This was the No. 1 issue that we've dealt with." (R. 68). The issue whether the Administration has the right to assign a 24/48 employee to a 40-hour light-duty assignment leads the way. Also significant is the issue whether the Administration can send a Firefighter to its physician for a determination whether the employee is medically fit for light duty, as opposed to the employee's doctor.

Significantly, at the hearing the Union attempted to withdraw the proposal while asserting that the District was precluded from seeking changes because it has been labeled a so-called “Union issue.” The undersigned neutral ruled that both parties had submitted final offers seeking changes and, therefore, the issue was open for resolution.⁸ The Union was given the opportunity to revive its final offer, but declined to do so (R. 66)(“The Union does not intend to revive its final offer. The Union’s position is it’s *status quo*, it’s withdrawn, and reserves its rights hereinafter with respect to it.”).

The District’s proposal (1) requires the use of a standard form; (2) requires the forms to be submitted to the Chief for consistency; and (3) makes it clear that the District’s right to have an employee’s fitness for duty reviewed by a medical professional at the Employer’s selection and expense is applicable to light-duty situations. Also, (4) light duty assignments are 40-hour assignments (since 1989, if not earlier)(R. 67). Moreover, (5) the District’s proposal continues the practice of allowing employees on light duty to take previously-scheduled vacations if desired by the employee, or to take time off for vacation or other leave even if not previously scheduled. Finally, (6) the Administration’s proposal makes it clear that they will not have permanent light-duty assignments, a rational proposal to be sure (R. 72).

I can take judicial notice of all things known to reasonable people. Light-duty assignments are routinely made that involve 24/48 employees working a 40-hour shift, which makes absolute sense given the nature of a Firefighter’s work. “Desk jobs” (AKA, “light-duty” jobs) are generally are *not* 24/48 jobs but, rather, 40-hour jobs, like filing or answering the phone or cooking for the firehouse (light-duty assignments, to be sure). Clear and simple, in many districts it is a given that light-duty assignments are, with rare exceptions, 40-hour assignments. **To place Firefighters on a 24/48 light-duty assignment when they cannot perform the emergency response function required of Firefighters simply does not make sense whatsoever (R. 68).** A silent contract will favor the Administration’s position that a light-duty schedule of 40-hours (or less) can be implemented when regular Firefighters work a 24/48 shift. As the parties know, Management does not look to a contract to ascertain what it can do. It looks to the collective bargaining agreement to see what it cannot do. The District’s attempt to remedy this situation by proposing measured language that will clean up holes in the contract is understandable.

Also, I agree with the Administration’s position that light-duty should be limited *to a definite period*, in this case one year. As correctly noted by District Counsel:

If you cannot perform the duties required of the position, the maximum time period we would allow it to be on light duty is one year. **This is to address a**

⁸ Both parties exchanged final offers that included Section 17.6, light duty changes (R. 63).

By Mr. Ottosen: “The final offer is a final offer. This issue was identified as an issue of the parties. It’s been extensively negotiated, and to now say, oh, this is an Employer issue versus a Union issue is false. It’s been a party issue from day one. Both sides have proposals on it.” (R. 59).

The fact that at one time the Union identified light duty as a “Union issue” goes only to who has the burden of proof, not to whether the Administration has a proposal on the issue (R. 60). Management did not “add” light duty as an issue contrary to the mandates of the parties’ ground rules, as argued by the Union (R. 61).

situation that our firm has handled in other jurisdictions where somebody has claimed that they have to be allowed to continue on in a light-duty position, they had a debilitating disease that was going to get worse and worse, and there was no way they could perform the essential functions of the job, but they had assigned them into the bureau for several years. And Dale Berry agreed with us, we can't have it permanent. Because he was also involved in that case in Elburn. And so the Union was in agreement at some point to restrict these things so light-duty assignments could not become permanent. (R. 72-73; emphasis in bold mine).

To this end the Union argues that "it is not the role of an interest arbitrator to interpret the parties' existing language, as that is the role of a grievance arbitrator. Rather, the role of the interest arbitrator is to determine where the parties would have ended up had they been left to their own devices. Thus, it is the Union's position that this cannot be resolved through interest arbitration, as the parties' grievance procedure is the appropriate method of this dispute." (*Brief for the Union* at 49). Interest arbitrators indeed attempt to place the parties where they would normally be given they are left to their devices. At the same time, they frequently determine what current language provides and size that interpretation up against a party's final offer to change the language. Indeed, many times the parties do not agree on what the current language permits, hence resort to arbitration. Bottom line: It is within an interest arbitrator's authority to interpret current language in assessing the utility of a party's final offer.

I believe the Union is wrong on both major issues regarding light-duty assignments (i.e., whether the Administration can send a Firefighter to *its* doctor and whether the District can assign light duty on a 40-hour basis),⁹ although its position is defensible if based on contractual language and/or past practice, both absent here. At the same time this matter has been back and forth many times with both parties falling back on a *status quo* proposal (See, *Brief for the Union* at 49-50)("Thus, the District's only on-the-record proposals with regard to light duty were to maintain the *status quo*, while the Union's only on-the-record proposals included a 24/48 schedule. Clearly, the District was willing to maintain the *status quo* just as the Union has proposed." *Id.* at 50, quoting Union Counsel). Again, nine grievances (a significant number) have been filed on the issue of light-duty assignments, with two grievances (Kulikauskas & Bergles) headed for

⁹ Asserting that Management does not have the right to send an employee to a its physician any time there is reason to believe that the employee cannot perform the essential functions of the job is completely contrary to black letter law in this area. See, Hill & Sinicropi, *Management Rights: A Legal and Arbitral Analysis* 166 (BNA Books, 1986)(discussing physical examinations, and concluding that there is no serious dispute that absent contractual language, Management has the right to send an employee to a physician as a condition of initial or continued employment). Management assumes tort liability with respect to the injuries caused by its workforce, and to conclude that Management cannot ensure the physical capability of its employees is rarely questioned among advocates. *Id.* at 166. As declared by Hill & Sinicropi: ". . . but where the Agreement is silent, labor arbitrators have ruled that the right is held by management as either a residual management prerogative or as an adjunct to the right to ensure the overall safety of the work force." *Id.* at 166-167. When there is disagreement between the employee's doctor and the Employer's physician, common practice is to agree to submit the matter to a neutral physician if the dispute involves one of medical fact, as opposed to medical opinion. See, Hill & Sinicropi, *Evidence in Arbitration* (BNA Books, 1991)(2d edition)(discussing the difference between medical facts and medical opinions).

Aside from black letter law, Section 16.1(F) and 17.6 of the collective bargaining agreement, as well as Section 4.1 (Management Rights) would favor the District's position.

arbitration (R. 67-68). A class-action grievance appears in the works (EX 12). The problems as seen by the Union, including (1) the issue of what kinds of information may be mandated from an injured Firefighter, and (2) whether grievance or interest arbitration is the appropriate forum for resolving this matter, are minor. **Management has carried the day in demonstrating that it has reasonably addressed the issues that have been pressing the District the last several years.** Also, I find that the Administration's final offer is consistent with the parties' past practice,¹⁰ including local ordinances (89-0-146; EX 12) and its Policy Manual (that included light-duty assignments; EX 12).¹¹ The fact the ordinance and Policy Manual existed prior to bargaining (as the Union points out) is not dispositive of the issue of documents supporting the past practice. Finally, I find that the bench-mark jurisdictions (i.e., the "comparables") support the Administration's position.¹² On all accounts the District makes the better case.

For the above reasons the District's final offer is awarded.

E. District Issue No. 4, Article 18, Section 18.4 (Compensatory Time)

The current language reads as follows:

¹⁰ The District cites instances where Deerfield Firefighters have been given a light-duty 40-hour assignment that has not been grieved. Clearly, the evidence record indicates that the Administration has assigned employees to a 40-hour workweek when the so-called normal work shift is 24/48. (R. 71-71). Although there may be numerous explanations why a Union will elect not to file a grievance, apparently the Union has not challenged every instance where the Administration makes a 40-hour light duty assignment. I agree with Counsel's assessment: "Our proposal is more addressing the issues that have been raised over the last several years and keeping in line with the current practice of the Chief." (R. 74).

¹¹ Normally I would just remand such a contentious issue to the parties for bargaining, which would be the easy way out of this morass.

The problem here is that this issue has been lingering for years *with no apparent accord*. I just don't see the Union coming off its unreasonable position that Management is without authority to send a Firefighter to a doctor of its choosing and its belief that the contract prohibits a light-duty assignment other than a 24/48 shift assignment. As explained in the opinion, both of the Union's positions are completely untenable and unsupportable in the reported cases. In the words of District Counsel: "To insist *status quo* is the appropriate method of proceeding forward clearly does not take care of an issue that we have had." (R. 68). The award should finally move the parties potentially to a compromise resolution.

¹² I have read through each of the contractual provisions of the bench-mark jurisdictions provided by the District (EX 13). Addison provides for light duty "based upon the District physician's approval." Their collective bargaining agreement also notes that light duty "is a temporary placement of an employee at the sole discretion of the District physician for a person placed on limited work restriction due to a work related injury or illness." Bartlett provides for light duty (temporary) based on a 40-hour work assignment, normally Monday through Friday. Bloomingtondale's collective bargaining agreement provides for light duty as a temporary assignment at the sole discretion of the BFPD#1 "for a person placed on limited work restriction due to a work related injury or illness." Their collective bargaining agreement is silent on the issue of a physician and whether light duty can be assigned on a 40-hour basis. Lincolnshire's collective bargaining agreement, while providing for light duty, contains a provision where "the District reserves the right, at its expense, to send the employee to an additional physician for a second opinion." Length of time on light duty is limited to six months per incident, "except the time may be extended upon the mutual agreement of the employee and the Chief or his designee." Significantly, light duty is provided on a 40-hour work week schedule. Pleasantview devotes one short paragraph to light duty with little spelled out that is relevant to this case., although there is a provision providing that the District may require an employee to undergo additional medical examinations before returning to work off a leave of absence not to exceed six months.

In short, overall the comparables support the District's case.

Section 18.4. Compensatory Time. Employees may place overtime hours into their compensatory time off account in lieu of pay within the limits stated below.

For each hour of overtime worked, an employee may place one and one half hours of time into their compensatory time account with no maximum on number of hours which may be accumulated. However, the maximum number of hours which may be used for time off in any fiscal year shall be ninety-six (96). Compensatory time shall not be allowed to be taken when it will cause the shift to fall below minimum staffing or when a department activity or mandatory training session has been previously scheduled.

In cases where two or more requests are submitted for the same day or time period, seniority shall prevail. Once the request has been approved vacation or holiday requests will not trump the comp time request. Request for compensatory time off must be made in writing to the employee's Battalion Chief and may be made up to one duty shift prior to the duty shift requested. Compensatory time can only be accumulated in full-hour increments.

Upon completion of overtime duty individuals shall fill out an Overtime Report card on which the employee shall designate how many of their hours worked shall be banked in the individual's compensatory time off account (one hour increments) and how many shall be monetary compensation. Individuals are not to calculate the comp time hours they are due. Completed cards must be forwarded to the individual's Battalion Chief prior to being forwarded to the Fire Chief. Once the Battalion Chief has recorded the information from the card he shall forward the card to the Fire Chief. Personnel assigned to days will forward overtime card to the Fire Chief.

All accumulated hours in an individual's account not taken or scheduled as time off by April 15th shall be converted to pay by the employer at the individual's hourly rate and deposited in their ICMA Retirement Health Savings account for the benefit of the employee by the April 30th end of the fiscal year. The Chief or his designee shall zero out each member's account and complete an Overtime Report with the remaining number of hours an individual has coming.

Under no circumstances shall overtime hours compensated with pay also be taken as compensatory time off.

(UX 1, Tab 9 at 35-36).

1. Position of the Administration

The Administration proposes the following provision:

Section 18.4. Compensatory Time. Employees may place overtime hours into their compensatory time off account in lieu of pay within the limits stated below.

For each hour of overtime worked, an employee may place one and one half hours of time into their compensatory time account with no maximum on number of hours which may be accumulated. However, the maximum number of hours which may be used for time off in any fiscal year shall be forty-eight (48). Compensatory time shall not be allowed to be taken when a department activity or mandatory training session has been previously scheduled.

In cases where two or more requests are submitted for the same day or time period, seniority shall prevail. Once the request has been approved vacation or holiday requests will not trump the comp time request. Request for compensatory time off must be made in writing to the employee's Battalion Chief and may be made up to one duty shift prior to the duty shift requested. Compensatory time can only be accumulated in full-hour increments.

Upon completion of overtime duty individuals shall fill out an Overtime Report card on which the employee shall designate how many of their hours worked shall be banked in the individual's compensatory time off account (one hour increments) and how many shall be monetary compensation. Individuals are not to calculate the comp time hours they are due. Completed cards must be forwarded to the individual's Battalion Chief prior to being forwarded to the Fire Chief.

All accumulated hours in an individual's account not taken as time off by April 20th shall be converted to pay by the employer at the individual's hourly rate and deposited in their ICMA Retirement Health Savings account for the benefit of the employee by the April 30th end of the fiscal year. The Chief or his designee shall zero out each member's account.

Under no circumstances shall overtime hours compensated with pay also be taken as compensatory time off.

In consideration of the District offering this limited compensatory time benefit, the District and the Union agree, in furtherance of Section 7(o)(5) of the Fair Labor Standards Act, to place restrictions on the use of compensatory time under circumstances which they agree would constitute an "undue disruption" of the department operations. The banked time may be used to take time off at a future date when the leave calendar might otherwise be full and prevent normal scheduling of time off.

The following procedure shall be followed for utilizing the compensatory bank time:

- A. Requesting to use compensatory bank time: In order to request compensatory time, the employee must have adequate time in the bank. A request to use compensatory time must be turned into the Battalion Chief for approval no later than 1600 hours of the duty shift prior to the shift that compensatory time is being requested. Compensatory time must be taken in:
- a. Full 24-hour shifts or;
 - b. A maximum of 24 hours in any fiscal year may be split into segments of not less than 8 hours and must be taken in full hour increments.

An employee's request for compensatory time shall be denied if they do not have one and one-half times the hours being requested in their compensatory time bank at the time of the request.

- B. Unduly Disruptive Days: If overtime is necessary to cover the employee's requested time off under this Section, it is agreed that the implementation of such compensatory time will necessitate additional administrative and operations efforts in order to fill such request, thus causing undue disruption to the Department's operation. If overtime is necessary to cover the employee's time off under this Section, the parties hereto agree that such request cannot be filled within a reasonable period of time without unduly disrupting the operation of the department. In such case, the employee shall have the following options:
- a. To withdraw the request and resubmit a request for leave at another time that does not cause overtime; or
 - b. Take the leave requested.

If the compensatory time causes overtime, the employee taking the leave shall be designated as having taken an "unduly disruptive day" and the employee's compensatory time bank shall be reduced by time and one-half for each hour off (e.g. 24 hour compensatory time at time and one-half equals 36 hour reduction in the employee's compensatory time bank).

If no overtime occurs, the request shall be deemed to be not unduly disruptive, and the employee taking the leave shall have his compensatory time bank reduced hour for hour (e.g. 24 hour compensatory time off equals 24 hours reduction in the employee's compensatory time bank).

If an off duty employee is unable to be secured to fill the requested compensatory time off slot or if four (4) total leave slots have been filled (e.g. three slots for scheduled time off plus one additional slot for compensatory time) or if previously scheduled / mandatory training exists the request may be denied in its entirety as unduly disruptive.

(UX 1, Tab 21).

* * * *

In support of the above provision, the Administration advances the following arguments:

The parties' strange bargaining history over compensatory time has led to the Employer seeking to remedy a situation in which the previous Union's attorney put the District on notice that the current provision was illegal. Based on court cases holding the fact an employee's request to use accrued compensatory time will cause overtime is not a legal basis to refuse the request, the District's counsel agreed with J. Dale Berry and the parties negotiated a remedy. See, Heitman v. City of Chicago, 560 F 3rd 642 (7th Cir. 2009). Also, the District's history regarding comp time was to permit greater accrual but not to allow significant usage as time off. The main focus has been to create a mechanism to provide better funding of employees' Retirement Health Savings Accounts (RHSA). The Union proposed language which had been agreed to in multiple jurisdictions after hammering out language with various management representatives. The Employer's final offer is essentially the Union's proposal without the offered indemnification clause. Attorneys for both the Union and Employer agreed the current language, which prohibits use of comp time if doing so will cause the shift to be below the established minimum manning, put the parties at risk for FLSA liability. Current Union counsel inexplicably asserts that the language is fine, but the District's application of it is the problem. New counsel proposes *status quo* – an illegal clause.

The current clause is no different than those in the court decisions finding it illegal to refuse to grant comp time off if it causes overtime. If the District falls below its minimum manning, it calls in employees on overtime to maintain the minimum staffing requirement. Somehow the Union asserts the denial of comp time if it were to cause the shift to fall below minimum staffing and thus trigger overtime call in procedures is not a denial due to causing overtime. That makes no sense. Indeed the District has denied requests by employees to use comp time because it would result in the fourth person to be off causing an overtime situation.

Because the current language is illegal it must be changed. The Union's insistence on an illegal contract provision is itself an illegal act. Therefore, the Arbitrator must award the Employer's final offer. The Union's new attorney at the hearing claimed that the Employer's final offer (the one originally proposed by the Union) also violates the FLSA because of some alleged waiver of rights regarding the definition of "unduly burdensome." It is an incomprehensible assertion to which the District has no reply.

2. Position of the Union

The Union again proposes to maintain the *status quo*. To this end the Union has offered, and continues to offer, to unilaterally or jointly request a ruling from the Department of Labor regarding the issue of whether the *status quo* language is unlawful. In the event it is determined that the *status quo* language is unlawful, the parties can re-negotiate the unlawful portion pursuant to the provisions set forth in Article 22, Savings Clause.

According to the Union, the District contends that the current contract language is illegal because compensatory time is not permitted when it causes the shift to fall below minimum staffing, and the practice has been to deny requests for compensatory time if they result in overtime. The District emphasized the fact that former Union legal counsel Dale Berry claimed that the *status quo* language is illegal and in need of modification. However, as noted above, Mr. Berry ceased serving as counsel to the Union, and it is the opinion of the Union's current counsel that this *status quo* language is legal (*Brief* at 65).

Notably, during the arbitration hearing, District Counsel stated that "as I read the federal cases under the Fair Labor Standards Act, the employers cannot deny comp time just because it creates overtime." (R. 22).

The Union agrees that an employer violates the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, when it denies the use of compensatory time because it results in overtime. Yet, the District's proposal does just that, as it defines "unduly disruptive days" as those that necessitate overtime and requires employees to either withdraw their request for compensatory time or be penalized by taking compensatory time at a rate of one and one-half hours for each hour worked. Thus, assuming the status quo language was illegal, the District's proposal does not cure the problem, and indeed, exacerbates the District's legal concerns, argues the Union.

The District's definition of "unduly disruptive days" outlined in its proposal is clearly illegal and constitutes a waiver of the bargaining-unit employees' rights under FLSA, as it can result in penalizing an employee for using compensatory time when it necessitates overtime.

Pursuant to the District's proposal, a request for compensatory time will be unduly disruptive "if overtime is necessary to cover the employee's requested time off ..." (UX 1, Tab 21). However, 29 C.F.R. §553.25(d) provides that requests for compensatory time off shall be honored unless such requests will be "unduly disruptive." This Section provides that:

[f]or an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

Id. Clearly, the District’s definition of “unduly disruptive” fails to conform to FLSA. Both the 7th and 6th Circuit Appellate Courts have held that denying compensatory time because it would require the employer to backfill for the absent employee on an overtime basis does not amount to an undue disruption that would allow the employer to deny the request. *See Heitmann v. City of Chicago*, 560 F.3d 642 (7th Cir. 2009) and *Beck v. City of Cleveland*, 390 F.3d 912 (6th Cir. 2004). Accordingly, there is no question that the District’s proposal is illegal and, if adopted, would guarantee that both the Union and individual employees would file claims with the Department of Labor.

The evidence demonstrates that it is not the *status quo* language that is illegal, but the District’s practice of denying compensatory time when it causes overtime that is illegal. Indeed, District counsel repeatedly acknowledges that it is the District’s practice to deny compensatory time if it results in overtime. The District admits that the *status quo* language does not state that compensatory time cannot cause overtime, but claims that the prohibition on compensatory time in the event it causes the shift to fall below the minimum has the same effect. The Union disagrees with this assessment because, so long as the District is able to bring someone in on overtime, the shift will not fall below the minimum and the District will be in compliance with both the Agreement and FLSA.

Assuming, *arguendo*, that this Arbitrator does not deem the above as sufficient reason to reject the District’s proposal, the fact remains that the District is seeking dramatic changes to the *status quo*. The District’s proposal seeks to:

- cut the maximum amount of compensatory hours which may be used in any fiscal year in half from ninety-six (96) to forty-eight (48);
- eliminate the language that provides compensatory time will not be allowed if it causes the shift to fall below minimum staffing; and
- include entirely new provisions and procedures addressing restrictions on the use of compensatory time, requests to use compensatory time, what constitutes an unduly disruptive day, and the process for dealing with requests that are considered to be unduly disruptive.

(UX 1, Tab 21; *Brief* at 68).

The District’s sole basis for these sweeping changes is its reliance on allegations that the Union’s prior counsel deemed the *status quo* language to be illegal, and that changes were initially sought by the Union. However, the Union secured new counsel and a second opinion on the issue, to which the Union is entitled, resulting in the conclusion, based on legal precedent, that the *status quo* language is lawful (*Brief* at 68).

Although the District may rely heavily on the Union’s so-called on the record proposals that were submitted on this issue (EX 3), given that the District’s proposed language is clearly illegal, the Union’s prior proposals are simply irrelevant. It is not the role of an interest arbitrator to impose language on a party that is illegal and that will unquestionably result in future litigation.

Furthermore, the parties' bargaining history works against the District, as the District's on-the-record proposals demonstrate that the District consistently proposed to eliminate the compensatory time provision.

The District's only justification for its proposal is the claim that the *status quo* language is illegal. Yet, the District's proposal does not cure the problem, and instead, furthers the problem by including language that is unquestionably illegal. Thus, the District failed to satisfy its burden because it failed to prove that the language is broken, failed to prove that its proposal cures the problem, and failed to provide a *quid pro quo*.

Although it is the Union's position that the *status quo* language is legal, the Union's proposal maintains the *status quo* language, while allowing the parties to seek a determination as to whether the language is legal. The *status quo* language contained in Article 22 (Savings Clause) has a mechanism for resolving the District's issue, which is inappropriately before this arbitrator for resolution. Again, the Union welcomes the District to join in its request to have the agency that oversees enforcement of the relevant statute decide what the District deems to be the issue. The District's refusal to do so is telltale. The District has simply used former Union counsel's statements, without more, to justify its sweeping modifications and unlawful proposal. For all of these reasons, the District's proposal must be rejected.

3. Decision and Analysis

The Union proposed, and continues to propose, that the parties request a ruling from the Department of Labor regarding the issue of whether the *status quo* language is unlawful, and, in the event it is determined to be unlawful, the parties can renegotiate the unlawful portion pursuant to Article 22 (Savings Clause) of the Agreement. The Union points out that, to date, the Administration has failed and refused to take the Union up on this offer, which would resolve the issue. Rather, says the Union, the District inappropriately requests that this Arbitrator determine the legality of the issue by adopting a sweeping modification to this provision and ignoring established legal precedent to the contrary. That is not the role of an interest arbitrator. (See, *Brief for the Union* at 67).

At the same time the Union has apparently declined to indemnify the District in the event that an employee successfully challenges the status quo and receives a remedy under FLSA (R. 75).

The federal cases appear to support the position that an employer cannot deny compensation time just because it creates overtime (R. 22). This is truly a matter that should be bargained by the parties, given the claim by both parties' counsel that either option/proposal contains illegal language. To this end I agree in spades with Union Counsel, that it is not my function to impose language on a party that is illegal and that will unquestionably result in future litigation. Even assuming that the *status quo* language is illegal, as concluded by former Union Counsel, I agree with the current

Union Counsel that the Administration's proposal does not cure the problem, as the Administration's definition of "unduly disruptive days" outlined in its proposal is arguably illegal and constitutes a waiver of bargaining-unit employees' rights under FLSA (as it penalizes an employee for using compensatory time when it necessitates overtime)(*Brief* at 66). Union Counsel's point is well taken.

For the above reasons the better course is to leave the current language in place, allowing the parties to sort out any illegal provisions.

The Union's final offer (status quo) is awarded.

F. District Issue No. 5, Article 18, Section 18.5 (Working Out of Classification)

The parties' current language reads as follows:

Section 18.5. Working Out of Classification. Whenever an employee covered by this Agreement is assigned to and performs the duties of a higher-rated classification for more than four consecutive hours on any shift (i.e., a firefighter assumes lieutenant's duties, or a lieutenant assumes Battalion Chief duties) then such employee shall be paid additional pay for all such hours worked performing the duties of the higher-rated classification. Acting Lieutenants pay will match that of a Lieutenant. Acting Battalion Chief's pay will match that of Battalion Chief's salary for the shift.

If the Employee is working an overtime shift in an acting roll the employee will receive time and a half pay for his own rank and receive the differential pay for working out of classification (i.e., straight-time difference between the rate for the employee's actual rank and the rate for the acting rank).

(UX 1, Tab 9 at 36).

1. Position of the Administration

The Administration requests including the following provision in its collective bargaining agreement:

Section 18.5. Working Out of Classification. Whenever an employee covered by this Agreement is assigned to and performs the duties of a higher-rated classification for more than four consecutive hours on any shift (i.e., a firefighter assumes lieutenant's duties, or a lieutenant assumes Battalion Chief duties) then such employee shall be paid additional pay for all such hours worked performing the duties of the higher-rated classification. Acting Lieutenants pay will match

that of a first step Lieutenant. Acting Battalion Chief's pay will match that of a first step Battalion Chief's salary for the shift.

If the Employee is working an overtime shift in an acting roll the employee will receive time and a half pay for his own rank and receive the differential pay for working out of classification (i.e., straight-time difference between the rate for the employee's actual rank and the rate for the acting rank).

(UX 1, Tab 21).

The Administration asserts that an issue presented to the Arbitrator is at what step of the higher rank's salary schedule should acting officers be paid? When the current contract was negotiated there were two steps in the lieutenant salary schedule and one for battalion chief. During the term of the contract a third step was added to lieutenant's and a second, lower, step was added to the battalion chief's schedule. The contract clearly provides acting lieutenants are paid at the first step of the lieutenant pay scale. The District's proposal seeks to do the same for acting battalion chiefs.

The Union correctly notes this will result in a reduction of acting pay for those who have been receiving pay at the top step. However, the Employer's proposal ensures lower-ranked acting officers are not receiving greater pay than the current recently promoted battalion chiefs. The acting pay for lieutenants and battalion chiefs going forward should be similarly treated. That is the essence of the Employer's proposal.

The comparables all pay acting pay at the first step of the higher ranks (EX 16). This supports the Employer's final offer.

For the foregoing reasons, the District's final offer should be awarded.

2. Position of the Union

The Union proposes to maintain the *status quo*.

(UX 1, Tab 20).

In support of its *status quo* position, the Union advances the following arguments:

At the time the Agreement was negotiated, there was only one pay step for Battalion Chiefs who are excluded from the bargaining unit. However, after the parties negotiated pursuant to the wage reopener, the District added a lower pay step so that starting Battalion Chiefs are paid less than the current Battalion Chiefs. The District is now seeking to amend the *status quo* language to provide that Acting Battalion Chiefs, who are bargaining-unit Lieutenants, are paid at the first step, thereby reducing the amount of pay they currently receive. Effective May 1, 2012, Acting Battalion Chiefs received a rate differential of \$5.46/hour. The undisputed evidence presented by the

Union demonstrates that the District's proposal will result in a loss of \$2.62/hour for those who are required to serve and take on additional responsibilities, outside the bargaining unit, when the District needs additional personnel to fill in for their absence.

The District offered no justification for altering the *status quo*, and no *quid pro quo* was offered to compensate for the loss in pay. Simply stated, the District failed to demonstrate that the current system is broken or that the language results in a hardship. Such a reduction in pay should be negotiated, not imposed by an arbitrator.

The Union's proposal, on the other hand, most closely satisfies the statutory criteria, as it preserves existing benefits and reflects the agreement that would have been reached if the parties were left to their own devices. Indeed, neither of the parties' on the record proposals addresses altering the status quo so that Acting Battalion Chiefs are paid at the lowest step. The Union's proposal should be adopted (*Brief* at 71-72).

3. Decision and Analysis

While the Administration's final offer will result in a reduction of acting pay for those who have been receiving pay at the top step, still the Employer's proposal ensures that lower-ranked acting officers are not receiving greater pay than the current recently promoted battalion chiefs. The acting pay for lieutenants and battalion chiefs going forward should be similarly treated. Any other interpretation is nonsensical.

Supporting the Administration's proposal are the comparable bench-mark jurisdictions. Those that have steps in the officer position most uniformly have the pay at the first step of the higher rank.

The Administration's final offer is awarded.

IV. AWARD

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

1. Section 12.2 Health Insurance Cost (Union's final offer awarded)
2. Section 13.8 Shift Trades (District's final offer)
3. Section 15.3 Vacation and Holiday Selection (District's final offer)
4. Section 17.6 Light Duty (District's final offer)
5. Section 18.4 Compensatory Time (Union's final offer)
6. Section 18.5 Working Out of Classification (District's final offer)
7. Appendix E Salary Schedule (the Union's position on retroactivity is awarded)(See, Brief for the Union at 54-62; See also notes #1 & 3, this opinion, *supra*).

Dated this 28th day of January, 2015
at DeKalb, Illinois, 60115

Marvin Hill
Arbitrator