



## I. BACKGROUND AND FACTS

The City of Batavia is a non-home rule municipality of 20,236 residents which lies approximately 35 miles due west of the Chicago Loop in Kane County. The City's consistent and rapid growth in population in recent years (C. Ex. 14) has increased the demand for municipal services to the public.

The City's Fire Department is headed by Fire Chief William Darin, who is assisted by a paid-on-call chaplain and a full-time civilian secretary (Tr. 340). Reporting to the Chief, and in charge of the full-time firefighters, is Deputy Chief Poole who is not in the bargaining unit. Reporting to Chief Poole are three lieutenants who are regularly assigned to platoon duty. There are 10 full-time firefighters and four lieutenants who are members of the bargaining unit.

The City also has paid-on-call firefighter program (which is the subject of dispute in this proceeding). Altogether the City employs 34 paid-on-call firefighters (C. Ex. 24), four of whom are lieutenants and one of whom is an assistant chief in charge of the paid-on-call program (Tr. 340-41), the majority of the paid-on-call firefighters work shift duty with the full-time firefighters assigned to platoon duty. There are also four special assignment paid-on-call firefighters covering shifts which operate eight hours per day Monday through Friday (Tr. 341).

The Department has two fire stations designated east and west, or stations 1 and 2 (C. Ex. 3). Normal staffing includes eight individuals assigned to shift work, one daytime firefighter, one daytime lieutenant, the Deputy Chief and the Chief. The staffing complement for Station 1 consists of one full-time lieutenant, one full-time firefighter, one part-time firefighter, and two contract paramedics/firefighters. Also working in Station 1 are the full-time eight hour/swing lieutenant during the morning hours and the full-time eight-hour swing firefighter. The staffing complement for Station 2 consists of two full-time firefighters and one part-time firefighter along with the eight-hour swing shift lieutenant in the afternoons only. Both stations are staffed 24 hours a day.

The bargaining unit represented by the International Association of Firefighters (IAF) negotiated its first contract with the City in 1992 and that contract covered the period of January 1, 1992 through December 31, 1994 (Jt. Ex. 1). The parties' second contract, to be resolved by award of this Arbitrator, will cover the period January 1, 1995, through December 31, 1997, a three-year collective bargaining agreement. The bargaining unit has 14 members, including 10 firefighters and 4 lieutenants.

The Union invoked interest arbitration to resolve an impasse reached between the parties as to the terms of a successor agreement to the parties' 1992-1994 labor agreement (Joint Ex. 1). The proceedings are governed by Section 14 of the Illinois Public Labor Relations Act ("IPLRA"), 5 ILCS 315/1 et seq. The undersigned's jurisdiction arises under the terms of the IPLRA and agreement between the parties. The parties agreed to exchange final offers of settlement on August 29, 1995. The parties stipulated that the undersigned has the authority to render an award on economic issues for the City's fiscal year beginning January 1, 1995. However, the parties have agreed that any award of Kelly days would not commence until the start of the month following acceptance of the award.

On August 29, 1995, the parties exchanged final offers on each of unresolved issues at the direction of the undersigned.

## II. RELEVANT STATUTORY PROVISIONS

The parties agree that the arbitration panel is directed by Section 14 of the IPLRA (5 ILCS 315/14(h)) to decide each of the disputed issues in accordance with the following criteria:

(g) . . . . As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in subsection (h). The findings, opinions and order 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, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, 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, 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.

Because Section 14 of the IPLRA provides that the decision be based on the factors only "as applicable," some of the factors enumerated in the statute may not be relevant or controlling. Further, under the IPLRA, other factors not enumerated may be relevant to the disposition of the case.

### III. ISSUES FOR RESOLUTION

The following issues are to be resolved in the instant proceeding:

#### A. Non-Economic Issues

- 1. Mid-Term Changes and Bargaining Obligations (4th paragraph of Article IV).

## B. Economic Issues

2. Hours of Work/Kelly Days (Section 16.1).
3. Eight-Hour Shift (Section 16.2).
4. Wages (Article XVIII).
5. Work Preservation (new section).
6. Firefighters In-Charge Pay (new section).

## IV. DISCUSSION

### A. SELECTION OF COMPARABLE JURISDICTIONS

The parties in the instant case are not in full agreement as to all of the communities which should be used as external comparables for purposes of resolution. With help from the Arbitrator during mediation, the parties have agreed that the communities of Geneva, Westchester, Mundelein, Zion, Carpentersville, and Lake Zurich are proper comparables (Tr. at 131). The undersigned determined that the communities of LaGrange, Brookfield, Villa Park, and St. Charles would also be properly used as comparables (Tr. at 131). However, the parties were permitted to make arguments at the hearing and/or in their briefs to exclude or include additional relevant communities (Tr. at 131).

The Union has indicated that it agrees to the use of the ten (10) communities identified above as comparables (Union Brief at 4). However, the City objects to several of the proposed comparable communities. The City argues that both LaGrange and Brookfield should be rejected because they have small tax bases, while St. Charles should be rejected because it has a far larger tax base than Batavia. The City also argues that Villa Park should be rejected as a comparable because it receives \$2 million more in sales tax revenue per year relative to Batavia.

Having considered the above, I hold that the comparable jurisdictions will include the agreed-upon communities plus the communities of LaGrange, Brookfield, Villa Park, and St. Charles. As noted by the City, the profiles of these communities vary slightly from the City of Batavia. However, it must be kept in mind that the communities, including those agreed upon by the parties, will merely serve as comparisons or benchmarks. Indeed, it is unlikely that any single characteristic of a community will be controlling or dispositive as to the outcome of the disputed issues. Inclusion of LaGrange, Brookfield, Villa Park, and St. Charles will not change the overall nature of the pool of comparables used to settle the case.

B. NON-ECONOMIC ISSUES

1. Mid-term Changes/Bargaining Obligations  
(“Zipper” Clause)

a. The Parties' Final Offers

(1) The City's Final Offer and Position. The City proposes that the fourth paragraph of Article IV of the 1992-94 Agreement at pp. 3-4 be deleted and replaced with the following paragraph:

This Agreement constitutes the complete and entire agreement between the parties, and concludes collective bargaining between the parties for its term. This Agreement supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated in this Agreement. The City and the Union, for the duration of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any matter or issue which is covered by the terms of this Agreement, absent mutual consent as provided in the second paragraph of this Article.

With respect to any mandatory subject of bargaining which is not covered by the terms of this Agreement, the City may implement changes with respect to such mandatory subjects of bargaining provided that it first gives written notice to the Union President or designee of the proposed change. If the Union wishes to negotiate over the proposed change, the Union President or designee shall respond with a request to negotiate within seven (7) days of receiving the City's written notice, and negotiations shall commence within fourteen (14) days of the Union's response.

Matters that are specifically reserved to management's decision-making under the terms of this Agreement, as well as all permissive subjects of bargaining that are not covered by the terms of this Agreement, are subject to change by the City without negotiations as to the City's decision to implement such changes, provided however, that the impact of any such change on the terms and conditions of employment where such impact would qualify as a mandatory subject of bargaining under the IPLRA shall be subject to negotiations upon request by the Union President or designee. The pendency of such impact or effects negotiations shall not serve to delay the implementation of the City's decision with respect to a permissive subject of bargaining or a matter which is otherwise reserved to the City's management prerogative by the terms of this Agreement.

In the event of an impasse in any mid-term negotiation referenced in this Article, the City shall be free to implement its proposal, it being understood that the Union will subsequently be entitled to propose to prospectively alter such implemented decision in connection with the renegotiation of this entire Agreement to the extent that the Union's proposals constitute mandatory subjects of bargaining at the time of such renegotiations.

The City argues that its proposal clarifies the accepted practice of interpreting Article IV as a zipper clause while the Union's proposal does not.

According to the City, there is no dispute that the existing language under Article IV, which provides that mid-term bargaining may occur only if "mutually agreeable," constitutes a zipper clause. The City argues that it proposes to retain the article's basic character as a zipper clause, freeing both parties from the obligation to bargain at the whim of the other party during the term of the agreement. The City says that the Union acknowledges that Article IV is a zipper clause but offers no language to clarify that understanding and practice.

According to the City, while the current language of Article IV is ambiguous, the intent of the provision is to foreclose unilaterally demanded mid-term bargaining. The City submits that its final offer makes that understanding clear, while the Union's final offer leaves it somewhat vague.

Further, the City argues that its proposal accepts the Union's demand for mid-term bargaining rights when the City proposes to change policies which constitute mandatory subjects of bargaining not covered by the agreement. The Union, claims the City, has made it clear that it seeks to modify Article IV to eliminate existing language which precludes negotiations in the event that the City would seek to change conditions of work or benefits that would otherwise be mandatory subjects of bargaining. The Union seeks to substitute language that would create an obligation to bargain with respect to those proposed changes. The City argues that while both parties' proposed language attempt to accomplish the purpose stated by the Union, the Union's proposal fails to address the issue of impasse resolution. This oversight by the Union, argues the City, may well lead to future conflict.

The City also argues that the comparable jurisdictions' contracts favor its final offer. None of the City's selected comparable jurisdictions have any mid-term bargaining provisions. St. Charles, a Union-proposed comparable jurisdiction, is the sole exception. On the other hand, Carpentersville, Lake Zurich, Westchester, and Zion, all have entire agreement clauses such as the City is currently proposing. Also, the Village of LaGrange,

the City of St. Charles, and the Village of Villa Park have entire agreement clauses. Indeed, the only comparable jurisdictions which do not have entire agreement clauses are the non-union jurisdictions of Brookfield, Geneva, and Mundelein.

(2) The Union's Final Offer and Position. The Union proposes that the following language be inserted into the contract [The underscored portion represents additions to the current language]:

The terms and conditions of this Agreement shall be considered full force and effect for a term of \_\_\_\_\_ commencing on \_\_\_\_\_ and shall remain in effect until \_\_\_\_\_. Pay scales will be retroactive to \_\_\_\_\_.

If either party desires to renegotiate any part of this Agreement, it must provide written notice to the other party by registered or certified mail. Notice shall be considered to have been given as of the date shown on the postmark. In the event such notice is given, and if mutually agreeable to both parties, negotiations shall begin within sixty (60) days of the notice being given. However, if not mutually agreeable, the existing terms of the agreement will remain in place.

If any term or provision of this Agreement is rendered invalid, unenforceable, or unlawful, upon request of either party, both parties shall meet promptly to negotiate with respect to the affected terms or provisions. The terms of this Agreement shall remain in full force and be effective during any period of negotiations and any period pending an impasse in negotiations.

It is recognized by both parties that issues of wages, hours, benefits, and working conditions of employment not covered in this Agreement, may come of issue during the term of this Agreement. In the event either party recognizes an issue of wages, hours, benefits and/or working conditions that is not covered by this Agreement during the term of this Agreement, both parties shall be held harmless for the failure to include such issue in the Agreement. In the event the Employer proposes to change any such condition during the term of this agreement it shall notify the Union and upon request, and negotiations shall begin within sixty (60) days of the notice being given to resolve such issues. The existing terms of the agreement and the existing wages, hours, benefits and/or working conditions that are mandatory subjects of bargaining shall remain in place during such negotiations.

The Union argues that its proposal seeks to modify current language in Article IV which has been treated by the City as a total waiver of any Union rights to decisional or effects bargaining as to mid-term changes in conditions of employment during the contract term. The Union proposes to limit the waiver to only subjects that are covered by the terms of the contract.

According to the Union, the record demonstrates a strong need to clarify the City's duties to bargain as to matters which are mandatory subjects of bargaining that are not covered by the express terms of the contract. The Union asserts that the City's actions with respect to its attempt to unilaterally implement a revised more restrictive no-smoking policy (as substantively desirable as that may be in the Union's eyes) is perhaps the most dramatic evidence of the City's predilection to act unilaterally even where there is a clear statutory mandate to bargain. At the June 23rd hearing, the Union notified the City that it objected to unilateral action with regard to a no-smoking policy and further apprised the City that because the contract had expired it was barred from unilateral action by virtue of the provisions of Section 14(1) of the IPLRA. Despite this, the City proceeded to unilaterally implement the new more restrictive smoking policy effective July 1. This action, however, was ultimately reversed.

Further, the Union argues that the City's duty to bargain with respect to wages, hours and other conditions of employment is established under Section 7 of the Act. Illinois courts have consistently rejected employer efforts to construe this duty to bargain narrowly. A corollary to the broad duty to bargain recognized under the Act is a reluctance to recognize waivers of bargaining rights by employee organizations. Broad waivers of bargaining rights clearly are inconsistent with the public policy favoring collective bargaining as a means for resolving disputes relating to employee wages, hours and working conditions. This reluctance is expressed in the articulation of a test which places a very heavy burden on any employer seeking to enforce a waiver of bargaining rights.

According to the Union, any doubts concerning the lawful authority of the City to require a continued waiver of employees' statutory rights to bargain as to subjects not covered by the terms of the successor contract should be resolved in favor of preserving the duty to bargain. The fourth paragraph of Article IV which is the subject of the parties' dispute is a unique provision. This language does not take the form of the typical boilerplate "zipper" clauses advanced by many management advocates. The first two sentences of the paragraph recognize the Union's interest in protecting wages, hours and conditions of employment that are not covered by the contract. The second sentence recognizes that these interests can be addressed by the process of mid-term negotiations. The only problem the Union has with the existing language is that

this process is available only "if mutually agreeable."<sup>1</sup> Even this language could be tolerated if the City was disposed to utilize the process. Regrettably, the City has adopted a position that is very resistant to engaging in negotiations with the Union as to mandatory subjects of bargaining even when it is under a clear statutory duty to do so. Given this disposition on the part of the City, the clause "if mutually agreeable" effectively expands this paragraph into a blanket waiver clause.

The Union asserts that it has narrowly tailored its language to retain the positive aspects of the existing language while preserving its statutory duty to bargain as to matters not covered by the existing terms of the contract.

As a matter of contract, the terms of the 1992-94 contract (Jt. Ex. 1) including Article IV, expired December 31, 1994. Wages, hours and conditions of employment provided under the express terms of this contract, as well as conditions of employment and benefits not covered by the express terms of the contract, are currently maintained in effect by law by the command of Section 14(1) of the Act. The issue before the Arbitrator is whether to renew and place into the new contract language that will carry forward the past restrictions on the bargaining rights of the Union expressed in the clause "if mutually agreed," now objected to by the Union. If the Arbitrator does so, he will be requiring the Union to continue to waive decisional and effects bargaining rights as to matters not covered by the terms of the successor agreement. Section 14(1) has particular relevance to this determination. Section 14(1) only continues in effect conditions of employment which constitute mandatory subjects of bargaining.

The procedure for bargaining proposed by the City fails to make any express commitment to maintain the existing conditions during the conduct of negotiations. In fact, the City's language reverses the emphasis entirely by presupposing that "the City may implement changes with respect to such mandatory subjects of bargaining . . ." subject to a proviso.

Additionally, the time period specified for Union action and commencement of bargaining is unduly short. The Union's 60 day period is both consistent with the time frame of the existing

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<sup>1</sup> The language at issue reads:

In the event such an issue is discovered, notice shall be issued to both parties and if mutually agreeable, negotiations shall begin within sixty (60) days of the notice being given to resolve such issues. However, if not mutually agreeable, the existing terms of the agreement will remain in place. The parties not agreeing to negotiate shall submit their reasons for their decision to the other party in writing.

contract as well as the time frame specified in Section 7 of the Act. The first paragraph also contains objectionable waiver language. The second sentence in particular proposes that "this agreement supersedes and cancels all prior practices and agreements, whether written or oral unless expressly stated in this agreement." The Union is not prepared to agree to such a broad waiver since there are in fact many practices, benefits and conditions of employment that are not addressed in the contract and which the Union is not prepared to cancel without an opportunity to seek to negotiate their inclusion in the contract. Such practices can be of critical importance to employees. This language is also at odds with the existing language of the contract whereby the parties recognize that "issues of wages, hours, benefits and working conditions of employment not covered in this agreement, may become an issue during the term of this agreement."

The Union also objects to the City's phrasing in paragraph 3 where it attempts to create a distinction between "matters that are specifically reserved to management's decision making" and "permissive subjects of bargaining not covered by the terms of this agreement." As to both these categories the City proposes that it can act unilaterally without negotiations. The import of this distinction is unclear. If a matter not covered by the contract is otherwise a mandatory subject of bargaining, does the fact that the contract allows the Employer discretionary action convert this subject into a non-mandatory subject? Here, it would appear that the City is seeking to contractually limit its statutory duty to bargain by contractually redefining mandatory and permissive subjects of bargaining. The Union's proposal is more faithful to the existing language and the statutory policy favoring bargaining over mandatory subjects of bargaining.

## 2. Discussion and Award

There is no question that the Administration has a duty to bargain with the Union regarding mandatory subjects of bargaining, usually wages, hours, and other conditions of employment. Citing the experience with a restrictive smoking policy (Brief for the Union at 89-90) and a unilateral decision the City made to bar physical fitness or recreational activity of any kind during working time (Brief at 90) (as examples of a mandatory subject of bargaining as to which the contract may be silent and as to which the City might be inclined to act unilaterally), the Union has noted that its objective in this arbitration proceeding is to modify existing language which precludes negotiations in the event that the City seeks to make changes in an area that would otherwise be a mandatory subject of bargaining (Tr. at 300). As such, the Union seeks to create an obligation on the part of the Administration to negotiate with respect to those issues (Id.).

While I have some problems with certain aspects of the Union's

proposal, I find that the Union's proposal is more faithful to the existing language and the statutory policy requiring bargaining of mandatory subjects, and arguably does no more than that required of the Administration under the Act. Further, the City's Final Offer proposes to delete entirely the language of the fourth paragraph of Article IV and replace it with completely new language. I find that the City's proposed fourth paragraph is a significant modification to the existing language. I also credit the Union's argument regarding the City's language dealing with "matters that are specifically reserved to management's decision-making" and "all permissive subjects of bargaining that are not covered by the terms of this Agreement." For the above reasons, the Union's proposal is awarded.<sup>2</sup>

### C. ECONOMIC ISSUES

#### (Article XVIII)

##### a. The Parties' Final Offers

(1) The City's Offer and Position. The City makes the following proposal as to wages:

Summary: 3% General Increase effective 1/1/95  
4% General Increase effective 1/1/96  
4% General Increase effective 1/1/97

#### ARTICLE XXIX - WAGES

January 31, 1995--December 31, 1995:

Firefighter

Start	\$29,326
1 Year	\$31,882

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<sup>2</sup> I am aware that under the Act I could "cut and paste" on this issue. The danger in drafting language that neither party has seen is clear to all who have ever bargained a collective bargaining agreement. How will an outsider's solution play out? The risk in including such language in a three-year collective bargaining agreement outweighs the expected utility in drafting a provision that could satisfy the concerns of both sides. This is arguably one reason for treating language items on an "either/or" or "final offer" basis. The "cure" is often worse than the "disease."

2 Years	\$33,697
3 Years	\$35,305
4 Years	\$36,992
5 Years	\$38,764
6 Years	\$39,733

Lieutenant

Start	\$40,488
1 Year	\$42,337
2 Years	\$43,456
3 Years	\$45,283

January 31, 1996--December 31, 1996:

Firefighter

Start	\$30,499
1 Year	\$33,157
2 Years	\$35,045
3 Years	\$36,718
4 Years	\$38,472
5 Years	\$40,315
6 Years	\$41,323

Lieutenant

Start	\$42,108
1 Year	\$44,031
2 Years	\$45,194
3 Years	\$47,094

January 31, 1997--December 31, 1997:

Firefighter

Start	\$31,719
1 Year	\$34,483
2 Years	\$36,447
3 Years	\$38,186
4 Years	\$40,011
5 Years	\$41,927
6 Years	\$42,976

Lieutenant

Start	\$43,792
1 Year	\$45,792
2 Years	\$47,002
3 Years	\$48,978

The City argues that the interest and welfare of the public demands that the Arbitrator select its final offer on wages rather than the final offer of the Union.

The City does not contend that it is unable to meet the wage demands of the Union. However, it claims that its expenditures have outrun its revenues due to increased population and a resulting increase in the number of city employees needed to provide public services. Thus, the resources that can be used to provide a wage increase for the firefighters are limited.

According to the City, its general fund expenditures outpaced revenues over the last five years by 29.6% to 25.3%. Fire Department wages increased by over 60% during that same period. Because of this and other pressures and constraints on the City's budget, it claims that it has been unable to maintain the requisite 25% of its general fund expenditures as a working cash fund. Consequently, the City argues that it would not serve the interests of the public to award firefighters and the lieutenants in the bargaining unit yet another 3% step in the salary schedule in addition to a substantial increase in wages. Such additional expenditures would be imprudent and contrary to the public interest.

Further, the City argues that there is no evidence that firefighters are leaving employment with the City for economic reasons. The City asserts that only one firefighter has resigned from the Department in the last ten years and that was not for economic reasons. Moreover, there is no indication that the City's wage levels are damaging its ability to attract and keep a sufficient, competent firefighting unit.

The City also argues that external comparability and the private sector favors the City's final offer. The City acknowledges that its Fire Department employees are not the best paid in the cited comparability groups. This is true now, has always been true, and will likely remain so in the future, says the City. However, from 1992 to 1994, the firefighters and the lieutenants received wage-rate increases at or very near the top when measured against the comparable jurisdictions. Likewise, the City's wage offer in this case either maintains or improves the firefighters' market position with regard to top base firefighter wages and top base lieutenant's salary. Moreover, the wages earned by firefighters in the employ of Fermi National Accelerator Laboratory are extremely low in comparison to the wages enjoyed by the City's firefighters. Further, according to data obtained from the Fox Valley Industrial Association, data reflecting the wage-rate increases enjoyed by employees of local firms from 1992 through 1995, Batavia firefighters have experienced greater wage increases in recent years than have the private-sector employees in the area.

While the Union argues that the firefighters' relative position in the market is low, the City points out that there is nothing in evidence or in the statute to suggest that they are entitled to mean wages or to any particular wage level defined in relation to the mean. Further, the City points out that the evidence showed that all City employees are paid at relatively low rates compared to the comparable jurisdictions. Moreover, the firefighters have made no case that they should be paid better, relative to the market, than all other City employees.

According to the City, internal wage comparability also favors its final offer on wages. The City of Batavia has bargaining units of IBEW linemen and crew leaders, police patrolmen and sergeants, firefighters and firefighter lieutenants, and non-organized employees. Between 1992 and 1994, the firefighters have received larger increases than any other group, except (slightly) police sergeants. The City's final wage offer would maintain the current pattern.

Moreover, the City argues that the cost-of-living criterion has been interpreted to favor the offer which is closest to recent increases in the Consumer Price Index. According to the City, that standard clearly favors the City's offer, yet the Union demands even more. The Administration points out that firefighters' salary increases outpaced inflation during the term of the last contract by over 11% and the top lieutenant salary increases exceeded inflation by 13.6%. Furthermore, if looking forward, the City's wage proposals clearly match the anticipated inflation rate projected over the next three years. Inflation is expected to be 3.2% for 1995 and 3.5% for 1996, well in line with the City's proposal for a 3% increase in 1995 and a 4% increase in 1996. Under these circumstances, there is simply no reason to increase the firefighters' and lieutenants' top base pay by 6% retroactive to January 1, 1995, as the Union desires.

The Union's final offer on wages, which includes an additional step for both firefighters and lieutenants, is inherently and fundamentally flawed, argues the City. This ill-conceived and lately referred proposal has the effect of setting starting base lieutenant wages at a rate lower than the top base firefighter wages. Under the Union's proposal, a top step firefighter will face a pay cut in connection with a promotion. This situation, says the City, will doubtlessly lead to future Union demands to "fix" the problem their hasty final offer caused.

(2) The Union's Final Offer and Position. The Union proposes adding a seven-year step for firefighters and a four-year step for lieutenants at 3% above the six-year step for firefighters and at the three-year step for lieutenants. The Union also wants to increase all steps of the schedule by 3% effective January 1, 1995, 4% effective January 1, 1996, and 4% effective January 1, 1997.

With the exception the seven-year step for firefighter and four-year step for lieutenants, the Union offers the same figures as the City for the term of the agreement.

January 31, 1995--December 31, 1995:

Firefighter

Start	\$29,326
1 Year	\$31,882
2 Years	\$33,697
3 Years	\$35,305
4 Years	\$36,992
5 Years	\$38,764
6 Years	\$39,733
7 Years	\$40,924

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Lieutenant

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4 Years	\$40,011
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7 Years	\$44,263

## Lieutenant

Start	\$43,792
1 Year	\$45,792
2 Years	\$47,002
3 Years	\$48,978
4 Years	\$50,447

The Union argues that adoption of its wage proposal will reduce the disparity between the wages paid to Batavia firefighters and lieutenants as compared to wages paid to their counterparts employed in comparable communities. In 1994, says the Union, Batavia ranked 10 out of the 10 comparables with respect to firefighter maximum base salary, and 9 out of 9 with respect to lieutenant maximum base salary. The Union also submits that Batavia firefighters' hourly rate ranked 9 out of 10 and lieutenants' hourly rate ranked 8 out of 9 in 1994. However, if the Union's final offer were accepted, Batavia would then rank 10 out of 11 in terms of firefighter maximum base salary and 7 out of 11 in terms of lieutenant maximum base salary. Further, the hourly rate for firefighters would place Batavia 8 out of 11 and the lieutenant hourly rate would be 5 out of 11. As seen, the Union's proposal will only modestly reduce the huge disparity that now exists (Brief for the Union at 9-10).

The Union also argues that another factor to be considered in evaluating firefighters' annual salary status is the level of contributions towards health insurance. Batavia firefighters are required to pay 50% of the cost of dependent health insurance premiums. This is a contribution formula that results in extremely high health care costs in comparison to the comparable communities. This consideration further exacerbates the great disparities between wages paid in Batavia and other communities and drops their "net salary" to dead last.

The Union points out that the City is not contending that it is unable to pay the additional wages proposed by the Union. In fact, the actual additional budgetary costs that would result in adopting the Union's wage proposal are minimal given the youth of the members of the bargaining unit. The evidence shows that the

City of Batavia has substantial and growing financial resources.

The Union further argues that its proposal to add another 3% step at the top of the salary schedule will reduce the existing wage disparities at a very minimal additional cost over the term of the contract. By combining the City's proposed 3% across-the-board increase with an additional 3% top step, the Union's proposal achieves a 6% "lift" in terms of the maximum base salary. Yet, it is much less costly to the City over the term of the contract than a straight 6% across-the-board increase because, as the City's counsel noted, Batavia is a young department. Consequently, very few members of the Department are at the top step or will reach the top step over the term of the agreement. Indeed, in 1995 only three members of the bargaining unit (two lieutenants plus one firefighter) would be eligible to receive the additional 3% step. In 1996, one additional firefighter would be eligible for a total of 4 employees. In 1997, a total of 6 employees would be eligible (three lieutenants and three firefighters). According to the Union, the additional wage costs in 1995 resulting from adopting the Union's wage proposal would be \$3,908.00 or .78%; in 1996, additional costs would be \$5,306.00 or .92%; and in 1997, additional costs would be \$8,274.00 or 1.35%. The total additional costs over the three year term above the City's 3, 4, 4 offer would be \$17,488.00 or 3%.

The Union says that its wage proposal is also consistent with the parties' bargaining history. In 1992, firefighters' maximum base salary was increased from \$32,204 to \$34,989. This represented an 8.64% increase in maximum base salary which was accomplished by adding another step to the salary schedule and then applying an across-the-board increase of 6%. The Union proposal to add another step and extend the service requirement from 7 to 8 years to reach maximum salary is thus wholly congruent with the parties own bargaining history.

The Union points out that the City's final offer to the police is the same 3%, 4%, and 4% that it is offering the Union. However, the Union adds that while internal comparisons are an important and relevant factor to be considered, under the circumstances of this case they should not be afforded controlling weight. In this case, there are several reasons why internal relationships should not determine the result. In terms of actual dollars, there is a large disparity between the annual salaries paid to firefighters and those of police officers and other organized employees, such as electrical linemen. It is evident that the City has avoided actual salary comparisons between employee groups and seeks to support its position by comparing percentage increases only. However, analysis of the City's bargaining history shows that even considered on a percentage basis, there is no uniform pattern. For example, over the three years of the predecessor contract, police sergeants, perhaps reflecting their disparity in relation to the external comparables, received across-the-board wage increases of 9%, 7% and 5% in 1992, 1993, and 1994. Police patrolmen received increases of

6%, 5% and 5% over the same three-year period.

The Union also argues that Batavia firefighters do more with less employees than any of the comparable departments. Exhibits offered at the hearing establish that in terms of total calls, Batavia firefighters rank 1st among the comparable communities. In terms of fire calls, Batavia ranks 3rd behind only Zion and St. Charles. During 1994 when the workload data was generated, there were only 13 full time firefighters of whom 11 were bargaining unit members. The number of firefighters was increased by 3 during the pendency of these proceedings but even augmented by three additional firefighters, Batavia still staffs its Fire Department on a per capita basis with the lowest number of full time employees, save only for Carpentersville. The Union asserts that part of the reason for these significant disparities in work load between Batavia firefighters and their counterparts is that they are responsible for serving a population beyond the municipal boundaries of Batavia. Even with the additional firefighters, Batavia's number of firefighters per capita is only .62, the second lowest among the comparable communities, exceeded only by Carpentersville .52. Further, given the projected high rate of growth in new construction and population being experienced in Batavia, it is only reasonable to expect that Batavia firefighters' number of calls and the work load will increase over the three year term of the new contract.

Finally, the Union argues that in this case, cost-of-living consideration should not control. The Union has accepted the City's 3% across-the-board wage increase (City Exs. 49-55). According to the Union, its proposal on this issue addresses the severe internal and external inequities by adjusting the top step of the salary schedule in a manner that is consistent with the parties bargaining history. The immediate impact of this adjustment will affect only a handful of employees over the term of the agreement, but it represents an important step out of the basement. The Union points out that the 1995 wage increases granted within the external comparable communities (4.25%) also exceed the cost-of-living. Here, the cost-of-living considerations must be subordinated to redressing a situation in which Batavia firefighters who have more than seven years of service deserve the 3% equity adjustment in the top salary proposed by the Union based on other statutory factors.

#### b. Discussion and Award

As shown above, the Union has agreed to the City's proposed wage increases for the three-year term of the agreement. The only issue in dispute is the proposal in the Union's final offer to add a seven-year step for firefighters and a four-year step for lieutenants.

For the reasons set forth below, the Union's final offer with

respect to wages is awarded.

The City objects to the addition of the seven-year step for firefighters and a four-year step for lieutenants, arguing that it is not necessary based on the external comparables. According to the City, Batavia is near the bottom in relation to the comparables with respect to wages, has always been, and will most likely always be there. The City concedes that while it would not be unable to pay if the Union's proposal was accepted, it also argues that it would not be in the best interests of the public to adopt the Union's proposal. Moreover, the City argues that the relatively low wages have not been shown to interfere with the City's ability to attract and maintain a competent Fire Department.

Does this mandate that the City's offer should be accepted?

It is true, as the City argues, that there is nothing in the statute to suggest that Batavia firefighters and lieutenants are entitled to mean wages or to any particular wage level defined in relation to the mean. However, it is also true that there is nothing in the statute or in the evidence offered which indicates that the bargaining-unit members must remain relatively lowly compensated simply because they have always been in this position. The evidence offered indicated that Batavia, in 1994, ranked last in both firefighter and lieutenant maximum base salary (see, e.g., Union Exs. 3A and 3B; Brief for the Union at 9). Similarly, Batavia ranked next to last in terms of firefighter and lieutenant hourly rates (Union Exs. 3D and 3E; Brief for the Union at 9).

Additionally, Batavia firefighters and lieutenants have to make considerably higher contributions for dependent health care insurance coverage than other relevant bench-mark jurisdictions (Union Exs. 15A and 15B; Brief for the Union at 10). Despite its relatively low salary status, Batavia firefighters ranked first among the comparables in terms of total calls responded to by the department (Union Ex. 2G; City Ex. 26). Further, it is generally accepted between the parties that the population to be served is only going to grow, thus increasing the potential workload of the Department. Wages which are at least not the lowest in relation to the comparable communities will serve to attract qualified firefighters which may be needed in the future.

Thus, even though the Union's proposal to add the additional steps will not have a significant immediate across-the-board effect, it will serve to boost the City's firefighters and lieutenants slightly in terms of pay over the course of the agreement. There is simply nothing in the evidence record to support an award against the Union.

As noted, the City has not contended that it is unable to pay for the Union's final offer with respect to wages. It argues only that adoption of the proposal would not be in the interests of the public. However, as the Union notes, the total additional costs

over the three-year term would be \$17,488.00 or approximately 3%. Moreover, having a Fire Department which is at least not the lowest paid in relation to comparable communities may help to retain experienced, qualified firefighters, thus serving the interests of the public.

The City's argument that a firefighter at the top of the salary schedule would have to take a pay cut when being promoted to lieutenant requires addressing. Indeed, the Union has not argued this point. However, the salary cut that a firefighter in this position would have to take would be minimal; depending on the year of the contract, the cut would range from \$436 to \$471. Moreover, this pay increase would be more than recouped when the former firefighter reached the first year on the lieutenant scale. Finally, there has been no evidence offered that promotion from firefighter is automatic or that such a situation will even arise during the term of the agreement. In short, the potential for such a situation alone does not outweigh the arguments made by the Union in favor of adopting its proposal.

Finally, the Union's final offer may result in a pay increase which slightly exceeds the cost of living during the term of the agreement. However, where the rest of the considerations fall in the Union's favor, a slightly larger increase than the cost of living does not make the Union's proposal more unreasonable than that of the Administration.

In summary, the Union has shown compelling reasons to adopt its wage proposal. Having the worst wages relative to the comparable communities is not consistent with an environment responding to the most calls out of those communities. On the other hand, the City has not shown any compelling reason for the adoption of its proposal. Accordingly, the Union's final offer on the wage issue is awarded.

## 2. Work Preservation (Paid-on-Call Firefighters; new section)

### a. The Parties' Final Offers

(1) The City's Offer and Position. There is currently no provision on work preservation in the parties' contract and it is the position of the City that the contract remain unchanged. Thus, the City asks the undersigned to refrain from ordering that such a provision be inserted in the successor agreement.

According to the City, this issue was never raised during the negotiations which led to the impasse now in arbitration and was initially offered to the City on May 19, 1995, when the parties met to work out ground rules for the arbitration. The City argues that to raise a new issue only after the parties have reached impasse

and have already invested heavily in preparing for interest arbitration is to act in bad faith. Indeed, arbitrators have held that they will not grant breakthroughs to parties imposing new terms and/or conditions of employment in the absence of prior good faith bargaining. (Brief for the City at 42-43).

The City has incorporated into its fire prevention and suppression program an extensive program of paid-on-call (POC) firefighters to supplement its full-time firefighting force. The City's paid-on-call firefighters are highly qualified and experienced, many of whom are professional firefighters in other departments. Further, the qualifications of the paid-on-call staff are impressive; most are Firefighter II certified and qualified EMT's, and they provide a very fine supplement to the City's overall fire prevention and suppression program. Indeed, the vast majority of the current full-time firefighting staff are products of the City's paid-on-call program. Interestingly, the paid-on-call firefighters in the City's corps who are not full-time firefighters in other departments have on average more years of service as Batavia firefighters than do the full-time firefighting staff.

The City argues that while the record in this proceeding is dominated by the Union's almost endless barrage of purported evidence in support of its work preservation proposal, all of the Union's "evidence" is either irrelevant, incorrect, or simply not credible. First, the City argues that the cases cited by the Union as Illinois State Labor Relations Board precedent and interest arbitration precedent in support of its declaration that it has a right to the work created by vacancies resulting from absences of full-time fire suppression personnel are inapposite and inapplicable. Also inapposite, and to some extent misleading, is the barrage of standards, studies, cases, and publications submitted by the Union as to the issue of safety. Clearly, the City is deeply committed to the safety of its firefighting force and is not making light of the safety issue. However, it must be noted that all of this purported evidence is of no consequence to the issue at impasse here. Finally, the City notes that it has found it necessary on several occasions to correct Union mischaracterization of facts relating to the City's use of paid-on-call firefighters.

In short, the City argues that upon review of the record, it is clear that the Union has failed to muster any evidence of a problem to be addressed by its work preservation proposal. For example, Union witnesses have admitted that there have been absolutely no cases wherein firefighters received injuries as a result of staffing problems. Indeed, says the City, if there were genuine safety concerns, the parties would be addressing contract language directed at enhancing the safety of firefighters rather than enlarging their bank accounts.

Further, of all of the comparable jurisdictions only one, St.

Charles, has a contractual requirement that full-time firefighters be called back to replace full-time firefighters. Also, among the comparable jurisdictions, only Carpentersville and St. Charles have contractual provisions imposing staffing restrictions upon the employer. Among the comparable jurisdictions, use of paid-on-call firefighters is common, yet not one of the comparable jurisdictions operates its POC program with the kind of shackles the Union proposes. There is simply no market justification for this Union proposal and it should be rejected as unwarranted by market forces or common practices among comparable jurisdictions.

Moreover, among the City's other employee groups, including the bargaining units of the FOP and the IBEW, there are no work preservation provisions.

The City argues that there would be substantial additional costs incurred if the Union's proposal were adopted (approximately \$107,160.69 over the next two years, according to the Administration). On the other hand, the Union has offered nothing in exchange for this windfall to its members. It is the position of the City that the Union merely seeks to deprive paid-on-call firefighters of work opportunities simply because the Union wants more money for its members.

(2) The Union's Offer and Position. The Union proposes adding the following language to the contract:

Section 16.3. Work Preservation. When a sworn full-time employee (Firefighter or Lieutenant) is absent from his regularly scheduled shift due to vacation, personal leave or illness, he shall be replaced by another full-time sworn employee, provided that this requirement shall be suspended during any shift when there are four or more full-time sworn employees on duty and assigned to a fire company.

The Union's proposal would limit the use of POC's as replacements for full-time firefighters who are absent from their regularly-scheduled shift due to vacation, personal leave or illness. When a full-time firefighter is absent for these reasons, he will be required to be replaced by another full-time sworn firefighter. The Union's proposal provides an exception. The requirement would be suspended during any shift when there are four or more full-time sworn employees on duty and assigned to a fire company.

The City currently employs approximately 35 POC's. However, describing these employees as "POC's" is a misnomer, as the term "POC" was coined to describe persons who responded to situational calls but were paid a specified amount when they responded to the call. This term most assuredly does not describe the duties of Batavia's "POC's." They can be most accurately described as regular

part-time and even full-time firefighters. There also can be little question that this practice is the reason why Batavia's per capita employment rate of sworn full time firefighters is at the bottom among comparable communities. This practice has denied employment to candidates certified on the register of eligibles established by the Fire and Police Commission. These individuals and others have bypassed the statutory hiring process.

Moreover, the City's efforts to bolster the apparent qualifications and certifications of its "POC" work force are beside the point. The fact that some of the individuals may be acceptably qualified cannot obscure the fact that some other individuals will not be. Indeed, the record is clear that at least three of the POC Lieutenants failed to qualify for appointment as a member of Batavia's Department under the statutory process.

According to the Union, the Illinois State Labor Relations Board as well as arbitrators have issued decisions which recognize firefighter's interests in retaining their jurisdiction. The Union notes arbitration awards which held that subcontracted labor undermined the interests of the Union. Here, the POC's, while not subcontracted labor, are cheaper labor who undermine the same union interests recognized and protected by these awards. Further, the Union submits that the Illinois State Labor Relations Board has also recognized employees' interests in protecting bargaining unit work as an interest encompassed within Section 6 of the Act.

The Union also states that the arbitration cases have recognized the potential for conflict developing between bargaining-unit members and part-time employees. In Batavia to date, these tensions have not resulted in conflicts that have led to disciplinary action. Nevertheless, the record establishes that the City's heavy reliance on POC's to fill regular shifts combined with a very lax disciplinary standard with respect to POC's who don't show up for scheduled shift and training assignments, has created a sense among bargaining unit members that a double standard exists.

The Union asserts that the City's current practice often results in bargaining-unit members working as members of engine companies consisting of only two firefighters or only one full-time sworn firefighter contrary to widely recognized fire safety standards. It is evident (despite the City's efforts to minimize these circumstances) that there will inevitably be a significant number of shifts when engines will be staffed by only one full-time firefighter and/or only two persons. It is the Union's position that in either of these circumstances (i.e., a two man engine company or an engine company staffed with only 1 full-time sworn firefighter), the safety interests of the bargaining unit members are seriously impaired.

The Union argues that exhibits offered in this case show that continuous staffing of fire companies with at least three

firefighters is the bare minimum for safe and effective operations at fires. Further, the risks and stress experienced by Batavia's firefighters is even more extraordinary because of the lack of continuity in the staffing of persons assigned to fire companies. The current minimum staffing policy requires that only one of the members of the company be a full-time sworn firefighter. The problem here is that there is a wide variability in the skills and experience of POC's.

The Union's proposal is strongly supported by prevailing practices within comparable communities. Union exhibits show that in only four of the comparable communities (Brookfield, Geneva, Carpentersville and Lake Zurich) are POC's used as replacements for sworn firefighters. Further, even in these communities there are significant restrictions on their use. In Lake Zurich, POC substitutes are limited to a maximum of one vacancy due to sickness. In Geneva, even in the absence of a contract, POC's only substitute for vacancies due to vacations. Carpentersville and Brookfield allow substitutions for vacations and sickness or vacations and Kelly Days, respectively.

It is perhaps most instructive to look at the practice in St. Charles. St. Charles together with Geneva and Batavia make up the "Tri-City" complex which among other things provide mutual aid to each other and share the Tri-City ALS service. St. Charles, like Batavia, is heavily reliant upon POC's to bolster a skeletal full-time firefighting force. Still, St. Charles' staffing patterns are not quite so skeletal as those which the City of Batavia seeks to continue, as the contract between Local 3322 and the City of St. Charles ensures a minimum staffing level at each station consisting of "three (3) employees of which a minimum of two shall be employees covered by this agreement."

In its eyes, the Union's case is compelling in all respects. The status quo provides a minimum staffing of only one sworn firefighter per engine, sworn firefighters are replaced willy-nilly by POC's of varying skill levels, the day shift is established and under the Union's proposal the personnel assigned to it can be used to fill in for absences of shift personnel.

#### b. Discussion and Award

As the Administration points out, at least 288 out of 596 pages of transcript are devoted to this single issue. (Brief at 44). The Union argues that its final offer should be awarded in order to maintain the safety of both the full-time firefighters and the community. The Union also argues that its final offer should be awarded because its members have a right to the work that the paid-on-call firefighters perform. The City responds both on a procedural basis (the issue was never raised during negotiations) and on a substantive basis (there is no credible evidence in support of the Union's position).

Neither of the Union's arguments are persuasive (and neither is the Administration's procedural argument). Accordingly, for the following reasons, the City's final offer is awarded.

First, the Union's safety argument is unsupported by the evidence record. Absolutely nothing in this record suggests that the safety of full-time firefighters or the community has been compromised in any way by the use of POCs. Indeed, as pointed out by the City, Union witnesses testified that there have been no instances where full-time firefighters received injuries as a result of staffing problems (Tr. at 247; 569). Although the Union asserts that the POCs are less qualified than the regular full-time firefighters, the evidence indicates otherwise. Many of the POC firefighters are professional firefighters in other departments (City Ex. 63) with substantial firefighting experience in other jurisdictions (City Ex. 64). Those that are not full-time firefighters in other jurisdictions have, on average, more years experience than Batavia's full-time firefighting complement (City Exs. 66 and 70). Further, it appears as though many of the City's full-time firefighters came from the City's POC program (City Ex. 65). Moreover, most of the POC firefighters are qualified to perform many functions and possess a number of certifications (City Exs. 67 and 68).

The Union has submitted a large amount of evidence containing staffing recommendations and descriptions of firefighting safety hazards experienced by other jurisdictions. However, as noted above, the Union has not produced any evidence that the City of Batavia has experienced any problems with its use of POC firefighters. While interesting, the safety evidence offered by the Union simply does not aid in the disposition of this issue.

The Union has similarly failed to show that any tension exists between full-time firefighters and POC firefighters because of lax disciplinary standards on the City's part with respect to POCs. Thus, its argument that the use of POCs leads to a double standard resulting in morale problems is without merit.

Moreover, the use of POC firefighters is supported by the practices of the comparable jurisdictions. City Exhibit 24 shows that use of POC firefighters is common among the comparable jurisdictions. Even the Union acknowledges that St. Charles, part of the "Tri-City" complex, is "heavily reliant upon POC's to bolster a skeletal full-time firefighting force" (Union Brief at 80).

Finally, the Union argues that arbitral and Board precedent recognize the Union's interest in retaining jurisdiction over the work in question. The Union has offered two cases in support of its position. Although the relevance of the cases offered by the Union is questionable, the undersigned acknowledges that the Union would, of course, have an interest in retaining work potentially within its jurisdiction. However, that interest cannot rise to the

level of a right to the work where no justification exists. In this case, based on the successful use of POC firefighters in the past in Batavia and the use of POC firefighters in comparable communities, there simply is no justification for the award of the Union's final offer.

3. Hours of Work/Kelly Days  
(Article 16.1)

a. The Parties' Final Offers

(1) The City's Offer and Position. There is currently no provision on hours of work or Kelly Days in the parties' contract and, as such, it is the position of the City that the contract retain the status quo.

According to the City, at the May 1995, meeting between the parties for purposes of establishing ground rules for interest arbitration, the Union withdrew its previously-maintained hours of work proposal and did not say that its withdrawal was contingent on any other proposal. To revive an issue which was withdrawn on the record and without contingency constitutes regressive, bad faith bargaining and the arbitrator should reject the Union's final offer on hours of work.

Further, the Union's final offer is inconsistent with its own forcefully stated and frequently repeated goal of increasing staffing and will certainly increase the City's burden to ensure adequate staffing. Throughout the hearing, the Union repeatedly expressed its concern with what it called a "ridiculous level of staffing" in the Batavia Fire Department. While the City does not ascribe to this exaggerated view of its fire department staffing, it is certainly sensitive to the need to maintain adequate staffing levels at reasonable costs to the public. However, the City does not wish to have to juggle yet one more set of concerns as it strives to meet its staffing needs. In light of the Union's severe criticism of current staffing, and its purported desire to increase staffing levels, it is being disingenuous and duplicitous putting this issue before the arbitrator.

The Union's assertions that it is "below market" in terms of Kelly Days and time off are simply not supported by the evidence. Only six of the 10 comparable jurisdictions have Kelly Days. One of the six, Brookfield, has fewer Kelly Days than the 6.76 days per year requested by the Union in this proceeding. Similarly, the annual hours worked, which are primarily driven by Kelly Days, show that Batavia, along with Zion, Mundelein, and Geneva, all without Kelly Days, have 2,912 annual hours worked. While that is the maximum, given the number of jurisdictions standing with Batavia at maximum hours with no Kelly Days, it can hardly be said that the City is out of the market.

According to the City, the Union insists that this issue must be evaluated in terms of total time off. While the City is on the low end of total time off at 10 years seniority, it is not alone in that category, and for more senior firefighters the City is quite generous compared to the comparable jurisdictions. Clearly, the City is in the pack without the need of any Kelly Days.

The City argues that if Union's proposal for Kelly Days were granted, the total time off for a senior firefighter in Batavia would exceed that of senior firefighters in all but two of the comparable jurisdictions. The Union is attempting to move the City from a reasonable place in the market to a leadership position. This move, says the City, is not warranted by any facts in evidence, by any quid pro quo, or by any reasoned argument made by the Union.

One further justification generally offered by unions seeking Kelly Days is that firefighters, who spend long hours in the workplace, and who work a steady cycle of on and off days, should have some opportunity for extended days off beyond the usual 48-hour periods firefighters enjoy after each shift. However, the City notes that an unusual scheduling practice has been in place in the City of Batavia for many years which serves those ends without the additional expense to the taxpayer of Kelly Days. This scheduling system was devised in large part to ensure that employees get significant blocks of time off on a regular basis every third weekend. The City argues that with judicious use of other guaranteed days off a firefighter can arrange substantial blocks of time off tantamount to vacations persons working 40 hour a week jobs enjoy only once or twice a year. Thus, argues the City, the evidence clearly shows that City of Batavia firefighters enjoy many of the benefits usually derived from Kelly Days without need for Kelly Days.

Moreover, the substantial costs the employer would incur as a result of the Union's final offer are not justified and the Union offers nothing in return. The Union, says the City, is attempting to delude the Arbitrator into thinking that this is a proposal with no cost because it is designed to eliminate the Fair Labor Standards Act overtime costs the City would otherwise pay. The FLSA savings to be derived from a Kelly Day program are more fantasy than fact. The fact is that firefighters have days off here and there throughout the year in addition to their regularly scheduled days off, which, when they occur, have the effect of "breaking" the FLSA overtime that might otherwise accrue. Unlike these illusive "savings," the cost of covering for firefighters off duty for Kelly Days will hold constant.

(2) The Union's Offer and Position. The Union's position is that the following provision be inserted in the parties' contract:

Section 16.1. 24 Hour Shifts. The normal shift schedule

for firefighters whose principal assignment is fire suppression shall be twenty-four (24) consecutive hours of duty beginning at 7:15 a.m. followed by forty-eight (48) consecutive hours off duty. Effective January 1, 1996 the hours thus generated shall be reduced by scheduling a "Kelly Day" off duty every eighteenth (18th) duty day to produce an average work week of 52.88 hours per week. Any time worked in excess of the regular shift schedule shall be considered as overtime and be compensated at the overtime rate of one and one-half times the employee's normal hourly rate. Whenever it is necessary to determine an hourly rate for 24-hour shift personnel, such rate shall be computed on the basis of 2,756 work hours per year.

Section 16.5. Trade Time. [Relocated from Article XXII] Trade time is a privilege that shall not interfere with the normal operations of the Fire Department or result in the payment of overtime. Any employee may be granted traded time if approved, with full normal pay, for any working day(s) on which that employee is able to secure another employee of comparable status to work in his place. Trades must be firefighter for firefighters, officer for officer. Requests for trade time will be turned into the Fire Chief or his designee for his approval not less than 24 hours prior to the trade time except in cases of emergency. Trades of one hour or less will not require advance notice, but proper paperwork must still be filed for documentation of the trade and approval granted by the shift officer.

Kelly Days may be traded between employees assigned to the same shift according to the same procedures currently utilized for trading duty time. Such trades are voluntary between employees and shall be paid back so that no FLSA liability for the city is created.

Section 16.6. FLSA Work Period. The City shall establish an individual FLSA work period for each employee covered by this Agreement which commences at 7:15 p.m. on the first day of the cycle and concludes at 7:15 p.m. on the 27th day of the cycle. Each employee's work cycle shall be established so that the employee's Kelly Day (18th shift) falls on the shift starting at 7:15 a.m. on the 27th day of his or her work cycle and ends at 7:15 a.m. on the first day of the succeeding work cycle. (Section 16.6 effective January 1, 1996).

According to the Union, Batavia firefighters who are assigned to platoon duty currently have a work week that averages 56 hours per week. The Union proposes to reduce the average work week from

56 hours to 52.88 hours by, effective January 1, 1996, scheduling employees under a 24 hours on/48 hours off work schedule and scheduling every 18th work shift off as a "Kelly Day." Under the Union's proposal, Kelly Days could be traded in the same manner as duty day trades are currently traded. As a quid pro quo, the Union proposes establishment of a system of individualized work periods based on 27-day cycles which would have the effect of eliminating the City's FLSA liability.

When compared with external comparables, Batavia firefighters again find themselves at the bottom of the heap. For example, St. Charles has an average work week of 52 hours and has 8.7 Kelly Days. Indeed, Brookfield, LaGrange, Villa Park, and Westchester all have less hours in their work weeks than Batavia and have at least six (6) Kelly Days. Further, while Carpentersville, Geneva, Mundelein, and Zion do not have Kelly Days, they all have less hours in the average work week than Batavia does.

If the Union's proposal were adopted, in 1995 Batavia's hourly rate would rank 8 out of 11. However, if the City's position is adopted, the hourly rate would be 10 out of 11. The City's final offer would limit total time off to 9.28 days per year for an additional three years. The Union's proposal would improve total time off to 16.03 days per year beginning in 1996. It would improve Batavia's rank from last to 5th and still leave them short of the 1995 average.

The City also makes much of the fact that there is an informal practice of modifying the contractually specified 24/48 scheduling procedure so that firefighters at times get four (4) consecutive days off. However, the Union submits that this is an accommodation that mitigates the burdens of the 56-hour work week. There is a price to be paid by every firefighter who is able to schedule four (4) consecutive days off. That price is that he has to then work other shifts with only 24 hours off. The Union's Kelly Day proposal would serve the same objective as the informal accommodation preferred by the City but without the accompanying penalty.

Moreover, the Union argues that it has offered a substantial quid pro quo. According to the Union, its proposal essentially eliminates the City's FLSA overtime liability in exchange for reducing the average work week to the FLSA standard for firefighters of 53 hours. The savings to the City is very substantial; the Union asserts that the anticipated FLSA overtime expense in 1996 is \$35,654. In 1997, it will be \$37,080. Even with full-time firefighters being hired back to replace any firefighter on a Kelly Day, the Union argues that the proposal is effectively a wash.

The Union also argues that, despite the City's arguments to the contrary, this proposal is properly before the arbitrator. The Union does not dispute that it made a proposal to the City which

included maintaining the status quo with respect to work schedules. However, what the City ignores is that this proposal was part of a package proposal which contained proposals relating to work preservation and acting pay. The Union argues that if the City had accepted these other items, it could have secured agreement to maintain the current work schedule. The City did not accept these other items and, therefore, it cannot now seek to prejudice consideration of the Union's proposal.

b. Discussion and Award

(1) Procedural Arguments. At the outset, the City's argument that this issue is not properly before the arbitrator must be addressed. The City argues that the Union engaged in bad faith bargaining by withdrawing its offer on this issue and not indicating that the withdrawal was contingent upon the submission of another offer. The Union contends that the offer was part of a package and, as such, was not withdrawn.

While bad faith bargaining on both sides is unacceptable, it is not entirely clear that this is the case here. Both parties have spent a considerable amount of time at the hearing and in post-hearing briefs arguing the substantive issue. Whatever happened during the discussions between the parties prior to the instant arbitration is known only to the parties. Apparently the Union did submit a package proposal to the Administration which contained proposals relating to work preservation and acting pay. According to the Union, "had the City accepted these other items, it could have secured agreement to maintain the current work schedule. However, it did not." Therefore, it cannot now seek to prejudice consideration of the Union's work week proposal with this bargaining history." (Brief at 41). Absent clear and convincing evidence that the issue was withdrawn, the substantive issue should be considered in this proceeding.

(2) Substantive Considerations and Decision on the Merits. For the reasons set forth below, the City's final offer on the Kelly Day issue is awarded.

Based on Union Exhibits 3C, 3I, and 3J and City Exhibits 91-94, and discussions between the parties as to the correct data (Union Brief at 34), the evidence record indicates that seven (7) of the comparable jurisdictions had Kelly Days by the end of 1995. Three comparable communities (Geneva, Mundelein, and Zion) did not. The number of Kelly Days the comparables had ranged from 6.09 (Brookfield) to 13.5 (Westchester). Further, of those comparable jurisdictions with Kelly Days, none had an average work week higher than 53.2 hours (Brookfield).

Under the City's final offer, Batavia firefighters would have an average work week of 56 hours and no Kelly Days. The three

comparables that do not have Kelly Days have the exact same situation. However, under the Union's final offer, firefighters would have an average work week of 52.8 hours and 6.75 Kelly Days per year. This would put Batavia exactly in line with LaGrange, Lake Zurich, and Villa Park. Adoption of the Union's final offer does not, as the City says, make it a leader with respect to Kelly Days. Instead, Batavia, under the Union's final offer, is simply average. The comparability criterion favors the Union's proposal. Costs estimates lead to another conclusion.

Using the Union's numbers, overtime expenses for 1996 and 1997 are expected to reach over \$72,000 (Union Exs. 7A and 7B). Of course, regular full-time firefighters (or POC firefighters) will be required to cover the shifts vacant by firefighters on Kelly Day. If POC firefighters are used, it is possible that the City would realize savings by the adoption of the Union's proposal. However, even if the vacant spaces were filled by other firefighters at overtime rates, the result would most likely be a "wash." Thus, adoption of the Union's final offer allows the Union to be on par with comparable communities at arguably little or no additional cost to the City.

The City takes a different position. According to the City, in order to calculate the "savings" to be derived from a Kelly Day provision for the years 1996 and 1997, the Administration used an equation whereby the number of platoon shift firefighters (12) times the three (3) hours per week average work reduction times 52 weeks times the time and one-half rate which would be payable to unit members on average pursuant to the Union's final offer to obtain a value representing the amount of FLSA overtime the City would otherwise pay, assuming that the firefighters took no other time off for vacations, personal business, sick leave, etc. That value for 1996, says the City, is \$2,063. For 1997, that value is \$44,816, for a total savings of approximately \$46,880 over the remaining two years of the collective bargaining agreement (Brief for the City at 59). These figures are based upon the assumption that FLSA would not be broken by any other time off a firefighter might take during any 28-day cycle. That assumption is arguably unreasonable in light of the minimum of five vacation days and two personal days enjoyed each year by the City's firefighters (Id.). If fire-fighters string guaranteed days off along with Kelly Days to block out large periods of consecutive days off, any savings would be reduced by at least 25%, leaving the estimated savings at \$65,160 for the two-year period (Id.).

Further, as pointed out by the Administration, unlike the illusive savings, the costs of covering for firefighters off duty for Kelly Days will hold constant. The net costs to the City are not insignificant (see, Brief for the City at 60-61).

While I agree with the Administration that it will have additional administrative burdens by the award of Kelly Days, this alone cannot serve to defeat an otherwise reasonable proposal which

puts the Union on par with comparable communities.

Where does this analysis leave the parties?

There are times that arbitrators will not award an item even though the party requesting it has demonstrated that comparability or other criteria favors its position. In education, for example, a party may request that an arbitrator adopt a "strict" salary-index schedule where all steps are based on a constant percentage of the base salary. Alternatively, a party may request that a neutral move a school district "off the index" that, for years, governed the salary relationships between lanes and columns. In each case it is possible that the requesting party could cite favorable comparative data in support of its request.

While there is no per se burden of proof on either party in an interest arbitration, if one party is making an unusual demand or one that substantially alters past practice, it is not uncommon for the interest neutral to place the burden of persuasion upon the proponent of such a proposal. For example, the Chairperson of the Arbitration Board in Twin City Rapid Transit Co. v. Amalgamated Ass'n of Street Employers, Division 1005,<sup>3</sup> stated:

We believe that an unusual demand, that is, one that has not found substantial acceptance in other properties, casts upon the [the party proposing the demand] the burden of showing that, because of its minor character or its inherent reasonableness, the negotiators should, as reasonable men, have voluntarily agreed to it. We would not deny such a demand merely because it has not found substantial acceptance, but it would take clear evidence to persuade us that the negotiators were unreasonable in rejecting it.<sup>4</sup>

Similarly, in the often-quoted decision, Tampa Transit Lines Inc. v. Amalgamated Ass'n of Street Employees, Division 1344,<sup>5</sup> the Chairperson of the Arbitration Panel stated that: "An arbitrator cannot often justify an award involving the imposition of entirely novel relationships or responsibilities. These must come as a result of collective bargaining or through legislation."<sup>6</sup>

Arbitrator Tom Gilroy, in Bettendorf Community School District

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<sup>3</sup> 7 LA 845 (McCoy, 1947).

<sup>4</sup> Id. at 848.

<sup>5</sup> 3 LA 194 (Hepburn, 1946).

<sup>6</sup> Id. at 196.

v. Bettendorf Education Ass'n.,<sup>7</sup> ruled that the party seeking changes in a past practice or a tentative agreement has to carry the burden of proof.

A third party neutral should not take lightly that which presumably competent representatives of the Union membership and the employer judged to be a fair settlement, honestly arrived at through the give and take of the negotiation process. While the right of subsequent rejection by elected officials or Union membership may be inherent in the negotiation process, a good faith agreement arrived at by negotiators, albeit tentative in this case, must be given strong consideration. To do less invites irreparable damage to the negotiation process and undermines the legitimate expectation of both parties that a concession made in good faith at the bargaining table will not be used later as a starting base point before a third party neutral for either party to gain additional contract concessions. That posture can be a two-edged sword that, if endorsed and perpetuated by the neutral, can be used by either party to negate good faith negotiations.<sup>8</sup>

Earlier in his decision Arbitrator Gilroy declared:

The Union has the considerable burden of demonstrating a compelling reason for this arbitrator to deviate from the tentative agreement reached by the negotiating teams representing both parties. Were the situation reversed, the arbitrator would apply the same burden to the employer.<sup>9</sup>

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<sup>7</sup> Iowa Public Employment Relations Board (Gilroy, Arb., Feb. 24, 1976) (unpublished).

<sup>8</sup> Bettendorf Community Sch. Dist. v. Bettendorf Educ. Ass'n, Iowa Public Employment Relations Board (Gilroy, Arb., Feb. 24, 1976) (unpublished)).

<sup>9</sup> Id. See also, City of Blaine v. Minnesota Teamsters Union, Local 320, 90 LA 549, 552 (1988) (Perretti, Arb.) ("unless the contract language is causing severe hardships or grievous harm to either party, I am most reluctant to change the construction of the contract without substantive evidence of a need for a change."); Williamson Cent. Sch. Dist. v. Williamson Faculty Ass'n, 63 LA 1087, 1090-91 (1974) (Coutnick, Arb.). ("No evidence has been presented to the Fact-Finder to demonstrate a specific need for the relief sought. Nothing in the record suggests that the Board has not exercised its power in a judicious and responsible manner. In the absence of clear evidence of improper conduct, I am unwilling to recommend that the Board adopt the Association's proposal at this time."); Adams County Highway Dep't v. Adams County Highway Employees Union, Local 323, 91 LA 1340, 1342 (1988) (Reynolds, Arb.) (designating

Arbitrator Sharon Imes, in School District of Wausau v. Wausau Education Ass'n,<sup>10</sup> expressed this principle as follows:

It is not uncommon for arbitrators to require a "compelling need" be shown and/or that a quid pro quo exists in order to justify the removal of benefits secured by a party through negotiations . . . .

. . . .  
Absent a showing of need for change or a showing of financial difficulties if the status quo were to be maintained, the undersigned finds no reason why she should implement a change in the working conditions which is more appropriately accomplished voluntarily by the parties.<sup>11</sup>

And, Arbitrator Joe Kerkman, in Fort Atkinson Education Ass'n v. District of Fort Atkinson,<sup>12</sup> set forth a three-fold criteria for change in the status quo, accordingly:

- 1) a demonstration that the existing language is unworkable or inequitable;
- 2) an equivalent "buy-out" or quid pro quo;
- 3) a compelling need.<sup>13</sup>

Status quo arguments are especially prevalent in disputes about higher insurance deductibles, co-insurance, and premium sharing.

The Kelly Day issue is a close "toss up," with comparability favoring the Union (somewhat) but economic considerations favoring the City. In this context, where (1) the parties have never negotiated Kelly Days, (2) there is serious question as to the net costs of the item, and (3) under the present scheduling system, most employees can block significant amounts of time off, I believe that Kelly Days represent a new relationship between the parties that should be reserved to the bargaining process.

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three-part test in evaluating whether party desiring to alter contract language has met burden).

<sup>10</sup> Decision No. 18189-A, Wisconsin Employment Relations Commission (Imes, Arb. 1982) (unpublished).

<sup>11</sup> Id.

<sup>12</sup> Decision No. 17103-A, Wisconsin Employment Relations Commission (Kerkman, Arb. 1979) (unpublished).

<sup>13</sup> Id.

4. Eight-hour Shift  
(Article 16.2)

a. The Parties' Final Offers

(1) The City's Offer and Position. The City proposes adding the following new paragraph after the third paragraph of Article XVI:

Employees employed as of June 1, 1995 who are initially involuntarily assigned to an 8-hour position will not be required to remain in such position for more than two (2) years. In the absence of volunteers who are determined by the Chief to be qualified for an open 8-hour position, preference will be given to less senior employees employed as of June 1, 1995 who are qualified to perform the functions of the open 8-hour position as determined by the Chief. Employees hired after June 1, 1995 may be assigned to 8-hour positions without limitation provided they meet the qualifications for an 8-hour position as determined by the Chief and such qualified employees will be assigned in preference over employees hired prior to June 1, 1995 in the absence of qualified volunteers.

Again, says the City, the Union has surprised the City with a unique, newly conceived and never bargained proposal. The Union's final offer on eight-hour shift assignments, while consistent with the City's concessionary proposal, differs from the City's proposal with its significant provisions for overtime pay for all hours worked outside the eight-hour shift employees' regularly scheduled shift.

According to the City, the cost of the Union's final offer on eight-hour shift assignments is astonishing. For example, using the work schedule for Firefighter Barr for the months of March, April, May and June, 1995, it can be assumed that he would work 1,059 hours outside of his regularly scheduled shift on a yearly basis. The proposed hourly rate for the newly hired firefighter now holding that position (\$29,326) divided by the 2,080 annual hours specified in the Union's final offer and multiplied by one and one-half times for the overtime rate yields an overtime rate of \$21.15 per hour for an entry-level firefighter. That overtime rate multiplied by 1,059 hours yields a total projected annual overtime cost for a first-step firefighter of \$22,398 per year, only \$6,928 less than the annual base salary for that same firefighter. This \$22,398 overtime figure is clearly exorbitant for working hours not in excess of regularly scheduled hours for firefighters but simply outside the regularly scheduled hours of the eight-hour shift assignment. This cost would make the City's current practice of filling in for shift firefighters with eight-hour employees impracticable, thereby destroying one of the primary reasons for current day-shift assignments.

The Union raised certain concerns which the City has addressed with its final offer on the eight-hour shift assignment issue. Specifically, the Union cited burdens upon the employee assigned to the eight-hour shift in that an employee might prefer to work platoon shifts and be required to work day shifts instead and further that the day shift schedule tends to be somewhat irregular given the fill-in responsibilities of the current eight-hour position. However, the City argues that it has made a number of concessions in its final offer to address those concerns. The City's final offer provides that, for employees employed as of June 1, 1995, involuntary assignments to eight-hour positions will be limited to two years in duration and in the absence of volunteers qualified to fill the position, the City will give preference to less senior employees in filling the assignment. The City's final offer also provides that employees hired after June 1, 1995 will, if qualified, be preferred over employees hired prior to June 1, 1995 in filling these assignments. These are significant concessions by the City which limit its right to select those personnel who are most qualified to fill these positions.

Union exhibits indicate that eight-hour shift assignments are common among comparable jurisdictions. City exhibits reveal that none of the comparable jurisdictions have any kind of restrictions whatsoever on eight-hour shift assignments. Further, the Union's primary objections to the eight-hour shift assignment are based upon unsupported notions of burdens on the employees assigned to eight-hour shifts.

The City also argues that internal comparability favors its final offer. No other City employee groups or bargaining units enjoy any restrictions on the City's ability to require irregular shift assignments except for the rotating schedule for utility officers in the FOP bargaining unit.

The Union has admitted that, given the manpower constraints under which the City must operate its fire services, the eight-hour shift assignments are important to City's ability to fill the gaps. Indeed, the Union has specifically agreed that the City should maintain its eight-hour shift option for new hires at least. Certainly the burdens imposed by the Union's final offer on eight-hour shift assignments would denigrate those advantages which the Union has acknowledged to be appropriate in the context of limited staffing. The Union's own concerns weigh heavily in favor of selecting the City's final offer on this issue.

Finally, the Union has failed to present any compelling evidence that there are any substantial problems or burdens associated with eight hour shift assignments. There is absolutely no evidence of abuses by the City. Likewise, the Union has offered no quid pro quo for its proposal which would net windfall income to firefighters assigned to eight-hour shifts and compelled to fill in on platoon shifts. Arbitrators consistently insist that moving parties seeking breakthroughs in arbitration must show compelling

need for the proposed breakthrough and also must show that some quid pro quo has been offered in exchange for its breakthrough proposal.

(2) The Union's Offer and Position. The Union's proposed contract language on this issue reads as follows:

"Section 16.2. 8-Hour Shifts. Subject to the limitations of this section, employees may be required to work eight-hour shifts. Such shifts shall be regularly scheduled Monday through Friday, extend over period of eight consecutive hours commencing on or after 7:00 a.m. and ending at or before 5:00 p.m. All 8-hour shift employees work schedule shall provide for a 15 minute rest period during each one-half shift, the rest period shall be scheduled at the middle of each one-half shift whenever this is feasible. Further, 8-hour shift employees shall be granted a one (1) hour unpaid lunch period during each work shift, and whenever possible, the lunch period shall be scheduled at the middle of each shift.

Vacancies in eight-hour shift positions shall be posted and filled by the Fire Chief from employees who bid the position(s). In the event that insufficient employees bid for the position(s), the Chief may fill the position(s) by mandatory assignment provided that the maximum length of any employee's assignment shall not exceed two (2) years.

Employees assigned to eight-hour shifts may be required to fill in for 24-hour shift personnel when there is necessity for such fill-in. No overtime pay will be paid for such fill-in as long as the hours do not exceed the employee's regularly scheduled work shift hours, and there is a minimum of twelve (12) hours notice prior to the need for such fill-in.

The hourly rate for eight-hour shift employees shall be computed on the basis of 2,080 work hours per year."

The Union's proposal seeks to limit the City's discretion with respect to the assignment of employees to eight hour shifts in two primary respects: (1) it seeks to define the regular hours for such shifts and (2) it limits the involuntary assignment of employees to such shifts to a maximum of two years. The Union's proposal continues to allow day shift employees to be used as fill-ins for vacancies on the 24 hour shifts. In contrast to the existing practice where such assignments go beyond the regular hours of shift, the employee would be entitled to receive overtime for such hours of work.

According to the Union, the City's proposal would also limit the Chief's discretion to mandatorily assign employees to the day shift for a period more than two years, but only as to employees hired as of June 1, 1995. The City's proposal also would establish a "preference" for "qualified employees" hired after June 1, 1995 over existing employees.

The Union's proposal preserves the Fire Chief's discretion with respect to making assignments to the day shift while affording the employees assigned some measure of assurance that their work hours will be more regular. Firefighter Barr testified at the hearing about the erratic schedule that he has had on occasion. However, the record is clear that this kind of erratic scheduling is typical rather than atypical. Barr's testimony was similar to the experience of Firefighter Sean Stephens who was assigned to the day shift over a three year period from 1992 to 1995. To add insult to injury, neither Stephens or Barr received overtime pay when they worked the schedules described. This is because under the existing language of the contract overtime liability does not occur until the employee works in excess of 160 hours in a 28 day "work period."

It is evident that the City's scheduling practices are driven primarily by the City's use of the eight hour shift position as a fill-in to avoid overtime on the 24 hour shifts. Usually overtime assignments are distributed generally throughout the members of the Department on a rotational basis. This equalizes the distribution of overtime and provides overtime opportunities to employees who desire to work it. Under the current practices, the day shift personnel are mere pawns in service to the City's desire to avoid overtime. The Union's proposal preserves the Chief's discretion to make the appropriate assignments to the day shift to perpetuate the Department's functions which can be better performed on a eight hour shift, like training and fire prevention. It also still preserves the City's right to use the day shift personnel to fill in vacancies on 24 hour shifts. However, when these assignments are made, it provides for some recognition of the disruption to the employees' work schedule and personal life resulting from such assignments. This recognition takes the form of overtime compensation based upon the contractual standard of an eight hour day and 40 hour work week.

The Union also argues that Batavia's practice of utilizing firefighters assigned to eight hour shifts to fill in on twenty-four hour fire suppression shifts is a practice that is not followed in nine of the ten comparable fire departments. The overwhelming majority of these departments utilize the three platoon (24 on/48 off) to staff their departments. The only exception is Carpentersville which employs a split 10 hour/14 hour shift rotation. Five of the departments (Brookfield, St. Charles, Villa Park, Westchester and Zion) have no other shifts other than the 24 hour shift. Of the remaining departments that have eight hour or day shifts, all but Geneva use these shifts to perform fire

inspection and administrative functions. Thus, even under the Union's proposal Batavia firefighters will remain subject to a work assignment which is a narrow exception among their counterparts.

b. Discussion and Award

The Union seeks, in large part, an award of overtime compensation to eight-hour shift employees when their assignments go beyond the regular hours of their shift in order to ensure that the hours of work for such employees would be more regular. The Union cites examples of eight-hour shift firefighters that have been forced to work erratic schedules which they claim are disruptive to their lives and have been forced to do so without overtime compensation. The Union contends that its final offer will serve to recognize the disruption of personal life that eight-hour shift firefighters are faced with when they must fill in on 24-hour shifts.

While it is understandable that the Union would seek to remove some of the disruption faced by its eight-hour shift firefighters, the final offer it has submitted to accomplish its objectives would be excessively burdensome to the City and fails to address the problem the Union contends exists. Accordingly, the City's final offer on this issue is awarded.

It is easy to understand that an eight-hour shift firefighter's personal life may be disrupted if he or she has to fill in on a shift that exceeds his or her expected hours of work. However, if the Union's final offer were adopted, the disruption would not cease to exist, although admittedly because of the overtime pay, the sting may be a little less. Nonetheless, even though the City has not argued inability to pay, the potential overtime costs for this could be staggering. The record reveals that most comparable jurisdictions do not even have an eight-hour shift and instead staff their platoon by the use of the 24 on/48 off schedule (Union Ex. 32). Of those that do have eight-hour shifts, most use these shifts to perform administrative or fire inspection functions. However, if the Union wanted to ensure that its eight-hour firefighters were used for administrative or fire inspection functions or at least had some normalcy in their working hours, certainly less financially burdensome means could have been proposed. The Union's final offer simply does not solve or lessen the problem allegedly experienced by eight-hour shift firefighters.

Further, the City's final offer also contains limitations on its ability to assign firefighters to the eight hour shift. Those employed as of June 1, 1995, who are involuntarily assigned to the shift will not be required to remain in the shift for more than two years. When a qualified volunteer does not exist, the shift will be filled by less senior firefighters. Thus, under the City's final offer, firefighters in the employ of the City as of June 1, 1995, would only have to suffer potential disruption to their

personal lives for a maximum period of two years.

In short, not only does the Union's final offer not solve the disruption problem eight-hour employees are allegedly faced with but it also imposes on the City an unwarranted financial burden. Against this background, the City's final offer is more appropriate under this evidence record.

## 5. Firefighter-in-Charge Pay

### a. The Parties' Final Offers

(1) The City's Offer and Position. There is currently no provision on pay for firefighters-in-charge in the parties' contract and it is the position of the City that the contract retain the status quo. Thus, the City asks the undersigned to refrain from ordering that such a provision be inserted in the successor collective bargaining agreement.

The City argues that the Union's proposal on this matter should be rejected because the Union has shown no need or convincing justification to impose this administrative burden and additional cost on the City. Firefighters in the City of Batavia are all expected to act out of rank as indicated in their job description. However, while it is regularly expected of more senior firefighters to take charge of fire stations, it is the practice of the City to use lieutenants, and only lieutenants, as shift commanders.

The Union rests its argument largely on comparisons to the comparable jurisdictions. Of the nine comparable jurisdictions, six have no contract provision requiring acting pay. Of the three that do, LaGrange requires a minimum of six weeks of continuous acting out of class before acting pay is given. Of the remaining two, Lake Zurich requires acting out of class for a full 24-hour shift and Zion requires at least 12 hours acting out of class. Both of those provisions are substantially more limited than the Union's final offer.

The Union also argues that the acting-out-of-class provision in the Batavia FOP contract supports its argument. The Union further alleges that the FOP has been trying to expand its acting out of class provision. However, the City notes that issue did not come before Arbitrator Berman in the FOP interest arbitration. More importantly, it should be noted that police patrol officers only receive additional compensation when there is no sergeant on duty and the patrol officer must fill that position for the entire shift, serving as the shift commander. Again, the City stresses that in the Fire Department the swing lieutenant fills in as needed and firefighters are not asked to serve as shift commander.

(2) The Union's Offer and Position. The Union proposes adding the following contract provision to the agreement:

ARTICLE XXII - FIREFIGHTER IN CHARGE PAY

On any shift in which a firefighter works as the Firefighter in charge of a Fire Company at Station 2 or when a firefighter is designated as the Firefighter in Charge at Station 1 in place of a Lieutenant, and acts in such capacity for eight (8) hours or more, he shall be paid additional pay in the amount of one (1) hour's pay at the overtime rate.

The Union asserts that its final offer on this issue helps to simplify the administration of the provision. Because the staffing patterns at Station 2 and Station 1 are different, the Union's proposal would apply differently at each Station. At Station 2 where there is currently no officer assigned at all, the firefighter designated in charge would be eligible for the acting pay for being in charge over the period of the 24-hour shift. At Station 1 where officers are usually assigned and whose absences are intermittent, the firefighter designated as the firefighter-in-charge would be eligible for in-charge pay after being in charge of the shift for a period of eight hours or more.

According to the Union, the external comparables support its position on this issue. The Union asserts that typically the issue of acting pay arises when the regularly scheduled Company officer is absent from regular duty. In this situation either another officer is recalled on an overtime basis to fill the vacancy if there is no other officer available on duty or a firefighter is designated to act in the capacity of the lieutenant as the officer in charge of the Company. By far the cheaper method is to utilize acting officers. Among the external comparables, three (Geneva, St. Charles and Mundelein) do not use acting officers but replace officers on a rank for rank basis. Four departments among the comparables (LaGrange, Villa Park, Lake Zurich, and Zion) use acting officers and compensate for the additional responsibility assumed. Only three communities (Brookfield, Westchester and Carpentersville) do not compensate with acting pay.

The Union argues that its proposal, as it applies to Station 1, is the more typical acting situation. At Station 1, the firefighter-in-charge would be acting in the place of the regularly scheduled lieutenant who is absent if the officer were absent for short periods during the shift. At the hearing, the City complained as to the administrative burden of implementing the Union's initial proposal. The Union's proposal simplifies this administrative burden by limiting the pay to one hour at the overtime rate and only where the firefighter-in-charge served for eight hours or more.

The conditions at Station 2 are the more extreme. The City

does not currently regularly assign a lieutenant to this Company at all. Thus, a firefighter must de facto perform the responsibilities of a Company officer on a continuing basis. The Union argues that, with respect to Station 2, the City saves on salaries of three lieutenants needed to staff Station 2 with an officer yet it proposes to pay no compensation to the firefighter who is in charge of the entire shift. The Union asserts that being the firefighter in charge possesses certain stresses which the firefighter should be compensated for.

The Union also argues that its proposal would lead to internal comparability, as the current contract of the police provides that the patrol officer in charge is entitled to receive one hour of comp time. Indeed, there are proposals pending to increase that comp time level. Thus, the Union argues that its proposal is wholly compatible with either the existing or proposed acting compensation available to patrol officers.

#### b. Discussion and Award

In its final offer, the Union seeks to have firefighters who act in charge at either Station 1 or Station 2 for at least eight hours be given one hour of overtime pay. Based on both internal and external comparables and other factors, its final offer is reasonable. Thus, the final offer of the Union with respect to firefighter-in-charge pay is awarded.

Of the external comparables, four departments (LaGrange, Villa Park, Lake Zurich, and Zion) use acting officers and compensate them for the additional responsibility assumed. Additionally, three (Geneva, St. Charles and Mundelein) do not use acting officers but replace officers on a rank-for-rank basis. Only the remaining three require firefighters to be in charge without compensating them with "acting pay." Thus, the prevailing practice among the comparables is to either compensate acting firefighters-in-charge or to not require them to act in such a capacity at all. Even though the Union's offer may be characterized as more liberal than the comparables because it only requires eight hours of acting duty before acting pay kicks in, the Union's final offer is entirely consistent with the practice of comparable communities. Additionally, the Union is seeking very minimal compensation for firefighters acting in charge. Moreover, as noted by the Union, the final offer is also consistent with the treatment of internal comparables, as the FOP contract provides for comp time for patrol officer in charge.

The Union's final offer is particularly reasonable with respect to Station 2, where apparently the practice is not to assign a lieutenant to the station. Further, the Union does not seem to dispute the City's argument that senior firefighters occasionally have to take charge of a fire station for short periods during a shift, nor does the Union appear to be opposed to

this practice. Instead, the Union's final offer deals with the situation where a firefighter, regularly or for extended periods of time, has to be in charge of one of the station. In these situations, the firefighter in charge most assuredly has more work and pressure than normal. The evidence record dictates that a firefighter be given the minimal compensation the Union is seeking when he or she is in charge of the station.

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## V. SUMMARY

### A. Economic Issues

The final offer of the City with respect to (1) Eight-Hour Shift (Article 16.2), (2) the work preservation issue (new section), and (3) Hours of Work/Kelly Days is awarded (Article 16.1).

The final offer of the Union with respect to (1) wages (Article XVIII), and (2) the firefighter-in-charge pay (new section) issues is awarded.

### B. Non-Economic Issues

The following language (Union proposal) with respect to mid-term bargaining obligations is awarded:

#### Mid-Term Changes and Bargaining Obligations (Article IV)

The terms and conditions of this Agreement shall be considered full force and effect for a term of \_\_\_\_\_ commencing on \_\_\_\_\_ and shall remain in effect until \_\_\_\_\_.  
Pay scales will be retroactive to \_\_\_\_\_.

If either party desires to renegotiate any part of this Agreement, it must provide written notice to the other party by registered or certified mail. Notice shall be considered to have been given as of the date shown on the postmark. In the event such notice is given, and if mutually agreeable to both parties, negotiations shall begin within sixty (60) days of the notice being given. However, if not mutually agreeable, the existing terms of the agreement will remain in place.

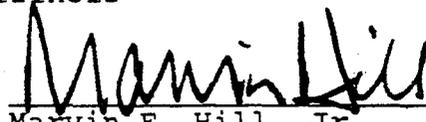
If any term or provision of this Agreement is rendered invalid, unenforceable, or unlawful, upon request of either party, both parties shall meet promptly to negotiate with respect to the affected terms or provisions. The terms of this Agreement shall remain in full force and be effective during any period of negotiations and any period pending an impasse in negotiations.

It is recognized by both parties that issues of wages, hours, benefits, and working conditions of employment not covered in this Agreement, may come of issue during the term of this Agreement. In the event either party recognizes an issue of wages, hours, benefits and/or working conditions that

is not covered by this Agreement during the term of this Agreement, both parties shall be held harmless for the failure to include such issue in the Agreement. In the event the Employer proposes to change any such condition during the term of this agreement it shall notify the Union and upon request, and negotiations shall begin within sixty (60) days of the notice being given to resolve such issues. The existing terms of the agreement and the existing wages, hours, benefits and/or working conditions that are mandatory subjects of bargaining shall remain in place during such negotiations.

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Dated this 23rd day of  
March, 1995, DeKalb, Illinois



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Marvin F. Hill, Jr.  
Neutral Arbitrator