



provided for in the settlement agreement. The City denies drug testing was a major consideration. After the Council's rejection the whole agreement was open for renegotiation.

In further bargaining, which continued even as arbitration was pending, the parties resolved all but three issues, wages, longevity, and drug testing, which constitute the impasse items for this interest arbitration. The wage issue, the Union maintains, really comprises two issues, the amount of the wage increase and the length of the agreement, although from a practical standpoint there is some question about whether they should be separated. The City proposes a two-year agreement with increases each year, while the Union offers one running for three years with increases each year.

#### **STATUTORY CONSIDERATIONS**

For ready reference it is well to set down the eight guiding criteria of Section 14(h) of the Illinois Public Labor Relations Act. They are

- (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 these 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 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 public or in private employment.

These eight factors guide arbitration for both economic and non-economic issues, but nowhere does the Act tell the parties or the arbitrator which factor is most important and which least important. Nor does the Act give weight to the factors. For each impasse issue the arbitrator decides which factors are important and how to weight them. A significant--perhaps the most significant--consideration in deciding an issue is the weight to be given to each of these criteria.

The arbitrator has considerable leeway in choosing the factors upon which to base an award, picking those deemed controlling while still giving attention to the others. The eighth criterion "other factors," deserves separate mention. It frees the arbitrator from confinement to the other seven, allowing special consideration of a factor that may be important for a particular issue even if the Act does not specifically mention this special factor.

Two of the impasse issues, wages and longevity, are economic issues under the Act, so I must pick the final offer of either the City or the Union. The third issue, drug and alcohol testing, is a non-economic issue under the Act, so I am not constrained to pick a final offer, but have more latitude. The parties instruct me to rule only on general principles for the drug testing issue. They will then work out the exact language to go into their agreement.

## WAGES

### 1. FINAL OFFERS

Appendix A of the current agreement contains a "base salary schedule" listing monthly salaries in four job classifications, Firefighter, Probationary Firefighter 2nd six months, Probationary Firefighter 1st six months, and EMT. The parties offer to increase these base salaries as follows:

UNION	EFFECTIVE DATE	CITY
3.5%	5/1/93	3%
3.5%	5/1/94	2.5%
4%	5/1/95	no offer

### 2. ARGUMENTS OF THE PARTIES

#### **UNION**

The Union's final offer was part of the settlement agreement, which the City initialed. It is one of three wage options in that agreement from which the City was to choose one. So in that settlement agreement the City assented to what is now the Union's final offer.

Voluntary settlement through collective bargaining, the Union maintains, is the best way of deciding what terms the parties might have adopted in the absence of arbitration, and is the best guide to the arbitrator in choosing a final offer. Interest arbitration should reflect as closely as possible the desires of the parties. Here we have an actual settlement reached voluntarily, which the arbitrator should adopt because the parties themselves viewed this as a "fair" wage increase.

The City Council rejected the entire settlement agreement, the Union contends, not because of the three wage options it contained but because there was no provision for the random drug testing the Council wanted. So this wage option should still be considered acceptable. The City should not be granted a lower wage than it

initialed voluntarily in that settlement agreement.

Salaries for police and firefighters have run parallel for many years, the Union argues, both in the percent increase each year and in the dollar amounts of the salaries themselves. This internal comparison favors the Union's offer. Since 1985, the first agreement under the Act, through 1992 salary increases for police and firefighters have been virtually identical in percentage, even though the agreements for the two units have not always covered the same number of years. The police were granted a 3.5% increase through arbitration, effective May 1, 1993, the same increase sought here for the firefighters.

The actual salaries of police and firefighters have also historically fallen within a few dollars of each other, the Union maintains.

The importance of such an historical relationship is widely recognized by arbitrators, the Union argues. Although the City points to lesser increases granted to the Sanitation Department, 3% for 1993 and 2.5% for 1994, no historical relationship exists between sanitation employees and firefighters.

External comparisons, the Union says, also favor its position.<sup>1</sup> The Union's 3.5% wage offers for 1993 and 1994 are below the average of the wage settlements for firefighters in these comparable cities. At the time briefs were received and this record closed only four of the comparable cities had settled for 1994-95. The Union calculates the average increase for these four at 3.68%, compared to its offer of 3.5%. But Urbana's settlement of 2.75% was unusually low, the Union points out, because of a

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<sup>1</sup>Twelve comparable Illinois cities ranging in population from 27,033 (Carbondale) to 43,202 (Moline) have been agreed upon, making it unnecessary for me to pick a comparable group from contending lists. I am grateful to the parties for sparing me this difficult task. The twelve are: Alton, Belleville, Carbondale, Danville, De Kalb, Galesburg, Kankakee, Moline, Normal, Pekin, Quincy, and Urbana.

change in language restoring FLSA overtime payments, which add, according to the Union's calculations, approximately 1.5% to Urbana's firefighter wage cost. Thus, the Union contends, the average of the known settlements is higher than 3.68%, and makes the Union's offer look modest.

If the City's final offer were chosen, the Union argues, firefighters would lose ground in comparison to the firefighters in the comparable cities. Such standings should be maintained unless there is some compelling reason for allowing them to change. There is no such compelling reason here, so stability should be favored.

Financial considerations loom large in the arguments of both parties. The Union believes the City exaggerates its financial difficulties. First, the Union points out, the settlement agreement was negotiated under guidelines set down by the Mayor, so the Union's final offer as part of the settlement agreement did not then exceed the City's ability to pay. The picture has not changed significantly since that agreement was initialed, the Union maintains.

Although the Union recognizes that the City's faces monetary difficulties, it argues that under the Act financial considerations are controlling only if the City lacks the ability to pay, which it does not. Granite City has a very strong industrial tax base, the Union points out. Although the City has lost population in recent decades, and is not a major retail center, new businesses have opened in the City. Some of the possible future expenditures which the City stresses, such as sewer repairs resulting from the 1993 flood, were known when the settlement agreement was signed. Most of the cost for these repairs will be reimbursed with federal funds through FEMA.

Finally, using a cost of living argument, the Union urges reliance on the national Consumers Price Index for Urban Workers (CPI-U), called the U.S. City Average, rather than the St. Louis index, favored by the City. The Bureau of Labor Statistics

recommends the national index, says the Union, because it uses a larger sample so is less subject to sampling and measurement error. But cost of living is at best a marginal argument, the Union concedes. Other factors loom larger.

#### **CITY**

External comparisons favor its final offer, the City argues, because they show that Granite City firefighters are in the upper one-third in wages and benefits when compared to firefighters in the comparable cities. Further, the ranking of Granite City firefighters within the comparable group remains the same regardless of which final offer is chosen. This stability in the rankings applies to the starting salary (first six months), the maximum base salary, and the salary after four years. The City uses the Union's own exhibits to make these points.

The City also argues that the Union's salary comparisons extend only to 1993 with no substantial evidence to show how salaries in Granite City would compare with those in the comparable group in 1994 and 1995. Yet the Union asks for a 4% increase effective in 1995, in addition to the 3.5% effective in 1994.

Firefighters are generously compensated in comparison to other City employees. To make this point the City shows salary comparisons between firefighters, police, sanitation workers, street employees, and white collar workers. Starting salaries as well as salaries for a five-year employee are calculated for 1993-94 and 1995-96. The dollar value of holiday pay is estimated and included in these figures, as is longevity pay.

In every instance but one, the City says, firefighters earn more than police and a great deal more than other City employees. The Sanitation Department recently settled for 3.0% for 1993 and 2.5% for 1994, the same percentages the City offers to the firefighters.

The City urges reliance on the St. Louis Consumers Price

Index, arguing that it more accurately reflects changes in prices in Granite City, since the two municipalities are so close together.

Its financial position has worsened in recent years, even within the past year, the City argues, leaving it with a greatly reduced cash balance in its general fund, from which firefighter salaries are paid. With a falling population and some important industrial plants actually closing and others rumored to be closing, the City's financial future looks bleak. A pending law suit may deprive the City of some fifteen percent of its tax revenues, while sewer breaks pose the danger of large drains on the City's funds.

Even without taking salary increases into consideration the City's cash balance dropped from approximately \$2.079 million on May 1, 1993, to \$1.4 million one year later. A \$2 million cash balance is desirable, the City's Chief Financial Officer maintains. Should cash reserves continue to decline at the present rate, the Mayor says, they would be gone within one and one-half years. This argues strongly against granting the firefighters an increase for 1995-96, which is part of the Union's final offer.

Because of its population loss Granite City has suffered a significant decline in state funds from the state income tax, local use tax, and photo-processing tax. Only Danville among the comparable cities had a greater decline in these state funds than did Granite City. Granite City ranks twelfth among the thirteen comparable cities in the amount of sales tax refunded to cities by the state, another result of the City's declining population as well as its inability to attract new retail outlets. Although a new Wal-Mart store recently opened resulting in some increase in sales tax receipts, Central Hardware and Woolworth closed stores in the City, which is likely to offset the gain from the new store.

The floods of 1993, which caused the groundwater table to rise, played havoc with the City's antiquated sewer system. Nearly \$1.8 million has already been spent on sewer repair, and the

breaks continue. There have been twenty-six since the tentative agreement was signed in September 1993. The City hopes to recover 90% of these costs from FEMA, but even the remaining 10% will severely strain the City's resources. There is no insurance to cover these costs.

Nestle's Inc., a large industrial plant employing about 200 people, has already announced the closing of its facility. As a large user of water Nestle paid about 25% of the total water service charge, an amount that will have to be absorbed by other water customers.

The Library District, recently established as a separate entity, has filed suit against the City claiming fifteen percent of the personal property replacement tax, approximately \$184,000 per year. Should the District win its suit this amount would be permanently lost to the City.

Increasing the property tax rate is not a viable option, the City says, because the rate is already high in comparison to other cities close by, and because of the public's general opposition to tax increases. An increase in the property tax might force industrial plants to move, and Granite City depends heavily on its industrial base. Were the property tax to be increased population loss would be even greater than it has been.

### 3. ANALYSIS AND FINDINGS OF FACT

Internal comparisons favor the Union's final offer, particularly the parallel movement of police and firefighter salary increases since 1985 (factor 8). Union Exhibit 4 shows identical percentage increases for police and firefighters every year from 1985, when the Act became effective, through 1992-93. In 1993 the police were granted 3.5% through arbitration, which the Union is seeking here.

Strikingly, these identical increases show up even though the police and firefighter agreements run for different periods. The first firefighter agreement under the Act ran for four years, 1985-

86, through 1988-89, while the first police agreement was for three years, 1985-86, through 1987-88. The next firefighter agreement was for one year, 1989-90, while the police had two successive one-year agreements, 1988-89, and 1989-90. The next firefighter agreement was for three years, 1990-91 through 1992-93. This arbitration involves the successor to that agreement. The police, meanwhile, had a two-year agreement covering 1990-91 and 1991-92 followed by another two-year agreement, gained in interest arbitration, 1992-93 through 1993-94. The second year of that agreement gave the police a 3.5% increase for 1993-94, the same as the increase sought here by the firefighters for 1993-94, one that would continue the historical pattern in existence since 1985.

In the face of this clear pattern bargaining I cannot give great weight to the City's plea that the agreement in the Sanitation Department, 3% on May 1, 1993, and 2.5% on May 1, 1994, should be the proper guide for the firefighters. There is no historical pattern between firefighters and sanitation workers and the sanitation bargaining unit is small while the police unit is large and in a position to set the pattern for other city units.

I also find convincing the Union's argument concerning the significance of the settlement agreement (factors 2 and 8). That agreement contained three wage options, the third being the Union's final in this arbitration. The City was to pick whichever of these three options it favored, so by initialing that agreement the City, in effect "accepted" the Union's final offer as one of the wage possibilities.

It may be correct, as the Union argues, that the settlement agreement was rejected, not because of the wage options, but because it did not include random drug testing. The evidence points in that direction, but we cannot really know. Although some members of the City Council openly opposed the settlement on the drug-testing question the real rationale for the vote is not as clear. What is really important is the City's financial condition since that vote.

If, as the City argues, its financial position has worsened so much so that the Union's final offer would impose an impossible burden on its ability to pay, a very strong argument against the Union's final offer would exist. So we must examine carefully the City's present financial condition compared to its condition when the settlement agreement was initialed.

Factor 3 speaks of the "financial ability of the unit of government to meet these costs." The City must make a very strong showing that it does not have the financial ability to pay what the Union offers. It is not enough to say that the city's budget does not provide for the wage increase the Union seeks, or that the City's offer fits more closely to budgeted amounts.

A budget, after all, is nothing more than a set of priorities. It reflects the desires of those drawing up the budget. It shows how the Comptroller, the Mayor, the City Council, and other City officials believe the City's funds should be spent.

But if other evidence and other factors in Section 14(h), point to a different set of priorities, factor 2 is not controlling. If internal and external comparisons and overall compensation (factors 4, 6, and 8) point toward the Union's offer, and the resulting financial burden on the City is not overwhelming, the Union's offer should be favored. In other words, the City must show that the Union's offer would place such a heavy burden on its finances that funds would have to be shifted from other City services to pay the Union's offer, resulting--and this is the important point--in the elimination or harmful diminution of essential City services, or extensive layoffs, or both.

This is indeed a heavy burden for the City, but one called for by the Act. It is not enough for the City to plead possible change in its budgeted amounts. The burden is far heavier.

As the Union argues, the City accepted the third option of the settlement agreement, the Union's final offer, even knowing some of the possible future financial drains on its funds. The pending suit by the Library District was known then. It is not a greater threat now. Numerous sewer breaks occurred before the settlement

agreement was initialed. In fact, the City's antiquated sewer system had long plagued it. But this is not a new cost, nor one that was not anticipated earlier. The floods of 1993 contributed greatly to that cost, but FEMA will pay 90%. Even 10% is a burden, as the City argues, but it has not been shown that the burden is greater than any "normal" amount paid for repairing or replacing old sewers.

Other financial considerations were also well known and ongoing at the time the settlement agreement was initialed, and have not worsened. Unfortunately, the City has been losing population for more than a decade. With this loss tax receipts, including sales tax revenues, returned to the City from the State, have gone down. But these are based on the 1990 census and are not something new since the settlement agreement.

The City stresses its high property tax rate, but Granite City ranks ninth among the comparable cities. Further, it must be stressed that only 1.2955% of the total tax rate of 8.1517% goes to Granite City, and is therefore under its control. The rest is levied by other taxing districts, 4.1433% going to the Granite City School District. This predominance of school taxes in the total levy is common in many Illinois counties. The City's rate has actually declined in some recent years.

These figures are not cited to argue that Granite City can easily increase its property taxes, but to show that the tax situation is not as serious as the City pictures it.

True, the closing of the Nestle plant will be a blow to the City's financial position, but not as great a blow as the City would have us believe. Nestle will no longer pay 25% of water costs, but neither will it use such a large proportion of the City's water. Granite City continues to have a strong industrial tax base, one of the strongest among the comparable cities.

Some City jobs have gone unfilled deliberately, so attrition is being used to reduce employment. Although the specter of further layoffs is raised by the Mayor and the Comptroller, the need for such drastic measures is not clearly demonstrated. Using

tight and competent management the City controls its financial problems very well.

Reduction in the cash balance in the City's General Account, the account from which firefighter wages are paid, is a danger sign, one that argues against the three-year agreement sought by the Union. Projections over a three-year period are fraught with uncertainties. Were the length of the agreement truly a separate issue this reduction in the cash balance would be a strong argument against a three-year agreement.

But I really have only two choices, the City's offer of a two-year agreement, or the Union's offer of a three-year agreement. And, in fact, the first year of the agreement has already passed, and had passed when briefs were received in May 1994. It had virtually passed at the time of this hearing in February 1994. So the hazards in forecasting the future are not as great as they would have been had this arbitration taken place earlier. This fact, along with the weight of other 14(h) factors, override the risk of adopting a three-year agreement.

A three-year agreement would push negotiations for the next agreement into late 1995 or 1996, an advantage for the stability of the relationship, as the Union correctly notes. A two-year agreement would expire May 1, 1995, so the parties would enter negotiations in late 1994--just a few months away--and no later than January 1995. The parties deserve a longer period to digest and work with the terms of this agreement before starting all over again. This is not the key consideration, but helps overcome the disadvantages of a three-year agreement.

On balance, although Granite City is not in the best financial health and has legitimate doubts concerning the future strength of its General Fund, the facts do not support a conclusion that the City lacks the ability to pay the Union's offer. Nor would the interests and welfare of the public be harmed with the adoption of the Union's offer.

Two relationships with the comparable cities are useful

(factor 4), the percentage change in salaries in those cities and the dollar amounts of the salaries. The average percentage change in the comparable group from 1992 to 1993 is 4.27%,<sup>2</sup> calculated so that each city carries equal weight. The Union seeks an increase of 3.5%, less than this average.

A reliable average increase from 1993 to 1994 is more difficult to come by because figures for only four of the comparable cities, the only cities that had settled, are supplied. This average is 3.68% (my calculation) compared to the Union's offer of 3.5%. No figures are available, of course, for the increase from 1994 to 1995, the third year of the Union's offer.

Based on these comparisons the Union's offer is below average for its first two years. The lack of comparison in the third year is a weakness in the Union's position,, but, as I argue earlier, one that does not destroy the Union's offer.

For the first six months of 1992 starting salaries in Granite City rank first among the comparable group, while maximum base salaries rank fifth. In Granite City it takes only one year to reach the maximum base. Only two of the comparable cities have so short a period.

These rankings--first for starting salaries and fifth for maximum base--are not changed no matter which final offer is chosen for the first year, 1993-94. Taking longevity into account and looking at salaries in the first six months of 1993 after 5, 10, 15, 20, 25, and 30 years of service, rankings still remain unchanged regardless of which final offer is chosen.

The City uses these figures to argue that firefighters rank high and are well paid, but a more solid conclusion, I believe, is that these figures do not detract from other factors, especially internal comparisons and financial considerations, which lean toward the Union.

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<sup>2</sup> The Union calculates this average at 4.52% but my computations show that figure to be in error. The difference between the Union's number and mine, however, is not significant for this analysis.

The Bureau of Labor Statistics of the U.S. Department of Labor, which compiles and publishes the Consumer Price Index (factor 5), recommends use of the U.S. City Average, a national index, rather than regional or city indices, and for good reason. The city indices are more subject to sampling errors while the national index is more stable. Although Granite City is near St. Louis the two cities are so different in size and in other characteristics that one cannot really know whether price changes in Granite City are accurately measured by those in St. Louis. It is safer to use the U.S. City Average.

Changes in the U.S. City Average index for all urban workers (CPI-U) from May 1992 to May 1993 favor the Union's position, but factor 5 carries little weight here.

4. AWARD

The Unions final wage offer is better supported by the evidence and is selected.

**LONGEVITY**

1. FINAL OFFERS

**UNION:** Add a 10% longevity step after 20 years of employment.

**CITY:** No additional longevity step.

2. ARGUMENTS OF THE PARTIES

**UNION**

The City agreed to this new longevity by initialing the

settlement agreement, so Union arguments for adopting its wage offer based on the City's acceptance of the settlement agreement apply with equal force to its longevity offer. They need not be repeated.

Historically, firefighters and police have enjoyed identical longevity benefits. In 1993 the police were granted this same longevity step by Arbitrator Feuille through interest arbitration. One of the factors that swayed Arbitrator Feuille was the increased medical insurance costs for employees brought about by Feuille's adoption of the City's health insurance proposal. This same health insurance provision was accepted by the Firefighters and the City under their settlement agreement, and remains an accepted item for this agreement.

Within the comparable group Granite City ranks seventh--tied with Pekin and Galesburg--when the thirteen cities are ranked according to the percentage by which actual salary exceeds base salary after twenty years of employment. Granite City stands in eighth place when the cities are ranked according to percentage over base salary of the top step of the salary range. All the comparable cities except Urbana and Quincy grant longevity beyond fifteen years of employment.

These data support its longevity offer, the Union argues.

#### *CITY*

Granite City Firefighters gain longevity step increases earlier in their employment than do firefighters in most of the comparable cities. In the first six months of 1992 salaries of Granite City firefighters after five years of employment ranked third among cities in the comparable group, while in 1993, regardless of which final offer is chosen, that ranking is second.

The City points out that it did not agree to a 20-year longevity step for police, rather it was ordered through

arbitration.

If the Union's offer is selected the City's costs will escalate on an accelerating basis as firefighters gain more years of service. Given the City's shaky financial condition, this is an unwarranted burden.

### 3. ANALYSIS AND FINDINGS OF FACT

Internal and external comparability as well as the settlement agreement (factors 2,4, and 8) support the Union's offer.

By initialing the settlement agreement the City recognized the correctness of a 20-year longevity benefit. The same justification for relying on that settlement put forward under **WAGES** applies here.

The historical relationship between police and firefighters is also extensively justified earlier. It does not matter that the police received this benefit through interest arbitration, the pattern is the important consideration. One reason for granting this longevity step to police is the increased health insurance costs to employees. Firefighters will experience this same increase.

Data for the comparable communities show only two cities, Urbana and Quincy, with longevity that does not extend to twenty years of service. Quincy has no longevity, while Urbana grants longevity only as far as ten years of service. All the others grant longevity at twenty years of service, and four cities, Alton, Carbondale, Galesburg, and Moline, go as high as twenty-five years of service.

These comparable data favor the Union's offer.

The City's financial position and my earlier comments about it are no different here than for the wage offer. Although certainly not bright, its financial condition is not as bleak as the City pictures it, and probably not as upbeat as the Union would have us believe. But the City has not demonstrated its inability to pay. It has not shown that essential services will suffer nor that

layoffs are inevitable.

4. AWARD

The Union's offer for a 10% longevity step after twenty years of employment is selected.

**DRUG TESTING**

1. BACKGROUND

Drug testing<sup>3</sup> was not one of the issues initialed by the parties in their settlement agreement. Rather, the parties said they would continue negotiations on this issue. According to the Union the newly elected City Council failed to ratify that agreement largely because the agreement did not include random testing. The City argues, on the other hand, that it was not the lack of random testing that scuttled the settlement agreement but significant changes in the City's financial position. I have already discussed this matter earlier. Although some members of the Council spoke out strongly in favor of random testing, we cannot really know what motivated each member in that vote.

Drug testing is now an issue. At a pre-hearing conference, held to agree on procedural matters, the parties stipulated that I am to decide only general principles. The parties will then use those principles in working out the exact drug testing language.

When final offers were submitted prior to the evidentiary hearing, three drug-related issues were still unsettled: 1) when testing may take place, 2) procedures and standards for conducting the tests, and 3) the consequences of a confirmed positive test.

By the time the evidentiary hearing convened the second of

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<sup>3</sup>Throughout this section, indeed throughout this decision, the word "drug" includes alcohol as well as illegal drugs.

these had been decided, so only the first and the third are dealt with here.

Each party has put into evidence the wording of its drug policies on the unsettled issues as part of its final offer. My **AWARD** deals with the specific points raised by these policies, leaving the exact wording to be worked out through negotiation, as instructed by the parties.

## 2. OFFERS OF PARTIES ON UNSETTLED ISSUES

### A. WHEN TESTING MAY TAKE PLACE

#### *UNION*

Employees may be subject to drug testing only if there is a reasonable suspicion supported by reliable evidence that the employee is impaired while on duty or has taken illegal drugs.

#### *CITY*

Employees may be subject to drug testing in the event of reasonable suspicion and by random testing.

### B. CONSEQUENCES OF CONFIRMED POSITIVE TEST

#### *UNION*

1. FIRST POSITIVE First confirmed positive will result in a minimum of five duty-day disciplinary suspension. The employee must agree to following conditions: a) mandatory referral to EAP; b) to cooperate in treatment plan and undergo unannounced periodic testing for up to 12 months; c) successfully complete prescribed treatment; d) remain free of drugs and alcohol; e) sign an agreement consenting to all these conditions.

Failure to comply with these conditions shall be cause for discharge.

2. SECOND POSITIVE-DURING TREATMENT Employee who has confirmed positive test while undergoing treatment shall receive a 30-duty day disciplinary suspension which shall not be subject to grievance procedure,

and shall be required to continue treatment, and comply with all conditions under paragraph 1. Any positive test result from unannounced or reasonable suspicion testing (i.e. a third positive test) shall result in discharge, which shall not be subject to grievance procedure.

3. SECOND POSITIVE-REASONABLE SUSPICION Employee who has first confirmed positive under paragraph 1, completes treatment, and who thereafter has confirmed positive under reasonable suspicion shall be discharged with no recourse to grievance procedure.

CITY

First positive test shall result in minimum suspension of 40 duty-hours without pay. Second positive test shall result in discharge. There are two exceptions to this policy:

- 1) An employee who voluntarily seeks treatment during first sixty days after implementation of this policy shall be referred to EAP and receive no discipline for drug or alcohol use prior to date of request.
- 2) Employee shall not be disciplined for positive test if that employee seeks EAP help at least 48 hours before being selected for testing, and who did not previously receive amnesty under paragraph 1).

3. ARGUMENTS OF THE PARTIES

UNION

Random testing should not be imposed for the following reasons:

1. None of the comparable jurisdictions have random testing. Reasonable suspicion testing is the standard for all locals represented by Associated Fire Fighters of Illinois.
2. Random testing without individualized suspicion is degrading and an invasion of privacy.

3. Random testing is a disciplinary investigation without just cause, a violation of the just cause standards of the agreement.

4. Under the City's random testing proposal unit members and supervisors would be less willing to report possible drug use, test related discipline would still be appealable through the grievance procedure, and the proposal would lack support within the bargaining unit. These reasons are inimical to a drug-free work place.

5. There is no evidence of any significant drug problem among City firefighters.

6. There is no federal or state mandate that firefighters be subject to random testing.

7. The imposition of random testing might be a violation of Federal Constitution.

8. At an earlier date the City tentatively agreed to reasonable suspicion testing only.

#### *CITY*

Through the testimony of expert witnesses the City establishes as a primary goal of drug testing the identification of drug users, the elimination of drug use by employees, and rehabilitation of those who use drugs. Reasonable suspicion testing would not properly identify users because it is difficult to discern a behavioral change in an individual drug user. Only overt symptoms are likely to be recognized. Neither supervisors nor co-workers will be able to tell who uses drugs and who does not.

Fellow workers are not likely to turn in drug users even if they know about the use, rather they are likely to have that employee placed in a position where he or she does not interfere with the proper operation of the department.

Random testing is highly successful in identifying users, increases workplace efficiency, and decreases absenteeism and accidents. Compared to reasonable suspicion testing, random

testing serves an educational purpose by enhancing awareness that use of drugs in the workplace is prohibited, and is more likely to cause employees to seek rehabilitation.

Among City bargaining units only the Fire Fighters and Operating Engineers do not have random testing. All other employees, including police, are subject to random testing.

Mayor Selph offers the opinion that reasonable suspicion testing places supervisors in an awkward position. They may be reluctant to report employees they have known and worked with for years, so may simply have the drug user call in sick.

Firefighters do indeed work as a team, a point stressed by the Union, but must also make important individual decisions that touch the lives of co-workers and of the public, such as driving a fire truck.

#### 4. ANALYSIS AND FINDINGS OF FACT

In Article 28, Sections 1 and 2, the City and the Union agree that discipline is to be used only when just cause exists. This just cause standard must be the starting point for analyzing the nature and effect of random drug testing. Under random testing each employee has an equal chance of being chosen for testing, with no particular event triggering the test and no suspicion that the employee has been using drugs or is impaired. It is simply a matter of testing a certain percentage of employees periodically.

The City says a first positive should bring automatic suspension, forty duty-hours without pay. A second positive should result in discharge. These penalties can be avoided only if the employee voluntarily enters a rehabilitation program before the test takes place.

So for all practical purposes a positive under the City's random testing proposal brings automatic discipline, either suspension or discharge. A positive is taken as absolute proof of inability to perform the job properly, in other words, it is on its face evidence of impairment. The discipline that follows is in

actuality discipline for inability to perform the proper duties of a firefighter. The disciplined employee is presumed have an impairment that will detract from the efficient and effective operation of the firefighting service.

Yet the just cause standard of Article 28 demands strong evidence that an employee is in fact unable to perform, or has in some clear and discernable way demonstrated inability to function properly on the job.

In fact, scientific evidence does not support the conclusion that a positive test result equates with impairment. I have previously cited a reliable study by Dr. Kurt Dubowski<sup>4</sup> in which the author concludes that neither impairment nor intoxication can be established "or even validly presumed from a urine test, or a series of such results."

Reasonable suspicion testing, on the other hand, takes place only after an employee does something--or fails to do something--that indicates drug influence, with a strong presumption that these actions or lack of actions show impairment. Reasonable suspicion testing, therefore, is more in line with the parties' own standard that discipline must depend on just cause.

Additional strong support for reasonable suspicion testing comes from the comparable cities, where none of the firefighter bargaining units are subject to random testing.

True, internal comparisons do not support the Union's position, especially the fact that police are subject to random testing. But the other arguments against random testing outweigh this one.

The City points out that 72% of its Worker Compensation settlements involve firefighters, but acknowledges that this percentage alone does not show that all these claims are drug

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<sup>4</sup> Kurt M. Dubowski. "Drug-Use Testing: Scientific Perspectives." 11 *NOVA LAW REVIEW*, 415-552, at 528. This citation is found in my decision in City of Evanston and Evanston Fire Fighters Association Local 742, IAFF (unpublished, 1990), which the Union put into evidence.

related. This second point must be emphasized. We do not know from the record whether firefighters in general, whether in Granite City or elsewhere, suffer more work-related accidents than employees doing other jobs, but knowing the nature of the work, one can presume that the accident rate is high, even without drugs.

Rehabilitation is the second goal stressed by the City, the first being identification of drug users. But the City's rehabilitation proposal falls short of assuring the maximum advantage from rehabilitation.

In the first place, a drug-using employee can avoid a positive and subsequent discipline by entering rehabilitation before the test is given. But under the City's proposal random tests would be unannounced, so the hope is that all drug users would turn themselves in at once--or within sixty days of the implementation of the drug policy--to avoid a positive result. This is highly unrealistic.

Drug users, especially habitual users, often deny they have a problem. Some may take advantage of this period of amnesty, but most probably will not. Many will continue their drug habit until shocked into change by some catastrophic--or near catastrophic event--such as loss of their job. Herein lies another weakness of the City's proposal. Discharge is not final until upheld in arbitration.

Under the City's scheme a drug user is not faced with the final job loss until the entire grievance procedure, including arbitration, has been exhausted. This is true for both the initial forty duty-day suspension following a first positive and the discharge following a second positive. Throughout this whole process the drug user may cling to the hope that an arbitrator will overturn the discipline, so the ultimate decision to seek rehabilitation is likely to be postponed until an arbitrator upholds discharge.

Still another weakness of the City's proposal is its failure to incorporate rehabilitation except when an employee voluntarily

takes advantage of amnesty. But with the strong likelihood that drug-using employees will deny they have a problem, very few will enter rehabilitation. Employees who test positive are not encouraged to seek help. Not having sought amnesty in advance, it is too late for them. They are written off as incurable and a loss to the firefighting service and to the City.

Detailing these flaws in the City's rehabilitation proposal focuses attention on some of the strengths in the Union's proposal. After the first positive the employee must enter rehabilitation and must agree to follow specified conditions designed to bring cooperation with treatment and be subject to unannounced testing, or face discharge. The entire plan is designed to force the offending employee to gain the maximum advantage from treatment, and, if successful, keep the employee as an effective firefighter after treatment.

Successful treatment must make allowances for some backsliding. The experts agree that progress is not uniform and not always upward. Some drug users will never be rehabilitated. Even those who are rehabilitated will occasionally suffer a relapse during treatment.

The Union's proposal allows for this well-known phenomenon by permitting a second positive during treatment, which brings a 30-day suspension that is not grievable--it must stick. Another positive during treatment (the third positive) brings discharge that sticks--it is not grievable. An employee who has a first positive, then goes through treatment, then has another positive under reasonable suspicion after completing treatment is discharged with no appeal through the grievance procedure.

This employee, then, is discharged after a second positive. That person is regarded as one not likely to benefit from further treatment.

This whole approach has the distinct advantage of combining treatment with discipline by forcing the employee to enter rehabilitation. Discipline is final because it is not subject to

the agreement's grievance procedure.

The City's arguments concerning the effectiveness of random testing in helping large corporations, introduced through its expert witness, Dexter Morris, would carry greater weight if there were evidence of extensive drug use among firefighters. But just the opposite is true. There is little drug use and from what we know of the few instances reported by co-workers these were occasional and involved recreational use only.

Under the Union's proposal discipline is not grievable, except for the five-day suspension that follows a first positive, and the discharge that follows the employee's failure to comply with the "last chance" agreement. To be consistent and to underscore the importance of following prescribed treatment, these disciplinary actions should be made binding on the Union and the employee. They should be exempt from the grievance procedure.

The Union proposes to make the five-day suspension after the first positive a maximum period, and make the thirty-day suspension after the second a specified period. I have made both minimum periods. The parties can, if so inclined, negotiate longer periods of suspension, but the importance of remaining drug-free should be emphasized with adequate discipline. Lesser amounts should not be allowed.

At one point in the lengthy negotiations leading to the settlement agreement City negotiators evidently agreed to reasonable suspicion testing only, but the settlement agreement does not include such a provision. The City's early acquiescence on this point carries no weight here.

The City wants a provision authorizing immediate discharge for an employee who uses drugs on the job or who is convicted of illegal drug use on or off duty. I include no such ruling because the collective bargaining agreement's just cause standard should be used in such instances.

4. **AWARD**

In summary, the principles to guide the parties in negotiating the unsettled drug testing issues are:

1. Only reasonable suspicion testing will be used, no random testing.

2. The first confirmed positive will be cause for a minimum disciplinary suspension of five duty-days, which shall not be subject to the grievance procedure.

3. After a first confirmed positive the employee must agree to follow conditions as given in the Union's proposal. Failure to comply with these conditions will be cause for discharge, which shall not be subject to the grievance procedure.

4. An employee who has a confirmed positive while in treatment (the employee's second confirmed positive) will receive a minimum disciplinary suspension of thirty duty-days not subject to the grievance procedure, will be required to continue treatment, and will be subject to the other conditions set out in the Union's proposal.

5. Any confirmed positive thereafter, unannounced or reasonable suspicion, (the employee's third confirmed positive) will result in discharge not subject to the grievance procedure.

6. An employee who has a first confirmed positive, goes through treatment, and subsequently has a confirmed positive under reasonable suspicion will be discharged with no recourse to the grievance procedure.

**AWARD SUMMARY**

1. The Union's final offer on wages is selected.
2. The Union's final offer on longevity is selected.
3. On the drug testing issue the principles to be followed are those given under the heading **AWARD** beginning on page 27.



Milton Edelman