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Interest Arbitration

Village of Westchester,

Employer

and

Illinois Firefighters Alliance,
Council 1,

Union

Il. State Labor Relations Bd.

ISLRB No. S-MA-89-83
Arbitrator's File No. 89 113

Herbert M. Berman,
Arbitrator

September 22, 1989

Opinion and Award

Appearances

Employer:

John T. Weise, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603

Union:

Lawrence A. Poltrock, Esq.
Witwer, Burlage, Poltrock & Giampietro
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606

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Village of Westchester, Employer	ISLRB No. S-MA-89-83 Arbitrator's File No. 89 113
and	Herbert M. Berman, Arbitrator
Illinois Firefighters Alliance, Council 1, Union	September 22, 1989

Opinion and Award

I. Statement of the Case

The collective bargaining agreement between the Employer and the Union expired on April 30, 1988 (Employer exhibit 1).¹ On March 25, 1988, the parties agreed (Jt. 1):

[N]otwithstanding the provisions of Section 14(j) of the Illinois Public Labor Relations Act, as amended, in the event the Illinois Firefighters Alliance, Council 1 invokes interest arbitration... the interest arbitrator shall have authority regarding wages, benefits and other bargainable subjects retroactive to May 1, 1988, even if arbitration is not invoked... until after May 1, 1988. The parties are entering into this agreement with the objective of reaching agreement through the collective bargaining process.

Mediation failed, and the parties reached impasse. The Union filed a demand for compulsory interest arbitration with the Illinois State Labor Relations Board on February 16, 1989 (Jt. 1).

A hearing was held in Westchester, Illinois on May 15, 1989. At the hearing the parties stipulated that a proper Section 14(j) demand for compulsory arbitration was filed (Tr. 4). The parties also waived

¹In the remainder of this decision, I shall cite Employer exhibits as "Emp. _____," Union exhibits as "Un. _____," and joint exhibits as "Jt. _____." I shall cite the transcript as "Tr. _____."

the requirement of a three-member arbitration panel, submitting solely to me economic and non-economic issues on a two year contract for the period May 1, 1988-April 30, 1990 (Tr. 5-7). Both parties have filed post-hearing briefs.

II. Final Offers

A. The Employer

The Employer made a final offer on May 11, 1989 (Emp. 4). I have summarized the economic or "compensation" proposals and quoted the non-economic proposals:

1. All provisions of the current collective bargaining agreement where neither party has proposed change and which are not before the arbitrator shall remain effect.
2. All items previously agreed during the 1988 contract negotiations between the parties which are not at issue in interest arbitration shall be included in the new agreement.

Compensation Issues

1. Wage Increases: 1988 and 1989.

First Year: 6% (all steps), effective April 30, 1989

Second Year: 6% (all steps), effective May 1, 1989

2. Medical Insurance. Group medical insurance will continue, with the Employer paying the entire employee and family coverage premium during two-year term of contract—May 1, 1988-April 30, 1990. However, there will be a \$2 million lifetime major medical cap, mandatory second surgical opinion for elective surgery (opinion paid for by medical plan), pre-hospital notification and authorization in non-emergency; prompt notification in emergency cases, and standardized catastrophic case management and audit.
3. Paid Holidays: No additional paid holidays.

Non-Compensation Issues

1. Call Back: An employee covered by this Agreement who is called out to work after having left work shall receive two hours' minimum pay. The department can require the employee to remain on duty for these two hours. This minimum guarantee does not apply if the call-out is immediately before the employee's regular shift.
2. Physical Exam Clause. Annually or every other year the Department may adopt a policy for employee physical examinations (paid for by the Village) in order to determine a firefighter's continuing ability to perform his regular job duties. The primary purpose of exams shall be preventative medicine and wellness emphasis and only in clear cases will be used to determine physical inability to perform regular job duties. If the employee does not pass such examination and the Village determines the employee is physically unable to work, the Village will pay for a second medical examination. If the medical opinions are in disagreement, a third medical examination shall be obtained from a physician selected by the first two physicians and the decision of the third physician shall be controlling. If an employee is determined medically unable to perform his job function and the employee seeks a disability pension from the Fire Pension Board and the employee's application for disability pension is denied, the decision of the Pension Board shall be controlling and the employee shall be returned to work.
3. Drug and Alcohol Testing. In the event the Village adopts a drug/alcohol testing policy, this policy will cover situations where the Village has reasonable suspicion for testing an employee and will not involve any random testing. Before the Village implements any testing policy under this Section, it will give the Alliance 30 days' advance notice and a full opportunity to negotiate. In the event agreement is not reached during said negotiations, or any agreement to extend the time of said negotiations, and the Village implements any testing policy under this Section unilaterally, the reasonableness of the policy implemented shall be subject to the grievance and arbitration procedure of this Agreement. In addition, whether Agreement is reached or whether the policy is implemented unilaterally, any employee disciplined because of said policy shall have the full protection afforded under the

procedures of the Board of Fire and Police Commissioners.

4. Contract Paramedic Seniority Clause. No contract clause.

B. The Union

The Union made a final offer on May 12, 1989 (Un. 1). I have summarized the economic or "compensation" proposals and quoted the non-economic proposals:

1. All provisions of the current collective bargaining agreement where neither party has proposed change and which are not before the arbitrator shall remain effect.
2. All items previously agreed during the 1988 contract negotiations between the parties which are not at issue in interest arbitration shall be included in the new agreement.

Compensation Issues

1. Wages: 1st year—8% all steps; 2nd year—6% all steps.
2. Retroactivity: Retroactive to May 1, 1988.
3. Medical: Group Medical Insurance to remain in effect, with Employer paying entire individual and family premium. Union agrees to mandatory second opinions for elective surgery with opinion paid for by insurance; prehospital notification and authorization in non-emergency; prompt notification in emergency cases; and standardized catastrophic case management and audit. There will a \$2 million cap for everyone with the exception of two employees with seriously ill, handicapped children.
4. Holidays: Increase to present policy for Village employees and police.
5. Longevity: Longevity payments of \$25 per month will be made to firefighters with 72 to 120 months of service and longevity payments of \$50 per month will be made to firefighters with more than 120 months of service.

Non-Compensation Issues

1. Call Back: An employee covered by this Agreement who is called out to work after having left work shall receive two hours' minimum pay. The department can require the employee to remain on duty for these two hours.
2. Physical Exam Clause: No policy, as in the expired agreement.
3. Drug Testing: No policy, as in the expired agreement.
4. Contract Paramedic/Seniority Clause: "The Village of Westchester, at expiration or cancellation of the current Paramedic/Firefighter Contract may contract for Paramedics only. All future Firefighters or Paramedic/Firefighters will be commissioned by the Westchester Police and Firefighter Commission."

III. Discussion and Findings

A. Economic Issues

1. Applicable Standards

Section 14(g) of the Illinois Public Labor Relations Act provides that "as to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in subsection (h)." Section 14(h) of the Act sets out eight factors to be utilized in evaluating economic proposals:

- (1) The lawful authority of the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions

of employment of other employees performing similar services and with other employees generally:

- (A) In public employment in comparable communities.
 - (B) In private employment in comparable communities.
- (5) The average consumer prices for goods and services, commonly known as the cost of living.
 - (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
 - (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
 - (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

The most significant factors in economic interest arbitration are set out in paragraphs 3 through 6. Comparability, the fourth factor, "is the most important factor to arbitrators."² The employer's "ability to pay" the wages and benefits requested, the third factor, and the "cost of living," the fifth are the other factors of primary significance.

²Richard Laner & Claire Manning, "Interest Arbitration: A New Terminal Impasse Procedure for Illinois Public Sector Employees," 60 Chicago-Kent L.Rev. 838, 858 (1984).

2. Comparable Communities

The parties are largely in agreement on the comparable communities. The Union contends that the following communities, which are adjacent to Westchester and have a "mutual aid pact" with Westchester, are comparable to Westchester: Bellwood, Broadview, Hillside, Maywood, Melrose Park, Northlake, North Riverside and Oakbrook (Tr. 19-21; Un. 2). The Employer agrees that the fire protection districts that have a mutual aid pact with Westchester, known collectively as "Battalion Seven," are comparable to Westchester. However, the Employer does not include Northlake and Oak Brook in its list of comparable districts. See Employer exhibits 6-11.

In light of Village Manager John Crois's unrebutted testimony that Battalion Seven consists of Bellwood, Broadview, Hillside, Maywood, Melrose Park, North Riverside and Westchester (Tr. 81) and that the "union has always addressed the battalion in their negotiations" (Tr. 80), I shall disregard Northlake and Oak Brook in making comparability findings. The relevant comparability factors are summarized on the following page.

	Bellwood Melrose Pk	Broadview N. Riverside	Hillside Westchester	Maywood ³
Population	22,000 25,000	10,000 6,700	10,000 17,700	28,000
No. of Firefighters	18 55	24 9	12 18	33
No. of Emps in F.D.	26 55	33 9	16 25	70
Per Capita Assessed Valuation	\$ 5292	13193	12940	3505
Rank	6 \$11742 4	2 15373 1	3 9094 5	7
Per Capita Gen. Rev. Fund	\$166	347	356	260
Rank	7 \$606 2	4 925 1	3 264 5	6
Per Capita F.D. Budget	\$ 40	140	82	56
Rank	7 \$101 3	2 164 1	4 55 6	5
Top Salary 5/1/88	\$32,253	32,789	32,859	33,050
No. Yrs. to Top	5 \$31,960 4	5 33,900 15	4 32,557* 5	4
Top Salary 5/1/89	\$33,938	34,428	34,255	In Negotiations
No. Yrs. to Top	5 \$34,960 4	5 33,900 15	4 34,510** 5	4
Percent Increases 5/1/88	7% None	5% 3.73%	5% In Negotiations	4.4%
5/1/89	3% 9%	5% 3.73%	4.25% In Negotiations	In Negotiations

*Based on 6% pay raise for May 1, 1988

**Based on 6% pay raise for May 1, 1989

³Data for Bellwood, Broadview, Hillside and Maywood are in standard print; data for Melrose Park, North Riverside and Westchester are in **bold print**.

(a) Wages

As illustrated, a six percent raise on May 1, 1988 and May 1, 1989 would result in a "top firefighter salary" in Westchester of \$34,510 on May 1, 1989, placing Westchester second to Melrose Park among six comparable communities. Excluding Maywood, which is currently in negotiations, a 12% (6%-6%) wage increase in 1988 and 1989 would give Westchester the highest percentage wage increase among seven comparable jurisdictions. The 14% (8%-6%) wage increase proposed by the Union would be 4% higher than the highest two-year wage increase received by any comparable fire department. Since Westchester ranks fifth in per capita assessed valuation, fifth in per capita revenue fund expenditures, and sixth in per capita fire department budget expenditures, a 6%/6% wage increase would seem more nearly comparable to comparable districts than an 8%/6% wage increase. Melrose Park, which had the highest top salary as of May 1, 1989, has three times as many firefighters and a 29% higher assessed valuation than Westchester.

All relevant comparability factors compel acceptance of the Employer's salary proposal, and no evidence on cost-of-living or other statutorily mandated economic factors was produced to rebut the weight of the evidence on comparability. Accordingly, I adopt the Employer's proposal on wages of "first year: 6% (all steps), second year: 6% (all steps)."

(b) Retroactivity

Both parties asserted that the effective date of the wage increases in 1988 and 1989 is a separate economic issue (Emp. Brief, 4; Un. Brief, 2). The Employer maintains, at page 4 of its brief:

The Village has maintained the position for many, many months that its offer for the 1988 wage increases would be retroactive to May 1, 1988 only if the labor contract were settled reasonably promptly and short of interest arbitration. Consequently, the Village's proposal on wages is that the first year increase shall not be retroactive and, thus, shall become effective at the end of the 1988-1989 municipal fiscal year, or on April 30, 1989. The second year 6% increase shall be effective May 1, 1989. This means that the 6% increase will be compounded and that the employees' salary levels at the end of the Agreement will be exactly the same as if each increase were to be effective on May of each fiscal year.

The Union argues, at page 7-8 of its brief:

Mr. Finn testified that the Union has always maintained that raises granted should be retroactive to May 1, 1988. The Village has denied retroactivity although the evidence and history of bargaining with other employees defies that position.... Mr. Finn testified that the current collective bargaining agreement between the police and the Village which was signed in January of 1989, contained retroactive wages to the beginning in May of 1988. The Village also applied retroactivity to nonunionized employees of the Village. The position of the Village on retroactivity, in light of its history with fellow employees of the Village is untenable. Under the retroactivity question, items number 4 and 6 are particularly applicable as found in Section 1614(h).

As Union President Robert Finn testified, the Village and the Illinois Fraternal Order of Police (FOP) entered into a collective bargaining agreement on January 13, 1989, retroactive to May 1, 1988 (Tr. 26; Un. 3). Finn also testified that the non-union public works employees did not receive their wage on increase on May 1, 1988, but that, when received, the increase was retroactive to May 1, 1988 (Tr. 26).

Parties who negotiate beyond the expiration date of their agreement may agree or not agree that wages will be retroactive to the date of the expired agreement. Where, as here, parties subject to

statutory impasse procedures have reached impasse on retroactivity, an arbitrator must make a decision on the basis of the factors set out in the Act. In this case, little evidence was offered by either party on any of the statutory factors. On the issue of comparability, for example, the evidence showed only that the wage increases of other village employees was retroactive.

Routine or automatic retroactivity may frustrate the timely settlement of an agreement. If employees are guaranteed retroactive wages, the Union may have little incentive to settle before the contract expires. On the other hand, since firefighter strikes are forbidden, an employer may also have little incentive to settle before the contract expires. The evidence did not establish that the Union's decision to reject the Employer's offer on wage increases was not motivated by the legitimate economic interests of its members, or that the Union was primarily responsible for the protracted negotiations. In the absence of contrary evidence on comparability or evidence that the Union had either delayed negotiations or negotiated in bad faith, there is little, if any, reason to deny retroactivity. Accordingly, I adopt the Union proposal on retroactivity. All wage increases for the first year shall be retroactive to May 1, 1988 and all wage increases for the second year shall be retroactive to May 1, 1989.

(c) Medical Insurance

Both parties have agreed that, with the exception of major medical coverage, group medical insurance will continue unchanged, with the Employer paying all premiums, including any increase in

premiums between May 1, 1988 and April 30, 1990. The Union "accepts the cost care package of mandatory second surgical opinions for elective surgery (opinion paid for by medical plan); pre-hospital notification and authorization in non-emergency; prompt notification in emergency cases; [and] standardized catastrophic case management and audit" (Un. brief, 2). However, the Union opposes the Employer's effort to change from an unlimited lifetime major medical maximum to a \$2 million per covered plan member lifetime major medical maximum, proposing that two members with chronically ill, handicapped children be excluded from any lifetime maximum.

Westchester and about 30 other municipalities "have grouped together to form a self-insurance cooperative" (Tr. 88). The cooperative purchases insurance to cover specific catastrophic claims, but "basically speaking, each community is to pay [its] individual claim" (Tr. 88). The catastrophic coverage had a \$1 million ceiling, and in December 1986 the "four or five communities who had an unlimited major medical benefit" were informed that the cooperative would not cover a claim in excess of \$1 million" (Tr. 89). In March 1987 and again in September 1987, the Village Board accepted the opinion of its attorney that the Village would alone be responsible for any claim in excess of \$1 million (Tr. 89).

During negotiations, the Employer told the Union that the Village "did not have the resources" to provide an "unlimited benefit under a totally self-insured position" (Tr. 90). In January 1989, the Village secured \$2 million in extended coverage from Lloyds of London (Tr. 90). About \$30,000 in claims have been paid to one of the

employees the Union wishes to exempt from the \$2 million ceiling; about \$33,000 has been paid to the other employee.

No sound reason has been advanced that would compel me to require the Employer to maintain unlimited major-medical coverage for two employees. No evidence was produced to show that the two handicapped, dependent children might be likely to exhaust their \$2 million lifetime benefit. In addition, four of the comparable fire departments have a \$1 million ceiling and one has a \$1.5 million ceiling. Only one, Melrose Park, has an unlimited ceiling. The factor of comparability and equity, as well as practical economic considerations, favor the Employer's proposal. There would seem to be no reason to exempt two employees from the insurance limitations reasonably applicable to other employees. I therefore adopt the Employer's medical insurance proposal.

(d) Paid Holidays

Article VI, Section 6.2 of the 1986-88 Agreement (Emp. 1) provides nine paid holidays to non-probationary firefighters. The Union proposes to increase the number of paid holidays to twelve. The Employer proposes that firefighters continue to receive nine holidays.

The Union argued, at page 9 of its brief, that "Firefighters should receive the same number of holidays that all other employees, including the police receive.... This is totally consistent with the elements to be looked at by the arbitrator."

The Employer maintained at page 16 of its brief that "wages and medical were the two big-ticket items in negotiations, and extra

holidays and longevity pay were merely 'frosting on the cake' which the Union is trying to obtain through interest arbitration." The "Union was not serious about these items during... bargaining, and ... the arbitrator should not award that 'little extra bit.'" The Employer pointed out that when the parties resumed negotiations in October 1988 in an effort to settle the agreement short of arbitration, the Union dropped its proposals for longevity pay and for additional paid holidays. The Employer quoted my comments in *Village of Lombard*, ISRLB No. S-MA-87-73 (1988):

I'm reluctant to adopt a proposal the Union... withdrew in the course of negotiations.

Interest arbitration is the final step of collective bargaining, a statutory substitute for a work stoppage. I do not believe that it was designed to permit a negotiating party to make a new demand or to resurrect a demand it has withdrawn.

The Employer also argued that, as its proposals on wages and medical benefits, the two "big ticket items," result "in a package of 8.65% in the first year of the labor contract and in excess of 6% in the second year of the labor contract," there "is no justification whatsoever for additional salary dollars, whether those dollars are called 'holidays' or... 'longevity'" (Emp. brief, 17-18). Finally, the Employer pointed out that "no other employee group received any improvements in holiday or longevity in 1988/89 negotiations (Emp. brief, 18).

Employer exhibit 15 compares the "paid time off" provided to firefighters in the seven comparable fire departments:

Jurisdiction	Assigned Days Off	Vacation	Holidays	Total	Holidays: Paid/Comp Time
Bellwood	13	13	10	36	Paid
Broadview	13	11	9	33	Paid
Hillside	12	12	8	32	Paid
Westchester	13	10	9	32	Paid
Melrose Park	13	10	4	27	Comp Time
Maywood	13	10	3	26	Comp Time
North Riverside	6	10	6	22	Paid

The 1988-90 police agreement (Un. 3) provides non-probationary patrol officers with "up to 12 days of holiday pay" or "up to 12 days off with no additional pay" every year.

Village Manager John Crois testified that firefighters' holidays differ from the holidays of other employees. Public works employees receive time off and police may either take time off or be paid for holidays they do not observe. Firefighters "receive a check for whatever number of holidays [the contract] calls for" and "they have no option of taking that time off" (Tr. 98). To a firefighter, a holiday "is not additional time off; it is just additional pay" (Tr. 98). According to Crois, one additional holiday would raise salaries 0.375% (Tr. 98). The three additional holidays proposed by the Union would thus raise salaries 1.125%.

Comparability does not favor the Union's proposal. The average number of holidays among the seven comparable fire departments is seven, two fewer than the number of holidays now enjoyed by Westchester firefighters. One comparable fire department has ten holidays and two, including Westchester, have nine. Four departments have fewer than nine holidays. In addition, only two departments provide

more than the 32 total days off, including holidays, provided by Westchester.

In effect, these holidays are supplemental wages. The additional wages and medical benefits offered by the Employer, which I have adopted, amount to a reasonable increase of almost 15% over two years. The evidence does not justify an additional wage increase. Finally, consistent with my comments in *Village of Lombard*, I am still "reluctant to adopt a proposal the Union...withdrew in the course of negotiations." Without evidence that the resurrected proposal was not thrown in the pot as a "bargaining chip" for the arbitrator to exchange for another proposal, I am skeptical that the proposal was meant to be considered seriously on its merits. I adopt the Employer's proposal on holidays.

(e) Longevity

The Union contends that firefighters are entitled to the same longevity pay as police officers: \$25 a month to firefighters with 72 to 120 months of service, and \$50 a month to firefighters with more than 120 months of service. The Union also pointed out that Finn testified that "a number of other fire departments within the mutual aid pact also have longevity" (Un. brief, 10).

The Employer argues that police officers are the only employee unit in Westchester to have longevity pay, and that they "took a lower wage increase than firefighters in the prior labor contract... to get longevity pay" (Emp. brief, 19). In addition, the Employer points out, the base salaries of firefighters are higher than those of police officers (Emp. brief, 19). Thus, "a firefighter makes \$214 more per

year which (by virtue of granting percentage increases) will increase to \$240 in 1989," a "situation almost unheard of in the suburban municipal world..." (Emp. brief, 19-20).

No evidence on comparability or on any other statutory factor supports the Union's proposal on longevity. Had the evidence established a history of salary parity between police officers and fire-fighters, the Union's proposal would have more authority. In any event, salaries as a whole, not selected elements of compensation, must be compared. Longevity is merely an element of overall salary; and the evidence does not support a salary increase beyond that proposed by the Employer. Finally, as the Union also dropped its proposal on longevity during negotiations, my previous comments on "resurrected proposals" apply.

B. Non-Economic Issues

In arbitrating non-economic issues, I may adopt, but am not restricted to adopting, a final offer made by one of the parties. The "panel evaluates [non-economic] issues in light of the statutory criteria and decides each issue as it deems appropriate."⁴

1. Call-Back

The Union proposed:

An employee covered by this Agreement who is called out to work after having left work shall receive two hours' minimum pay. The department can require the employee to remain on duty for these two hours.

The Employer proposed:

An employee covered by this Agreement who is called out to work after having left work shall receive two hours'

⁴Laner & Manning, *supra*, n. 2, 841.

minimum pay. The department can require the employee to remain on duty for these two hours. This minimum guarantee does not apply if the call-out is immediately before the employee's regular shift.

I adopt the Employer's proposal. As the Employer pointed out, "the Union was attempting to achieve two hours' pay at time and one-half for call outs and the Village language accomplishes this proposal precisely" (Emp. brief, 20). Call-out pay compensates an employee for the inconvenience he may suffer if required to work during his scheduled time off. Requiring an employee to report to work early is less inconvenient than requiring him to return to work after he has gone home at the end of his shift. Without evidence that the Employer has modified the normal work-day by routinely adding time to the beginning of the shift, it would not seem appropriate to guarantee two hours of pay for a call-in immediately before the start of a shift.

2. Physical Exam Clause

The Union objects to physical exams because the "Village could use a physical exam requirement to remove young firefighters from the force at its will and caprice" (Un. brief, 11). The Employer maintains that "it is important for workers' compensation and group medical insurance purposes that employees who perform arduous and dangerous work, such as fire fighting, are physically able to perform their jobs" (Emp. brief, 20). The Employer "has no objection to language which would make clear that the employee's doctor and the Village doctor are the first 'two doctors' and that these two doctors select the third doctor" (Emp. brief, 20-1).

The National Fire Protection Association (NFPA) recommends "standards [and] guidelines for the operation of fire prevention programs." (Tr. 105). Section 8-5.1 through 8-5.3 of NFPA Fire Department Occupational Safety and Health Program (Emp. 16) provides:

8-5.1. The fire department shall provide and require the structured participation of all members in a program to develop and maintain appropriate levels of physical fitness. The maintenance of these levels of fitness shall be based on fitness standards determined by the fire department physician that reflect the individual's assigned functions and activities, and that are intended to reduce the probability and severity of occupational injuries and illnesses.

8-5.2. Members who are unable to meet the fitness standards shall enter a rehabilitation program to facilitate progress in attaining a level of fitness commensurate with the individual's assigned functions and activities.

8-5.3. The physical fitness program shall be under the medical supervision of the fire department physician.

Currently, "a committee of fire chiefs" is reviewing the NFPA program; Village Manager Crois anticipates that Illinois will soon adopt the program (Tr. 106).

Even if Illinois does not adopt NFPA's program, it is a sound program designed to reduce injuries and enhance performance. The Union's objection that physical exams should not be required because the "Village could use a physical exam requirement to remove young firefighters from the force at its will and caprice" is without merit. It would be possible to eliminate "caprice," or to at least reduce its likelihood, by allowing an employee to be examined by his physician, and to require the Company's physician and the employee's physician to select a third physician should there be a dispute. Since medical exams would be undertaken in the Employer's interest and

at the Employer's request, it would also seem appropriate for the Employer to pay for all examinations.

I adopt the "physical exam clause" proposed by the Employer, as modified below (additions underlined and deletions lined out):

Physical Exam Clause

Annually or every other year the Department may adopt a policy for employee physical examinations (paid for by the Village) in order to determine a firefighter's continuing ability to perform his regular job duties. The primary purpose of exams shall be preventative medicine and wellness emphasis and only in clear cases will be used to determine physical inability to perform regular job duties. If the employee does not pass such examination and the Village determines the employee is physically unable to work, the Village will pay for a second medical examination by a physician chosen by the employee or the Union. If the medical opinions are in disagreement, the Village will pay for a third medical examination shall by ~~be obtained from~~ a physician selected by the first two physicians and the decision of the third physician shall be controlling. If an employee is determined medically unable to perform his job function and the employee seeks a disability pension from the Fire Pension Board and the employee's application for disability pension is denied, the decision of the Pension Board shall be controlling and the employee shall be returned to work.

3. Drug Testing

The Union objects to the drug and alcohol testing clause proposed by the Employer on several grounds (Un. brief, 11-12):

1. Drug testing has not been required in the past, and "past practice" should be followed.
2. Five fire departments in Battalion Seven have no drug testing requirement.
3. The former fire chief was "arbitrary and capricious," and the Employer's proposal has no "procedural and substantive safeguard" to protect employees from "arbitrary and capricious actions."

The Employer argues that a policy on drug and alcohol testing is needed because "firefighters must work in teams, ... be mentally alert and in a position to make split second decisions in a time of emergency" (Emp. brief, 21). The Employer also points out that it has not proposed a "precise policy," but only that the parties "will negotiate" and that the Employer will set up a formal program entailing "only reasonable cause testing" if no agreement is reached.

A firefighter under the influence of alcohol or other drugs may jeopardize life and property. Therefore, it is not unreasonable to require some form of drug and alcohol testing for firefighters. Testing should be "reasonable," in that it should not be random and without reasonable suspicion that testing is needed in an individual case. The Employer's proposal is fair and reasonable. It requires bargaining, and if bargaining fails the Employer may implement a "reasonable policy" subject to review through grievance and arbitration.

While a drug testing program has not been implemented in most of the Battalion Seven fire departments, it is not unknown. In light of increased drug usage among all segments of the American work force,⁵ a drug testing program, especially for employees engaged

⁵As professors Tia Schneider Denenberg and R.V. Denenberg point out: "The economic damage in terms of lost productivity and medical expenditures [of chemical dependency] is enormous: more than \$100 billion annually, according to some estimates. The careers of millions of American workers are jeopardized—and often prematurely ended. Alcoholism is by no means a new menace, but added to it in recent decades has been drug abuse of epidemic proportions, which seems to be growing worse." Denenberg & Denenberg, *Alcohol and Drugs: Issues in the Work place* (Washington: BNA Books, 1983), preface, at page v.

in hazardous work, is a reasonable precaution. I adopt the Employer's proposal on drug testing.

4. Seniority; Contract Paramedic Clause

As the Union points out, the first five sections of its proposal on seniority "pretty well parallel the seniority clause maintained by the Village on behalf of its police department." The sixth section does not. It provides:

The Village of Westchester, at expiration or cancellation of the current Paramedic/Firefighter contract, may contract for Paramedics only. All future Firefighters or Paramedic/Firefighters will be commissioned by the Westchester Police and Firefighter Commission.

The Employer has no objection to the first five sections of the Union's proposal. It has several objections to the sixth section:

1. Sections 4 and 14(i) of the Illinois Public Labor Relations Act (IPLRA) remove the paramedic issue from the jurisdiction of the arbitrator (Emp. brief, 22).
2. The proposal "affects directly or indirectly" the "right of the Village to manage the Fire Department," "determine the number of paramedics and/or whether paramedics will be contract paramedics," and "to increase or decrease the size of the contract to paramedic force" (Emp. brief, 23).
3. If a layoff were required, "and contract paramedics would go first," the Village would be "out of the paramedic business" (Emp. brief, 23).

The Union argues:

1. Section 6 "is consistent with Section 1614 of the statute, [as it] preserves... job rights and the bargaining unit" (Un. brief, 12).
2. Firefighters "who work for the Village... are committed to the Village for life-time employment." Contract Firefighter/Paramedics come and go.... They are usually paid at minimum and substandard wages and leave the village as soon as they obtain employment

elsewhere. They are certified by the State of Illinois which is the minimum certification requirement.... It is untenable to require sworn fire fighting personnel in the village to lay their life on the line at a fire and rely on individuals whom they don't know and who have been hired from the outside for some unknown reason. (Un. brief, 13.)

(a) Arbitrability

Neither Section 4 nor Section 14(i) of the IPLRA precludes me from considering the Union's proposal. Section 4 provides in relevant part:

Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of service, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.

Section 14(i) provides in relevant part:

In the case of fire fighter, and fire department or fire district paramedic matters, the arbitration decision shall be limited to wages, hours and conditions of employment and shall not include the following matters: i) residency requirements; ii) the type of equipment (other than uniforms and fire fighter turnout gear) issued or used; iii) the total number of employees employed by the department; iv) mutual aid and assistance agreements to other units of government; and v) the criterion pursuant to which force, including deadly force, can be used; provided, however, nothing herein shall preclude an arbitration decision regarding equipment levels if such decision is based on a finding that the equipment considerations in a specific work assignment involve a serious risk to the safety of a fire fighter beyond that which is inherent in the normal performance of fire fighter duties. Limitation of the terms of the arbitration decision pursuant to this subsection shall not be construed to limit the facts upon which the decision may be based, as set forth in subsection (h).

Under Section 4 of the IPLRA an employer may refuse to bargain over "matters of inherent managerial policy," examples of which are listed. A well-known rule of construction says: "To mention one item or group or class of items, and not to mention others is construed to mean that the others were meant to be excluded."⁶ Section 4 lists examples of "inherent managerial policy," about which an employer is not required to bargain. It would seem incumbent upon an employer to show that the items not listed are "inherently" within the "policy of management."

Under Section 4, an employer must bargain "with regard to policy matters directly affecting wages, hours and terms and conditions of employment." The Union proposal seeks to preserve jobs for bargaining unit employees and thus directly affects "wages, hour and terms and conditions of employment."⁷ Nor, by denying the Employer's right to contract out the work of "firefighters or paramedic/firefighters," does the Union proposal impinge upon the Em-

⁶Marvin Hill, Jr. and Anthony V. Sinicropi, *Evidence in Arbitration*, 2d ed. (Washington: BNA Books, 1987), 352.

⁷Even though the IPLRA does not ban secondary activity, including "hot cargo" agreements, the test developed by the NLRB and the federal courts to determine whether a restriction on subcontracting is secondary activity may help me to understand the purpose of the clause the Union has proposed. By analogy, if not by strict parity of reasoning, it would seem that if the Union's proposal is designed to preserve bargaining unit jobs and to maintain the integrity of the bargaining unit, the proposal concerns "wages, hours and terms and conditions of employment" about which the Employer must bargain under Section 4 of the Act. On the other hand, if the proposal is designed primarily to restrict the Employer's capacity to enter into contracts with other employers, its purpose is secondary and unrelated to the working conditions of employees in the bargaining unit. As one commentator has pointed out, "specific limitations on subcontracting have been negotiated into some labor agreements. These limitations now usually are called 'work preservation agreements,' to distinguish them from 'secondary boycotts,' which are now clearly illegal." Owen Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd ed. (Washington: BNA Books, 1983), 469.

employer's right to determine "the total number of employees employed by the department," as set out in subsection 14(i). Rather, the proposal seeks to maintain the integrity of the bargaining unit. Thus, while the Employer may feel that there should be no restriction on its "option to determine how the village will be run, what services will be provided, and [how to] provide services in the most efficient, least costly manner,"⁸ it is generally recognized that a union may lawfully bargain to restrict subcontracting.⁹

The Union obtained representational status in 1986, and the Employer has been providing paramedic services through a subcontracting arrangement "for about a year and a half" (Tr. 72), or starting at some point in early 1988 or late 1987. Since it is difficult to conclude that the paramedic services the Union hopes to restrict have been "traditionally and customarily" performed by bargaining unit employees, the Union's proposal might not pass muster under a strict interpretation of Section 8(e) of the National Labor Relations Act.¹⁰ However, my responsibility is not to determine whether the Union's proposal to eliminate subcontracting is a "hot cargo" clause, but whether it concerns the wages, hours and terms and conditions

⁸Testimony of John Crois, Tr. 111.

⁹The National Labor Relations Board and the federal courts hold that a contractual restriction on subcontracting does not amount to unlawful secondary activity if it "has as its objective the preservation of work traditionally performed by employees represented by the union," so long as the "contracting employer [has] the power to give the employees the work in question--the so called 'right of control' test...." See *NLRB v. Longshoremen*, 447 U.S. 490 at 504-05, 104 LRRM 2552 at 2557 (1980).

¹⁰Section 8(e) of the NLRA bars "hot cargo" agreements--agreements, express or implied, under which an employer is to stop handling, using, selling, transporting, or otherwise dealing in the products of any other employer or to stop doing business with any other person.

of employment of employees in the bargaining unit the Union represents. As the proposal attempts to prevent erosion of the bargaining unit, as well as erosion of the salaries and benefits of bargaining unit employees, it concerns their wages, hours and terms and conditions of employment, within the clear meaning of Section 4 of the IPLRA.

(b) The Union's Proposal

(1) Arbitral Authority on Subcontracting

Subcontracting "is one of the most troublesome and perplexing problems in labor-management relations. It affects the concern of the recognized collective bargaining agent and the preservation of the bargaining unit. It triggers the fear of job loss and unemployment." *American Air Filter Co.*, 54 LA 1251, 1254 (Dolnick 1970). While public and private employment may differ in critical ways,¹¹ the experience of employers and unions in the private sector may provide some guidance. In the private sector, contracting out generally results from a "make or buy" analysis...by a management to determine whether purchasing a part, a product, or a service, instead of making or providing it, reduces costs, thereby increasing profits or decreasing prices."¹² In the absence of a contractual ban on subcontracting, arbitrators normally permit employers to contract out ancillary or extra work, unusual construction or repair, or work not normally performed by bargaining unit employees. But, even with-

¹¹See, for example, Summers, "Public Sector Bargaining: Problems of Governmental Decision Making," 44 U. Cin. L. Rev. 669, 669-73 (1975).

¹²Owen Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd ed. (Washington: BNA Books, 1983), 469.

out a contractual ban on subcontracting, employers are not generally permitted—

to commingle... employees of a subcontractor, working under a different set of wages or other working conditions, regularly and continuously with employees of the employer performing the same kinds of work; [or] contract out work for the specific purpose of undermining or weakening the Union or depriving the employees of employment opportunities.¹³

In *Uniroyal, Inc.*, 76 LA 1049, 1052 (Nolan 1981), arbitrator Dennis Nolan noted that “no one would seriously contend that immediately after signing a collective bargaining agreement an employer could lay off all employees and hire a subcontractor to perform all bargaining unit work simply to escape the burdens of the collective bargaining agreement,” and cited Elkouri and Elkouri for the proposition that:

In the absence of contractual language relating to contracting out work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.

(2) Union's Concerns

Subcontracting ancillary services or work not normally the work of firefighters would not be a matter of serious concern. The danger, as the Union realizes, is subcontracting work normally performed by firefighters, a step that might subvert the interests of bargaining unit employees and the Union.

Subcontracting could occur under two circumstances. First, subcontracted paramedic/firefighters could replace bargaining unit

¹³ *Allis Chalmers Mfg. Co.*, 39 LA 1213, 1219 (Smith 1962).

members. Second, subcontracted paramedic/firefighters could supplement the bargaining unit. In the first case, bargaining unit jobs would be lost. In the second case, jobs might not be lost, but the bargaining unit would be weakened and standards of employment eroded. In both cases, separate units of employees with separate standards of employment would be commingled. Commingling increases the possibility of rift and imperils discipline—a result inconsistent with the “interests and welfare of the public.”

Under these circumstances, the Union is not unreasonably concerned that firefighters may feel apprehensive about “lay[ing] their life on the line... and rely[ing] on individuals they don’t know and who have been hired from the outside...” (Un. brief, 13). Firefighting requires mutual trust, respect and teamwork; and the use of contract firefighter/paramedics “paid at... substandard wages” and not subject to the same standards of employment as bargaining unit firefighters would do little to improve teamwork.

(3) The Employer’s Concerns

The “basic and difficult problem” in determining whether management has the right to subcontract is “that of maintaining a proper balance between the employer’s legitimate interest in efficient operation and effectuating economies on one hand and the union’s legitimate interest in protecting the job security of its members and the stability of the bargaining unit on the other.”¹⁴ The Employer has a substantial interest in “effectuating economies.” But the job

¹⁴Elkouri and Elkouri, *How Arbitration Works*, 4th ed. (Washington: BNA Books, 1985), 538.

security of firefighters and the stability of the bargaining unit may not be sacrificed to this need. As long as the Employer is party to a collective bargaining agreement, I do not think it appropriate for the Employer, as suggested by Village Manager Crois, "to contract out for a fire service."¹⁵ Indeed, I can think of few things so likely to be inconsistent with the public welfare as either a rift among the employees whose job it is to protect the public or embroilment of the Village in a dispute between its former employees and the employees of an outside contractor.

(4) Conclusion

As the subcontracting of paramedic/firefighter work raises the likelihood of "commingling" as well as the loss of "employment opportunities," the Union's proposal to ban subcontracting is appropriate. I therefore adopt the Union's seniority proposal in its entirety (Un. 1, attachment, p. 2).

¹⁵As pointed out by professor Summers, supra, n. 11, the "political questions of the size and allocation of the budget, the tax rates, the level of public services, and the long term obligations of the government" are made by "elected officials who are politically responsible to the voters." Section 4 of the IPLRA, however, requires the Employer to bargain about "policy matters," so long as they "directly affect wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives." An employer does not have an unfettered *right*, as suggested, to replace its employees with the employees of a contractor. The Union has a right to bargain about the destruction of the bargaining unit it represents.

V. Summary of Award

My award is summarized below:

A. Wages

I adopt the Employer's proposal on wages: first year: 6% (all steps); second year: 6% (all steps).

B. Retroactivity

I adopt the Union's proposal on retroactivity. All wage increases for the first year shall be retroactive to May 1, 1988 and all wage increases for the second year shall be retroactive to May 1, 1989.

C. Medical Insurance

I adopt the Employer's proposal on Medical Insurance set out in Employer exhibit 4, pages 2-3.

D. Paid Holidays

I adopt the Employer's proposal on paid holidays. There shall be no additional paid holidays.

E. Longevity Pay

I deny the Union's proposal that firefighters be paid longevity pay "as per police contract."

F. Call Back

I adopt the Employer's proposal on Call Back set out in Employer exhibit 4, attachment 4-A.

G. Physical Exam

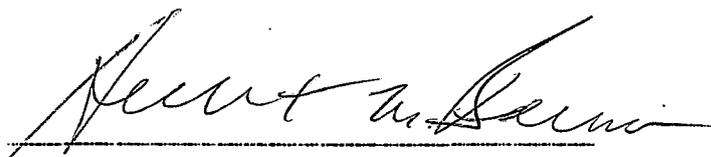
I adopt the Employer's proposal on physical exams as modified and set out at page 20 of this opinion.

H. Drug Testing

I adopt the Employer's proposal on drug testing set out in Employer exhibit 4, attachment 4-C.

I. Seniority; Contract Paramedic Clause

I adopt the Union's seniority proposal set out in Union exhibit 1, attachment, page 2.



Herbert M. Berman
Arbitrator

Deerfield, Illinois
September 22, 1989