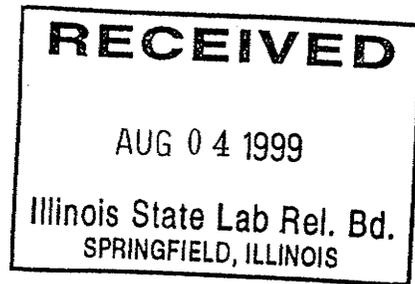


1LRB
#195

**BEFORE
EDWIN H. BENN
ARBITRATOR**



In the Matter of the Arbitration

between

**STATE OF ILLINOIS, DEPARTMENT
OF MILITARY AFFAIRS**

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 73**

CASE NO.: Arb. Ref. 98.189
(Interest Arbitration)

OPINION AND AWARD

APPEARANCES:

For the Employer: Lt. Col. Wayne S. Carlson, Staff Judge Advocate

For the Union: Stanley Eisenstein, Esq.

Place of Hearing: Springfield, Illinois

Date of Hearing: January 28, 1999

Dates Briefs Received: March 10, 1999 (Employer); March 12, 1999
(Union)

Date of Award: July 31, 1999

CONTENTS

I. ISSUE 3

II. FACTS..... 3

III. DISCUSSION..... 4

 A. The Criteria 4

 B. The Burden 5

 C. The Showings 5

 1. Comparability 5

 2. Other Considerations 7

 a. The Lawful Authority Of The Employer 8

 b. The Interests And Welfare Of The Public 8

 c. The Employer's Claimed Difficulty In
 Implementation Of The Union's Proposal..... 10

 d. Other Statutory Concerns Raised By The Union.. 10

 D. Conclusion On The Showings..... 12

IV. AWARD 16

I. ISSUE

Whether or not as a condition of continued employment, bargaining unit civilian employees must remain members of the Air National Guard ("Guard")?¹

II. FACTS

This case was presented as an interest arbitration. The Union represents Military Security Police ("MSP") and Military Crash Fire Rescue ("MCFR") employees.²

A prerequisite for initial employment as a MSP or MCFR is membership in the Guard.³ The Union does not take issue with that precondition for initial employment.⁴ The

dispute here is over the Employer's requirement of Guard membership as a condition of *continued* employment.⁵ In this proceeding, the Union argues that "... bargaining unit employees should not be required to maintain active membership in the Illinois National Guard as a continuing condition of their civilian employment."⁶

Guard membership as a condition of continued employment has existed since as far back as 1976.⁷ The decision to require Guard membership as a condition of continued employment was a discretionary de-

¹ The parties are in agreement concerning the statement of the issue. Union Brief at 3; Employer Brief at 1.

² During proceedings before the Illinois State Labor Relations Board ("ISLRB"), the parties stipulated that the Union has been the exclusive bargaining representative "... of certain of Respondent's employees in a unit of Military Security Police I ... and accreted with a unit of Military Crash Fire Rescue I & II" Union Exh. 3 at par 3.

According to the Employer (Employer Brief at 2), the main complements of employees are assigned to the Springfield and Peoria Air National Guard bases (37 MCFR and 24 MSP employees, respectively).

³ See the job descriptions for the bargaining unit positions. Jt. Exhs. 4, 5 at 3 ("Minimum Requirements Must be a member of the Illinois Air National Guard upon initial hire"); Jt. Exh. 3 at 2 ("Qualifications (Mandatory) (1) Be a member of the Illinois Air National Guard.").

⁴ See Union Brief at 2:

[footnote continued]

[continuation of footnote]

The Union does not here challenge the right of the Employer to establish initial minimal qualifications for employment. Thus, under Local 73's position here, the Employer is free to establish membership in the military in a National Guard or equivalent unit as both a prerequisite for the job and a condition for initial employment.

⁵ That condition is found in the job descriptions. Again, see Jt. Exhs. 4, 5 at 3 ("Must ... maintain military membership"); Jt. Exh. 3 at 2 ("Be a member of the Illinois Air National Guard").

⁶ Union Brief at 2.

⁷ Director of Personnel Sharon Dayton testified that the MCFR positions did not exist prior to 1989. The parties stipulated in proceedings before the ISLRB that "[s]ince on or about July 1, 1976, new hires and incumbents have been and are required to maintain active National Guard status either in the appropriate military unit or in a related military unit as defined by the Respondent as a condition of continued employment." Union Exh. 3 at par. 5.

termination made by the Adjutant General.

Brigadier General Frank Rezac is the Assistant Adjutant General. Consistent with the parties' evidence (*see* Employer Exh. 8; Union Exhs. 20-23, 25-35, 37-39), Rezac acknowledged that there are other states which do not require such membership as a condition of continued employment and that in some instances such work is contracted out. Further according to Rezac, the security work at O'Hare (where an active military refueling function has been performed), has been contracted out.⁸ In addition, recently, Military Security Guards were made subject to the Personnel Code and military membership is no longer a prerequisite for that position. Union Exh. 40.

The parties were unable to resolve the dispute at the bargaining table. This proceeding resulted.⁹

⁸ Rezac testified that he did not like the fact that the O'Hare work has been contracted out. Further, according to Rezac, the O'Hare facility is in the process of closing down. The O'Hare military functions are being transferred to Scott Air Force Base near Belleville, Illinois.

⁹ The history behind the parties getting to this proceeding is, to say the least, extensive. The Union sought representation rights in 1988. Thereafter a stream of litigation ensued before the ISLRB and into the courts over issues of ISLRB jurisdiction, the

[footnote continued]

III. DISCUSSION

A. The Criteria

The statutory factors governing interest arbitrations of this type are found in Section 14 of the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et. seq.* ("IPLRA"):

- (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).

* * *

- (h) Where there is no agreement between the parties, ... 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.

[continuation of footnote]

Employer's obligation to bargain over the topic of Guard membership as a condition of continued employment, bad faith bargaining charges and the like. Union Exhs. 1-8. Ultimately, the Employer was required to bargain "concerning our policy that employees have and maintain active membership in the National Guard as a condition of their continued employment." Union Exh. 8. Bargaining did not end the dispute — the parties did not reach agreement. This proceeding followed.

- (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 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.

B. The Burden

The existing *status quo* is the Employer's requirement that bargaining unit employees maintain Guard membership as condition of continued employment. In an interest arbitration, the party seeking to change the *status quo* bears the burden. Here, that party is the Union.¹⁰

C. The Showings

1. Comparability

The Union keys upon comparability as the determining factor in this case.¹¹

¹⁰ "Arbitrators may require 'persuasive reason' for elimination of a clause which has been in past written agreements." Elkouri and Elkouri, *How Arbitration Works* (BNA, 4th ed.), 843. See also, *Will County Board and Sheriff of Will County* (Nathan, 1988) at 50 ("... [I]n interest arbitration when one party seeks to implement entirely new benefits or procedures (as opposed to merely increasing or decreasing existing benefits) or to markedly change the product of previous negotiations, is to place the onus on the party seeking the change."). The Employer (Employer Brief at 21) characterizes this burden as "... a system that isn't broke ... doesn't need to be fixed", thereby requiring the Union to show that the system is "broke".

While not a negotiated clause, the Guard membership requirement as a condition of continued employment is the *status quo* and, as the moving party, the burden rests with the Union to demonstrate why that *status quo* should be changed.

¹¹ According to the Union (Union Brief at 5, 7), "... the 'comparability' test is the sin-
[footnote continued]

First, the Union (Union Brief at 13-14) points out that as of January 11, 1999 Military Security Guards I and II were made subject to the Personnel Code. According to the January 11, 1999 memo from Director of State Personnel Dayton, "[b]asically it means the positions are no longer military exempt and military membership is no longer a prerequisite for the positions." Union Exh. 40. Because these employees are employed by the State, this is an "internal" comparable — *i.e.*, another group of employees of the same employer engaged in a military security function who do not have the same conditions of employment. For purposes of discussion, this point favors the Union's position.

Second, in terms of "external" comparability, the Union argues (Union Brief at 15) that "Local 73's request is consistent with the overwhelming practice at other National Guard locations throughout the country." The parties offered exten-

[continuation of footnote]

gle most determinative factor ... the single most compelling standard which must guide the Arbitrator's Award ... [which] compels the conclusion that Local 73's position must be sustained and that membership in the National Guard as a continued condition of employment must be eliminated."

sive evidence on external comparables.¹²

It is not necessary to parse through the differing results, distinctions and nuances flowing from the parties' research on other states' requirements. For the sake of discussion, I will accept the Union's analysis of its and the Employer's offerings concerning external comparability (Union Brief at 15-16 [emphasis in original]):

... Local 73 introduced documentation indicating that at least 16 different States that perform identical security and fire fighting functions at their respective National Guard

¹² Aside from identifying Illinois, the Employer claims that California, Delaware, Florida, Idaho, Indiana, Maine, Maryland, New York, North Dakota and West Virginia currently require military membership for employees similar to MSP and MCFR. Employer Exh. 8. A second survey conducted by the Employer identifies states (including the District of Columbia) where no military membership is required for one of the categories of employees in dispute (either firefighters or security) — Alabama, Alaska, District of Columbia, Hawaii, Louisiana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma and Wyoming. *Id.* Thus, according to the Employer (Employer Brief at 5), "... at least 22 states require military membership for either security or firefighter personnel or for both."

For states supporting its position that no requirement of Guard membership for continued employment should exist, the Union points to the lack of such requirements in New York, Utah, Tennessee, Kansas, Georgia, Wisconsin, Vermont, Iowa, Virginia, Nebraska, Colorado, Michigan, Missouri, Minnesota, and Indiana. Union Exhs. 20-23, 25-35, 37-39.

Dept. of Military Affairs/Local 73 SEIU
Interest Arbitration
Page 7

bases do not require those employees to maintain National Guard membership as a condition of continued civilian employment.

* * *

[With respect to the Employer's evidence concerning other states, clearly, not only are there far fewer than ten other States that require a 20 year commitment to the National Guard to maintain civilian employment, but several of the responding States are actively reconsidering their current position on Guard membership. The Department's survey of practices in other States that allegedly have the same requirement as in Illinois proves much less than the Department suggests.

The Department also introduced a second survey showing that with respect to guards and firefighters in other States it is "a mixed bag." Ex. 8. That is, some States require continued Guard membership for firefighters but not for security police. In contrast, other States require continued membership in the Guard for security police but not for firefighters.

But, taking the Union's analysis of the external comparables quoted above, the evidence shows, at most, that Illinois is in the minority. Nevertheless, there are states that require in some form the same condition of continued employment as required here. Illinois is not an aberration — it is just in the minority. Being in the minority is not, in and of itself, a sufficient reason for overturning a long-standing condition of continued employment.

Third, the Union points out (Union Brief at 16) that some states contract out for similar services and that "[i]ndeed, the Department has contracted out its security services of the O'Hare base to a private firm." What other states do in this regard is similar to the Union's position concerning external comparability. While some states contract out the work, others do not. However, the fact that certain security functions at O'Hare have been contracted out favors the Union's position.¹³

2. Other Considerations

While the Union's emphasis in this case is on comparability, the IPLRA contemplates examination of other factors. Granted, as the Union argues, because this dispute concerns a non-economic issue, a number of the other factors are not relevant. Nevertheless, the other factors which can be considered for non-economic issues must be discussed.

¹³ The Employer argues (Employer Brief at 2) that the contracting out of security functions at O'Hare was done as a "temporary measure" during the shutdown of that facility. Nevertheless, the work was contracted out. For purpose of discussion and to give the Union the benefit of the doubt, I will assume that during the time the contractor worked, there were valuable military assets present at O'Hare.

**a. The Lawful
Authority Of The
Employer**

Section 14(h)(1) lists "[t]he lawful authority of the employer" for consideration.

There is no Federal requirement for Guard membership as condition of continued employment in order to perform MSP or MCFR work. The requirement of Guard membership as a condition of continued employment is at the State level imposed by the Adjutant General — an apparent discretionary call.¹⁴

¹⁴ The parties so stipulated before the ISLRB. See Union Exh. 3 at par. 7:

The National Guard Bureau (Department of Army and Air Force) does not require active National Guard status in any military unit as a condition of continued employment for the positions in question. Rather, the Respondent [Employer] has determined that active National Guard status is a "requirement" for the positions.

See also, the Civil Service Commission's determination in August, 1977 cited by the Employer (Employer Exh. 4 at 29):

The Adjutant General has designated certain positions within the Department as being "military exempt". These positions do not come under the jurisdiction of the Personnel Code. The Civil Service Commission stated in an August 19, 1977 letter that in their judgment the Adjutant General had the discretion to determine which positions should be civilian and which positions shall be required membership in the Illinois National Guard. They also stated "If the Adjutant General

[footnote continued]

The point here is that the Adjutant General's discretionary decision to require Guard membership as a condition of continued employment falls within the "[t]he lawful authority of the employer." While the Union argues that the Employer's position may violate anti-discrimination provisions concerning handicap and age (see discussion *infra* at III(C)(2)(d)), the Union has not pointed to a specific statutory provision which *prohibits* the Employer from imposing such a condition for continued employment. It is not unlawful *per se* for the Employer to require Guard membership as a condition of continued employment. This factor favors the Employer's position.

**b. The Interests And
Welfare Of The Public**

Section 14(h)(3) addresses "[t]he interests and welfare of the public"

[continuation of footnote]

attaches the requirement to a position that it may be filled only by a member of the Illinois National Guard, then that position is exempt from all jurisdictions of the Personnel Code. If that requirement is not attached, the position is subject to all jurisdictions of the Personnel Code and must be filled accordingly, even though the incumbent may happen to be a member of the Illinois National Guard."

With respect to the decision to require Guard membership as a condition of continued employment, Brigadier General Rezac defends the decision arguing that given the nature of the employees' functions — guarding valuable military assets and dealing with crashes and fires involving military personnel and military assets — military membership is part of "the glue that binds". According to Brigadier General Rezac, the decision imposing the requirement of Guard membership as a condition of continued employment is purely subjective in that he believes that people who wear the military uniform will provide better protection for others in the military than would those who do not wear the uniform.¹⁵

The correctness of the Adjutant General's subjective decision may be a topic of strenuous debate. The basis for the decision is premised

¹⁵ Consistent with Brigadier General Rezac's testimony, the Employer asserts (Employer Brief at 17-18):

... As Brg Gen Rezac testified, from his own experience as a pilot, when the landing gear goes out and he knows that he is in trouble, he wants to see personnel in uniform coming "over the hill". He knows military personnel are properly trained and will do everything possible to rescue him, even if they have to put themselves at risk.

upon the notion that military members will better protect military individuals and military assets. As a civilian, I personally disagree with that notion. The quality of the employees — be they purely civilian or having military membership — and their training are the key factors, not whether they must wear a uniform as a condition of keeping their jobs. Civilians performing security, police and fire fighting duties routinely perform in an heroic manner and, sadly, are often seriously injured and even give the ultimate sacrifice with their lives in the performance of their duties.

However, while debatable, the Adjutant General's decision to require military membership as a condition of continued employment falls within that individual's discretion. Notwithstanding my disagreement with the notion that employees will better perform these types of duties if they are required to wear a military uniform, as far as this factor is concerned, these are the types of decisions that require deference. The Adjutant General in his capacity of implementing his office's military responsibilities has determined that military members will better perform the functions. As an arbitrator, it is not for me to

second guess that determination merely because I personally disagree with the rationale. The Adjutant General's determination is entitled to deference as being made for the benefit of the interests and welfare of the public.¹⁶

But who might do the job better (military versus civilian) misses the point of this proceeding. The dispute over this factor must return to the burden. Because the burden rests with the Union to demonstrate why the *status quo* should be changed, it is not for the Employer to demonstrate that its decision better serves the interests and welfare of the public. Rather, it is for the Union to show why the Adjutant General's decision does not serve the interests and welfare of the public. The Union has not done that. At most, the point is debatable.

¹⁶ Ongoing training is part of these types of positions. The testimony of Senior Master Sergeant Larry Gilmore (the Fire Chief at Peoria) and Master Sergeant John Gee (the Superintendent Security Force at Springfield), training of employees who are also members of the military is less expensive (because the Federal Government pays for the training) and military membership permits greater flexibility in choosing military training programs. Further, there is increased assignment flexibility because the employees can be assigned and/or called up to active status consistent with their military obligations.

**c. The Employer's
Claimed Difficulty In
Implementation Of
The Union's Proposal**

The Employer argues that, internally, implementation of the Union's proposal would be difficult from an administrative standpoint. See Employer Brief at 12-14. The Employer argues that the process "... is a lengthy and cumbersome process which takes 12-18 months and involves the Governor, the Department of Central Management Services (CMS), the Civil service Commission, and the Joint Committee on Administrative Rules." *Id.* at 13. The Union characterizes that position as "tail wagging the dog' procedures". Union Brief at 21. Canine analogies aside, I agree with the Union's contention that internal procedural roadblocks for accomplishing a transition are irrelevant. If the statutory factors require the removal of the condition, then it must be removed — irrespective of whether accomplishing that goal is a difficult administrative task.

**d. Other Statutory
Concerns Raised By
The Union**

The Union urges that to allow Guard membership as a condition of

continued employment to remain will run afoul of statutory prohibitions — in terms of age and disability discrimination. Union Brief at 17-18. Union Business Agent Al Pieper related the circumstances of one individual who was involved in a motorcycle accident and who might not be able to pass a Guard physical exam and would thus have his civilian job placed in jeopardy. Further, the question of what happens to the employee who reaches the retirement age was raised. Will that employee who may be forced to retire from the Guard lose his civilian job as well because Guard membership is no longer possible?

These statutory questions cannot determine the outcome of this particular dispute. First, they are hypothetical. The parties have not presented me with a *concrete* situation where an employee failed and Guard physical and was discharged from his MSP or MCFR position. Nor has the age question been brought to the point of being ripe for adjudication. These are hypothetical scenarios. These cases are not decided on hypotheticals. These cases are decided on burdens and showings — here, with the Union required to demonstrate why the *status quo* should be changed.

Second, and more fundamentally, as an interest arbitrator my function is contractual and statutory only to the point of determining the terms of the collective bargaining agreement as specified by Section 14(h) of the IPLRA. It is not my function to interpret in the first instance whether fact situations (which are hypothetical) violate federal or state discrimination laws. Those decisions are best left to judicial forums of more competent jurisdiction.¹⁷

¹⁷ See e.g., *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 57 (1974) (“[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land [T]he resolution of statutory or constitutional issues is a primary responsibility of courts”).

For that reason, as an interest arbitrator, I cannot rely upon the decision in *McKamey v. Montana*, No. 94-180 (1994) (Union Exh. 43) where the Supreme Court of Montana ruled that a military service requirement violated constitutional equal protection requirements because “... the State failed to offer any compelling evidence that the military service requirement is rationally related to a legitimate government interest ... [but i]nstead, the evidence overwhelmingly supports the conclusion that the requirement’s sole purpose is to circumvent the wage and overtime standards set forth in the Fair Labor Standards Act and the Montana Wage and Overtime Compensation Act.” *Id.* at 13. My function is to write the terms of the contract which the parties have not be able to agree upon. Constitutional issues raised by the Employer’s position should be addressed in the first instance by the courts, and not by an interest arbitrator.

D. Conclusion On The Showings

The evidence shows the following: Illinois is in the minority of states requiring Guard membership as a condition of continued employment; other military security employees within the State do not have the requirement; security work at O'Hare has been contracted out; the decision to require Guard membership as a condition of continued employment is a call that is within the discretion of the Adjutant General in that individual's capacity to carry out his military mission which must be presumed to be in the interests and welfare of the public; the Department's concern that there is an internal administrative difficulty in implementing the Union's proposal is irrelevant; and there are hypothetical age and disability concerns caused by the Employer's requirement of Guard membership as a condition of continued employment.

Based on these showings, I cannot require the implementation of the Union's proposal. As noted throughout, the burden is on the Union to demonstrate why the *status quo* should be changed. I find the Union has not met that burden.

First, the Union has shown that a majority of other states do it differently and do not require Guard membership as a condition of continued employment for security and fire fighting employees. However, being in the minority does not, by itself, require the change the Union seeks. These decisions are not made on the basis of majority/minority viewpoints. There must be more — particularly where the *status quo* has existed as far back as 1976 and the employees hired on knowing full well that Guard membership was not only a condition of initial employment, but a condition of *continued* employment.

Second, the Union has also shown that elsewhere in Illinois security type functions at military installations other than Springfield and Peoria are performed by State employees who do not have the requirement for Guard membership as a condition of continued employment and that at O'Hare, security functions have been contracted out. Although it can be argued that the functions performed by those employees are different from the employees in dispute and the military assets at the locations may also be different (but no less important as the Union points out), again, this

shows only that for other locations it is done differently. Balanced against this showing (an internal comparability showing which for the sake of discussion favors the Union's position), is the fact that this type of decision is a discretionary call within the legal authority of the Adjutant General and which must be presumed to be in the interests and welfare of the public as that individual performs the function of military security for the State.

Third, the Union has shown that there are potential age and disability discrimination issues which evolve from the position that Guard membership is a condition of continued employment. But as discussed *supra* at III(C)(2)(d), those concerns are hypothetical at best and, in the end, are better suited for a court interpreting federal or state discrimination law, rather than an interest arbitrator attempting to apply limited statutory factors for formulating the terms of a contract.

Fourth, in the end, the parties must remember that this is an *interest* arbitration which has a very limited function to determine *the terms* of parties' collective bargaining agreement. This is not a grievance arbitration which deter-

mines whether an action or policy violates the contract and it is not a court proceeding which determines whether a provision of the contract violates Federal or State law or is unconstitutional. At most, the Union has presented an argument that it is a *good idea* that because it is done differently elsewhere outside and inside the State, the Department's policy of continued Guard membership as a condition of continued employment for MSP and MCFR employees should be stricken. I agree that the Union's arguments demonstrate that it is a good idea to end that condition of continued of employment. For reasons pointed out by the Union, that kind of requirement which is totally subjective on the Adjutant General's part and which is based solely on a notion of a "team" concept, is fraught with potential problems and may well prove to be a magnet for further extensive litigation. Indeed, one would think given the experience in other states, that the Employer would jump at the opportunity to negotiate a way out of what looks like a litigation nightmare, with potential liabilities and disruption.

But "good ideas" do not determine contractual terms in an interest arbitration — particularly where

Dept. of Military Affairs/Local 73 SEIU
Interest Arbitration
Page 14

the problems pointed out by the Union are hypothetical and where the *status quo* has existed since as far back as 1976. The Union has the burden to demonstrate why that *status quo* should be changed. In this interest arbitration proceeding, I am not satisfied that the Union has met that burden. A good idea is just not enough to meet that burden.¹⁸

The parties agreed at the beginning of the hearing that because the dispute before me involves a non-economic issue, this proceeding was not a "baseball" arbitration — *i.e.*, I am not bound by either party's final offer, but I could craft an award

¹⁸ This case ultimately raises similar issues which I have had to previously face. In *Village of Oak Brook and Teamsters Local 714, S-MA-96-73* (1996), the village sought to change the existing conditions to require employees to make contributions to insurance premiums because by doing so there would be an incentive for the employees (police) to hold down unnecessary use of medical insurance. I rejected the attempted change. The village's proposal amounted to a "good idea". I agreed that it was a "good idea". However, the village had not demonstrated (as its burden required because it was seeking the change) that its health care premiums had increased or that the system was being abused. The village's proposal to change the *status quo* was not based on facts requiring the change. From the Union's perspective, that is the problem here. The Union's proposal here, like the village's proposal in *Oak Brook*, is a good idea. That is not enough.

with terms which I deem appropriate.

The Union's ultimate goal in this case is to have a clause in the Agreement which after a while eliminates Guard membership as a condition of continued employment.¹⁹ For reasons discussed above, the Union has not met its burden to achieve that clause. However, I will not place a clause in the Agreement as the Employer might desire that affirmatively requires Guard membership as a condition of continued employment. I have too many problems with such a blanket requirement.

While the Union has not prevailed in this interest arbitration, its arguments point out that there may be problems on an *case by case* basis with a provision which requires Guard membership as a condition of continued employment. As pointed out by the Union, an employee may not be able to pass a Guard physical examination in an

¹⁹ According to the decision in *General Service Employees Union Local 73 v. The Illinois State Labor Relations Board, etc.*, No. 4-93-03111 (4th Dist., 1994) (Union Exh. 5), the Union proposed language providing that "No employee shall be required as a condition of employment to retain membership in the National Guard, except as an initial condition at hire for four (4) years." *Id.* at 2.

area which has no nexus to the employee's ability to perform duties as a MSP or MCFR. Further, as pointed out by the Union, a compelled military retirement may also be unreasonable for the performance of that individual employee's position as an MSP or MCFR. The *status quo* here is not a clause in the Agreement. The *status quo* is the existent *policy* requiring Guard membership as a condition of continued employment. I shall not disturb the *status quo*. The policy can remain — it just will not be added as a specific contract provision in the Agreement.

By not including a clause requiring Guard membership as a condition of continued employment in the Agreement, the Union and an individually affected employee will be free to contest the application of that policy (e.g., through the grievance procedure as an arbitrary, unreasonable application of the policy) to that employee's individual circumstances. The parties' rights are not affected. All that will be required is that the *status quo* shall remain unchanged.²⁰

²⁰ Obviously, an individual may also judicially challenge the policy on statutory grounds.

[footnote continued]

But the bottom line is that this is an interest arbitration and not a grievance arbitration. Through this process the parties have a third party formulate contract terms which the parties were unable to put together at the bargaining table. The Union has not met its burden to place a clause in the Agreement which eliminates any requirement of Guard membership as a condition of

[continuation of footnote]

Another question which arises is the situation raised by the Union where the Guard simply refuses to re-enlist a member. In that circumstance, must the employee lose his civilian job as well? By placing a clause in the Agreement which requires membership, the answer may well be in the affirmative — the condition is there and, if not met (for whatever reason) the employee's tenure of employment is ended. However, by leaving the policy in place as opposed to elevating it to the terms of the contract, the employee who has been denied re-enlistment rights for no justifiable reason can challenge an action seeking to remove him from his civilian position as arbitrary or unreasonable. The analogy is to those cases where a customer no longer wishes to deal with a salesman who is then discharged by the salesman's employer because the employee no longer can work that account (referred to as the "*persona non grata*" cases). Such employees cannot be discharged on a mere whim or for unsubstantiated reasons, but "... there must be the strongest showing of good faith" that the employee's conduct was unacceptable to the customer. *Granny Goose Foods*, 42 LA 497, 502 (Koven, 1964). By not placing the Guard membership requirement in the Agreement, an employee who loses his Guard status is free to challenge the reason for that loss if the Employer seeks to discharge the employee for lack of Guard membership.

continued employment. However, the Employer shall not have a clause which elevates its policy to a term of the Agreement. As the Employer asks, the *status quo* shall be maintained — and that is all.

IV. AWARD

The Union's request to eliminate the requirement of Guard membership as a condition of continued employment is rejected. The *status quo* shall be maintained.



Edwin H. Benn
Arbitrator

Dated: July 31, 1999