

In the Matter of the Arbitration)
)
 Between) FMCS File No. 90-23906
)
 VILLAGE OF WESTCHESTER) Interest Arbitration
)
 and)
)
 ILLINOIS FIREFIGHTERS ALLIANCE,)
 COUNCIL 1)

Appearances

For the Union

Mr. Lawrence A. Poltrock of Witwer, Burlage, Poltrock
 & Giampietro, Attorney at Law
 Mr. Dennis Keeffe, Fire Fighter
 Mr. James Waters, Fire Fighter
 Mr. Sean G. Casey, Fire Fighter

For the Employer

Mr. John T. Weise of Seyfarth, Shaw, Fairweather
 & Geraldson, Attorney at Law
 Mr. John H. Crois, Village Manager
 Mr. Thomas P. Rafferty, Fire Chief
 Mr. Angelo L. Luciano, Village Trustee

FINDINGS, OPINIONS, and ORDER

Nature of the Case

Illinois Firefighters Alliance, Council 1 ("the Union") has been the recognized exclusive bargaining agent of a unit of fire fighters employed by the Village of Westchester ("the Village" or "the Employer") in the State of Illinois since 1986. A different labor organization represented the fire fighters before 1986. The present collective bargaining agreement ("the contract" or "the Agreement") is the third two-year agreement between the parties. The Village's fiscal year begins on May 1, and annual contractual wage increases have been effective as of that date.

The most recent Agreement between the parties was for the term May 1, 1988, through April 30, 1990, and was arrived at through interest arbitration. In negotiations, including

mediation, following expiration of that Agreement they were unable to reach agreement on a new contract, and the Union filed a demand for compulsory interest arbitration with the Illinois State Labor Relations Board. The parties agreed that the arbitration panel should consist of a single neutral arbitrator and waived the right to have partisan members on the panel. They also agreed to follow time limits as set by them for selecting an arbitrator and setting a hearing instead of the statutory time limits. In addition, they stipulated that "the interest arbitration shall be conducted pursuant to Section 14 of the Illinois Public Labor Relations Act and the Rules and Regulations of the Illinois State Labor Relations Board".

The undersigned arbitrator was selected from a panel furnished by the Federal Mediation and Conciliation Service. Hearing was held in the Village Hall in the Village of Westchester on March 4, 1991. Evidence was presented on the following economic issues: wages, employee contribution for medical insurance, number of paid holidays, number of personal days, longevity pay, and acting officer pay. Evidence was also taken on the non-economic issue of drug and alcohol testing. The parties agreed that all terms of the 1988 contract not included within the issues in dispute or a list of agreed items are to continue in full force and effect in the 1990 Agreement.

In accordance with Section 14 (g) of the Illinois Public Employment Relations Act ("the Act"), just prior to conclusion of the hearing, the parties were given the opportunity to submit to the arbitrator and to each other their last offers of settlement on each issue. At that time the Union withdrew the issue of acting officer pay.¹ Following conclusion of the hearing the parties filed briefs in support of their respective positions, which were received by the arbitrator on April 16, 1991. They agreed to extend the time for the arbitrator to make written findings of fact and promulgate a written opinion until June 3, 1991. The issues will now be discussed beginning with the wage issue.

Wages

As of the date of the hearing the Village employed 17 fire fighters. Its normal complement is 18 fire fighters, but one resigned on January 17, 1991, and had not been replaced by the date of the hearing. Article VI, Wages and Benefits, Section

¹Apparently the Union overlooked the fact that it withdrew acting officer pay as an issue since in its post-hearing brief it argues that this benefit should be granted to the fire fighters. However, I believe that I am bound by the statute not to consider that issue once it has been withdrawn pursuant to Section 14 (g).

6.1 of the 1988-1990 contract contains the following salary schedule in effect beginning May 1, 1989:

<u>Amount of Service</u>	<u>Annual Salary - May 1, 1989</u>
New Employee	\$23,758
After 12 Months	26,946
After 24 Months	29,641
After 36 Months	31,308
After 48 Months	32,848
After 60 Months	34,510

The breakdown of years of service of the 17 employees on the hearing date was as follows:

Top Rate: 8 fire fighters

48 Months: 1 fire fighter

36 Months: 0

24 Months: 1 fire fighter

12 Months: 5 fire fighters

Starting Rate: 2 fire fighters

The Village's last offer of settlement on the wage issue was as follows:

May 1, 1990: \$1,400 per year salary increase--all steps

May 1, 1991: \$1,400 per year salary increase--all steps

The Union's last offer on wages was as follows:

May 1, 1990: 5.5% increase--all steps

May 1, 1991: 5.5% increase--all steps

Section 14 (h) of the Act sets forth eight general factors on which an arbitration panel, in an interest arbitration, "shall base its findings, opinions and order . . . , as applicable:"

(1) The lawful authority of the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(A) In public employment in comparable communities.

(B) In private employment in comparable communities.

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

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

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

(8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in 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 comparison criterion, item (4) above, is commonly considered one of the most important in determining interest arbitration disputes. To apply this criterion it is necessary to decide which communities are comparable to Westchester. In the present case that task is made easy because the parties are in agreement that the following communities are comparable to Westchester :

Bellwood
Broadview
Hillside
Maywood
Melrose Park
North Riverside

These six communities at the time of the last contract, together with Westchester, comprised what is known as Battalion 7 or Division 7, a group of municipalities located near each other who have joined together for mutual assistance in fighting fires.

North Riverside has since dropped out of the group, but the parties are in agreement that it may be used as a comparable community for purposes of applying Section 14 (h) of the Act.

The following table shows the top salaries of fire fighters in the seven communities for four years beginning May 1, 1988. The six other communities have fixed their fire fighter salaries for 1990 and all but Hillside have also already set their fire fighter salaries for fiscal 1991. The table shows what the salaries would be for 1990 and 1991 both under the Village's and the Union's last offers. The Union's offer for each year is in bold face. In parentheses after each salary figure, the ranking of that community is shown. Below each figure is the percentage increase that figure represents over the previous salary in effect for the community.

<u>MUNICIPALITY</u>	<u>5-1-88</u>	<u>5-1-89</u>	<u>5-1-90</u>	<u>5-1-91</u>
BELLWOOD	32,253 (6) 7%	33,938 (6) 3%	35,889 (4) 5.75%	37,243 (6) 5.5%
BROADVIEW	32,789 (4) 5%	34,101 (5) 5%	35,806 (5) 5%	37,506 (4) 4.75%
HILLSIDE	32,859 (3) 5%	34,255 (4) 4.25%	35,797 (6) 4.5%	
MAYWOOD	33,050 (2) 4.4%	35,033 (1) 6%	37,135 (1) 6%	39,363 (1) 6%
MELROSE PARK	31,960 (7) None	34,960 (2) 9%	36,710 (2) 5%	38,460 (2) 4.75%
N. RIVERSIDE	33,900 (1) 3.73%	33,900 (7) None	35,550 (7) 5% + 2% Dec.	38,101 (3) 5%
WESTCHESTER	32,557 (5) 6%	34,510 (3) 6%	35,910 (3) 4.1%	37,310 (5) 3.9%
			36,408 (3) 5.5%	38,410 (3) 5.5%

The foregoing table applies to the top rate for fire fighters at the various communities. The Village presented testimony that a \$1,400 increase for all fire fighters, including fire fighters below the top rate, represents a 4.5% increase for the first year of the new contract on the average salary of the 17 fire fighters employed as of the date of the hearing, and a 4.2% increase as of the second year. Those figures are largely meaningless, however, because the percentage of increase figures for all of the other communities are for the top salary steps in those communities. As Village Manager Crois acknowledged, unless the fire fighters below the top of the salary schedule in the

other communities also received the same percentage increase as the fire fighters at the top of the scale, the average percentage increase in those communities would be different than the percentage increase for the highest paid fire fighters. Mr. Crois did not know whether the percentage increases for the lower paid fire fighters in the other communities were the same or different from those at the top of the scale (Tr. 230).

Since the only known reliable figures for the other communities pertain to the top salary scale at each of those communities, any comparison of Westchester with the other communities must be limited to the top rates of the respective municipalities. The top rate is also the most important rate for comparison both because the greatest concentration of employees is at the top and, in the normal course, all employees will, in no more than five years, reach the top. Further, according to the undisputed evidence, the only figures used by the parties in their negotiations were for the highest salaries in the respective jurisdictions. For all of these reasons consideration of the comparison factor with respect to wages pursuant to Section 14 (h) (4) of the Act shall be based on the top salary scale at Westchester and the other communities.

The average percentage increase for fiscal 1990 of the other six communities, besides Westchester, in the comparison group was 5.375%.² The Union offer of 5.5% was much closer to the average increase of the other communities than the Village offer, which comes to 4.1% for the top rate for 1990.³ Although the Employer has accepted the Division 7 or Battalion 7 group as a proper one for comparison, Village Manager Crois nevertheless testified that Bellwood and Broadview were traditionally the closest to Westchester among all of the communities in the division. The average increase in 1990 for just those two communities was also 5.375%. Consequently whether all six communities are considered or only Bellwood and Broadview, the conclusion is the same. From a percentage standpoint, the Union offer compares much more favorably with the increases instituted at the other comparable communities than the Village offer.

For the fiscal year 1991, the average percentage

²The average figure was reached by totaling the percentage figures shown in the table for the six communities and dividing by six. A 6% figure was used for N. Riverside since the additional 2% for the 1990 fiscal year did not go into effect until December. If the full 7% were used for N. Riverside, the average increase at the other jurisdictions would come to 6%

³Actually, \$1,400 represents a 4.05% increase for the first year of the contract, but I have rounded the figure to 4.1%

increase at the other municipalities was 5.2%.⁴ Again, the Union offer of 5.5% is much closer to the average of the other communities than the Village offer, which, for the second year of the contract, comes to 3.9%. The average increase including only Bellwood and Broadview was 5.125%. Here too the Union offer is much closer to the increase at the other communities than the Village's.

From a dollar point of view the \$1400 offered by the Village the first year and the 2800 over two years represents the least amount of dollars offered by any of the communities in the division. Among the six other communities the dollar increases paid to fire fighters for fiscal 1990 ranged from \$1,542 at Hillside to \$2,102 at Maywood. The average was \$1,783. Just counting Bellwood and Broadview, the average was \$1,828.

For 1990 and 1991 at the other five communities (excluding Hillside, for which the second year figure is unavailable) the total increases for the two years ranged between \$4,330 at Maywood and \$3,305 at Bellwood. On a dollar basis, therefore, the Village's offer is last among all of the communities. The Union offer, which, in dollars, comes to \$1,898 the first year and a total of \$3,900 for the two years would, both at the end of the first and the second years, put the Union in the third rank in terms of the dollar amount of the salary increase granted. This is precisely the dollar ranking the Union had as of May 1, 1989--the beginning of the second year of the contract. The \$3,900 figure is also within \$152 of the average total increase for the five communities for which two year figures are available. The average for the five communities for the two years is \$3,748.

The Village, however, argues neither on the basis of percentage figures or dollar increases but on a comparison of the final dollar amounts fire fighters will receive (or, stated another way, the relative standing of the Westchester fire fighters) under its offer vis-a-vis the salaries of the fire fighters in the other communities during the relevant years, especially as of May 1, 1991. The Village notes that Maywood, Melrose Park, and North Riverside are at the top and asserts, "Two of these three should be at the top, and there seems little argument about that (Tr. 155)." At page 155 of the transcript is the testimony that North Riverside has a large shopping center which brings in much sales tax revenue and that Melrose Park has a large industrial base.

The Village then asserts that Bellwood, Broadview, and

⁴The average is for five of the communities only because as of the date of the hearing the salary for fiscal year 1991 had not yet been determined for Hillside.

Westchester are very close to each other, with less than \$300 separating the lowest and the highest of them. It thereafter remarks, "In sum, Westchester salaries are very much within the pack, very much within the prior ranking of Westchester firefighter salaries and, understandably, some dollars behind the top paying municipalities in the Battalion." The Village argues that the relative standing of Westchester would not change if its offer was adopted: "[T]he standing of Westchester," the Village declares, "including the \$1400 raise in 1990 and 1991, keeps Westchester exactly where it was in the relative standings. In the last two contracts, Westchester ranked fifth and third within the comparable jurisdictions and under the new arrangement Westchester stands third and fifth"

Contrary to the Village's argument, its final wage offer will result in a significant change in the relative standing of Westchester. In the two prior negotiations the Village agreed to raise the relative standing of the fire fighters to bring them up to the middle of the division, and indeed one step above the middle. Thus in the 1986 negotiations the Village agreed to stagger four increases over two years to permit Westchester fire fighters to "catch up" with their counterparts in the division. This brought them up only to fifth in rank, and in the 1988 negotiations, which wound up in interest arbitration, the Village proposed and the arbitrator found that a 6% rate increase was appropriate each year. This increased Westchester's rank among the division communities to third.

To adopt the Village's proposal will not, as the Village contends, keep Westchester exactly where it was in the relative standings but will reduce it from third at the end of the last contract to fifth or sixth as of May 1, 1991, depending on how Hillside settles. In Village Exhibit 17, the Employer estimates that the May 1, 1991, increase at Hillside will be 4.5%--the same percentage increase as in 1990. Should that occur, then Westchester will fall to sixth in rank. The movement of Westchester in the 1988 contract from fifth to third in standing was not a matter of chance, but the result of the Village's acquiescence in the Union's desire to bring Westchester's position up from near the bottom to the middle.

It is not an answer to state that Westchester is still at the middle because Bellwood, Broadview, and Westchester are so close to each other that there is little difference between being No. 4 or No. 6 in the group after the three highest paying jurisdictions. The effect of the Village's offer is to greatly increase the spread between Westchester's top salary and the No. 1 and 2 salaries in the division and to substantially reduce the difference between Westchester's top salary and the two lowest top salaries. This represents a very significant deterioration of Westchester's relative position among the communities in the comparison group.

A comparison of the pertinent salary figures will show this to be true. The Westchester May 1, 1988, top salary of \$32,557 for fire fighters was \$1,343 or 4.1% below No. 1 in rank North Riverside's top salary in the division of \$33,900. On May 1, 1989, the top salary at Westchester rose to \$34,510, which was only \$523 or 1.5% below Maywood's No. 1 top salary of \$35,033. The spread between the No. 2 salary in the division and the Westchester salary was \$493 or 1.51% in 1988 and \$450 or 1.3% in 1989.

The Employer's \$1,400 offer for 1990 would increase the spread between Westchester and the No. 1 community (Maywood at \$37,135) to \$1,225 or 3.4%. For the second year of the contract, effective May 1, 1991, the distance between the No. 1 salary (Maywood, \$39,363) and Westchester's top salary would increase to \$2,053 or 5.5%. This holds true also for the spread between Westchester and the No. 2 salary if the Employer's final wage offer were adopted. It would increase to \$800 or 2.2% in 1990, and \$1,150 or 3.08% in 1991.

The Employer's final offer, if adopted, would also significantly decrease the difference between Westchester's top rate and the top rate of the two lowest ranking communities in the division. Thus in 1988, Westchester's top rate was \$597 or 1.87% above the lowest rate in the group. This remained almost constant in 1989, where the difference between Westchester and No. 7 increased slightly to \$610, but the percentage figure decreased somewhat to 1.8%. In 1990 and 1991, however, there would be significant reductions in the differences of salaries between Westchester and the lowest ranking community under the Village's offer, diminishing to \$360 or 1.01% in 1990 and \$67 or .18% in 1991. Similarly, with regard to the next to lowest ranking community, Westchester's lead increased from \$304 or .94% in 1988 to \$572 or 1.68% in 1989, but, under the Village's offer would decrease to \$113 or .32% in 1990. In 1991, Westchester itself would be next to last in salary standing among the division communities.

In sum, if adopted, the Village's final offer will greatly increase the spread between Westchester's top salary and the salaries at the two highest communities in the group and significantly reduce the difference between the Westchester salary and the salaries of the two lowest ranking municipalities in addition to lowering Westchester's rank in the group from third to fifth or sixth, depending on the settlement at Hillside. It will not keep Westchester where it was in the relative standings. It will undo the "catch-up" agreements which the Village itself cooperated in achieving.

The Union's offer would leave Westchester much closer to the relative positions of Westchester vis-a-vis the two highest and two lowest municipalities as compared to where it

stood at the end of the 1988 to 1990 contract. As noted above, as of May 1, 1989, Westchester was 1.5% below the highest salary in the division and 1.3% below the second highest salary. The Union's offer for 1990 would bring Westchester 1.96% below the highest paying community and .82% below the second highest paying jurisdiction. For 1991, it would situate Westchester 2.48% below the highest paying community and .13% below the next highest paying jurisdiction. By contrast, as previously noted, the Employer's 1990 offer would increase the spread between Westchester and the highest paying community in the division to 3.4% for 1990 and 5.5% for 1991. With respect to the next highest paying municipality the Employer's offer would produce a spread of 2.2% in 1990 and 3.08% in 1991. Clearly then the Union offer will maintain Westchester's relative standing with the highest and next highest paying communities in the division much more faithfully than the Village offer.

A similar comparison between the Westchester top salary and the top salary of the lowest paying and next to lowest paying communities in the division will show that the Employer offer results in a greater percentage change in the difference between Westchester and the other communities for 1990 and 1991 as compared with 1989 than the Union offer. This is especially pronounced with respect to the next to lowest paying communities for each of the years. Thus for 1989 the difference in the salaries between Westchester and Bellwood, which ranked sixth in top salary, was \$572 or 1.68%. Under the Employer offer, the salary difference between Westchester and the sixth ranking community in 1990 (Hillside) would be reduced to \$113 or .32%. Under the Union offer the difference in salaries for 1990 would be \$611 or 1.7%, almost no change in the relative positions of Westchester and the sixth ranking communities for 1989 and 1990. For 1991, the Employer offer would place Westchester itself in next to last place in salaries among the communities in the division. Under the Union offer, there would be a difference of \$904 or 2.41% between the 1991 salaries of Westchester and the next to last ranking municipality. The Union offer thus retains better relative standing than the Employer's in comparison with the lowest paying communities also.

The Company's final offer also changes the existing wage structure which has been in effect for three contracts between the parties. Thus in all previous contracts the parties have negotiated for across the board percentage increases applicable to all steps. By applying the same \$1,400 figure to each step of the five step progression after the starting rate, the Village will reduce the percentage increase between each step. For example under the previous contract, an employee received a 13.41% increase in moving from starting salary to the 12 month salary. The Company's offer would reduce this to 12.6% for the first year of the contract, and an even greater amount the second year. This would also apply at every other step in

the progression except for the last step. The second year of the contract the reductions between steps will be even greater. No justification is offered by the Employer for this reduction.

The Village asserts in its brief that "there is no likelihood that the Union in 1991 would have negotiated an increase of 5.5% as requested by the Union." I am inclined to agree with that statement. The Union, however, could well have negotiated a 5% increase for each year or 5% in 1990 and 4.5% in 1991. Either package would have been a fair and reasonable increase which would have placed Westchester squarely in the middle of the field as No. 4 in rank as of May 1, 1991.

A 5% increase each year would have resulted in a top salary of \$36,235 in 1990 and \$38,046 in 1991. That would make the spread between Westchester and the No. 2 community \$475 or 1.31% the first year and \$414 or 1.09% the second year, which would compare favorably to the spread between Westchester and the No. 2 communities in 1988 and 1989, which were, respectively, \$493 or 1.51% and \$450 or 1.3%. A 5% - 4.5% deal would have moved Westchester to \$37,865 beginning the second year, 1.57% behind the second ranking municipality.⁵ Either arrangement, as noted, would have made Westchester No. 4 in ranking. A No. 4 ranking would probably be more defensible than a No. 3 rating since among the seven communities in the comparable group Westchester ranks fifth in per capita assessed valuation, fifth in per capita general fund revenue, and fifth in per capita sales tax revenue. However, it is No. 3 in property tax per capita income.

The Village quotes from my opinion of August 27, 1990, in the interest arbitration between Village of Bartlett and Laborers International Union. I there observed that awarding either party a wage package which is significantly superior to anything it would likely have obtained through the collective bargaining process undermines that process. That comment must be taken in context and applies in a situation where one final offer is reasonable and the other is not. In the present case, while I believe that a 5% increase each year (or even 5% and 4.5%) would have been more reasonable than a 5.5% increase, the Village's offer is even less reasonable than the Union's. It is lower both

⁵I have made the comparison with the No. 2 ranking community instead of the highest paying municipality in the division, Maywood, in deference to the Village's argument that Maywood is atypical. A 5% increase each year would place Westchester \$900 or 2.48% behind Maywood the first year and \$1,317 or 3.46% behind it the second year. A 4.5% increase the second year would put Westchester 3.96% behind Maywood commencing May 1, 1991. In 1988, Westchester was 4.1% behind the highest paying community in the division, and in 1989, 1.5% below the No. 1 ranking community.

in dollars and percentages than the increases instituted in all other communities in the comparison group and undoes the catch-up which the Village itself cooperated in attaining. It greatly increases the spread between Westchester and the two highest paying communities in the division and significantly lowers the difference between Westchester and the two lowest paying jurisdictions. It moves Westchester from No. 3 to next to last in ranking. It departs from the parties' historical practice of negotiating percentage increases across the board for all steps and thereby changes the wage structure by lowering the percentage increases between steps in the wage progression.

Although I am not happy in adopting either party's last offer on wages, I must choose between the two. The Union's offer is the less objectionable of the two because of the problems stated above in connection with the Village offer. Those considerations require a finding that the Union's wage offer rather than the Employer's should be adopted. None of the remaining applicable statutory considerations requires a different result. The total difference in the cost between the Union's and the Village's offers for the two years is approximately \$11,100. Village Manager Crois acknowledged in his testimony that his revenue projections included assumptions that the income tax surcharge in effect in Illinois in 1990, which provided the County with \$350,000 in 1990, will not be continued in 1991 (Tr. 239). It also assumes that the 12% increase in real estate property assessments which the Village would otherwise be entitled to as a result of the quadrennial reassessment will be reduced by the legislature to 5% (Tr. 240). That both of these possibilities will come to pass seems highly unlikely to this arbitrator. I am persuaded that the additional \$11,100 will be available to the Village and that the interests and welfare of the public will not suffer unduly as a result of the additional payment.

The Village argues that its \$1,400 offer should be adopted because that is the increase it has awarded to public works, clerical, supervisory, and other Village employees. The rationale offered by the Village for increasing other employees by that amount is that it wishes to increase the salaries or wages of its lower paid employees and that there has been no showing that the higher paid employees need a greater dollar increase than the lower paid employees.

There is no specific statutory standard which sanctions a particular wage or salary increase based on the fact that the public employer has decided to pay that particular increase to other employees of the employer. If that were permissible, every government entity could set wages unilaterally by awarding all employees the exact same increase. There is, however, a statutory standard which speaks of "comparison of the wages . . . with the wages . . . 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." It seems to me that the express statutory standard must take precedence over a method of setting wages not specifically provided for in the statute. That is not to say that wages paid to non-represented employees are irrelevant or even that they may not be determinative under appropriate circumstances. In the present case, however, the comparability factor and the other considerations discussed above outweigh any argument by the Village based simply on the fact that the Village has decided to award all other employees annual increases of \$1,400 for 1990 and 1991, with the exception of police officers who have been offered \$1,500, with the extra \$100 going for a uniform allowance.

The consumer price index increase was approximately 5.5% for 1990 and 5.1% for 1989. Those figures are closer to the Union's final offer than the Employer's. The weight of the relevant statutory factors favors the Union's wage proposal over the Village's. I conclude that the Union's final offer on wages should be adopted.

Employee Contribution for Medical Insurance

Effective July 1, 1991, the Village anticipates a 39% increase in its medical insurance premium. It proposes that, for family coverage, employees contribute \$20 a month toward the premium. The current premium for family coverage, prior to any increase, is \$385 per month. The Village agrees to pay the entire cost of employee-only medical insurance coverage. The Union opposes any contribution by employees toward the premium for insurance coverage, family or otherwise.

Of the seven communities in the division, only Hillside and Maywood require employees to contribute toward insurance coverage. At Hillside fire fighters contribute \$15.00 per month toward family coverage, and in Maywood they pay \$10.20 toward both individual and family medical insurance premiums. The comparison factor therefore favors the Union's position.

Other criteria, however, favor the Village's position. Section 14 (h) (3) lists the factor of the "interests and welfare of the public and the financial ability of the unit of government to meet those costs." The interests and welfare of the public require that health care costs be contained. If the contemplated insurance premium increase comes to pass, the medical insurance expenditure will increase to over \$500,000 or 10% of the general fund budget. Already the cost is well over \$300,000.

Sean Sullivan, "New Approaches to Handling Employee Health Care Costs," Proceedings of the Forty-First Annual

Meeting, Industrial Relations Research Association, Dec. 1988, p. 94, states:

Employers have two basic courses they can take when faced with rising health care costs: (1) they can try to reduce their employees' demand for health care services; or (2) they can try to induce some competition among the suppliers of those services. . .

The author observes that there "are also two basic ways to reduce employees' demand for or use of health care services. The first is to shift to them some of the costs of these services, which they have been largely unaware of so long as they have not had to bear them. The other is to control the use of services more directly through a managed care approach--screening hospital admissions in advance, reviewing utilization during a hospital stay, and encouraging provision of services in less costly outpatient settings."

One of the methods of cost sharing is to have employees share in the premium cost. The author notes, "Half of all workers now pay a share of the premium for individual coverage under employer-provided plans, and two-thirds pay part of the cost of family coverage." The Employer's proposal that fire fighters share the premium cost for family coverage is clearly not an unusual demand in view of the wide-spread acceptance of this financial obligation by work forces generally even though only a minority of the communities in the comparable group requires this of employees. Both as a means of impressing upon employees the steadily increasing costs of insurance coverage and as a measure for reducing somewhat the burden on the Village of insurance premiums, the Village proposal for insurance cost sharing is reasonable. Unless something is done soon to reduce this accelerating cost, it will threaten the Village's ability to provide other necessary benefits and services to its employees and residents. The interests and welfare of the public favor the Village's proposal regarding cost sharing of medical insurance premiums for family coverage.

What tips the scale on the Employer's side with respect to this cost item, however, is the fact that the Union wage offer, as noted above, was on the high side. Section 14 (h) (8) adds as an element to be taken into account, "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 . . . in the public service or in private employment." Plainly, in collective bargaining, one of the factors considered is the total cost of the package. Although the Employer's final wage offer was on the low side compared to the other municipalities in the division and had other

difficulties discussed above, the Union's is somewhat on the high side. It is therefore appropriate to reduce it by the modest cost sharing contribution sought by the Employer.

The Union argues that because "it is clear that this [insurance] burden was originally undertaken by the Employer as an alternative to a salary increase, and as a result of free and open collective bargaining, it would be inequitable to permit the Employer to prevail here." I think that the logic of the situation leads to exactly the opposite conclusion. Since individual and family medical insurance coverage were assumed by the Employer respectively in 1968 and 1972 in lieu of a wage increase those years, the tie-in between health insurance costs and wages is indisputable. Consequently where the application of the statutory criteria requires an arbitrator to choose one of two wage offers, one of which is higher than optimum under the statutory criteria and the other, lower and possesses other problems, it is appropriate for the arbitrator, if he adopts the higher wage offer, to offset the cost by adopting a proposal for reasonable cost sharing on insurance premiums. This is especially fair and proper where, as here, the parties have treated insurance coverage as in the nature of a wage benefit.

I do not view my basing my decision on the insurance premium issue, to some extent, on my determination of the wage issue as inconsistent with the requirement of Section 14 (g) of the Act 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)." (emphasis supplied). This provision would prevent an arbitrator from, on his own, deciding to add a cost sharing requirement on medical insurance to partially offset a wage increase. Where the parties on their own, however, have placed the insurance issue before him, he certainly can take the entire package involved into account in ruling on the insurance issue. Not only would this be permissible under paragraph (8), referring to "Such other factors," as discussed above, but it can also be implied from paragraph (6), which speaks of "The overall compensation presently received by the employees, including direct wage compensation, . . . insurance and pensions, medical and hospitalization benefits" This language indicates that the legislature wished the arbitration panel to consider the entire package of benefits possessed by the bargaining unit in making its findings of fact and decision. This, I think, would also include the wage increase awarded in the proceeding currently before the arbitration panel.

I have considered all of the applicable criteria bearing on the insurance premium issue and adopt the Employer's offer over that of the Union.

Paid Holidays

The Union proposes to increase the number of paid holidays of fire fighters from 9 to 12. The basis for the Union request is that police officers and all other Westchester employees receive 12 holidays. The Village opposes the request and would maintain the status quo. Because police officers and other Village employees work a normal 8-hour day instead of 24 hours on and 48 hours off, as fire fighters do, it is not appropriate to compare fire fighter holiday provisions with those for the other employees. Comparison with holiday provisions of fire fighters employed by the other communities in the division shows that no other community but Bellwood has more than nine paid holidays, i.e., days on which fire fighters work and receive holiday pay in addition. Hillside has 8 paid holidays and North Riverside, 6. Comparability thus favors the Village offer on paid holidays.

Further, for the reasons stated above, I would not adopt an offer for the term of this contract which would increase the compensation of fire fighters over what has been awarded them on the wage issue.

Personal Business Days

The Union proposes that fire fighters be granted two 24 hour days per year to carry out personal business, such days to be lost if not used during the year. No showing was made of any other community in the division which has such a provision for its fire fighters. Nor has there been a showing that fire fighters are having difficulty taking care of their personal business on their regular days off. This proposal, which is opposed by the Village, and would constitute a new benefit is not adopted.

Longevity Pay

The Union proposes longevity pay of \$25 a month for fire fighters with between six and ten years of service and \$50 a month for employees with more than ten years of service. None of the other communities in the division provides its fire fighters with this benefit, which is opposed by the Village. The Union relies on the fact that the police unit receives longevity pay, but the evidence shows that this is because the police officers proposed that benefit in lieu of higher base wages and now receive lower pay than fire fighters. The Union suggests that longevity pay will benefit the Employer by inducing long-term employees to continue their employment. It is purely speculative, however, to state that longevity pay would have made the difference between any fire fighter's leaving or remaining with the force. Providing longevity pay would also increase the

salary award which I have already indicated I consider to be on the high side. No case has been made out for allowing longevity pay. I therefore adopt the Village offer on the longevity issue.

Alcohol and Drug Testing

The Village Last Offer of Settlement on the subject of employee alcohol and drug testing has two parts:

- a. The Village has the right to require random drug tests two times per year.
- b. The blood alcohol content set forth in the policy shall be .05.

The Union agrees to the .05 blood alcohol content standard but objects to any random drug testing. It would agree, it states, to drug and alcohol testing of each employee a maximum of two times per year, but states its position "that any drug testing [must] be based upon just cause or reasonable suspicion."

James Waters, a fire fighter with the Village and president of the Union, testified that both arbitrator Berman and the prior contract permitted testing for reasonable suspicion only and not random testing. Village Manager John Crois was asked why the Village wanted random testing and stated (Tr. 188-189):

The whole program is preventative, things of that nature. I think that the whole idea for the random is that the random is a better deterrent. If an individual has a problem, in some cases they could possibly cover up the problem. They could disguise the problem. It may not arise in the just-cause type of situation and we may not find it or the individual may even harm himself to a greater extent by covering it up and not getting the treatment he needs. . . . I think people will have a second thought about using the drugs or using something that would impede their performance if they are not really certain as to when these tests could be conducted.

As modified in its post-hearing brief, the Village's position with respect to a voluntary request for assistance and to discipline for positive test results are as follows:

1. Voluntary request for assistance (employee self referral). No disciplinary consequences. The employee follows Steps (a) through (d) under the heading "Voluntary Request for Assistance."

2. First confirmed random positive test result. No disciplinary consequence. Same as above, Steps (a) through (d).
3. First confirmed reasonable suspicion positive test result. One-day disciplinary suspension plus same steps as above, Steps (a) through (d).
4. Second confirmed positive test result (random or reasonable suspicion). Disciplinary action up to and including termination. If Village selects termination, this termination is subject to the appeal procedures of the Village of Westchester Fire and Police Commission.
5. Treatment Test. Any test given by the employee's treatment facility, while the employee is in treatment or aftercare, is not a Village of Westchester test and shall not be taken into account as any type of drug testing pursuant to this policy.

Steps (a) through (d) appear in the original Village proposal presented at the hearing and provide as follows:

- (a) The firefighter agreeing to appropriate treatment as determined by the physician(s) involved;
- (b) The firefighter discontinues his use of illegal drugs or abuse of alcohol;
- (c) The firefighter completes the course of treatment prescribed, including an "after-care" group for a period of up to twelve (12) months;
- (d) The firefighter agrees to submit to random testing during hours of work during the period of "after-care."

In its brief the Village gives four reasons why random testing twice a year is appropriate and should be adopted by the arbitrator:

1. Disciplinary safeguards are incorporated as explained above; coupled with this discipline policy, the Arbitrator can and should adopt minimum random testing.
2. Random tests will deter illegal drug use and will help prevent death/injury of a firefighter or citizen.

3. Random testing will encourage employee self-referral and early detection.
4. Random testing is expensive (particularly with the GCMS confirmatory requirement) and actual use will be minimal.

The Village stresses that "[s]plit second decisions must be made concerning exiting a burning building and methods to attack a fire, let alone the seeming routine task of driving a fire truck to a fire." It asserts that it "has no interest in discharging any employee for drug/alcohol problems, and wants to encourage self-referral prevention, counselling and other practices which insure that an employee is not fighting fires in Westchester, impaired by drug or alcohol. There simply is nothing more effective," the Village declares, "than the possibility of an occasional random test."

The Village cites excerpts from findings of the Federal Emergency Management Agency, U.S. Fire Administration (January, 1988) entitled "Administrative Manual on Use of Drugs by Fire Department Members," which lists types of problems caused by drug use by fire fighters: degraded ability to respond to emergencies, increased accident rates, increased injuries and deaths, increased departmental administrative costs, increased cases of legal liability, diminished public trust.

It also cites Supreme Court and lower court cases upholding the legality of drug testing. It notes that Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S. Ct. 1402 (1989), identified several governmental interests which are advanced by the drug testing of public employees: 1) Testing promotes the compelling interest of detecting regular drug users who can "cause great human loss before any signs of impairment become noticeable to supervisors or others." 2) "[R]egulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." 3) If testing cannot be predicted by an employee with certainty, the testing would likely serve as an effective deterrent against on-duty impairment.

The Union argues that random testing "is done on the basis of arbitrary selection" and "therefore might easily become a tool of harassment wielded by the Employer against specific firefighters, whose job performance is satisfactory, and who show no signs of drug or alcohol abuse, but who have managed to displease, in some way, a supervisor or other agent of the Employer." The Union also contends that the Employer's random testing proposal is discriminatory because it does not include fire department officers and Village officials whose decisions may also have a substantial effect on public safety. It urges that the Union proposal "balances the legitimate interest of the

Employer in maintaining an efficient and substance-free firefighting force, with the firefighters' legitimate interest in being free from arbitrary and capricious acts by supervisors, and in receiving some level of due process prior to testing."

What troubles me about the Village's case concerning drug testing is that it has shown no change of circumstances from September, 1989, when arbitrator Herbert M. Berman adopted the Village's own proposal on drug testing, which expressly provided that any drug policy adopted "will not involve any random testing." (emphasis supplied). The pertinent clause in the expired contract, Section 7.9, stated, "Before the Village implements any policy under this Section, it will give the Alliance 30 days' advance notice and a full opportunity to negotiate."

No negotiations commenced pursuant to Section 7.9 during the term of the expired contract. According to Mr. Crois's testimony, negotiations on drug and alcohol testing were first commenced in the negotiations for the present contract (Tr. 182). In these negotiations, however, the Village has departed from its prior position, adopted in the previous arbitration, that a drug/alcohol testing policy "will only cover situations where the Village has reasonable suspicion for testing an employee and will not involve any random testing."

No evidence was presented that any other community in the group of comparable communities has a drug testing policy permitting random testing. The prior arbitration opinion notes the Union's comment that "Five fire departments in Battalion Seven have no drug testing requirement." The Village has not disputed the accuracy of that statement. Further, there is no evidence that the two municipalities with a drug testing program provide for random testing. If there was such a provision at another jurisdiction in the comparison group, presumably the Village would have informed me of that fact.

Besides the comparison factor, which clearly favors the Union position in this case, the "interests and welfare of the public" is another factor which is here pertinent. Little evidence was presented on this factor. There was no evidence of a drug problem among the existing members of the force. The right to test on suspicion is a strong deterrent to drug use because taking drugs is likely to cause erratic behavior or other physical signs which can trigger the right of the Village to order a drug test. The fire fighter who uses drugs may also be involved in an accident in which he is at fault or do some other suspicious act which can trigger a test for suspicion. The interests of the public are not ignored, therefore, by a testing plan which permits drug testing on reasonable suspicion that one is under the influence of drugs.

On the other hand, it is true that an employee may be affected by the residual effects of certain drugs without it being apparent to an observer. Nevertheless the employee's judgment and reaction time can be impaired. A random test program would be more likely to detect and deter such drug use than a plan based on reasonable suspicion or cause. To that extent random testing may provide an extra margin of safety. Random testing, however, can also have the opposite effect if it makes the force feel degraded and second-class citizens. If that occurs there can be a morale problem, with reduction in the quality of performance, to the detriment rather than the benefit of the community. Maintaining the morale of a fire fighting force is very important for good fire protection.

The law clearly permits random testing. There are numerous court decisions upholding the right of random testing of government employees in occupations affecting public safety. A recent Court of Appeals decision specifically upheld the right of the city of Chattanooga, Tennessee, to test fire fighters and police officers "without reasonable cause to believe that the employees so tested were using controlled substances." Penny v. Kennedy, 5 IER Cases 1290 (6th Cir. 1990).

After considerable reflection on the question I have decided that it would not be appropriate to permit random testing at this time absent a showing of any changed circumstances since the issuance of the prior arbitration award. The present contract provision, which expressly excludes random testing as a policy, was proposed by the Village, and it should have the burden of showing why what was acceptable under the prior contract is no longer adequate. In this connection one may note the statement in Elkouri and Elkouri, How Arbitration Works, Third Ed., at p. 788, "Arbitrators may require 'persuasive reason' for the elimination of a clause which has been in past written agreements." Elkouri and Elkouri further states (Id. pp. 788-789):

In arbitrating the terms of a renewal contract, one arbitrator would consider seriously "what the parties have agreed upon in their past collective bargaining, as affected by intervening economic events * * *." The past bargaining history of the parties, including the criteria that they have used, has provided a helpful guide to other "interests" arbitrators. (citations omitted)

Changed circumstances that might justify adoption of a random drug testing plan would be adoption of such a plan by other jurisdictions in Division 7 or evidence of a drug problem among fire fighters in the bargaining unit. Where, as here, the fire fighters of the seven jurisdictions are likely to be fighting fires together because of their mutual aid and

assistance agreement, then the presence or absence of a random testing policy among the other jurisdictions becomes even more significant.

Although, for the reasons stated, the present record does not support adoption of a random drug testing program, the fact that drug or alcohol use by fire fighters can seriously endanger public safety justifies a drug and alcohol testing program which provides a greater degree of protection than a policy which permits testing only on individualized reasonable suspicion of drug or alcohol use. I would require therefore that testing also be permitted, in the Employer's discretion, in the following situations where drug or alcohol use is often a factor, although individualized reasonable suspicion can not be established: (1) an accident in which a fatality occurs; (2) an accident in which the fire fighter may be at fault (or, stated another way, where it cannot be said that the accident was clearly not the employee's fault) involving a reportable injury to a fire fighter or another party or damage to fire equipment of at least \$1,000; or (3) where the fire fighter commits a serious rules violation in connection with a fire.

I think that permitting drug testing in the foregoing circumstances would help deter drug use by employees under the reasoning of the Supreme Court in Skinner, supra, which upheld the right of the Federal Railroad Administration to promulgate regulations mandating and, in other cases, permitting blood, urine, or breath tests of train crew members in the event of train accidents or specific rules violations:

By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, . . . concomitantly increasing the likelihood that employees will forego using drugs or alcohol while subject to being called for duty.

I would also permit drug testing of any fire fighter with a very poor attendance record. My experience has been that employees who are addicted to drugs or alcohol often develop very poor attendance records. Although certainly not all employees with very poor attendance records take drugs or are alcoholics, there is a sufficient correlation between absenteeism and drug or alcohol use to permit such testing for employees in a hazardous occupation like fire fighting where public safety is at stake.

So far as the number of tests per year is concerned, the figure two was proposed by the Employer for random testing. Testing for reasonable cause, or following the triggering events

listed above, cannot reasonably be limited to any specific number. However, no more than two tests per year should be conducted where the reason for the testing is poor attendance.

Under the Act, the "lawful authority of the employer" is a factor to be considered in connection with either party's proposal. It must not be lost sight of that testing of urine for drugs constitutes a search within the coverage of the Fourth Amendment. In NTEU v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384 (1989), the Court set forth a balancing test to be applied in assessing the legality of drug testing:

[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

In National Treasury Employees Union v. Yeutter, 918 F. 2d 968 (D. C. Cir. 1990), the Court of Appeals invalidated certain drug testing guidelines of the Department of Agriculture, which permitted direct visual observation of all employees ordered to undergo reasonable suspicion urinalysis. The Court declared:

Because we can discern no weighty government interest in observation that counterbalances the intrusion on employee privacy, we hold that this procedural provision violates the Fourth Amendment.

The court expressed the opinion that in most cases such measures as coloring toilet water to discourage adulteration of the urine specimen, taking away personal belongings and unnecessary outer garments that might conceal substances intended to foil the test, and listening for urination were adequate to keep suspected drug users from cheating. The court indicated, however, that direct visual observation was permissible where there is specific "reason to believe that a particular individual may alter or substitute the specimen to be provided."

Another problem I have with the Village's drug testing plan is that it makes no provision for medical review of the test results and interviewing of the tested employee in the event of a positive test result. There are numerous reported instances of employees who tested positive for drug use because they took medicine or ate particular foods which caused false positive results. A medical person with experience in drugs must be involved in the testing program to assure that a proper questionnaire is developed in which, before being tested, employees are requested to list all medications being taken by

them or food eaten which might affect the test results. The employee must also be given the opportunity, in the event of positive test results, to discuss the matter with the medical person and provide an explanation, if one is available, of why he or she may have tested positive other than because of drug use. A medical person with sufficient knowledge and experience in drug use to prepare a proper pre-testing questionnaire and evaluate the employee's explanation should be selected by the Village.

The medical person chosen by the Village need not be employed full time by the Village. Indeed the cost of such employment would probably be prohibitive. A reasonable ad hoc arrangement would be sufficient. Since we are dealing with the constitutional rights of public employees, however, skilled medical supervision is essential both for the design of the testing procedures and evaluation of any positive test results and employee explanations.

I shall not adopt either the Village's or the Union's final offer regarding alcohol and drug testing but, instead, shall order that the following alcohol and drug testing provisions be included :

Section 7.9. Drug and Alcohol Testing. The parties agree to the following policy with respect to the use, possession, or sale of alcohol or illegal drugs.

Statement of Policy. It is the policy of the Village of Westchester that the public has the absolute right to expect persons employed by the Village in its Fire Department will be free from the effects of drugs and alcohol. The Village, as the employer, has the right to expect its employees to report for work fit and able for duty and to set a positive example for the community. The purposes of this policy shall be achieved in such manner as not to violate any established constitutional rights of the firefighters or the Fire Department.

Prohibitions. Firefighters shall be prohibited from:

- (a) Consuming or possessing alcohol at any time during or just prior to the beginning of the work day or anywhere on any Village premises or job sites, including Village buildings, properties, vehicles and the firefighter's personal vehicle while engaged in Village business;
- (b) Possessing, using, selling, purchasing or

delivering any illegal drug at any time and at any place except as may be necessary in the performance of duty;

- (c) Failing to report to the employee's supervisor any known adverse side effects of medication or prescription drugs which the employee may be taking.

Drug and Alcohol Testing Permitted. In order to help provide a safe work environment and to protect the public by insuring that firefighters have the physical stamina and emotional stability to perform their assigned duties, the Village may require a urinalysis, blood test, or other appropriate test of any employee who has given reasonable cause to suspect that he or she is under the influence of an illegal drug or of alcohol; or who has been involved in an accident in which a fatality occurred; or who has been involved in an accident in which the employee may be at fault involving a reportable injury to a firefighter or another party or damage to fire department equipment of at least \$1,000; or where the employee commits a serious rules violation in connection with a fire; or where the employee has a very poor attendance record.

An employee's consent to submit to such a test is required as a condition of employment and the employee's refusal to consent will result in discipline up to and including discharge, in the Village's discretion, for a first refusal. However, the employee may contest through the grievance procedure whether there were sufficient grounds in accordance with the preceding paragraph to request the employee to submit to a test. The Village shall designate the time and place for testing.

No employee may be required to submit to more than two tests within a twelve month period solely because of very poor attendance.

Test To Be Conducted. In conducting the testing authorized by this Agreement, the Village shall:

- (a) Use only a clinical laboratory or hospital facility which is certified by the State of Illinois to perform drug and/or alcohol testing.
- (b) Establish a chain of custody procedure for both the sample collection and testing that will ensure the integrity of the identity of

each sample and test result.

- (c) Collect a sufficient sample of the same bodily fluid or material from a firefighter to allow for initial screening, a confirmatory test, and a sufficient amount to be set aside reserved for later testing if requested by the firefighter.
- (d) Collect samples in such a manner as to preserve the individual firefighter's right to privacy while insuring a high degree of security for the sample and its freedom from adulteration. There shall be no direct visual observation of an employee while providing a urine specimen except if there is specific reason to believe that a particular individual may alter or substitute the specimen to be provided. In the latter case observation shall be by a member of the same sex to be designated by a supervisory officer. The Village may provide reasonable measures for safeguarding the test such as coloring toilet water, taking away personal belongings and unnecessary outer garments that might conceal substances intended to foil the test, listening for urination, and taking the temperature of the urine specimen. Proven adulteration of a sample is grounds for discipline up to and including discharge, in the Village's discretion.
- (e) Confirm any sample that tests positive in initial screening for drugs by testing the second portion of the same sample by gas chromatography/mass spectrometry (GC/MS) or any equivalent or better scientifically accurate and accepted method that provides quantitative data about the detected drug or drug metabolites.
- (f) Provide the firefighter tested with an opportunity to have the additional sample tested by a clinical laboratory or hospital facility of the firefighter's choosing at the firefighter's own expense; provided the firefighter notifies the Village within seventy-two hours of receiving the results of the test.
- (g) Require that the laboratory or hospital facility report to the Village that a blood

or urine sample is positive only if both the initial screening and confirmation test are positive on a particular drug. The parties agree that should any information concerning such testing or the results thereof be obtained by the Village inconsistent with the understandings expressed herein (e.g., billings for testing that reveal the nature or number of tests administered), the Village will not use such information in any manner or form adverse to the firefighter's interests.

- (h) Require that with regard to alcohol testing, for the purpose of determining whether the firefighter is under the influence of alcohol, test results showing an alcohol concentration of .050 or more based upon the grams of alcohol per 100 millimeters of blood be considered positive.
- (i) Provide each firefighter tested with a copy of all information and reports received by the Village in connection with the testing and the results.
- (j) In connection with its testing program the Village shall engage the services of a medical expert experienced in drug testing to design an appropriate questionnaire to be filled out by any employee being tested to provide information of food or medicine or any other substance eaten or taken by or administered to the employee which may affect the test results and to interview the employee in the event of positive test results to determine if there is any innocent explanation for the positive reading.

Voluntary Request for Assistance. The Village shall take no adverse employment action against any firefighter who voluntarily seeks treatment, counselling or other support for an alcohol or drug related problem, other than the Village may require reassignment of the firefighter with pay if he is unfit for duty in his current assignment. The foregoing is conditioned upon:

- (a) The firefighter agreeing to appropriate treatment as determined by the physician(s) involved;

- (b) The firefighter discontinues his use of illegal drugs or abuse of alcohol;
- (c) The firefighter completes the course of treatment prescribed, including an "after-care" group for a period of up to twelve (12) months;
- (d) The firefighter agrees to submit to random testing during hours of work during the period of "after-care."

Firefighters subject to this procedure who do not comply with its terms shall be subject to discipline, up to and including discharge. This clause shall not be construed as an obligation on the part of the Village to retain a firefighter on active status throughout the period of rehabilitation if it is appropriately determined that the firefighter's current use of alcohol or drugs prevents such individual from performing the duties of a firefighter or whose continuance on active status would constitute a direct threat to the property and safety of others. Such firefighter shall be afforded the opportunity, at his or her option, to use accumulated paid leave or take an unpaid leave of absence pending treatment.

Disciplinary Steps. The following concepts on discipline are incorporated in the drug testing policy:

- (1) Voluntary request for assistance (employee self referral). No disciplinary consequences. The employee follows Steps (a) through (d) under the heading "Voluntary Request for Assistance."
- (2) First confirmed positive test result. One-day disciplinary suspension plus same as above, Steps (a) through (d).
- (3) Second confirmed positive test result. Disciplinary action up to and including discharge. If Village selects discharge, the discharge is subject to the appeal procedures of the Village of Westchester Fire and Police Commission.
- (4) Treatment test. Any test given by the employee's treatment facility, while the employee is in treatment or after-care, is not a Village of Westchester test and shall not be taken into account as any type of drug

testing pursuant to this policy.

A W A R D a n d O R D E R

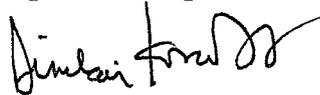
The arbitrator awards and orders as follows with respect to the economic issues:

1. The Union's last offer on the wage issue is adopted.
2. The Village's last offer on the issue of employee contribution to medical insurance is adopted.
3. The Village's last offer on the paid holidays issue is adopted.
4. The Village's last offer on the personal business days issue is adopted.
5. The Village's last offer on the longevity pay issue is adopted.

The arbitrator awards and orders on the non-economic issue of alcohol and drug testing:

6. The drug and alcohol testing provisions set forth at pages 24-29 of the opinion accompanying the award and order are adopted.

Respectfully submitted,



Sinclair Kossoff
Arbitrator

Chicago, Illinois
June 2, 1991

SEP 27 1991

In the Matter of the Arbitration)
Between) FMCS File No. 90-23906
VILLAGE OF WESTCHESTER) Interest Arbitration
and)
ILLINOIS FIREFIGHTERS ALLIANCE,)
COUNCIL 1)

Appearances

For the Union

Mr. Lawrence A. Poltrock of Witwer, Burlage, Poltrock &
Giampietro, Attorney

For the Village

Mr. John T. Weise of Seyfarth, Shaw, Fairweather &
Geraldson, Attorney

SUPPLEMENTAL FINDINGS, OPINIONS, AND ORDER

Background: Prior Proceeding
and Rejection of Prior Award

A hearing in an interest arbitration between these same parties, Village of Westchester ("the Village" or "the Employer") and Illinois Firefighters Alliance, Council 1 ("the Union"), was held before this same arbitrator on March 4, 1991. In dispute were issues concerning wages, employee contribution for medical insurance, paid holidays, personal business days, longevity pay, and alcohol and drug testing. The undersigned arbitrator rendered his Findings, Opinions, and Order ("the award") in the case on June 2, 1991. On June 11, 1991, pursuant to Section 14 (n) of the Illinois Public Labor Relations Act, the Village Board voted unanimously to reject those portions of the award relating to wages and drug and alcohol testing.

By letter dated June 12, 1991, the Village Manager, John H. Crois, notified the Union attorney, with a copy to the undersigned arbitrator, of the Village's rejection of the arbitrator's award on the wage and drug and alcohol testing issues. A copy of the Village's resolution rejecting those portions of the award was enclosed. The resolution included a direction to the Village Manager "to send a letter to the Illinois Firefighters Alliance, Arbitrator Sinclair Kossoff and

the Illinois State Relations Board informing them of the Board's rejection."

The Village Manager's letter of June 12, 1991, gave the following reasons for rejecting the award:

. . . it is not consistent with the requirements of Section 14 of the Illinois Public Labor Relations Act, particularly:

(1) the Arbitrator's award was not consistent with the interest arbitration factors required by Section 14 (h) of the Act; and (2) the Arbitrator's order did not comply with the requirements of Section 14 (k) of the Act because the Arbitrator exceeded his statutory authority and/or was without authority; and (3) the Arbitrator's order is arbitrary or capricious.

Supplemental Hearing

Section 14 (n) of The Illinois Public Labor Relations Act ("the Act") provides that after the governing body gives reasons for its rejection of one or more terms of the arbitration panel's decision, "the parties shall return to the arbitration panel for further proceedings and issuance of a supplemental decision with respect to the rejected terms." Section 14 (n) also recognizes the right of the parties to refer the rejected portions of the award to some "other decision maker" for determination. Section 14 (o) of the Act states, "If the governing body of the employer votes to reject the panel's decision, the parties shall return to the panel within 30 days from the issuance of the reasons for rejection for further proceedings and issuance of a supplemental decision." Section 1230.110 of the Illinois State Labor Relations Board ("the Board") Rules and Regulations provides in paragraph f):

The parties may mutually agree to select a different neutral chairman for the supplemental hearing, provided they notify the Board and the original neutral chairman within seven days after service of the reasons for rejection of the award.

Union Motion

In the present case the parties agreed to submit their supplemental dispute to the same undersigned arbitrator for decision. A supplemental hearing was held at the Village Hall in Westchester, Illinois, on July 26, 1991. A procedural point was raised at the hearing by the Union which must be disposed of before ruling on the merits of the dispute. At the hearing the Union moved for a finding that the Village had not complied with

the requirements of the Act for convening a supplemental hearing in that the Board failed to provide reasons for rejection of the wage and drug and alcohol testing portions of the award. The Union contends that the letter from the Village Manager does not satisfy the statute because providing reasons for rejection is a nondelegatable duty of the governing body--here the Village Board of Trustees--, and the Village Board improperly delegated that duty to the Village Manager.

I must reject the Union's motion. Section 14 (n) of the Act provides, "The governing body shall review each term decided by the arbitration panel. If the governing body fails to reject one or more terms of the arbitration panel's decision by a 3/5 vote of those duly elected and qualified members of the governing body, . . . such term or terms shall become a part of the collective bargaining agreement of the parties. . . ." The next sentence states, "If the governing body affirmatively rejects one or more terms of the arbitration panel's decision, it must provide reasons for such rejection with respect to each term so rejected, within 20 days of such rejection and the parties shall return to the arbitration panel for further proceedings and issuance of a supplemental decision with respect to the rejected terms. . . ."

It should be noted that the only vote to be taken by the governing body is on whether to reject or accept. No vote need be taken on the reasons for the rejection. This, to me, indicates that the legislature contemplated that the providing of the reasons was to be a less formal process. The governing body, moreover, is given 20 days after the rejection to provide the reasons. This also shows a division between the act of voting on whether to accept or reject and the act of furnishing of the reasons for the action. I have no reason to believe that the reasons stated in the Village Manager's letter were not the reasons of the Board or that they were not given with the prior approval or subsequent ratification of the Village Board. On the contrary, the Village Manager testified in some detail about the concerns of the Board members with the award, which strongly indicates that he discussed the award with the Board and did not act on his own but with their authorization and approval. I shall therefore deny the Union's motion.

An alternative reason for denying the motion is that the Union appears to have waived its objection to proceeding on the merits of the dispute. The supplemental hearing in the present case was originally scheduled to be held on July 11, 1991. The Employer attorney had a conflict on that date and, therefore, the supplemental hearing was convened by telephone on July 3, 1991. On that date I spoke by conference call with the Union attorney and the office of the Village attorney. The Union attorney expressly agreed that the hearing was being convened as of that day to avoid missing any statutory deadline for

commencing the supplemental hearing and that the hearing was being continued by mutual agreement of the parties to July 26, 1991. In our telephone conversation, the Union attorney did not object to going forward on the merits of the parties' dispute. He did not state that he was appearing specially or otherwise indicate that there was some procedural problem in the case. I wrote to the Union and the Employer attorneys on July 3, 1991, stating, "The parties have reconvened by telephone today in lieu of the scheduled July 11, 1991, hearing and the hearing heretofore scheduled for that date shall be considered as commenced as of today and continued by mutual agreement of the parties to July 26, 1991, at 10:00 a.m. at the Westchester Village Hall." No objection was received from either party to that letter. I think that under these circumstances the Union may well have waived any procedural defect to proceeding on the merits.

Positions of Parties on Merits

I turn to a consideration of the merits. At the hearing on July 26, 1991, the parties agreed that each side had the right under the Act to make a new offer with regard to the two portions of the award rejected by the Employer. They stipulated that each party's final offer to the arbitrator should be submitted on or before August 20, 1991, and that the arbitrator would have 30 days thereafter to render his supplemental decision on the open issues. The Village attorney stated that he did not discuss the possibility of a revised offer with the Board of Trustees prior to the hearing because of the ambiguity of the statute on this point. Upon learning that the Union agreed that a revised offer was permissible, he stated that he would explore with the Village Board the question of a revised offer. The next regular Village Board meeting after the supplemental hearing was scheduled for August 13, 1991.

The format followed at the hearing was as follows. The parties first discussed whether they had the right to make new offers or were bound by their original offers. Both sides agreed that they had the right to make revised offers or to stick with their original offers (Tr. 16-17). The Village then proceeded to point out portions of my original award with which it took issue or of which it desired clarification. It asked that I comment in my supplemental award on the points raised by it. Mr. John H. Crois, Village Manager, was then called as an Employer witness. He testified about certain concerns of the Village trustees with the award and addressed matters involving tax revenue and the Village's ability to pay.

The Union attorney then presented the Union's case. He stated that since the original hearing in this case, an arbitration decision had been issued by arbitrator Steven Briggs, which ordered, in pertinent part, as follows. (1) The final

offer of the Union was adopted on wages. The Union offer provided that all bargaining unit employees shall receive a 5-1/2 percent increase in wages in each year of the contract (effective May 1, 1990 and May 1, 1991, respectively); (2) The final offer of the Union was adopted on contribution to the cost of dependent medical insurance. The Union offer provided that employees would not contribute to the cost of such insurance. (3) The arbitrator held that there shall be no random drug and alcohol testing. A copy of arbitrator Briggs' decision was introduced into evidence.

The Union stated that the effect of my award was to reduce the wage increase of the fire fighter by \$240 a year, or .625% (5/8%). The Village challenged this and pointed out that the payment for family insurance coverage would not begin until July 1, the third month of the contract year, so that the total cost for the year for those with family coverage would be \$200 and not \$240. The Union argued that the decision of the Illinois legislature to extend the surcharge for two years and to permit a quadrennial reassessment is a changed circumstance, which, under Section 14 (h) (7) of the Act is additional support for its final offer. The Village asserted that it cannot use temporary revenue sources, such as a two-year tax surcharge extension, to fund continuing expenses. It must begin to make plans now, it stated, for financial problems looming in the not too distant future so that it will not have to take harsh measures such as layoffs at that time. Further, it pointed out, its revenue share of the tax surcharge has been greatly cut (to 50% the first year and 75% the second), and it has already levied an additional \$600,000 based on the expected increased income from the reassessment. Despite the increased revenue, its current budget shows a shortfall of income of between \$150,000 and \$200,000. The Village also stresses that new legislation has frozen the Village's assessed valuation for the next year so that there will be no increase in the property tax for that year.

Final Offers

On August 20, 1991, the parties submitted their final offers in the supplemental proceeding as follows:

Union: The Union stated that it "is resubmitting as its last final offer, the previous final offer it submitted at the original hearing and reincorporates said offer as part of this hearing."

Village: The Village submitted a revised last offer of settlement on Wages as follows:

May 1, 1990: 5% salary increase -- all steps
May 1, 1991: 4-1/2% salary increase -- all steps

Decision

At page 11 of my original decision I wrote, "In the present case, while I believe that a 5% increase each year (or even 5% and 4.5%) would have been more reasonable than a 5.5% increase, the Village's offer is even less reasonable than the Union's." I then explained why I believed this to be true. The Village has now presented me with an offer that I said would have been more reasonable than the Union's. The Union's present offer is a resubmission of its previous final offer presented at the original hearing. Does consistency require that I now accept the Village final offer on wages?

The answer is no. The reason lies in the old adage that you cannot turn back the clock. What I said about the original respective offers applied before I awarded \$20 per month contribution by employees in the second year of the contract for family medical insurance coverage. I can state fairly confidently that had I then had before me and adopted a 5%-4.5% wage offer, I would not have awarded contribution toward family medical insurance premiums to the Village. A 5%-4.5% settlement would have been a fair settlement that would not have called for any offsetting medical insurance contribution. This is especially true here since medical insurance contribution by employees represents breaking new ground for the Employer. Arbitrators generally require strong evidence to justify adding a new contract term and, as a rule, prefer that important changes be negotiated. Establishing the obligation of employees to share in soaring insurance costs is an important accomplishment for the Village significant beyond the cash savings to the Village equivalent to 1/2% in wages.

The Village was awarded insurance premium contribution by employees only because of the award to the Union of a relatively high wage increase. Adoption of the Village's revised offer would permit it to retain the very important new contract term of insurance premium contribution without having to pay the higher wage increase which was the reason for its prevailing on the insurance issue in the first place. This would make a travesty of the collective bargaining process and is not something that should be encouraged by an arbitrator.

The foregoing is relevant to a decision on the wage issue pursuant to Section 14 (h) (7) of the Act, which lists as one of the factors to be considered in determining wage rates and other conditions of employment: "(7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings." The awarding of employee contribution to family medical insurance coverage is a changed circumstance after the submission of the parties' original final offers.

Another changed circumstance is the issuance of the

Briggs arbitration decision, awarding 5-1/2% each year in salary increases to the police officers' unit. The police officers and fire fighters are the only two units of sworn personnel employed by the Village. While there is not exact parity between their salary schedules, the salary schedules of the two groups are very close to each other. Both bargaining units provide for a top salary after 60 months and have yearly increments after 12, 24, 36, 48, and 60 months. Both units received increases of 6% each in the 1988 and 1989 contract years for "catch up" reasons. From testimony at the original hearing (Tr. 193-194), it appears that the principal reason for the difference in the salaries of police officers and fire fighters is that the police officers preferred to have longevity pay for long-term employees while the fire fighters wanted their increased remuneration in base salaries.

Because of their different preferences in respect to base pay and longevity pay, at the end of the 1989 contract year fire fighters were earning \$240 more in base salary at the top rate than police officers' (\$34,510 vs. \$34,270). After 72 months of employment, however, police officers earn \$25 a month or \$300 a year in longevity pay. After 120 months, longevity pay increases to \$50 a month or \$600 a year. If the revised Village offer is adopted, fire fighters, instead of earning \$240 a year more than police officers in base salary, would be earning \$266 less, an overall difference of \$506, not counting the additional earnings of police officers in longevity pay. Adoption of the Village's revised offer on wages would thus result in a fairly substantial change in the existing relationship between fire fighters' and police officers' salaries.

I have taken all of the other statutory factors listed in Section 14 (h) of the Act into consideration, insofar as they are relevant. The lawful authority of the employer factor does not favor either party because both the Union final offer and the Village's revised final offer are lawful. The Village appears to interpret "lawful authority of the employer" to mean that deference must be given to the Village offer because the Village trustees have a legal duty to spend the public money in accordance with their best judgment and know what is best for their community (Tr. 21-23). I do not think that factor (1) means that because if it did, an arbitrator would always have to favor the employer's proposal on the ground that the employer knows government needs best and how expenditures should be prioritized. If the legislature intended that, it could have simply said that there is a presumption in favor of the employer's final offer, and the burden is on the union to show that its offer is more beneficial to the public, or words to that effect. There is no such provision in the Act, however.

I think that factor (1) in Section 14 (h) of the Act is intended simply to rule out any unlawful proposal by either side.

An example would be an employer drug testing proposal without the proper safeguards required by the Fourth Amendment. A second example would be a union proposal unlawfully abridging a governing body's statutory rights. Neither proposal here in issue in any way impinges on the lawful authority of the Employer or arrogates powers improperly.

Factor (2), stipulations of the parties, is not here pertinent. Factor 3, the interests and welfare of the public and the financial ability of the unit or government to meet those costs, is not a significant consideration. Accepting Union Exhibits 4 and 5 as accurate, in the absence of any challenge from the Village, I found in my original award that the total difference over two years between the cost of the Union offer and the Village's original offer was \$11,100. In the supplemental hearing the Village stated that the actual difference in the costs of the two final offers was \$17,144. The primary reason for the difference is that the Village's figure assumes a force of 18 fire fighters the second year of the contract, while the Union used a figure of 17 for both years.

The Village's revised offer of 4-1/2% and 5% for two years would reduce the \$17,144 figure substantially, probably below \$11,000. At the supplemental hearing the Village Manager acknowledged that the Illinois legislature has voted to continue the surcharge for two years, albeit at a reduced rate, and to permit a full 12% increase in the quadrennial reassessment. With these changes in the financial picture the Village should have little, if any, difficulty in finding the funds to cover the difference between the Union's offer and the Village's revised offer on wages.

So far as factor (4) is concerned, comparison with comparable communities, the two offers are fairly close. Subtracting the cost to employees for family medical insurance contribution, the Union offer is approximately 10.5% in increases for two years. The Company revised offer of 5% and 4.5% comes to 9.5% over two years. As I point out at pages 5 and 6 of my original decision, the average percentage increase for fiscal 1990 of the other six communities in the comparison group is 5.375%; and for 1991, it is 5.2%, or a total for the two years of 10.575%. The Union offer comes closer to that figure than the Employer's. Approached strictly from an average percentage increase basis, therefore, factor (4) favors the Union rather than the Village.

However, in my original decision I also discuss the dollar amounts involved and the respective rankings of the comparison communities in per capita assessed valuation, per capita general fund revenue, per capita sales tax revenue, and property tax per capita income, and, on the basis of those considerations, I conclude that a 5% increase each year or a 5%-

4.5% deal would have been more reasonable than a 5.5% increase each year. The changed circumstances, however, as discussed above, in the form of the adoption of the Village offer on insurance premium contribution--which it is not proposing to give up--and the issuance of the Briggs arbitration award (and the consequences of those two occurrences) outweigh, in my opinion, the fact that a 5%-4.5% wage offer is more reasonable in this case than a 5.5%-5.5% wage settlement.

Factor (5), the cost of living or consumer price index, does not clearly favor one side or the other in this case and is not a determinative consideration. For the Chicago area, the percentage increase in the consumer price index for the calendar year 1990 was approximately 5.36%, comparing the average for 1990 with the average for 1989. However, it is currently running substantially below that figure.

For the reasons stated above, I find that application of the factors listed in Section 14 (h) of the Act requires that the Union's last offer on the wage issue be adopted rather than the Village's revised offer. The Village, in its revised offer, seems to have withdrawn its objection to the portion of my award relating to drug and alcohol testing. In the event, however, that that issue is still in contention I reaffirm my original award in respect to drug and alcohol testing.

Additional Comments

In the foregoing discussion I have commented on most of the items raised by the Village in the supplemental hearing that it asked me to comment on. I shall now speak to the remaining items not covered.

The Village is not being penalized for allowing "catch up" in the past. There is no requirement that the Village maintain a particular ranking among the comparable communities, such as third or fourth. As arbitrator Briggs pointed out, however, by granting catch up, the Village acknowledged that a certain degree of inequity existed in the bargaining unit's salaries. Undoing catch up is likely to cause a return to the former situation which the Village itself acknowledged should be changed. Consequently, a strong showing is properly required of the Village before it should be permitted to undo the catch up it cooperated in achieving.

The Village is correct that collective bargaining is not a science. Nevertheless mathematical calculations are often necessary or helpful in order to apply the statutory factors such as comparison of wages of other employees, or the cost of living. Having obtained his figures, however, the arbitrator should realize that they are only one among several elements to be taken

into account in making a decision in the case.

A high standing in property tax per capita income does show that the governing body is taxing its constituents at a high rate. It also indicates, however, that individual property values are high, one of the signs of a financially sound community. See arbitrator Briggs' award at page 18, especially footnote 6.

SUPPLEMENTAL AWARD and ORDER

1. The Union's last offer on the wage issue is adopted.
2. The arbitrator reaffirms his original order on the alcohol and drug testing issue.

Respectfully submitted,

Sinclair Kossoff
Arbitrator

Chicago, Illinois
September 17, 1991