

#121

ILLINOIS STATE LABOR RELATIONS BOARD
INTEREST ARBITRATION

In the Matter of the Arbitration)	ISLRB No. S-MA-94-163
)	
between)	HARVEY A. NATHAN,
)	Chairman
VILLAGE OF ROCK FALLS)	
)	
and)	JAMES L. REESE,
)	Employer Delegate
)	
ROCK FALLS FIRE FIGHTERS)	MICHAEL J. TONNE,
ASSOCIATION LOCAL No. 3291,)	Union Delegate
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, AFL-CIO, CLC)	

Hearing Held: November 1, 1994 (Informal)
November 22, 1994
November 23, 1994

Briefs Filed: February 28, 1995

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I. INTRODUCTION

A. Description of the Proceedings

This is an interest arbitration proceeding held pursuant to Section 14 of the Illinois Public Labor Relations Act (5 ILL 315/14), hereinafter referred to as the "Act," and the Rules and Regulations of the Illinois State Labor Relations Board, hereinafter referred to as the "Board." The parties are the City of Rock Falls, located in Whiteside County, hereinafter referred to as the "City," and the Rock Falls Fire Fighters Association, Local 3291 of the International Association of Fire Fighters, AFL-CIO, hereinafter referred to as the "Union." The panel of arbitrators consists of the chairman, Harvey A. Nathan, a professional arbitrator selected under the auspices of the Board, James L. Reese, a partner in the law firm representing the City, and Michael J. Tonne, Northern District Vice President, Associated Fire Fighters of Illinois.

The Chairman was notified of his appointment on September 7, 1994. A preliminary meeting was held with the parties on November 1, 1994, at which time the parties attempted to resolve their differences and, when that was unsuccessful, discussed the procedures to be followed for the arbitration hearing. On November 2, 1994, the Chairman prepared a document entitled Stipulations of the Parties based upon the discussions at the informal meeting. The document was thereafter signed by counsel for the parties and returned to the Chairman. It was subsequently made a part of the record in this case. Among the agreements recited by the parties

therein were the following:

7. The Union will proceed first with its case as to the items in dispute. The City will then proceed with its case as to the items in dispute. After the completion of their initial presentations, each party shall have limited rebuttal. At the conclusion of the taking of evidence the parties shall submit in writing to the arbitration panel and to each other their last and final offers on each of the following economic issues:

- a) **Salary including salary structure. Salary proposals for all three years of the Agreement shall be considered as one issue.**
- b) **Employer and employee contributions for health insurance.**
- c) **Hours of work and overtime as effected, if at all, by Kelly Days.**
- d) **Call Back pay.**

After the exchange of final offers, the parties will advise the arbitration panel whether they will require additional hearing time to address the respective last and final offers. Once final offers are made they may not be modified except upon the unanimous consent of the parties and the arbitration panel.¹

The hearing proceeded on November 22 and 23, 1994, in the Rock Falls Municipal Building. On December 2, 1994, the parties exchanged their final offers. The City presented final offers on the subject of wages, insurance, hours and overtime, and call back pay. The Union presented final offers on these issues as well as the issue "term of agreement." Notwithstanding the above-recited

¹ The Stipulations also included statements on the selection of the party-appointed arbitrators, the exchange of comparability lists, the dates for the hearing and a waiver of the time limits, the transcription of the proceedings, the applicability of the Illinois Open Meetings Act, the designation of joint exhibits, the filing of briefs and the preparation of the Opinion and Award, including the waiver of time limits.

Stipulations, the Union offered a two year contract. However, the text of its offer on this issue also included provisions for wages and hours in the event the arbitration panel selected a three year contract.

On December 5, 1994, the Union advised the panel that there was an error as to dates in its final offer relating to wages for the third year and a corrected version was enclosed. The City did not object to this correction at that time or any other time prior to the filing of its brief three months later on February 28, 1995.² At that time the City, citing the provision in the Stipulations as well as the Chairman's caveat, given at the hearing, against changes in final offers, objected to the Union's correction. On March 6, 1995, the Union's counsel responded to the City's objection.³

Draft copies of this Award were circulated with the party-designated arbitrators on May 5, 1995. An executive session was held on June 9th at which time the case was remanded to the parties for additional discussion. No further agreement having been reached the arbitrators met and signed the Award on June 26, 1995. This Opinion and Award is rendered pursuant to the parties' agreement on the time limits for its issuance.

² This was so even though counsel for the City wrote to the Chairman on three occasions advising him of the parties' agreement to extend the time for the filing of briefs.

³ There was no request by the parties to reconvene the hearing after the submissions of the final offers.

B. Description of the Parties

The City of Rock Falls is located in northwest Illinois in eastern Whiteside County. The Rock River serves as the northern border of the City and Interstate 88 runs through the southern part of the City. Immediately to the north, across the river, is the larger community of Sterling. These two communities contain more than 40% of the County's population and form the economic unit serving the area. Rock Falls is approximately 25 miles east of Clinton, Iowa, and half way between Rockford and the Quad Cities on a 110 mile diagonal line running northeast to southwest. The City of Dixon, in Lee County, is a few miles northwest. The City of Chicago is about 125 miles to the east. Rock Falls had a 1990 census of 9,654, down about 1,000 people since 1980. However, the area served by the Rock Falls Fire Department, hereinafter the "Department," is reported to be about 17,000 or 18,000. This includes an unincorporated area east and south of the City within the boundaries of the Rock Falls Rural Fire Protection District. The Fire Protection District purchases the Department's services pursuant to a written contract.⁴

The City has about 75 full time employees. There are three collective bargaining units. The Electrical Workers ("IBEW") represent employees in the Water, Sewer, Streets and Electrical

⁴ In its brief the City argues that it uses a figure of 9,000 as the population for the unincorporated area outside of the city limits for which fire protection service is provided but that this is an artificial guesstimate, and that no accurate census exists for the area covered by the Department. However, inasmuch as this was the number established by the City for record keeping purposes it is the number which must be used absent better information.

Departments. The Fraternal Order of Police represents police officers and the Fire Fighters make up the third unit. There are nine bargaining unit members (3 Lieutenants and 6 Firefighters), a Chief and his Deputy in the Department.⁵ The City has a staff of 25 paid-on-call firefighters who are called when regular employees are engaged or otherwise unavailable. There is one station and all of the equipment is kept there including the truck supplied by the Whiteside County Airport for calls to the airport. The Department does not have an ambulance service but provides emergency medical service, and has a rescue truck. Emergency medical calls make up a substantial number of the calls received by the Department.

The Fire Department is has three platoons, with one Lieutenant and two Firefighters to each. Each platoon works 24 hours on and has 48 hours off. Two employees (including the Lieutenant, if available) will respond to emergency, non-fire calls. Fire calls are answered by all employees on duty. If the regularly scheduled employees are responding to a call, off duty employees are called in. If an insufficient number of regular employees respond, paid-on-call employees will be paged to report to the station.⁶

⁵ The only authorized full time ranks in the Fire Department are Lieutenant and Firefighter. The Chief and the Deputy Chief are appointed by the Mayor and the City Council and may be removed by them. The Police Department has 18 authorized commissioned employees, including a Chief, an Operations Commander (both appointed), Sergeants and Patrol Officers. The Police Department also has a variety of civilian employees but does not employ any part time officers.

⁶ The Union went into some detail in its brief as to an analysis of the calls made by bargaining unit members. In 1994 (including a period of time after the close of the hearing), the Department responded to 797 calls. This compares closely with the

II. STATUTORY REQUIREMENTS

The applicable provisions of Section 14 of the Act are as follows:

(g) At or before the conclusion of the hearing ***, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days of the conclusion of the hearing, or such further additional periods to which the parties may agree shall make written findings of fact and promulgate a written opinion and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the Board. As to each economic offer 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). The findings, opinions and orders as to all other issues shall be based upon the applicable factors prescribed in subsection (h).

(h) Where there is no agreement between the parties, *** and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- (1) The lawful authority of the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally
 - (A) In public employment in comparable communities.
 - (B) In private employment in comparable communities.
- (5) The average consumer prices for goods and services,

number of responses in 1992, but is down 10% from the 882 calls answered in 1993. In 1993 about 60% of the calls were accident or medically related. The rest was fire related. According to the City, most of the actual time on duty is at the fire station, although some of this is used for training.

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.

III. BARGAINING HISTORY

The dispute in this case is very much a continuation of the parties' historical differences on the same issues. That is, the issues in arbitration are issues which have been the subject of hard bargaining since the inception of collective bargaining for this unit of employees.⁷

According to the City, the Fire Fighters were the last of the City's three bargaining units to organize. The City voluntarily recognized the Union as the bargaining agent for six firefighters. The Chief and four Lieutenants were excluded from the unit, as were the 25 paid-on-call part time employees. According to the City, the Department operated with three man crews since 1982. The Department operated within the FLSA requirements by scheduling employees for no more than 159 hours in each 29 day cycle. Employees had rotating nine hour periods off and the four

⁷ The City expended substantial efforts in its brief to review bargaining history. Most of its recitation is supported by the record. Occasional comments are outside the evidence of record but are accepted as part of the narrative.

Lieutenants were able to cover all shifts. Scheduled time off was also covered by paid-on-call employees. There was no preference for overtime by regular employees. When regular employees were called back there was no guarantee of paid time, and time off was not counted as hours worked for overtime purposes. However, overtime when it was worked was calculated on an hourly rate based upon 2080 hours per year. Thus the "hourly rate" for overtime pay purposes was set at a rate substantially higher than the actual hourly rate based upon 53 hours a week.

Historically the City did not have a salary schedule for either Police or Fire employees, although, according to the City, Police were customarily paid \$1,000 more than Fire employees at the same level. Because there was no schedule, the most senior Firefighter actually earned a higher salary than Lieutenants with less years of service. The starting salary for a Firefighter prior to the first agreement was \$16,298. Employees also received a 5% holiday pay bonus at year's end.

In negotiations for the first agreement the Union sought major changes in hours, wages and benefits. In its first proposal, the City accepted the Union's request for a one hour call back minimum, proposed a six step salary schedule similar to that which it had bargained with the Police and insurance premium contributions capped at the then present cost. This insurance proposal plus the language of the insurance article was the same as the City had negotiated with the other two unions. Eventually, the parties agreed to insurance caps which were higher than that agreed to with

the other two unions. Salaries were agreed upon based on a formula similar to that agreed to with the Police, with \$1,000 increments at each step, longevity pay and a starting salary of \$17,000, which was \$1,000 less than the Police base. In the second year of the contract \$600 was added to each step.⁸

The area of greatest contention, according to the City, was hours and overtime. The Union was seeking Kelly Days, mandatory overtime, with preferences, and overtime pay for all unscheduled hours worked regardless of whether the FLSA maximum had been met. The parties eventually agreed to a system which eliminated the rotating 9 hours off and created FLSA overtime. The cycle was changed to 15 days and employees were scheduled for six more hours per cycle than the FLSA maximum. Employees were then given four Kelly Days, one every 90 days.⁹

At the outset of bargaining for the 1992 agreement, the Union proposed including Lieutenants in the unit, salary increases, a strengthening of the Kelly Day provision (including floating Kelly Days), and a increase in the cap on City insurance contributions. The City agreed to expanding the unit, and Lieutenants were placed

⁸ The parties initial agreement was effective May 1, 1990 through April 30, 1992. The FOP, which had a reopener after one year which the Union (IAFF) did not have, then got the same \$600 increment in the second year of their contract.

⁹ There were other technical provisions such as the requirement that Kelly Days were earned if an employee actually worked his scheduled hours in four of the six 15 day period in the 90 day segment, that the overtime rate was calculated on the basis of a 2080 hour year, Kelly Days were scheduled by the Chief during the last 2 weeks of the 90 day segment, and that comp time was available in lieu of actual additional overtime pay.

on the salary schedule \$1,750 above the top step of the Firefighter rate. (It had been \$1500.) Lieutenants were also placed on the longevity schedule. All employees were given a \$500 increase and the base salary was likewise increased (to \$18,000), both effective May 1, 1992. The parties agreed to a wage reopener for the year commencing May 1, 1993. There were improvements in the holiday and vacation provisions and in insurance caps (City contribution). The parties settled for a Kelly Day provision which gave the employees four floating Kelly Days.¹⁰

For the May 1, 1993 year, the parties subsequently negotiated an \$825 increase for Fire employees, thus reducing the historical difference with Police from \$1,000 to \$675. Lieutenants obtained an additional increase so that the differential with Firefighters was now \$2,000.

IV. FINANCIAL CONSIDERATIONS

A. The City's Financial Situation

In 1993 the City issued \$6,220,000 in general obligation bonds to be used for refunding earlier bond issues. The bonds were rated AAA/Aaa and were insured. According to the prospectus for the bonds, Rock Falls has had increasing revenues from real estate and sales taxes, and has had a modest increase in its EAV over the last

¹⁰ The FOP contract was for two years, and gave \$500 each year, thus maintaining the \$1,000 difference between the starting salaries for Police Officer and Firefighter.

several years.¹¹ The record also indicates that its tax levy for 1993 was a relatively low 1.27, although the levy for public safety is at the statutory maximum rate.¹² On the other hand, for the fiscal year ending April 30, 1994, the City's General Fund had a deficiency of revenue over expenses in the amount of \$367,000. The Fund balance at the end of the year decreased from \$1,249,000 to \$882,000. The Annual Financial Report shows that revenues for the General Fund were only about \$75,000 less than anticipated, but expenditures were larger than budgeted. The Fire Department spent about \$276,000 more than was budgeted, all of this can be accounted for with the purchase of new equipment. The direct cost of all sworn personnel was actually about \$6,000 less than what was appropriated.

Notwithstanding the decrease in the General Fund last year, it remains at a comfortable level. While the General Fund balance cannot finance continuing expenses such as salaries and benefits, a fund balance of almost half of total expenditures reflects a conservative fiscal position and generally indicates that the City is in a sound financial condition.

The City owns and operates waterworks, sanitary sewage

¹¹ While the City maintains that it has suffered some losses in industry and commerce in the recent past, on balance the City has shown growth, albeit modest. While no one should accuse Rock Falls of being a paradigm of economic health and stability, it is likewise true that the City is not in financial straits by any means.

¹² However, the City does not levy for the library. Although it provides the building and supplies utility and janitorial services for the library, revenue for the library is collected by Coloma Township.

treatment and electrical generating and distribution systems which supply the needs of the City's population and are sold to the residents of the surrounding area. The City's hydroelectric plant, while very capital intensive, is a substantial source of revenue for the City. In the year ending April 30, 1994, the Electric Enterprise Fund had a net income of \$1,628,000. Revenues from this system are available for the General Fund, and the City does transfer modest amounts from its Electrical Enterprise Fund. In 1994, the City transferred \$477,000 from the Electric Enterprise Fund to the General Fund, an increase of about \$156,000 from the prior year. The transfer of \$375,000 of this amount to the General Fund was for the purpose of purchasing a new fire truck (telesquirt) with auxiliary equipment. However, the City has categorized this as a "loan," payable over 20 years with interest of 2%. While the City insists that it has to maintain large balances in its Electric Fund for future capital needs, there is evidence that this is a choice made by the City and is not mandated by statute or other regulation.¹³

B. Other Financial Considerations and Cost of Living

There are other economic factors to be taken into

¹³ The City also argues that the revenue from this utility cannot be made available for other purposes because it is pledged as support for the bonds and because of common law principles. However, the balance, which is increasing at a measurable rate, is more than sufficient to cover the City's legal requirements. Additionally, no one is arguing that the Electric Enterprise Fund be savaged, or that user rates be increased. The point is that some additional monies are available for the City's general purposes. The equity in the Electric Enterprise Fund as of 4/30/94 was \$10,984,000. There was an increase in retained earnings (after transfers out to other funds) of \$1,065,000.

consideration. Whiteside County has experienced an increase in employment, or at least the unemployment rate dropped substantially in 1994 from 1993. At the same time, there has been some loss of employment as a result of the cutback in operations by the area's largest employer (Northwestern Steel) and because of the closing of some retail operations. Additionally, while there have been some challenges to the City's real estate valuations, the City appears to be in a slow growth curve. While the City suggests that it has a disproportionate number of older and low income residents, this is generally true of most older small cities in the midwest. There is no evidence that this is more true of Rock Falls than other comparable communities.

The City contracts with the Rock Falls Rural Fire Protection District for fire protection services. The fees for the services are 90% of the tax levy by the District, which taxes at the rate of .125. There is evidence that this rate is artificially low, that other rural fire protection districts in the area levy at the rate of .30. The City claims that if a higher tax rate were demanded, it might lose the account, or part of it. However, because of geographic proximity as well as the rate levied by other potential protection providers, this seems unlikely.

The cost of living, or at least the Consumer Price Index as published by the U.S. Bureau of Labor Statistics has been between 2.5% and 3% for the last two years. All economic indicators point to continuing modest increases. The only area of measurable rising costs is medical care, although this has moderated somewhat in

1994. However, the history of medical contributions for Rock Falls' employees indicates that this is not a serious consideration. Increases in employee contributions have been modest, or at least what the Chairman understands to be below the level of increases experienced in many other jurisdictions. Generally speaking, in the last few years inflation has not eroded the earnings of employees in this bargaining unit.

V. COMPARABILITY

A. Internal Comparability

Comparability is significant in interest arbitration cases because it provides a framework against which the proposals at issue may be measured. The appropriateness of individual proposals sometimes can be best measured by examining what other parties or other bargaining units with the same parties have accepted. Of course no two units are alike, just as no two municipalities are the same. Therefore a comparison with an isolated group, or a small or non-representative assembly of bargaining units is not particularly helpful. There is no reason why a limited few agreements should influence the case in question simply because these other contracts came first. It is only when the comparison group is both similar in significant characteristics and numerous enough to be statistically meaningful that comparability can be a useful and powerful tool in establishing the appropriateness of one proposal over another. This reasoning is somewhat less applicable with internal comparability because there are less units to compare

with. On the other hand, the need for a large enough sample to overcome the exigencies of individual cases is not as pressing with internal arbitrability because the employer is the same and therefore there are built in analogies.

Internal comparability is the measurement of the terms and conditions of employment of one bargaining unit with others of the same employer. It is significant because of the inherent similarities when the employer is the same. The important question of whether the municipality has a community of interests with the comparison employer is obviated. Moreover, ability to pay and other economic considerations, as well as local community features and practices are self-evident or have been resolved. However, internal comparability can be a two-edged sword. On the one hand the employer seeks uniformity among its different bargaining units. It does not want one unit to play off of another. The employer wants uniformity among its employee groups, not competition for a costlier contract. It rightfully wants some structure in its wage and benefit plan for its employees as a whole, and not have pay packages running every which way without regard to skills or level of importance within the overall community. Additionally, the employer may lose credibility if it bargains a contract for wages and benefits at one level only to agree to a more costly package with another group.

Unions, on the other hand, do not want to be bound by the agreements negotiated by other labor organizations representing other types of employees. The unions argue that there can be no

good faith negotiations when the employer presents a package justified mostly on the basis of its acceptance by other employee groups. In some cases the employer's so-called "pattern" is self-serving. It settles with its weakest bargaining units first and then argues that the other units must accept the "pattern" it has established. Moreover, there may have been special needs and considerations which led one unit to settle for certain terms which are not as applicable to the unit in question. Internal comparability should not be used as a straightjacket which inhibits the consideration of the separate needs of particular units.

The City has a bargaining relationship with three units of employees. Local 196, International Brotherhood of Electrical Workers has represented blue collar employees in the City's Water, Sewage Treatment, Garbage and Street, and Electric Department since 1985. There are presently about 20 full time employees in this unit. The current collective bargaining agreement runs from September 1, 1994 to August 31, 1997. The prior agreement expired on August 30, 1993, but employees received lump sum payments of either \$1,000 or \$1,500 in lieu of retroactivity.

The City recognized the FOP in 1989, following a contested proceeding before the Board, for a unit of Patrol Officers and Lieutenants (later reclassified as Sergeants). The City has had two year agreements with the FOP effective May 1, 1990 and May 1, 1992. The current agreement runs from October 1, 1994 to April 30, 1997, and the 16 employees now in the unit received a lump sum of \$500 each in lieu of backpay.

The evidence is reasonably clear that the City has attempted to maintain some semblance of stability among its three bargaining units. While it has not insisted on a lock-step comparison of wages and benefits, terms and conditions of employment among the three units have a lot in common. As noted above, the six step salary schedule in the Fire Fighters' contract was initiated by the City as a system similar to what was in place with the Police.¹⁴ The language of the insurance provisions is the same as exists in the FOP and IBEW agreements. The vacation and holiday provisions are also the same.

Because of the chronological order of bargaining, it appears that at times the parties played catch-up with each other. Sometimes the FOP got increases which were then matched with the Fire Fighters. At other times, the Fire contract had slightly more generous provisions, such as with caps for medical insurance contributions. However, there does appear to be a pattern emerging where the Fire Fighters are slowly closing the gap in salaries with the Police unit. Thus, as a result of the May, 1993 reopener the Fire Fighters narrowed the salary gap to \$650. This narrowing has occurred despite the fact that certain Fire employees are among the highest paid employees in the City. For its part, the IBEW has negotiated more modest increases although certain employees in the Electric Department received enhanced increases.

Because of the structure of a platoon system fire department,

¹⁴ As with the Police, there was a difference of \$1,000 between each step and there was a longevity system allowing for an additional \$300 every three years, up to 15 years.

the Fire Fighters have more generous overtime provisions than the FOP. However, the FOP has a two hour guarantee call back provision as compared with the one hour guarantee for Fire Fighters.¹⁵ Again, some of the Fire employees have gross earnings way above the mean for City employees generally.

B. External Comparability

It has been suggested that external comparability is the most significant of the factors to be considered by the arbitration panel.¹⁶ The appropriateness of one offer over another is often not apparent without some measurement of the marketplace. The addition or deletion of many terms and or practices, or the precise increase in remuneration, can often be best determined by analyzing the collective wisdom of a variety of other employers and unions in reaching their agreements.¹⁷ Every case has its own facts but the

¹⁵ But according to the City, Police are rarely called back. Under the IBEW contract, employees are guaranteed two hours of pay when called in, but one hour when told to merely stand by.

¹⁶ Laner and Manning, "Interest Arbitration: A New Terminal Impasse Procedure for Illinois Public Sector Employees," 60 Chicago-Kent L. Rev. 839 (1984). The article's conclusion on this point was cited with approval by Elliott Goldstein in City of DeKalb and Dekalb Professional Firefighters Association, Local 1236, ISLRB No. S-MA-87-26. Goldstein discounted the argument made by unions that such reliance discourages the implementation of new and innovative provisions, as well the argument by management that comparability leads to a domino effect of victory for unions.

¹⁷ While individual proposals may be inappropriate on their face because of poor draftsmanship, obvious conflicts with other sections of the agreement, a marked variation in bargaining history or employment practices, an apparent inability to pay, or simply apparent operational problems, the worth or importance of particular proposals may not be measurable in terms other than their presence or absence in other bargaining agreements. Of course, the value of such measurement increases in significance in proportion to the similarity of the comparison group with the unit

determination of the appropriate result can be better gauged by the struggles of those with similar characteristics and circumstances.

Generally speaking, population of the community, size of the bargaining unit, geographic proximity and similarity of revenue and its sources are the features most often accepted in composing a comparability group.¹⁸ Some arbitrators emphasize geography because the marketplace concept is essential to comparability. A professional fire fighter is less apt to move, even for an increase in earnings, than take a position in a nearby community where the only question is the daily commute.¹⁹ On the other hand, it is inappropriate to examine fire protection districts, despite their proximity, for purposes of comparability of wages and benefits. Fire protection districts are not "communities." They do not have diverse revenue sources, or other employees with whom to make internal comparisons of wages and benefits. They do not have the breadth of interests of an incorporated community, but

in question.

¹⁸ See Village of Lombard and Lombard Professional Fire Fighters Local 3009 (Berman); Village of Skokie and Skokie Firefighters Local 3033, ISLRB No. S-MA-89-123 (Goldstein); Village of Mokena and Metropolitan Alliance of Police, Chapter 72, ISLRB No. S-MA-93-74 (Perkovich).

¹⁹ This was the conclusion reached by Steven Briggs in Village of Arlington Heights and Arlington Heights Firefighter Association, Local 3105, ISLRB No. S-MA-88-89. See also, Elliott Goldstein's Award in City of DeKalb, supra., where he was critical of a uniquely tailored list of 5 university towns located throughout the state as against a list of 22 communities within the geographic area. But see, City of Peoria and Peoria Fire Fighters Local 544, ISLRB No. S-MA-92-067, where Peter Feuille accepted a group of "downstate" (i.e. away from Chicago) cities located throughout the state.

have the limited purpose of providing fire protection.

The parties in this case sharply disagree as to what, if any, list of communities compose an appropriate comparability group. The City does not so much press its own list as much as it opposes the Union's list. According to the City, most communities of its size simply do not have regular professional fire departments. According to the City, with the exception of Monmouth, no cities smaller than Rock Falls north of Springfield have full time fire fighter employees. Mendota, LaSalle and Peru, which are comparable in size, have only one full time employee on duty each day. Rochelle and Princeton are comparable in size but the former is now bargaining its first contract and the latter is non-union.

The City objects to the Union's proposed group because the cities are all larger than Rock Falls, even though some of them are geographically close. It further objects to what it sees as the Union's artificial attempt to cobble together inaccuracies in an attempt to build a semblance of comparability with these larger communities. Specifically, the City objects to the Union's use of 18,000 as the population served by the Fire Department when the City's official population is under 10,000. It objects to the Union's use of profits from the hydroelectric plant as a source of revenue for the City generally. However, the City does contract to provide fire services for an incorporated area and the only figures in the record for this area is the +/- 9,000 population number which the City itself supplied. The City claims that other cities have enterprise funds which make profits, but only Rock

Falls' Electric Fund has its retained earnings calculated as part of the City's revenues. However, the City offered no evidence in support of this claim.²⁰ It offered no support for its argument either that the population of the unincorporated area was much than the number used by the Union, or that other communities had retained earnings anywhere comparable to that of the Rock Falls Electric Fund. Although this panel recognizes that some of the communities on the Union's list are larger than Rock Falls, it must use the Union's list for comparison purposes in the absence of a better list by the City.

The Union's list includes all communities of generally comparable size with organized fire departments within 100 miles of Rock Falls. The group, with various comparability factors, is as follows:

	Pop. Served	Sales Tax & Levy *	Home Mean \$ **	EAV *	Tax Rate	Dept Size	# of Calls
Sterling	23,100	\$4.649	\$48.3	\$89.1	1.37	23	536
Dixon	15,134	4.248	48.5	66.0	2.05	16	253
Sycamore	17,000	3.886	85.6	98.8	1.67	15	403
Streator	14,900	3.966	41.1	57.0	2.33	14	278
Pontiac	14,000	3.654	51.8	52.6	.60	8	433
Canton	14,000	3.581	38.7	48.8	2.26	16	755
Rochelle	14,000	2.834	60.8	59.9	1.59	10	215
Kewanee	12,500	3.774	31.8	38.4	3.72	19	179
Monmouth	10,000	2.503	38.2	31.5	2.73	13	387
AVERAGE	14,959	3.677	49.4	60.2	2.04	14.9	382
ROCK FALLS	18,000	2.072	39.9	38.9	1.67	11	752

* Expressed in terms of \$ millions.

** Expressed in terms of \$ thousands

²⁰ In the calculations below, the panel has not included the income from the hydroelectric plant in the measurement of the communities in the Union's proposed comparability group.

This diagram shows that Rock Falls is above average in size but has below average revenue and its tax base is also below average. While its revenues for a community of about 10,000 are in line with the statistics generally, for the purposes of this case one must look at the territory served by the Department. For those purposes the revenue realized for a population of 18,000 is out of line. But the activity of the Department is certainly in line with a community of 18,000. Indeed, although Rock Falls has the third smallest department it has the second highest number of calls among the comparable communities. The statistics here show that responses are nearly twice the average for the group. While the City may challenge the accuracy of the 18,000 population figure, it is less able to challenge the total number of calls made by the Department. According to the City, more than 20% of the calls in 1993 were in the Fire Protection District. However, almost half of the major structural fires were in the FPD. Thus we see a fire department serving an above average population responding to a much higher than average number of calls but with the revenues of a much smaller community. Given the City's reluctance to transfer funds from the Electric Fund, or to raise property taxes, the need for funding the Fire Department should come from the rural fire protection district. While the City argues that to transfer money from the Electric Fund would mean that rate payers are supporting other City services, the same argument can be made regarding the low revenue realized from the FPD. The City is supporting them.

VI. DISCUSSION OF THE ISSUES

A. Salaries

As discussed above, Firefighters are on a six step salary schedule. The entry level, Step 1, pays \$18,925. There is a \$1,000 advancement with each step. Lieutenants are paid \$2,000 above the step on the Firefighter schedule to which they qualify. Advancement on the schedule is not automatic. To advance to Step 2, an employee must successfully complete the basic EMT course and obtain an EMT-A certification, and must be certified as a Fire Fighter Level I. To move to Step 3, the Firefighter must achieve Fire Fighter II certification and complete 12 months at Step 2 with at least a satisfactory evaluation. To advance to Step 4, the Firefighter must achieve Fire Fighter III certification and complete 12 months at Step 3 with at least a satisfactory evaluation. To advance to Step 5, the employee must obtain Fire Apparatus Engineer certification and complete a year at Step 4 with at least a satisfactory evaluation. Advancement to Step 6 requires only that the employee participate in training as directed by the Chief.²¹ There is also a longevity schedule which pays an additional \$300 per year after every three years an employee is at the highest step.²²

The City's last offer of settlement prior to arbitration was

²¹ At all steps employees must maintain their EMT-A certification.

²² Lieutenants at the highest step are covered by the same formula. Employees promoted to Lieutenant prior to reaching the highest step have their longevity measured from the date of promotion.

an across the board increase of \$775 for FY 94-95, \$700 for FY 95-96 and \$700 for FY 96-97. All other provisions remained the same. In arbitration the City's last and final offer is an across the board increase of \$1,000 for FY 94-95, \$750 for FY 95-96 and \$750 for FY 96-97. This represents a base increase of 5.28% in the first year, 3.76% in the second year, and 3.63% in the third year, and increases at Step 6 of 4.18%, 3.00% and 2.92%. This is a 13.2% increase at the base and 10.44% at the top step for Firefighters over three years. Salaries for Lieutenants would remain at \$2,000 above their placement on the schedule.²³

The Union's last offer of settlement prior to arbitration was a \$1,100 increase for all steps in the first year and a \$1,000 increase in the second year. There was no proposal for the third year. The formula for Lieutenants' salaries would change so that they would receive 8.5% above the Firefighters' Step 6 rate. In arbitration the Union's last and final proposal is the same as it was prior to arbitration except that for the third year the Union seeks a \$1,000 increase for all steps while maintaining the 8.5% differential for Lieutenants.²⁴ Under this proposal Lieutenants

²³ For Lieutenants, the City's final proposal represents 3.86% in the first year, 2.79% in the second year, and 2.71% in the third year.

²⁴ In its written Final Offer the Union wrote that the proposed increase in the third year was as follows: "Effective 1-1-96 increase all steps of the Schedule effective 1-1-95 by \$1,000 ***." Soon after its submission counsel for the Union wrote that this date was in error and that the dates of 5-1-96 modifying the rates effective 5-1-95 were intended. The City objects to this clarification as a forbidden modification of a final offer. However, parties must be allowed to change errors which were unintentional and which render their offers nonsensical. In this

would get increases of only \$127 more than under the existing \$2,000 formula. Under the present formula, \$2,000 represents 8.36% above the present step 6 rate. In the second year, the differential would increase to \$212 more than they would have earned with a flat \$2,000 differential, and in the third year the differential would increase to \$297 over the present \$2,000 formula. Looked at from another perspective, under the Union's final proposal Lieutenants would receive increases of \$1,227, \$1,085, and \$1,085 respectively for each of the three years, as against Firefighter increases of \$1,100, \$1,000 and \$1,000, respectively. This represents increases of 4.73%, 4.00%, and 3.84% for Lieutenants. The proposed increases of \$1,100, \$1,000, and \$1,000 for Firefighters represent increases of 5.81% at the base and 4.60% at the top step for the first year, 4.99% at the base and 4.00% at the top step for the second year, and 4.76% at the base and 3.84% at the top step in the third year of the contract.²⁵

case the Union clearly was proposing an increase in the third year. If its unedited offer were read literally, there would be no increase in the third year because the increase was to be on the rate which was effective on 1-1-95. Because the rate in effect on that date was still the first year rate, a \$1,000 increase would be ineffective for the third year. Furthermore, an increase at the start of the calendar year is completely contrary to all of the exchanges during negotiations as well as changes effective in the past for this bargaining unit.

²⁵ While the Union conditions its third year proposal as contingent upon there being a third year to the Agreement, this is not an issue. At the outset of these proceedings the parties entered into stipulations among which was the clear statement that the parties would submit offers for salaries and salary structure "for all three years of the Agreement." There was no formal request to alter this stipulation nor any changed circumstances which might merit consideration of such a change.

Looked at another way, the differences are as follows:

	CITY	UNION	DIFFERENCE
Base 1	5.28%	5.81%	.53%
Base 2	3.76%	4.99%	1.23%
Base 3	3.63%	4.76%	1.13%
Top 1	4.18%	4.60%	.42%
Top 2	3.00%	4.00%	1.00%
Top 3	2.82%	3.84%	1.02%
Lieut 1	3.86%	4.73%	.87%
Lieut 2	2.79%	4.00%	1.21%
Lieut 3	2.71%	3.84%	1.13%

Examination of the salary structure among the comparable communities shows that Rock Falls is below average both in starting salary and in maximum base salary. This is true whether or not longevity is factored in.²⁶ While Fire employees in Rock Falls have the potential of reaching the top earlier than in most of the other communities, many of the others do not have the advancement requirements present in Rock Falls. This is particularly true regarding the requirement to become certified as an Engineer. The City correctly argues that an examination of just base salaries for Fire Fighters is misleading because so much of their earnings comes from overtime. However, most of the other communities have more

²⁶ Examination of the maximum base and longevity is critical because most of these bargaining units are made up of senior employees. Turnover is slight and the demand to fill any openings is so great that starting salaries are not as significant as maximum base salaries.

scheduled days off, the usual source of overtime, than Rock Falls. It may be true that individual Fire employees in Rock Falls have total gross annual incomes higher than particular employees in other cities as a result of overtime, but it should be remembered that working overtime is still work. Employees in Rock Falls have to work more shifts and respond to more calls than in other communities to earn comparable gross salaries.²⁷

The salary comparison for Lieutenants is likewise unfavorable. The base pay for Lieutenants in Rock Falls is not only significantly below average, but it is behind Kewanee and Monmouth, two communities which are probably demographically similar to Rock Falls, and perhaps more economically depressed. Indeed, the Union's proposal for Lieutenants would not materially alter their status among similarly situated officers in other the communities. The effect on salaries by converting the \$2,000 differential to an 8.5% separation would have very little financial impact in the three years covered by this Agreement. As shown above, the cost difference for the City would be a few hundred dollars a year. Against this, the City's proposal does not reflect the lower percentage increase which occurs each time the schedule increases. With regard to Firefighters, the City's first year proposal of

²⁷ The City is critical of what it seems to characterize as the fewer number of days Fire employees have to work compared with Police. This ignores the actual number of hours put in by Fire employees. Beyond this, Fire Fighters live at their work. Their commitment goes far beyond simply having a job which they go to and then return home. While it is true that few hours are spent in actual fire suppression, to ignore the demand in hours away from home required of Fire Fighters in order to denigrate salary demands is unfair and unpersuasive.

\$1,000 is certainly adequate. The weakness in the City's proposal is with its third year offer. Given the risks regarding future health insurance costs and unknown general inflation possibilities, an increase of below 3% in the third year is simply too low.

While this panel will not pretend that Rock Falls is flush with financial resources, the difference between the two salary offers is not such as to impact the City's budget in any meaningful way. While we believe that the Union's proposal is a little on the high side it is less out of line than the City's offer especially with regard to Lieutenants and the third year proposal generally.

The City argues that acceding to the Union's salary demands would upset internal comparability. However, the Fire Fighters have been closing the gap with Police over the last few contracts and, with regard to the IBEW unit, salary comparisons are difficult at best. However, even here the new longevity increases for linemen represent a significant improvement for those employees. Finally, this panel believes that an increase above the cost of living is appropriate for this bargaining unit because of the high number of runs made by such a small unit. Today most economists look at productivity to justify increases above the inflation rate. In Rock Falls, the City is getting a lot of productivity from its nine bargaining unit and two supervisory employees. An increase in salaries above the rate of inflation is justified in this case. Accordingly, having considered all of the statutory factors, this panel awards the Union's proposal on salaries.

B. Hours and Overtime

As indicated above, the schedule of hours and Kelly Days have been a source of continuing problems for the parties. Hard bargaining has resulted in a number of changes in each successive agreement. The current contract establishes 15 day work cycles. Under the Fair Labor Standards Act (FLSA) 114 hours is the maximum number of hours a Fire Fighter may work within a 15 day cycle before the City incurs time and a half (overtime) liability. Because employees will normally work 120 hours in a 15 day cycle, the parties have provided for one "Kelly Day" to be taken during the sixth 15 day cycle, or one every 90 days. These are not true Kelly Days but rather an alternative resolution for the payment of FLSA overtime which is permissible, but not mandatory under that statute.²⁸

Both prior to the arbitration hearing and in its final offer the City seeks to maintain the status quo. It argues that the current arrangement was the product of collective bargaining and should not be changed in arbitration unless the Union can demonstrate good and sound reasons for doing so. The City also argues that there is little comparability support for the Union's proposal (of a reduced workweek with built in overtime obligations) and that the Union's proposal is merely a subterfuge to put pressure on the City to increase the time. It particularly objects

²⁸ The current agreement also provides that employees who actually work more than 120 hours during a 15 day cycle shall be paid time and a half unless the employee elects to have additional comp time.

to the Union's proposal for a 5th Kelly Day beginning in the last year of the Agreement as unnecessary and costly. While the City recognizes the legal difficulties present when discretionary FLSA formulas are mandated, it argues that the scheme of state law dictates that the City's offer be construed in a way which legitimatizes its proposal.

Prior to arbitration, the Union was seeking a change in the Hours of Work provisions so that employees would have a Kelly Day every 18th shift, and that individual work periods be established for each employee on 27 day cycles in a way which eliminates FLSA overtime. This proposal would have greatly reduced the regular workweek for Fire employees. In arbitration the Union's final offer would establish one Kelly Day after each 30th duty day, effective May 1, 1995, and one after each 24th shift commencing in the third year of the Agreement, for a total of four Kelly Days in the second year of the Agreement and five in the final year. The proposal would also pay employees overtime rates for all hours worked "in excess of their normal shifts" unless the employee agreed to comp time.²⁹ The Union concedes that its proposal would create 54.12 hour workweeks in the second year and 53.66 hour workweeks in the third year. Inasmuch as the FLSA standard is 53 hours per week and the Union's proposal also maintains the 15 day

²⁹ It might be argued that this is a proposal for premium pay to be given whether or not an employee actually works his regular shift, that is, that this is a provision for out-of-schedule pay, and not true overtime. However, the wording of the proposal is in terms of hours worked in "excess" of the normal shift. We construe this to mean that an employee must actually work his normal shift before he is entitled to this additional premium pay.

cycles, the result would be built-in overtime for all employees working their regular schedules. While the Union acknowledges that this proposal would be very costly, it suggests that it is the only way it can persuade the City to increase the staffing of the department, a subject area which is otherwise outside the scope of this arbitration.

The Union argues that its proposal is justified because of the heavy workload employees now experience, because they have less off days than other employees in the comparability group and because the four so-called Kelly Days now in existence are really comp time days for work in excess of FLSA standards.

The City is certainly correct in its arguments against the Union's proposal. What the Union seeks in this case is a major departure from the system the parties negotiated over the course of their entire bargaining history. While the Union is dissatisfied with the old system, this is not enough in itself to justify the type of systemic changes it seeks in these proceedings. Arbitrators should be wary of forcing major changes in contractual procedures upon the parties unless the party seeking the change can show gross inequities in the old system or that the system did not work as intended. Neither of these factors is present in this case. The current system was agreed to by the Union and the only complaint as to its operation relates to the complement of employees. But employees are not required to work overtime. They do so because it is in their financial interests and because of their sense of professional obligation. The City is correct, and

the Union concedes, that this proposal is really a backdoor attempt to pressure the City to increase the regular full time staff. There is also little comparable support for this proposal. It is a system found in larger communities with larger staffs. Under most of the factors specified in the Act, the City's proposal should be selected in favor of the Union's.

Nonetheless, the City's proposal cannot be awarded. The problem with the City's proposal is simply that it is unlawful. This panel cannot impose upon the Union (as representative of FLSA employees) an alternative overtime formula. The statute allows employees to voluntarily agree to such a system, but it cannot be forced upon them. In the parlance of impasse arbitration, the City's proposal is a non-mandatory subject for bargaining, albeit under federal law which, the parties understand, preempts state law. This issue presents a real dilemma for the panel. The Union's proposal is not supported by the conventional tests mandated by the Act, but the City's proposal is unlawful under federal law. On the other hand, it is not unusual for arbitrators to be faced with two facially unacceptable proposals, one of which must be selected. In such cases the arbitrators must select the least offensive proposal; the one which does the least damage to the purposes of and guidelines under the Act. While the panel here would not select the Union's proposal on this issue were it given a less offensive City proposal, the panel believes it would be wholly inappropriate to select a final offer which is conceded to be unlawful.

C. Callback Pay

The City's current callback system provides the Department with coverage when the employees on duty leave the fire station to respond to a call. The system works in such a way that the City is able to staff its station with three employees each shift and have additional employees "on call" if the need arises. It has been the Department's practice to not call in a third employee if one of the three is absent due to scheduled offtime, although employees are called back if two employees are absent during a shift.³⁰ In 1993 there were about 800 callbacks.

At one time callbacks were available to regular employees and the volunteers who are only paid when they are called in (paid-on-call). The Union negotiated a provision which gave bargaining unit employees the first option of responding to calls. Employees are not required to respond, but most if not all do because of their sense of professional responsibility and because it affords the opportunity to earn pay at overtime rates. Employees responding to a callback are now paid a minimum of one hour's pay at time and a half.³¹ While Police are given a two hour guarantee, the occasions when they are called in are much more limited than with Fire employees. Additionally, most of the comparable

³⁰ As a result there are times when only two Fire employees are sent to the scene of a fire and their ability to address the fire is limited until other employees are called in. This situation is not at issue and will not be affected by the resolution of the instant issue.

³¹ In most cases the time spent in the station is less the guaranteed one hour. Of course, this does not include the time spent traveling to and from the fire station.

communities pay at least two hours' callback pay, although the record is unclear as to whether these communities call back as frequently as Rock Falls.

The City proposes paying employees a minimum of two hours' pay when a callback occurs between the hours of 8:00 pm and 8:00 am, and one hour's pay at other times. The City argues that its proposal is appropriate because callbacks are voluntary. If the employees do not like the pay, they need not respond. In fact, the City points out, if they did not respond, paid-on-call employees would respond and they are paid less. The City also argues that inasmuch as most calls last for less than an hour, a two hour guarantee is inappropriate.

The Union proposes a flat two hour guarantee at overtime rates. It argues that the current system is very advantageous for the City because it enables the City to do maintain only a minimum staff. If the City did not have such responsive employees it would be required to hire additional full time professional employees. A staff of paid-on-call employees simply could not handle the requirements of a city fire department. The City should encourage responses by its regular employees because of their expertise and the risks present when only two professional are at the scene of a fire. The Union also argues that the number of callbacks is such that they are disruptive of the personal lives of Fire employees, who may even be called back on holidays and vacations. Finally, the Union argues that the City's offer is at odds with the overwhelming evidence as to what other cities in the comparability

group pay for their callbacks.

The panel sees this issue as a straight economic issue. There is no operational reason why two hours of pay should be guaranteed. The system works well enough as is. As the City points out, if the employees do not want their lives disrupted, they need respond as often as they do. That they do respond so frequently demonstrates no market place reason to change the rate. The Union argues that the custom and practice among other fire departments is to pay more than one hour. However, the record is not clear as to how often they are called and how long each call lasts. The Union's data is not probative. Considering all of the factors, and that the Union has already achieved a substantial increase in the base rate of pay, there is no justification for accepting its proposal. The City's final offer on this issue is the most appropriate.

D. Contributions for Health Insurance

Prior to 1990, Rock Falls employees were covered under a medical insurance policy with Travelers Insurance Company. When Travelers attempted to sharply increase rates in late 1989, the City switched to a pooled plan operated by the Rural Water Association ("RWA"). At about that time the City and the three unions agreed to a system under which the City's contributions for health insurance are capped and all premium costs above the cap are split between the City and individual employees on a 50/50 basis. In 1992 the RWA plan failed because, according to the City, inadequate premiums were collected in relation to the claims experience. The City paid all 1992 claims under the failed plan

and established its own self-funded plan. Premiums under the new plan were frozen at the 1992 rates although it is arguable that those rates were already too low. In August, 1994 the administrator of the new plan set rates based upon 1993-1994 claims experience and administrative costs.³²

In these proceedings the City proposes increasing its contribution cap from \$155.00 per month for individual coverage, the amount which went into effect on August 1, 1994, to \$156.75 a month, and from \$360.00 to \$370.50 per month for individual and dependent coverage. The new caps are for the three year term of the Agreement. The effect of this proposal will be to decrease, although perhaps temporarily, what the Fire employees now pay for their insurance. Employees with single coverage now pay \$11.90 per month while those with dependent coverage pay \$41.55 per month. Under the City's proposal these amounts would be decreased retroactively to May 1, 1994, to \$11.03 and \$36.81, respectively.

The City has consistently held to this proposal and points out that it is the formula agreed to with the other two unions. The City also proposes language allowing employees in the unit to participate in a Section 125 plan now available to other City employees by an outside insurance company.³³ Although the City

³² According to the City new rates were to go into effect in May, 1994, but were delayed until August.

³³ The actual language of the City's proposal is:

So long as it is legally authorized, the City will make available to employees covered by this Agreement the same Section 125 plan being offered to employees of the City not within

strongly objects to the injection of language issues into the stipulated issue of insurance premium contributions, it nonetheless feels compelled to contractualize the opportunity for employees to participate in a Section 125 plan operated by AFLAC, a company which sells insurance and offers tax sheltered features which can be used for health insurance premiums. The City acknowledges that there is no guarantee that this plan will be available to employees for the length of the contract, or available in its present form. It disclaims responsibility for the AFLAC plan, but argues that its presence obviates the need for the City to incur the administrative expense of establishing its own Section 125 plan. The City also points out that the AFLAC plan is available to all employees and therefore no one unit would be favored over another. The City argues against the Union's proposal for a City operated Section 125 plan because it would foist all administrative responsibility upon the City without any contribution by employees.

The Union's final offer on this issue is considerably different from what it was proposing prior to arbitration. Whereas it had been seeking a change in the formula for the payment of premiums, it now accepts the City's proposal for new caps of \$156.75 and \$370.50 for individual and dependent coverage, respectively, and for the maintenance of the 50/50 split for the

the unit covered by this Agreement. The City does not accept or assume any responsibility for the operation or administration of any Section 125 plan, and shall not be financially responsible for, nor the guarantor of, such plan.

costs above these caps. However, it also seeks two language changes, both of which were discussed during the arbitration hearing but which are outside of the stipulated issues. First, it seeks a guarantee that during the term of the Agreement "the overall level of benefits shall remain the same." The current contract contains a provision which permits the City to change carriers or plans, and provides that coverage shall be the same as that offered to other employees. But there is no representation that the plan itself will not change. The Union argues that inasmuch as this is a negotiated item, and one which employees contribute to, they ought to have some guarantees that their negotiated benefit will not be dissipated. According to this argument there is nothing in the contract which prevents the City from gutting the plan and substituting one with less benefits, albeit at less expense for the City. A bargain over contributions is meaningless if there is no bargain over what those contributions are for.

The City takes great umbrage as to this feature of the Union's proposal. It argues that it is wholly inappropriate for the Union to propose such a major change in the scheme of the insurance provision without having it on the table before arbitration and when it is clearly outside the stipulated issue which is limited to the level of contributions for the insurance. The parties did not agree to take the subject matter of insurance generally to arbitration. In any event, the City argues, the Union has not shown any need, or justification, for this change. The City also

points out that the Union's demand is not supported by the comparables.

The second language change sought by the Union in its insurance proposal is a provision for a Section 125 plan and "if such plan is not established, employee contributions to the cost of health insurance premiums shall be reduced by 28%." The Union argues that employees should know whether they will have the benefit of tax sheltering or not. It objects to the City's proposal for a Section 125 plan as illusory. The City only agrees that Fire employees can have the same plan as other employees of the City have. But the only plan in existence is one sponsored by a private insurance company which may or may not be continued and which is offered as an inducement to purchase that company's insurance. The Union argues, in effect, that the City's refusal to sponsor a tax shelter for employees is short sighted. The cost to the City would be minimal but the advantages to the employees would be great. The City has an opportunity to provide a low cost benefit to employees and build good employee relations. Instead employees are left without a basic benefit which many employers offer their employees.

While five of the nine departments in the comparability group provide benefit protection for their employees, the Union has not offered any data on which cities in the group have Section 125 plans. An examination of the contracts for the comparability group shows that only in Sycamore is there any mention of Section 125 or other sheltering. While the feature may exist but not be covered

in the contracts, the absence of any evidence on this point by the Union leaves the impression that the contrary is true.

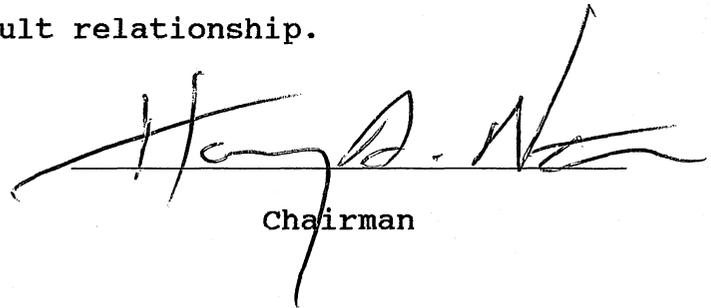
With regard to benefit protection, while the Union did propose this in its last offer before arbitration, it agreed to the stipulation which limited this issue to the rate of contribution for the insurance itself. While a proposal for a Section 125 plan can be seen as a rate issue because the sheltering would have the effect of reducing the real cost to employees, there is no way the panel can accept a proposal outside of the stipulated issues. While we agree that a clause providing the maintenance of insurance benefits is an economic issue and not a "language" issue as that term has been interpreted under the Act, the parties' own limitations on the issues before the panel supersede what might otherwise be a permissible proposal under the Act.

There are also many factors which militate against acceptance of the Union's proposal at this time. Historically, all three unions shared the same insurance provisions. To accept the Union's proposal would have the effect of dictating the plan for other employees of the City. Also, the addition of a maintenance of benefits provision is something which should be obtained at the bargaining table unless the Union can show that it has been unable to get this language despite several tries and that employees have been harmed by the old language. In this case there is no evidence that the City is out to cut benefits, or that it has done so in the past. Therefore, the Union, with this proposal, may be seeking to put out a fire which does not exist.

CHAIRMAN'S RESPONSE TO EMPLOYER'S WRITTEN DISSENT

This case was initially decided on May 5, 1995. At the request of the Employer, an executive session of the Board was held on June 9th. At that time the panel members discussed only the issue of Kelly Days. At no time during this executive session did the Employer voice any objection to any language or results in this Award other than that pertaining to the Kelly Days issue. At the Employer's request, because the Chairman recognized that the proposed award of the Union's proposal represented a major change in terms and conditions of employment, and because the Union's proposal might not have been selected but for the fact that the Employer's proposal was unlawful, the matter was remanded to the parties for additional bargaining. When the remand did not produce any change in the Employer's position, the Chairman had no choice but to issue the Award as previously written. As the panel disbanded after signing the agreement, the Employer-selected arbitrator handed the Chairman a written dissent to be attached to the Award. The dissent raises a number of complaints which were not previously addressed to the panel, although the parties had two executive sessions after the proposed Award was drafted and circulated. The dissent is replete with untrue statements, unwarranted attacks upon the Chairman, misstatements of fact and innuendos of impropriety which are wholly unjustified. For example, the dissent states that the Employer's final proposal was the result of the Chairman's urging. In fact, sitting as a mediator, before the convening of this interest arbitration case,

the mediator urged both sides to moderate their positions. Both sides did change positions. The Union increased its proposal and the Employer submitted an unlawful proposal. In fact, the Employer was told at the hearing that under the FLSA its proposal could not be imposed on the employees. Counsel for the Employer disagreed, and the Employer maintained its position. Now, the Chairman is blamed for this error of judgment. Finally, the vitriolic manner in which the dissent also attacks the Chairman for allowing the Union to change an obvious typographical error in its final offer, stating that the Chairman has condoned Union misconduct, neither advances the process of collective bargaining nor will assist the parties in working out a difficult relationship.

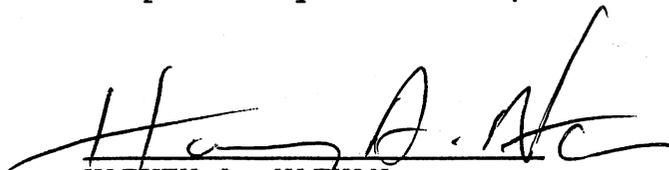


Henry D. Nelson
Chairman

A W A R D

1. The Union's proposal on wages is selected.
2. The Union's proposal on hours and overtime is selected.
3. The City's proposal on callback is selected.
4. The City's proposal on insurance contributions is selected.

Respectfully submitted,



HARVEY A. NATHAN
Panel Chairman



JAMES L. REESE
Dissenting in part



MICHAEL J. TONNE
Dissenting in part

June 26, 1995

Concurring and Dissenting Opinion of Arbitration Panel Member James L. Reese

I concur in result with respect to the panel Chairman's decision regarding the issues of "Call Back Pay" (Section VI (c)) and "Contributions For Health Insurance" (Section VI (d)), and vote in favor of items 3 and 4 of the Award. I concur in result only because of a number of unfounded, and in my opinion, erroneous judgments made. In particular, in an attack upon the Employer's proposal increasing caps on insurance premium costs the Employer will assume before any costs are shared with employees, the opinion herein states:

"The new caps are for the three year term of the Agreement. The effect of this proposal will be to decrease, although perhaps temporarily, what the fire employees now pay for their insurance...."

In fact, as the City projected during the hearings in this case, the Insurance Plan's new PPO Agreement, coupled with extra funding of the Plan by the City in 1993-1994 and 1994-1995 while employee contributions were frozen, resulted in a determination after the hearing closed that the premiums for 1995-1996, effective May 1, 1995, could be set at levels equal to the City's "caps", eliminating any premium costs to employees. Yet the opinion ignores the evidence this was likely to occur, not only in analysis of the issue of health insurance contributions, but in "wages" as well.

I dissent, both from the Award on Item 1, phrased as "wages", and from the analysis and decision concerning the issue of "Salary including salary structure". I do so first because, in my judgment, the panel Chairman's analysis and decision manifest an infidelity to the Stipulations under which the parties' agreed these proceedings would be conducted, and are in excess of his authority, both under those stipulations, and under the provisions of Section 14 of the Public Labor Relations Act. As noted at page 4 of the Chairman's decision, the parties' Stipulation specified in relevant part:

"...at the conclusion of the taking of evidence the parties shall submit in writing to the arbitration panel and to each other their last and final offers on each of the following economic issues:

- a) Salary including salary structure. Salary proposals for all three years of the Agreement shall be considered as one issue.
- b) Employer and employee contributions for health insurance.
- c) Hours of work and overtime as effected, if at all, by Kelly Days.
- d) Call Back Pay.

After the exchange of final offers, the parties will advise the arbitration panel whether they will require additional hearing time to address the respective last and final offers. Once final offers are made they may not be modified except upon the unanimous consent of the parties and the arbitration panel. (Emphasis added)."

Although the Chairman gives it only passing mention, almost immediately after signing this Stipulation, the Union sought to repudiate it, putting forth a "Last Offer Prior To Arbitration" (Un Ex 1) at hearing which sought to add "Term of Agreement" as an additional issue, and proposed a two year term, with a proposal on wages covering only 1994-1995 and 1995-1996. Despite the Employer's strenuous objection, the Chairman, both at hearing and in his proposed decision, ignores the Union's misconduct, as well as the parties' Stipulation. Emboldened by the Chairman's inaction, the Union continued its games. The panel Chairman notes the Union's Final Offer submitted December 2, 1994, the date established for the exchange of Final Offers, included a wage proposal for 1996-1997 (the third year of the Agreement) only as an alternate proposal under its proposed Fifth Issue, "Term". That alternate proposal stated:

"5. Term - Two years. If the City continues to propose a three year term and the Panel adopts a three year term, the Union proposes the following as to the Wages and Hours of Work items:

Wages: Effective 1-1-96 increase all steps of the schedule effective 1-1-95 by \$1,000 and maintain Lieutenant's rank differential at 8.5% above Fire Fighter Step VI.

Hours of Work: Effective 5-1-96 increase the existing four (4) Kelly Days to five (5) by scheduling a Kelly Day off every 24th shift."

Since the duration or term of the Agreement was already stipulated, it was not in issue, as the Chairman finds. The Union's "Term" proposal was therefore non-responsive, and should be ignored

in its entirety, leaving the Union having submitted wage proposals only for 1994-1995 and 1995-1996, despite the stipulated three year duration of the Agreement, which is the position it espoused throughout the hearing. Even then, the Final Offer submitted stated "Effective 1-1-96 (January 1, 1996) increase all steps of the Schedule effective 1-1-95 (January 1, 1995) by \$1,000...." Because salary steps on January 1, 1995 are those effective May 1, 1994 under the Union's two year proposal, its third year alternate proposal leaves salaries at the level established by its second year proposal, which was to take effect May 1, 1995.

Subsequent to the established deadline for submission of Final Offers, (December 2, 1994), the Union submitted what clearly constitutes an alteration, and thus, a "modified" proposal, changing the dates when its alternate salary proposal would take effect, to May 1, 1996 rather than January 1, 1996, and providing for \$1,000 on top of salaries to be effective May 1, 1995 instead of January 1, 1995. The attorney for the Union claimed he made an "error" in his Final Offer, although no proof of this was offered. In any event, the Union and its attorney neither sought leave of, nor obtained any consent to modify his client's Final Offer, which was obviously to the Employer's detriment. Because the Union's attorney, although dating this modification December 5, 1994, mailed it directly to the Employer's attorney, rather than exchanging it through the panel Chairman in accordance with stipulated procedures, Employer did not receive notice of this proposed modification until after the date set for submission of any request for further hearing and the Chairman took no action to indicate he would accept it, or place the parties on notice of any nature concerning it.

Rather than following the rules set by the Stipulation, and allowing the Union to rely upon their counsel's errors and omissions coverage to remedy his "error", the panel Chairman attempts to blame the Employer for the Union's conduct, citing a failure to "object to this 'correction' at that time or any other time prior to the filing of its brief." The Stipulation, however, does not say "Once final

offers are made they may be unilaterally modified, except where the opposing party objects", but instead that "once final offers are made they may not be modified except upon the unanimous consent of the parties and the arbitration panel." The Union never sought consent of the Employer, or any member of this panel. I expressly withhold my consent to the Union's proposed modification, and object to the panel Chairman's effort to ignore the Stipulation in his footnote 24, in which he states "parties must be allowed to change errors which were unintentional and which render their offers nonsensical. In this case the Union clearly was proposing an increase in the third year". Contrary to the panel Chairman's statement, the Union's proposal at hearing was a wage package that applied only to 1994-1995 and 1995-1996 (Un Ex 1), despite its stipulation that "salary proposals for all three years of the Agreement shall be considered as one issue", and the parties' agreement, before and after that stipulation, to a new Agreement of three years' duration. The Union's effort at hearing, and in its Final Offer, to repudiate that agreement is misconduct which should not be condoned, as the panel Chairman does, both at footnote 25 and in his decision to allow and to adopt the Union's alternate proposal, without addressing its invalidity. That optional proposal should instead be ignored, and the Union left with the result of what it proposed, provisions for salary increases only in the first two years of an agreed three year Agreement, with the second year increase effective from May 1, 1995 until the Agreement's April 30, 1997 expiration. The panel Chairman's remarks, together with the heterogeneity of the standards he employs in favor the Union versus those he imposes on the Employer in his analysis of Hours and Overtime, subvert these proceedings, ignore the limitations placed upon him by the Stipulation previously agreed upon and signed by both parties, and is a calculated dereliction of, and a manifest disregard for, his limited authority under Section 14, as amplified by those Stipulations.

Secondly, I dissent from the "merits" of the panel Chairman's analysis of the Salary issue. The panel Chairman's analysis gives only lip service to any factor under Section 14(h) other than "external comparability", and ignores unique attributes of the Employer's operations which make it vastly dissimilar to the "comparables" the Union proposed. While giving lip service to "internal comparability", the panel Chairman's analysis reduces that statutory standard to insignificance, ignoring the fact that another labor organization with equal rights to interest arbitration under Section 14 voluntarily agreed to a proposal which is substantially similar to the Employer's final offer, except that it produces a lower overall percentage during the same years because of higher base salaries. In essence, the panel Chairman relegates "internal comparability" to a standard to be used only to "whipsaw" the Employer. If the Employer has agreed to a higher amount or percentage with another bargaining unit, its proposal fails the "internal comparability" test, and may be rejected, yet, if its proposal is equal to or greater than what other labor organizations of equal or greater bargaining power voluntarily agreed to accept without resort to impasse procedures, its effect will be rejected on the grail of "external comparability". Moreover, the Arbitrator ignores essential elements of the test of "external comparability". There was and is no evidence of any changes in comparisons of the Employer and the external comparables proposed by the Union since the parties last negotiated, and set a rate, both for salaries and benefits, in light of all relevant factors. Thus, the panel Chairman's analysis reduces prior negotiations to insignificance as well, guaranteeing instability.

Contrary to the panel Chairman's misstatement of fact that "the Fire Fighters have been closing the gap with police over the last few contracts," the evidence demonstrates only one deviation, in a wage reopener for 1993-1994, the last year before these negotiations. Moreover, the evidence shows a ten (10%) percent rise in call response, which the panel Chairman employs (erroneously) as an equivalent to increased "productivity". Yet, as the panel Chairman notes (but then ignores), call

response declined by an equal amount in the first year covered by this Agreement. Yet this decline in "productivity" justifies abnormal increases in salaries, at least according to the panel Chairman. At bottom, what is being done is to rewrite the standards the parties previously mutually agreed were valid because one party (the Union) has become disgruntled with what it agreed with previously. While the panel Chairman also gives inordinate attention to the City's contractual service to the Rural Fire Protection District, for what the Union (and he) now contend is inadequate compensation, he ignores the fact this relationship was in place in 1990, 1992, and 1993, when these parties previously negotiated about salaries, and reached voluntary agreements on the issue. Moreover, his decision nails the coffin shut on that relationship. Yet when it terminates in 1996, eliminating over twenty percent of calls, and thus "productivity", the panel Chairman's analysis will justify god only knows how much more increase in salaries for this declining productivity.

The panel Chairman's capitulation to, and condonation of the Union's misconduct and bad faith throughout these proceedings is untenable and unwarranted. His analysis of the merits is, in my judgment, faulty, and guarantees employer-employee unrest, not only in this relationship, but others, not directly involved in these proceedings, for years to come. It is his shocking disregard for, and disdain of any factor other than his grail, "external comparability", which may ultimately force the elimination of services, making the City more comparable to the numerous communities of its size which do not have a service staffed with full time personnel. So much for benefit to the public.

Even more disheartening, however, is the panel Chairman's analysis and award regarding the issue of Hours and Overtime. As he notes, here the Union, throughout negotiations and these proceedings, sought fundamental, one-sided revisions unwarranted under any standard other than unbridled self-interest. Even more odious is the Union's dramatic alteration after hearing, presenting a new proposal never previously submitted. While the Arbitrator asserts the City's Final Offer to be

retention of the product of prior negotiations, he misstates facts in asserting "[b]oth prior to the arbitration hearing and in its final offer, the city seeks to maintain the status quo". On the contrary, until the November 1, 1994 meeting with the panel Chairman, at which he attempted to first mediate unresolved issues, the City's position throughout the negotiations was to remove the prior provisions authorizing "Kelly Days" off duty in compensation for scheduled "FLSA overtime", and replace those provisions with ones providing for cash overtime payment for these hours. It was only at the "neutral" Chairman's urging that the City withdrew from that position, offering to retain current contract provisions, obviously without benefit of any warning by the panel Chairman how he would subsequently employ that effort at compromise. Ignoring the fact he aided and abetted the Union in modifying its Final Offer on Wages without authority, he then turns on the City by finding the City's proposal "permissive" or "unlawful", ignoring the offer. While the City's offer was to "retain present provisions from prior Agreement", that Agreement includes a provision that "in the event that any of the provisions of this Agreement shall conflict with any state or federal law or regulations, such provisions shall be deemed modified sufficiently in respect to either or both parties to the extent necessary to comply with such laws or regulations and the remaining portion of this Agreement shall remain in full force and effect". (§7.01) Thus, to the extent the panel Chairman concludes the provision of compensatory time pursuant to Section 7(o) is unlawful because the Union withholds its consent to its continuation, the agreed provisions already provide for modification rendering them lawful, by construing them to require cash payment of FLSA overtime hours in light of the Union's objection. While bending over backwards for the Union, however, the panel Chairman gives the City no similar latitude. What happened to "parties must be allowed to change errors which were unintentional and which render their offers nonsense." Quite obviously, what the Chairman really

means is Unions must be allowed that latitude, even when expressly prohibited, but Employers should be denied it, even when it is unambiguously provided.

The Chairman's purported legal analysis is equally faulty and biased. How overtime is compensated is a clear "mandatory" term or condition of collective bargaining, and the panel Chairman does not cite, and can not cite, authority for his conclusion it is instead a "permissive" subject for negotiation. (See, generally, The Developing Labor Law (3d Ed) pp. 851-954.) Section 7 of the Fair Labor Standards Act (29 USC §207) plainly authorizes public employers to provide overtime compensation in cash, compensatory time off, or a combination of cash and compensatory time, as the negotiated agreements between the City and this Union for 1990-1992 and 1992-1994 (Jt Ex 1) do. (Having been compensated at straight time by their salary, each employee received a minimum of .8 hour off for each hour worked between one hundred fourteen and one hundred twenty hours in each fifteen day FLSA work period, or 1.8 times their "regular rate", in addition to cash overtime, paid at an inflated "hourly overtime rate", for hours exceeding one hundred twenty.) While Wage and Hour regulations make clear there must be an agreement or understanding between the Employer and the Union to authorize this, the Union has agreed. Nothing in either the regulations, nor any case authority supports the assertion that the Union, having agreed, may unilaterally withdraw consent, and thereby render the system "unlawful", as the Chairman concludes. The only authority the Union cited, Section 553.23(b)(2) of the Regulations, 29 C.F.R. §553.23(b)(2) (which it took out of context), is inapposite, providing:

(2) Section 2(b) of the 1985 amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement. However, the terms and conditions of such

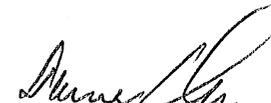
agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of Section 7(o) of the Act and the regulations.

Nothing in this provision applies to an agreement first adopted in 1990, and renewed in 1992, and nothing in either Section 7(o), or Section 554.20-25, provide any suggestion that agreement, once reached, may be unilaterally altered, or becomes unlawful because the Union seeks an alternative provision in later negotiations. Of course, even if the neutral Chairman were correct, the Union's "third" year modification was proposed only as part of an optional, alternate proposal which should be ignored, and is not properly considered a part of its Final Offer.

As the panel Chairman states "under most of the factors specified by the Act, the City's proposal should be selected in favor of the Union's." The remainder of his analysis is erroneous, and is contrary to the panel's duty under Section 14, to "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)."

I therefore dissent, both from the panel Chairman's Award on item 2, and from his finding and analysis of what Final Offer the Union actually submitted. I also dissent from his analysis of the City's Final Offer, as well as his decision to adopt a proposal never submitted in collective bargaining negotiations or during hearings. That proposal contains patent ambiguities and omissions, only one of which the panel Chairman expressly addresses, appropriately (in my judgment) interpreting what the Union's proposed Section 21.02(c) states, and means. I therefore join in his footnote 29. The Arbitrator's other comments fail to address additional patent ambiguities, although I note, and concur, that nothing in the Award, the panel Chairman's analysis of this issue, the Union's Final Offer, or its Post-Hearing Brief, contains anything which even hints that the four (4) or five (5) "Kelly Days" to be scheduled off annually at stated intervals are to be compensated. (In fact, such construction would

clearly conflict with Section 21.01 of the Union's Final Offer that "[the] Article shall not be construed as a guarantee of hours of work, and is not intended to establish a right to compensation in any form for time not worked, except as expressly provided in this Article" and "[t]here shall be no pyramiding of compensation provided for in this Agreement, and overtime compensation shall not be paid more than once for the same hours under any provision of this Agreement"). I also note that the Union's Proposal deletes provisions which had governed how the City was to comply with FLSA obligations for scheduled overtime. Since the provisions of Article 21, as modified, are silent on this issue, it is left to management rights (as set forth in Article 2) to determine how the City will comply. Nothing in the panel Chairman's analysis or Award suggests, or states, anything to the contrary, and I concur to this extent as well.


James L. Reese