

In the Matter of the Arbitration) Interest Arbitration
 Between)
 VILLAGE OF OAK BROOK)
 and)
 TEAMSTERS LOCAL UNION NO. 714)

FEB 9 1998
 Village of Oak Brook, Ill.
 307

APPEARANCES

For the Union

Mr. J. Dale Berry of Cornfield and Feldman, Attorney
 Mr. Jerry De Francisco, Business Agent, IBT Local 714
 Mr. Alan J. Laatz, Police Officer
 Mr. Robert Mudra, Police Officer
 Mr. Marty Zelisko, Police Officer

For the Employer

Mr. R. Theodore Clark, Jr. of Seyfarth, Shaw,
 Fairweather & Geraldson, Attorney
 Mr. Michael A. Crotty, Assistant Village Manager
 Mr. Allen W. Pisarek, Police Lieutenant
 Mr. Edward Caspers, Police Sergeant

O P I N I O N A N D A W A R D

Introduction

Village of Oak Brook ("the Employer" or "the Village") and Teamsters Local Union No. 714 ("the Union"), pursuant to the Illinois Public Labor Relations Act, selected the undersigned arbitrator to serve as the chairman of an arbitration panel to hear and determine various economic and noneconomic issues at which the parties were in impasse in collective bargaining. The other members of the panel are the attorneys of the respective parties, J. Dale Berry for the Union and R. Theodore Clark, Jr. for the Employer. Each of them replaced another panel member who was selected on the first day of hearing, but who agreed to step down on the second day of hearing in favor of the respective attorneys. Hearing was held in Oak Brook, Illinois, on January 8-9, February 19, March 25, 27, 31, and April 1, 1997. The final offers were exchanged by the parties on May 7, 1997. Post-hearing briefs were filed on August 13, 1997. In the course of the proceeding the parties were able to reach agreement on several of the issues. The remaining issues are the following:

1. structure of the salary schedule; 2. salaries; 3. retroactivity of salaries; 4. length of service performance stipend; 5. fair share; and 6. discipline. The first four items are considered economic issues, and the last two, noneconomic.

Statutory Criteria

Section 14 (h) of the Act states that "the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable" and lists eight factors:

- (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.

Comparable Communities

Since item (4) requires that a comparison be made with employees "in comparable communities" it is necessary to determine which communities are comparable to Oak Brook. The Union proposes the following 12 municipalities as comparable communities to Oak Brook: Bloomingdale, Downers Grove, Elmhurst, Hinsdale, Libertyville, Lincolnwood, Lombard, Oakbrook Terrace, St. Charles, Westmont, Wilmette, and Willowbrook.

The Village chooses for its list of comparable communities the following seven jurisdictions: Bensenville, Burr Ridge, Hinsdale, La Grange Park, Westchester, Western Springs, and Willowbrook.

As Michael A. Lass, the Union's expert witness on the issue of comparability, pointed out, we have the very unusual situation here of a low population municipality with a disproportionately large police force for the population. Union Exhibit 13 is a spread sheet containing data for 63 communities regarding population, size of police department, state disbursements to local governments, equalized assessed valuation, tax levy, revenue generated from property tax, sales tax, and income tax both as a gross figure and on a per capita basis, per capita income, median family income, and mean housing value. The suggested comparables of both the Union and the Employer, plus many additional jurisdictions, are covered by the spread sheet.

According to Union Exhibit 13, the department size of Oak Brook's police force, including both supervisory and nonsupervisory personnel, is 40. Village Exhibit 2 gives the number of sworn personnel, which I understand to mean the same as "Dept Size" on the Union exhibit, as 41. The discrepancy perhaps may be accounted for by the fact that the department size figures on the Union exhibit are given as of 1994. The population of Oak Brook, according to the Union exhibit, was 9,178 as of 1990. Village Exhibit 1 gives Oak Brook's population as 9,087 as of 1993.

To indicate the high ratio of department size to population at Oak Brook we may look at the populations of other communities with 40 or 41 sworn personnel.

<u>Jurisdiction</u>	<u>Population</u>	<u>Department Size</u>
Carpentersville	23,049	41
Dolton	23,956	40
Park Forest	24,656	40
Wilmette	26,694	41

Oak Brook with 40 or 41 sworn personnel for a population of 9,178

is, if not unique, certainly highly unusual. Among the reasons for the high number of officers is the presence of Oak Brook Center shopping mall in the community, one of the largest shopping centers in the world, which requires protection. Many very large corporations also have offices in Oak Brook. In addition, the mean value of homes in Oak Brook, according to Union Exhibit 13, is \$463,600--the highest value for any jurisdiction on the list of 63 communities. Moreover, according to the evidence, the day time population of Oak Brook is approximately 70,000 people. There are thus a lot of people and property to protect in Oak Brook, which, no doubt, accounts for the disproportionately large police force for so small a resident population.

The disproportion between department size and population calls for a different approach than usual to selecting comparable communities. For example, in a decision relied on by the Employer, Village of Justice and Metropolitan Alliance of Police, decided on May 19, 1997, arbitrator Berman stated at page 10 of his opinion, "Population and proximity are probably the two most important factors used to determine comparability." He declared at page 11 of his decision, with regard to the percentage spread to be used for comparing communities for population, "I have adopted suggestions ranging from $\pm 25\%$ to $\pm 50\%$." The ranges given by Mr. Berman are probably the most common ones used by arbitrators. In line with this, in an award relied on by the Union, City of Batavia and Fraternal Order of Police, decided on August 6, 1996, Arbitrator Berman used a $\pm 50\%$ standard. He excluded jurisdictions which fell outside this limit.

Were the chairman to apply a $\pm 50\%$ standard for population comparison and rule out those jurisdictions falling outside these limits, he would have to exclude Bensenville, Hinsdale, and Westchester from the Employer's list, and almost all of the communities on the Union's list. Of course, one could double the population limitation and thereby capture all of the Employer's suggested comparables. But that would still leave beyond reach many of the Union's examples.

To use a $\pm 100\%$ limit as opposed to a $\pm 50\%$ cap is essentially arbitrary in the circumstances of this case. Thus the 100% standard would bring Westchester in, with a population of 17,301, but keep Bloomingdale out, with a population of 19,992. Bloomingdale's per capita combined revenue from property tax, sales tax, and income tax (\$513.92), however, is closer to that of Oak Brook (\$1,256.98) than Westchester's (\$454.74). Bloomingdale's per capita income (\$22,008) and median family income (\$56,642) are also closer to Oak Brook's (\$60,347 and \$120,405) than Westchester's (\$20,009 and \$49,878). The department size of both jurisdictions is very close to Oak Brook's, 38 for Westchester and 42 for Bloomingdale. It simply

does not make sense to include Westchester and exclude Bloomingdale on the basis of an arbitrary population limit.

Oak Brook is like the precocious child who graduates high school at age 12 and enrolls in the university. His intellectual abilities make him incompatible with a high school curriculum. Because of his age, however, he will also not fit in well with his college classmates.

Under all of the circumstances of this case, the chairman has decided that a reasonable way to proceed would be to use proximity and department size as the two determinants for inclusion in the group of comparables with which to compare Oak Brook. As arbitrator Berman observed, proximity is one of the most frequently used criteria in deciding comparability issues. Communities close to each other are usually in the same labor market and, the places of residence for employees who work in the communities. They are also the communities with which workers compare themselves in terms of wages and other job benefits. The communities on both the Employer's and the Union's lists are reasonably similar in terms of per capita combined revenue from state disbursements to local governments, per capita income, and median family income. If to these considerations are added proximity to Oak Brook, and department size within $\pm 50\%$ of Oak Brook's, then we should have a reasonably comparable group of communities to Oak Brook for purposes of this case.

Using the criterion of proximity, the chairman must exclude Libertyville, Lincolnwood, Wilmette, and St. Charles from the Union's list. The first three municipalities are located respectively in the far north, north, and north shore suburbs of Chicago. Oak Brook is located principally in DuPage County, to the west of the western, south suburbs of Chicago. The closest of the three suburbs, Lincolnwood, is probably around 25 miles from Oak Brook. The chairman does not consider them proximate to Oak Brook. None of the department members live in or near any of the three communities.

In addition, if one charts all of the remaining municipalities on a large map of the Chicago area and connects the dots representing the communities, they form a shape similar to the big dipper, with Bloomingdale as the handle. Each of the jurisdictions has another comparable municipality on each side of it. Lincolnwood is completely out of the loop off to the northeast of Bensenville, but in no pattern with Bensenville, and with many other municipalities between it and Bensenville, none of which have been selected by the Union. It does not meet the criterion of proximity, and the chairman will exclude it from the group. What the chairman has said about Lincolnwood goes with greater force for Wilmette and Libertyville.

St. Charles also presents a problem. It is a community

in the Fox River Valley, and the chairman would not consider it proximate to Oak Brook. It is also the only community situated in the Fox River Valley selected by the Union. To the chairman this indicates that St. Charles was not selected on grounds of proximity, which is the principal criterion being used by the chairman of the panel to choose the members of the group, but for some other reason that does not entitle St. Charles to admission. The distance of St. Charles to Oak Brook and the other members of the group is sufficiently far so that if proximity were the criterion being used for its selection, at least one or two other communities between St. Charles and Oak Brook or St. Charles and other members of the group would also have been selected in addition to St. Charles. Since St. Charles does not meet the proximity criterion, the chairman will exclude it from the group of comparable communities.

The Union defends the selection of several jurisdictions solely on the basis that they abut Oak Brook. This is an acknowledgement by the Union that geographical proximity is an important criterion. The chairman would carry the reasoning a little farther and say that there comes a point where one must conclude that the distance between two communities, or between one community and a cluster of other communities, is such that they may not fairly be considered to be proximate. Where the communities proximately located to each other are sufficiently large in number to provide a block from which to choose a statistically valid number of jurisdictions with similar demographics for comparison purposes, then it is not necessary to go outside of the proximate communities. In fact, it may be counterproductive to do so.

The Union cites the decision of arbitrator Herbert Berman in City of Batavia and Illinois FOP Lodge 224, ISLRB No. S-MA-95-15 (August 6, 1996) for the proposition that a large sample is more reliable than a small sample and notes that Mr. Berman approved a 25 mile radius. If one were to chart all of the communities approved by arbitrator Berman in the Batavia case, as this chairman has done, he would find that all 17 communities selected by Mr. Berman form a connected pattern, with one community leading naturally into another. There is no example in his group of any municipality off by itself in the distance apart from the main body of communities, as is the case with the jurisdictions of Wilmette, Lincolnwood, Libertyville, and St. Charles proposed by the Union.

Indeed this chairman finds it revealing that Union witness Brian Molloy, in testifying how his salary has deteriorated since being hired, compared himself with "people that were working in the other towns surrounding this town. . ." (emphasis supplied). Similarly the newspaper article introduced into evidence by the Union dated December 11, 1996 (Union Exhibit 7), quoted Officer Molloy as stating that the then

top patrol officer salary of \$44,478 was "not competitive with surrounding communities' police forces of similar size." The article specifically mentions the cities of Elmhurst, Villa Park, and Lombard. This is strong confirmation that Oak Brook's police officers compare their wages and benefits with nearby communities and not with Lincolnwood, Libertyville, or St. Charles.

The following table provides relevant data concerning the jurisdictions remaining from the Employer's and the Union's choices. It includes all of the Employer's choices, and the Union's choices less Libertyville, Lincolnwood, Wilmette, and St. Charles. The choices common to both parties, Hinsdale and Willowbrook, are in ALL CAPS. The row for Oak Brook separates the Employer's choices from the Union's selections (except for the two communities common to both).

NAME	POPULATION	DEPT. SIZE	PER CAPITA EAV	PER CAPITA COMBINED REVENUE	PER CAPITA INCOME	MEDIAN FAMILY INCOME
Bensenville	17,767	38	23,592	501.85	15,024	42,318
Burr Ridge	7,669	21	52,655	372.49	37,797	94,647
HINS-DALE	16,029	27	38,335	473.05	39,215	81,170
La Grange Park	12,861	24	12,560	234.59	20,411	52,383
Westchester	17,301	38	15,512	454.74	20,009	49,878
Western Springs	11,984	21	17,013	410.40	27,848	73,287
WILLOW-BROOK	8,701	22	24,805	326.08	28,592	63,492
Oak Brook	9,178	40	96,708	1,257	60,347	120,405
Bloomingtondale	19,992	42	22,831	513.92	22,008	56,642
Downers Grove	46,845	68	22,800	399.57	20,891	56,055

Elm-hurst	42,029	64	20,868	469.06	21,005	55,203
Lombard	39,408	63	19,069	435.31	18,281	50,848
Oak-brook Terrace	2,251	17	108,680	921.11	22,660	47,625
West-mont	21,402	34	18,373	448.05	17,874	43,488

Application of the $\pm 50\%$ standard with respect to the department sizes of the remaining communities would require removal of Downers Grove, Elmhurst, and Lombard from the list, since they have respectively 68, 64, and 63 sworn personnel in their police departments. In addition, Elmhurst and Lombard each has almost four times the population of Oak Brook, and Downers Grove, five times.

A similar argument was made by the union before arbitrator Milton Edelman in City of Alton and International Association of Fire Fighters Local 1255, ISLRB Case No. 2-MA-96-91, decided on December 17, 1996. The City of Alton wished to include Wood River as a comparable community although it was one-third Alton's size (population of 11,490 vs. 33,604 for Alton) and despite the fact that Wood River's fire department boasted only 10 people as compared with Alton's 64 member department. In support of its position the City relied on two arguments: (1) contiguity and (2) that Wood River was similar to the group of seven comparables, including Alton, in that its per capita EAV and its median family income placed it in the median of the seven cities; and its median home value was higher than two of the comparables.

The union strongly opposed the City's position, pointing out the great difference in population, the gross disparity in department size, the fact that Wood River's revenues from all sources were 65% less than Alton's, and that on EAV, the only direct revenue source used by the City, Wood River deviated from Alton by more than 60%. Arbitrator Edelman held for the City and included Wood River as a comparable community. He explained his holding as follows: "Wood River lies within the same labor market as Alton. Its geographical proximity is the first reason. After that, the fact that Wood River fire fighters operate under a collective bargaining agreement, and the relative closeness of most of the other criteria cited by the City argue for its inclusion as a comparable community."

The three jurisdictions, Downers Grove, Elmhurst, and Lombard, are all contiguous with Oak Brook. Downers Grove and Elmhurst each has a mean housing value higher than the mean

housing value of three of the seven comparables, excluding Oak Brook, on the Employer's list of comparables. Lombard has a mean housing value higher than Bensenville's. The per capita EAV of each of the three communities, as the table above shows, is close to the median of the seven comparables selected by the Employer, excluding Oak Brook. Thus each has a per capita EAV higher than those of La Grange Park, Westchester, and Western Springs, and lower than the other four comparable communities. In addition, Downers Grove and Elmhurst each has a median family income higher than that of three of the Employer's comparable jurisdictions. The median family income of Lombard is higher than that of two of the Employer's comparable communities. Downers Grove and Elmhurst each also has a higher per capita income than three of the Employer's selections, and Lombard has a higher per capita income than Bensenville.

Moreover, despite their much larger populations than Oak Brook, the total state disbursements to local governments is much closer between Oak Brook and any of the three (Downers Grove, Elmhurst, and Lombard) than with any of the seven in the Employer's group of seven comparable jurisdictions. Thus the largest spread among the three is between Oak Brook and Downers Grove in the amount of \$2,157,922 (\$13,694,477 for Downers Grove and \$11,536,555 for Oak Brook). The smallest spread between Oak Brook and any of the Employer's group of seven comparable communities is \$6,259,913 (\$11,536,555 vs. \$5,276,642 for Bensenville). Moreover, the disbursements to Oak Brook exceed those to Lombard by almost \$500,000.

Thus based on contiguity of Downers Grove, Elmhurst, and Lombard to Oak Brook plus the other measures discussed above which show that, on the whole, these jurisdictions compare no less favorably with Oak Brook than the seven communities selected by the Employer, the chairman finds that they should be included in the list of comparable communities with the seven municipalities named by the Employer and the two others selected by the Union. The chairman would also include the Union's choice of Oakbrook Terrace, which abuts Oak Brook.

The chairman finds that the 14 municipalities listed in the table above are comparable to Oak Brook for purposes of this proceeding. Although many arbitrators choose one or the other party's list of comparable communities, it is not unusual to select jurisdictions from both parties' lists. See, for example, City of Batavia, Illinois and Illinois Fraternal Order of Police, ISLRB No. S-MA-95-15 (Herbert M. Berman, 8-6-96) at page 17, where the arbitrator found 17 jurisdictions to be comparable to Batavia. Some were from the union's list of comparable municipalities; some were proposed by the employer; and some were agreed on by both parties. The chairman has included Burr Ridge and La Grange Park in the group, despite the fact that they do not have collective bargaining relationships with a labor

organization, because, while he is of the opinion that possession of a collective bargaining agreement can be an indication of comparability, it is not a necessary element of comparability. See Arbitrator Briggs's remarks in City of Elmhurst and IAFF Local 3541 (April 20, 1997) at 10, footnote 9.

Issue 1 -- Salary Schedule

The Union's final offer regarding salary schedule states as follows:

Modify existing contract language to incorporate a defined salary schedule based upon seven annual steps leading to the 1995 maximum base salary of \$44,478 payable after six years of service, as described in "Appendix A".

Appendix A of the Union's final offer provides as follows pertaining to the salary schedule:

The Union proposes the following Base Salary Schedule to which a general wage increase would be applied. The Schedule would be implemented by moving employees whose current salary is different than the step salary to the nearest step that is higher than their current salary. Thereafter annual step increases would be made in accordance with the Union's proposed Article XI, \$1-Step Increases.

Police Officer:

Start	\$32,946
After one year.	34,868
After two years	36,790
After three years	38,712
After four years	40,634
After five years	42,556
After six years	44,478

Detective (Permanent Assignment)

Minimum	\$36,535
Maximum	\$49,323

Article XI, \$1:

b) Police Officer Step Increases -- Step increases will be determined based upon the employee's performance as described in the Employee Performance Evaluation and the recommendation of the Police Chief with review and approval by the Village Manager. Step increases shall occur within the steps of the Salary

Schedule and shall not exceed the maximum of the range for the position. Employees shall be evaluated every six months for the first two years of employment. Thereafter, they shall be evaluated annually on their respective anniversary date. Police Officers who are rated acceptable or as meeting Village standard shall be moved to the next step of the Schedule. For an employee assigned to a different pay grade, the effective date of the assignment shall be his anniversary date.

c) Detective performance Increases --
Performance increases will be based upon the employee's performance as described in the Employee Performance Evaluation and the recommendation of the Police Chief with review and approval by the Village Manager. Merit increases shall occur within the parameters of the Salary Adjustment Schedule and shall not exceed the maximum of the range for the position. Employees shall be evaluated every six months for the first two years of employment. Thereafter, they shall be evaluated annually on their respective anniversary date. For an employee assigned to a different pay grade, the effective date of the assignment shall be his anniversary date.

The Village's final offer on the salary schedule is as follows:

1 Structure of Salary Schedule

The Village's final offer on the structure of the salary schedule is to maintain the status quo without change, i.e., specify a minimum and maximum of the range for both Police Officer and Detective (perm. assignment) and continue to provide for movement through the range based on performance increases in accordance with the "Performance Increases" provision of the parties' 1993 collective bargaining agreement (see page 31 of the 1993-96 collective bargaining agreement) .

The salary structure in the 1993-1996 contract was negotiated by the parties. Arbitrator Raymond E. McAlpin declared in Lincoln County, 97 LA 786, 789 (1991), regarding an attempt by the union to change an existing provision in the collective bargaining agreement:

. . . This proposal significantly alters the bargaining relationship. As this Arbitrator has noted in other awards, the proponent of such change must fully justify that change, and provide strong reasons

and a proven need. This is an extra burden of proof. The proponent of such change must fully justify that change by exceptional arguments under the statutory criteria or show a quid pro quo was given or that other groups were able to obtain this change without a quid pro quo.

The Employer notes that in a local case, Village of Lombard, ISLRB Case No. S-MA-87-73 (January 1988), and specifically with respect to salary structure, arbitrator Herbert M. Berman asserted, "Without 'compelling evidence,' it is inappropriate for an arbitrator to disturb a wage structure the parties have agreed to in negotiations concluded within the year."

In an earlier case heard by the chairman, Village of Bartlett (August 27, 1990), he stated, "Most arbitrators are of the opinion that contract changes of a fundamental nature on so important an issue as salary structure should be left to the parties themselves in free collective bargaining." Had there not been an existing, negotiated salary structure in the collective bargaining agreement, then the Union's evidence showing that most of the comparable jurisdictions have a salary schedule in effect whereby employees move through the schedule so long as they have "meets standards" or "satisfactory" ratings would be very significant in deciding the issue. Where, however, the provision in question was negotiated in arms length bargaining in the immediately preceding collective bargaining agreement, as is the case here, then a much more compelling showing is required for the Union to prevail.

No such showing has been made in this case. The Union asserts in its brief that the Employer has adamantly expressed its opposition to negotiating a salary structure such as desired by the Union. No one, however, can provide a party with a guarantee that it will succeed in all of its negotiating aims. Expressed opposition, however, is not necessarily the last word. Perhaps with persuasive arguments or an adequate quid pro quo the Union will eventually succeed in achieving its goals in the area of salary structure.

The Union points to the example of an officer who was evaluated on his sixth anniversary in August, 1995, and received a "meets expectations" evaluation. The employee felt that he was not properly treated when the raise given him was \$192 short of maximum salary. The Employer points out, however, that the employee received a full five percent increase as contemplated under the salary advancement plan. Perhaps there was a failure of communication between management and the individual, but the example does not show abuse of the salary adjustment schedule.

The panel has considered all of the pertinent statutory criteria with regard to issue No. 1, salary structure, and a

majority of the panel finds for the Employer and adopts its final offer on this issue.

Issue 2 -- Salaries

The Employer's final offer on salaries is as follows:

Effective January 1, 1996:

<u>Position</u>	<u>Minimum</u>	<u>Maximum</u>
Police Officer	\$34,264	\$46,257
Detective (perm. assignment)	\$37,448	\$50,556

Effective January 1, 1996, (1) each Police Officer shall receive a minimum increase of 4.0% over the salary the Police Officer was receiving on December 31, 1995, provided that no Police Officer will be paid above the maximum of his pay range, and (2) each Detective (perm. assignment) shall receive a minimum increase of 2.5% over the salary the Detective (perm. assignment) was receiving on December 31, 1995, provided that no Detective (perm. assignment) will be paid above the maximum of his pay range.

Effective January 1, 1997:

<u>Position</u>	<u>Minimum</u>	<u>Maximum</u>
Police Officer	\$35,635	\$48,107
Detective (perm. assignment)	\$38,497	\$51,972

Effective January 1, 1997, (1) each Police Officer shall receive a minimum increase of 4.0% over the salary the police officer was receiving on December 31, 1996, provided that no police officer will be paid above the maximum of his pay range, and (2) each Detective (perm. assignment) shall receive a minimum increase of 2.8% over the salary the Detective (perm. assignment) was receiving on December 31, 1996, provided that no Detective (perm. assignment) will be paid above the maximum of his pay range.

Effective January 1, 1998:

<u>Position</u>	<u>Minimum</u>	<u>Maximum</u>
Police Officer	\$37,060	\$50,031

Detective (perm. assignment) \$39,652 \$53,531

Effective January 1, 1998, (1) each Police Officer shall receive a minimum increase of 4.0% over the salary the Police Officer was receiving on December 31, 1997, provided that no Police Office will be paid above the maximum of his pay range, and (2) each Detective (perm. assignment) shall receive a minimum increase of 3.0% over the salary the Detective (perm. assignment) was receiving on December 31, 1997, provided that no Detective (perm. assignment) will be paid above the maximum of his pay range.

The Union's final offer on salaries is as follows.

Effective January 1, 1996 increase the six (6) year (maximum) step by 6.5% and the starting (minimum) step by 4%, the Detective (minimum and maximum) by 4% and (assuming adoption of the Union's salary schedule proposal) the one (1) year through five (5) year steps based upon increments of \$2,184; Effective January 1, additional 4% and effective January 1, 1998 increase all steps by an additional 4% as described in "Appendix B". If the Union's salary schedule is not adopted, increase the minimum and maximum levels of the 1995 salary range by the above specified percentages to provide the minimum and maximum salaries indicated in "Appendix B".

Since the Union's salary schedule was not adopted, the Union's final offer on salaries as appears in Appendix B to its brief is as follows:

Effective January 1, 1996:

<u>Position</u>	<u>Minimum</u>	<u>Maximum</u>
Police Officer	\$34,264	\$47,369
Detective (perm. assignment)	\$37,996	\$51,296

Effective January 1, 1997:

<u>Position</u>	<u>Minimum</u>	<u>Maximum</u>
Police Officer	\$35,635	\$49,264
Detective (perm. assignment)	\$39,516	\$53,348

Effective January 1, 1998:

<u>Position</u>	<u>Minimum</u>	<u>Maximum</u>
Police Officer	\$37,060	\$51,234
Detective (perm. assignment)	\$41,096	\$55,482

One of the most important criteria in selecting between the wage or salary last offers of the parties is the comparison of wages or salaries with those of other employees performing similar services in public employment in comparable communities. Both sides have made such a comparison in their presentations and have prepared tables showing earnings by police officers in the years 1996, 1997, and, where available, 1998, in the communities that they consider to be comparable to Oak Brook.

The parties differ, however, regarding how the comparison should be made. The Employer contends that all comparisons should be made as of January 1 in any year, since that is the date when Oak Brook's fiscal year begins. The Union takes the position that comparisons of wage increases should be made on a fiscal year to fiscal year basis so long as the fiscal year of the comparison community starts within the first six months of the calendar year. Both sides make arguments in support of their positions.

Rather than extend this opinion by considering the respective arguments, the chairman has decided to use the alternative method of comparison which both sides have used in their briefs to some extent. He agrees with arbitrator Fleischli's comment in City of Elgin, quoted in the Union's brief. Arbitrator Fleischli states that the methodology such as used by the Employer in this case "tends to distort the rank comparison" but that "ignoring the differences in the start of the fiscal year among the various comparables also involves a distortion since it ignores the fact that firefighters receive their increase in wages that much sooner." He stated that "these concerns . . . can easily be dealt with by employing other methods of comparison as both parties have done."

The alternative method utilized here by both parties to some extent is to figure the actual dollar earnings in a particular year by the police officers in the comparable communities. For example, Hinsdale's fiscal year begins on May 1. To figure the dollar earnings of Hinsdale's officers in 1996, one would have to take the earnings at the 1995-96 rate for the first four months of the year; and at the 1996-97 rate for the last eight months of 1996. The chairman has used that method for all earnings tables which are found in this opinion.

The following table shows the dollar earnings at the

maximum base salary for the police officers in all comparable communities for 1995, as best the chairman could determine them. Neither side provided this information in its brief for 1995. Both sides provided this information for 1996 for their external comparisons. However, as to one of the two communities on both sides' lists of comparable jurisdictions, Willowbrook, the Union gave the earnings as \$49,052, and the Employer, as \$48,824. the chairman has used the Union's higher figure in the table, but then also calculated what the difference would have been had the Employer's salary figure been used.

The method used for figuring 1995 earnings was as follows. Where the chairman had a copy of the contract, and the contract had sufficient information to permit him to calculate the maximum base earnings for the calendar year 1995, he used the figure so obtained. Where the chairman did not have a contract with the necessary information, he worked backward from the 1996 figures he had. After ascertaining the correct amount for 1996, the chairman calculated the earnings for 1995 on the basis of the percentage increases for 1996 shown in the tables in Union Exhibit 19 and in the Employer brief at page 39.

Thus both parties agree that the dollar earnings by Hinsdale officers in 1996 were \$46,451. They also both agree that the increase in 1996 was 4.16%. The chairman divided \$46,451 by 1.0416 and got a quotient of \$44,595.81, which represented the earnings of Hinsdale officers in 1995. The chairman recognizes that this method is not exact, but in the absence of knowledge of the 1994-95 fiscal year maximum base salaries for the officers involved, or information regarding what the percentage increase was in 1995-96 over 1994-95, it was the closest he could come.

A word should be said about Bloomingdale. Bloomingdale is shown in Union Exhibit 19 as receiving a 11.40% wage increase. A footnote on the page explains that the percentage increase was based on elimination of steps 9 and 10 of the salary schedule in 1996-97 and an increase of the Step 8 salary from \$41,020 to \$45,697. Examination of the Bloomingdale contract, however, shows that step 8 was already the highest step in 1995-96. The increase in fiscal 1996-97, the contract shows, was 3%, from \$45,697 to \$47,068. In preparing my table of earnings for 1995, the chairman assumed that the highest salary earned in fiscal year 1994-95 was \$41,020.

Calendar 1995 Comparisons

1.	Willowbrook	47,165
2.	Lombard	45,450
3.	Elmhurst	45,823
4.	Burr Ridge	45,385
5.	Downers Grove	45,283

6.	Westmont	44,672
7.	Hinsdale	44,596
8.	Oak Brook	44,478
9.	Bensenville	43,566
10.	Westchester	43,416
11.	La Grange Park	42,921
12.	Bloomingtondale	42,579
13.	Western Springs	42,159
14.	Oakbrook Terrace	41,646

Average 44,205

Oak Brook .62% above the average

For 1996, with two exceptions, the chairman used the figures appearing in the Union brief at page 52 for the Union's proposed comparable communities; and at page 41 of the Employer's brief for the Employer's choices of comparable communities. The two exceptions are Lombard and Bloomingtondale, for which jurisdictions the chairman used his own calculations, which he thinks are correct. For Willowbrook the chairman has used the Union's higher figure in the table, but he has also calculated and stated what the effect would be in terms of the average if the Employer's lower figure were used. The chairman does not have sufficient information to choose between the two numbers.

The dollar earnings for the calendar year 1996 for the comparable communities and Oak Brook, using the Union's final offer, are as follows:

Calendar Year 1996 Comparisons - Union Offer

1.	Willowbrook	\$49,052
2.	Westmont	\$48,022
3.	Elmhurst	\$47,542
4.	Lombard	\$47,452
5.	Oak Brook (Union)	\$47,369
6.	Downers Grove	\$47,321
7.	Hinsdale	\$46,451
8.	Burr Ridge	\$46,293
9.	Bloomingtondale	\$46,154
10.	Bensenville	\$45,200
11.	Westchester	\$45,153
12.	La Grange Park	\$44,209
13.	Western Springs	\$43,635
14.	Oakbrook Terrace	\$43,103

Average \$46,122

Oak Brook (Union) 2.5% above the average

If the Employer's figure for Willowbrook (\$48,824) were used, the

average would be \$46,105, and the Union's offer would be 2.74% above the average.

Using the Employer's final offer, the dollar earnings for 1996 would be as follows:

Calendar Year 1996 Comparisons - Employer Offer

1.	Willowbrook	\$49,052
2.	Westmont	\$48,022
3.	Elmhurst	\$47,542
4.	Lombard	\$47,452
5.	Downers Grove	\$47,321
6.	Hinsdale	\$46,451
7.	Burr Ridge	\$46,293
8.	Oak Brook (Employer)	\$46,257
9.	Bloomington	\$46,154
10.	Bensenville	\$45,200
11.	Westchester	\$45,153
12.	La Grange Park	\$44,209
13.	Western Springs	\$43,635
14.	Oakbrook Terrace	\$43,103
	Average	\$46,122

Oak Brook (Employer) .29% above the average

If the Employer's figure for Willowbrook (\$48,824) were used, the average would be \$46,105, and the Employer's offer would be .33% above the average.

For 1997, the chairman used the following method for determining calendar year earnings. All of the communities but Burr Ridge and La Grange Park have collective bargaining agreements covering their police officers, and the chairman calculated 1997 calendar year earnings from the contracts. For Burr Ridge and La Grange Park, where the police officers are not represented by a labor organization, the chairman accepted the percentage increases shown in the Employer brief at page 39 for Burr Ridge and La Grange Park as accurate and assumed a May 1 beginning of the fiscal year for both communities.

The chairman then proceeded as follows for Burr Ridge. The maximum base salary earnings for a police officer in Burr Ridge in calendar year 1996 were \$46,293, which included a 2% increase in May, 1996. He used the formula $4x + 8(1.02x) = \$46,293$. In the formula "x" represents monthly earnings before the May 1, 1996, raise and "1.02x" stands for the monthly earnings for the remainder of the 1996 fiscal year after the 2% raise. Adding $4x$ and $8(1.02x)$ yielded a sum of $12.16x$, which, in turn, = \$46,293; or $x = \$3857.75$. $1.02x = \$3,934.91$, representing an officer's monthly earnings each of the first four

months of 1997; or a total of \$15,739.64 for the first four months of 1997. The 10.86% raise on May 1, 1997, brought the monthly earnings at the maximum base salary rate to \$4,362.24 for the remaining eight months in 1997, or a total of \$34,897.92 for the eight months. The total for the 12 months comes to \$50,637.56, or rounded out to \$50,638. The chairman used the same method to calculate 1997 calendar year earnings at maximum base salary in La Grange Park.

The following table shows the dollar earnings in calendar year 1997 for all of the comparable communities, with Oak Brook represented by the amount of the Union offer. The figures appearing for Lombard and Oakbrook Terrace are estimated figures, assuming a 4% increase for the 1997-98 fiscal year. No information regarding fiscal 1997 was presented for these municipalities either at the hearing or in the parties' briefs. The table uses \$51,014 for Willowbrook, which is how much calendar year earnings in 1997 would be assuming a 4% raise on May 1, 1997, calculated as described above for Burr Ridge, and 1996 calendar earnings of \$49,052 (the Union's figure). According to the Company's figure of \$48,824 for calendar year 1996, the calendar year earnings for 1997, with a 4% raise on May 1, would be \$50,777.

Calendar Year 1997 Comparisons - Union Offer

1.	Willowbrook	\$51,014	
2.	Burr Ridge	\$50,638	
3.	Westmont	\$50,410	
4.	Downers Grove	\$49,482	
5.	Elmhurst	\$49,404	
6.	Oak Brook	\$49,264	
7.	Lombard	\$49,195	(est. 4% increase)
8.	Hinsdale	\$48,019	
9.	Bloomington	\$47,700	
10.	Bensenville	\$47,008	
11.	Westchester	\$46,806	
12.	La Grange Park	\$45,980	
13.	Western Springs	\$45,245	
14.	Oakbrook Terrace	\$44,757	(est. 4% increase)

Average \$48,128

Oak Brook (Union) 2.36% above the average

If the Employer's figure for Willowbrook is used, calendar year earnings for 1997 were \$50,777 and the average for the comparable communities, excluding Oak Brook, was \$48,109, and the Union's offer would result in earnings 2.40% above the average.

Using the Employer's last offer, we get the following

comparisons for calendar year 1997:

Calendar Year 1997 Comparisons - Employer Offer

1.	Willowbrook	\$51,014	
2.	Burr Ridge	\$50,638	
3.	Westmont	\$50,410	
4.	Downers Grove	\$49,482	
5.	Elmhurst	\$49,404	
6.	Lombard	\$49,195	(est. 4% increase)
7.	Oak Brook (Employer)	\$48,107	
8.	Hinsdale	\$48,019	
9.	Bloomington	\$47,700	
10.	Bensenville	\$47,008	
11.	Westchester	\$46,806	
12.	La Grange Park	\$45,980	
13.	Western Springs	\$45,245	
14.	Oakbrook Terrace	\$44,757	(est. 4% increase)

Average \$48,128

Oak Brook (Union) .04% below the average

If the Employer's \$50,777 figure for Willowbrook is used, the average for the comparable communities, excluding Oak Brook, as already noted, was \$48,109, and Oak Brook was just \$2.00 below the average.

The Union contends that its final offer of a 6.5% increase for the first year should be granted because as of the end of the 1995 contract year Oak Brook's maximum base salary was 4.47% below the average of comparable communities. That was true, however, only in comparison with the jurisdictions proposed by the Union including Libertyville, Wilmette, Lincolnwood, and St. Charles. The chairman has excluded them as comparable communities for the reasons explained in the section dealing with selection of comparable communities. The tables above show that, based on the comparable jurisdictions selected by the majority of the panel, Oak Brook ended the 1995 contract year slightly above the average of all of them, excluding Oak Brook.

Under the Employer's final offer, Oak Brook remains slightly above the average as of the end of the 1996 contract year. It ranked 8th among 14 at the end of 1995 and will retain that ranking under the Employer offer at the end of 1996. Considering the much larger communities in the comparable group, both in size of population and number of officers in the department, a ranking of 8 is not low. Indeed, in Union Exhibit 7, a police officer is cited as stating that Oak Brook's salary "is not competitive with surrounding communities' police forces of similar size." (emphasis added). As of the end of 1997 under

the Employer offer, Oak Brook would move up to 7th place in the ranking.

Downers Grove, Elmhurst, and Lombard both have populations four or five times that of Oak Brook, and their department sizes exceed Oak Brook's by 57% to 70%, accepting the Union's figure of a 40 person department at Oak Brook. They were included as comparable communities on the basis of geographical proximity and some similar demographics, using the reasoning of the City of Alton decision. They also are all covered by collective bargaining agreements, which, while not a sine que non for inclusion, nevertheless is another thing that they have in common. Nevertheless because of the much larger departments in those communities and much greater ratio of population to police, the working conditions are likely to be different and perhaps less pleasant. Given the differences between those municipalities and Oak Brook, it is not surprising that the salaries should also vary to some degree.

The Union emphasizes the wealth and financial resources of Oak Brook. If Oak Brook police officers ranked near the bottom of the comparable group or if the salary offer of Oak Brook was low compared with the others in the group, ability to pay would be an important consideration. The Oak Brook officers do not rank near the bottom, and the 4% offer for each of three years is well within the mainstream of percentage increases for the comparable communities as shown in Union Exhibit 19 and page 39 of the Employer brief. So far as morale is concerned, it is hoped that the 4% increases for each year, which thus far exceed the cost of living increases in the Chicago area the past two years, will counteract any negative feelings resulting from low salaries.

In its brief, the Union directs the arbitrator's attention to Union Exhibit 7, the lead article in the December 11, 1996, issue of "The Press," a daily newspaper in Oak Brook, which has already been referred to in this opinion. According to the article, which devotes substantial space to complaints by a police officer of low wages at Oak Brook compared with wages in surrounding communities, "Salaries for senior officers in Elmhurst, Villa Park and Lombard are currently \$48,121, \$48,212 and \$48,225, respectively." The article further states, "A senior patrol officer in the Oak Brook Police Department is currently paid an annual salary of \$44,478." Thus a year ago, according to the article, the difference between a senior officer's salary in Elmhurst and a senior officer's salary in Oak Brook was \$3,643. Now one year later, as the table above shows, the difference in annual earnings of a senior officer in Elmhurst and a senior officer at Oak Brook is \$1,297.

The article describes a disparity of \$3,747 between the salary of a senior officer in Lombard and a senior officer in Oak

Brook as of December 11, 1996, which, of course, was before the Employer had offered 4% salary increases for each year of the contract. Under the Employer's last offer for 1996, however, the disparity on a calendar year basis will have been reduced to \$1,195. The figures for Lombard for 1997 are not available, so no comparison is yet possible for that year except on an estimated basis.

The Union brief also directs the chairman's attention to a critical editorial in "The Doings" newspaper of December 25/27, 1996. The editorial criticized a Village offer of a 5.5 percent wage increase over three years, which the writer stated was "hardly enough to keep up with the cost of living. . . ." The current Employer offer is twice the one criticized and outpaces the cost of living increase thus far for the first two years of the Agreement.

Bearing the foregoing comments in mind, the chairman of the arbitration panel will now address the specific statutory issues as they affect the salary issue:

1. The lawful authority of the employer. The Employer may lawfully accept either the Union's or its own last offer on the salary issue. This criterion does not favor either side.

2. Stipulations of the parties. The chairman has accepted as factual any stipulations of the parties regarding facts in this case. He is not aware of any stipulations directly pertaining to how the salary issue should be resolved.

3. The interests and welfare of the public and the financial ability of the unit of government to meet those costs. The Union contends that the interests and welfare of the public are adversely affected by the Employer's final offer because it does not significantly remedy existing inequities between Oak Brook police officers and those in comparable communities and thereby negatively affects employee morale. The chairman thinks that this could have been true of the Employer's original offer. It should not be true, however, of the current Employer offer, which is well in line percentagewise with those of the other jurisdictions and on a dollar basis places Oak Brook approximately in the middle of the comparable communities. From a financial standpoint the Employer is able to meet the costs of either party's offer.

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. No evidence was presented pertaining to comparisons

with employees in private employment.

The aspect of the Union's offer which prevents the chairman of the arbitration panel from adopting it is the 6½% increase in salary proposed for the first year of the contract. This far exceeds the average percentage increase for 1996 shown on either Union Exhibit 19 or the Employer table of percentage increases in its brief. It is significantly higher than any of the percentage increases shown for 1996 in the Employer brief. It is also higher than 10 of the 12 percentage increases shown on Union Exhibit 19 for 1996. Nor does any of the increases for 1997 or 1998 on the Union exhibit approach 6½%. Only one of 12 percentage increases for 1997 and 1998 shown in the table in the Employer brief exceeds 6½%. For the remaining 11, 4% is the highest percentage increase shown.

Nor does the chairman think that he would be justified in adopting a 6½% increase for 1996 on the basis of "catch-up" or pay equity considerations. The Employer's salary offer leaves the bargaining unit at the end of 1996 and 1997 in approximately the middle of the comparable communities in terms of dollars earned. Too few settlements have been reported for 1998 to make a definitive judgment, but the emerging pattern indicates that a 4% increase for 1998 will be in line with increases in other jurisdictions.

5. The average consumer prices for goods and services commonly known as the cost of living. This criterion favors the Employer's proposal. The Employer's and Union's proposals for the first two years of the contract both exceed the increase in the cost of living in the Chicago area during this period. The Union's offer, however, exceeds it by a much greater amount than the Employer's.

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. Neither side presented evidence to any degree regarding this criterion.

7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings. All changes which occurred which were brought to the chairman's attention were duly taken into account.

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. Arbitrator Steven Briggs, in

City of Elmhurst and Elmhurst Professional Firefighters Association, IAFF Local 3541, decided on April 20, 1997, stated at page 31, "A fundamental purpose of interest arbitration is to approximate what the parties would likely have negotiated themselves through the process of free collective bargaining." Many other arbitrators have echoed that sentiment.¹ In view of the sizes of salary settlements thus far negotiated for police officers in the greater Chicago area for 1996, it is more likely that in free collective bargaining the parties would have agreed to a 4% wage increase for the first year of the contract than a 6½% increase.

For the reasons stated, the chairman of the arbitration panel adopts the Employer's final offer on the salary issue.

Detectives

A word should be said about the detectives. The proposal by the Village to pay a lesser increase to detectives than police officers is a departure from the prior contract, which made no distinction in terms of salary increases between police officers and detectives. Had the chairman been faced with the choice of adopting 4% increases for each of three years for all bargaining unit personnel, detectives and police officers, and 4% for police officers and a lesser amount for detectives, he would have a different situation than now confronts him. As it turns out, the Union's offer also provides for a lesser increase for detectives than for police officers for the first year of the contract. For that reason and the more important consideration that there are only two detectives on permanent assignment on the force and 38 or 39 police officers, the chairman will not withhold adoption of the Employer's offer because of its smaller increases allotted for detectives than for police officers. The chairman would also note that there is very little in the record to permit of comparison between the Village's treatment of detectives salarywise and their treatment with regard to salary in other jurisdictions. Nevertheless the Employer appears to have accomplished a separation of detectives from police officers in terms of salary treatment, as compared with the salary treatment of detectives in the previous collective bargaining agreement between the parties, without any quid pro quo for the improvement achieved.

¹See, for example, Pan Am World Services, 93 LA 348, 352 (Charles J. Morris, 1989): . . . "[T]he interest arbitrator should endeavor, whenever reasonably possible, to achieve a result which the parties themselves would likely have achieved had they exhausted the normal collective bargaining process."

Issue 3 - Performance Stipend

Article XI, SALARIES AND ECONOMIC BENEFITS, Section 1, Salaries, contains a provision entitled Length of Service Performance Stipend, which provides a "performance stipend" for employees with at least ten years of service who are rated "Exceeding Expectations" or "Excellent." The provision gives the amounts of the stipends and concludes with a clause regarding grievances. The only change the Employer proposes to make is in the amounts of the stipends. The Union wishes to change the basis on which the stipends are awarded. The parties' respective offers follow:

The Employer's Final Offer

Length of Service Performance Stipend --

Employees who are at the maximum of their pay grade, who have at least ten (10) or more years of full-time service, and who are rated "Exceeding Expectations" or "Excellent" shall receive a performance stipend annually in January of each calendar year as follows:

<u>Years of Service</u>	<u>Exceeding Expectations</u>	<u>Excellent</u>
10-14 yrs.	\$250	\$500
15-19 yrs.	\$375	\$750
20 yrs. and over	\$500	\$1,000

Effective January 1, 1997, employees who are at the maximum of their pay grade, who have at least ten (10) or more years of full-time service, and who are rated "Exceeding Expectations" or "Excellent" shall receive a performance stipend annually in January of each calendar year as follows:

<u>Years of Service</u>	<u>Exceeding Expectations</u>	<u>Excellent</u>
10-14 yrs.	\$300	\$600
15-19 yrs.	\$450	\$900
20 yrs. and over	\$600	\$1,200

Effective January 1, 1998, employees who are at the maximum of their pay grade, who have at least ten (10) or more years of full-time service, and who are rated "Exceeding Expectations" or "Excellent" shall receive a performance stipend annually in January of each calendar year as follows:

<u>Years of Service</u>	<u>Exceeding Expectations</u>	<u>Excellent</u>
10-14 yrs.	\$350	\$700
15-19 yrs.	\$525	\$1,050
20 yrs. and over	\$700	\$1,400

Grievances Concerning Performance Increases and Length of Service Performance Stipends. If an employee believes that the Village has acted arbitrarily, unreasonably, or discriminatorily with respect to either a performance increase or a length of service performance stipend, then the employee may grieve the matter in accordance with the grievance and arbitration procedure set forth in this Agreement.

The Union's Final Offer

Length of Service Stipend -- Employees who are at the maximum of their pay grade and who have at least ten (10) years or more of full-time service shall receive a service stipend as follows:

<u>Service in Oak Brook Police Department</u>	<u>Length of Service Pay Based on Max Base Salary</u>
Upon completion of 10 years of service but less than 15 years	\$600
Upon completion of 15 years of service but less than 15 years	\$900
Upon completion of 20 years of service or more	\$1,200

All eligible employees who are rated acceptable or meeting Village Standards on the Village's annual performance appraisal shall be paid the stipend.

Grievances Concerning Performance Increase and Length of Service Performance Stipends. If an employee believes that the Village has acted arbitrarily, unreasonably, or discriminatorily with respect to either a step/performance increase or a length of service performance stipend, then the employee may grieve the matter in accordance with the grievance and arbitration procedure set forth in this Agreement.

DELETE BALANCE OF \$1 AND \$2 ON PAGE 32 OF CONTRACT AS INDICATED.

The Union's Position Regarding Performance Stipend

The Union contends that its proposal is an appropriate method for restoring the performance stipend benefit and compensation previously enjoyed by officers prior to the Village's unilateral change in eligibility standards in 1994. The Union cites the testimony of police officer Brian Molloy who stated that there has been a huge reduction in the number of people receiving performance stipends. The reduction was accomplished, the Union asserts, by changing the standards for administering performance evaluations. The Union notes that in 1992 all 13 officers eligible for a stipend received one either because of an "Exceeding Expectations" or an "Excellent" performance rating. The Union suggests that the Village "implemented this change in something less than a forthright manner" because officers were not made aware of the change until they received a copy of a memo sometime in February after a sergeants' meeting to discuss the changes. The Union argues that it was not until May, 1996, after a freedom of information request regarding payment history of the performance bonus, that the officers fully appreciated the impact of the change in administration of the performance reviews. Consequently, the Union asserts, "The Impartial Chairman should not afford the method of administering performance stipends which the Village is seeking to maintain, the same deference as he would a fully negotiated and bargained condition of employment." The Union argues that adopting its proposed standard will make more employees eligible for the stipend but assures the arbitration panel that it does not seek to change the evaluation form or the method of applying the criteria to achieve a "Meets Standards" rating. An officer must perform very well to obtain an "Acceptable" rating, the Union asserts.

A majority of comparable jurisdictions--seven of twelve--, the Union argues, receive a longevity or performance stipend, with the standard in five of the seven being strictly longevity. According to Union testimony, in jurisdictions with a performance as opposed to longevity standard, a higher proportion of the officers receive stipends than at Oak Brook since the latter's evaluation standards have been tightened. This exacerbates the shortfall in earnings at Oak Brook, the Union maintains.

The Union next argues that adoption of the Union's proposal would eliminate a major source of frustration among members of the bargaining unit with respect to the administration of the evaluation system. The current system at Oak Brook, the Union contends, is unfairly administered so that it is unduly difficult if not impossible to score high enough to get a

stipend. The Union quotes testimony showing the reluctance of officers to file a grievance regarding an evaluation. It cites an example which it views as evidence of a conflict of interest between the rating supervisor and the officer being rated. The Union notes a coincidence between the date of unionization and the date in the change in the evaluation system and suggests that there may be a correlation. It cites what it believes to be examples of antiunion animus.

The Employer's Position Regarding Performance Stipend

The Employer takes the position that the arbitrator should not dramatically alter the parties' negotiated agreement on performance stipends in the absence of a compelling justification. The Employer observes that a Union witness acknowledged that the change in the evaluation system was communicated to employees and became common knowledge on or about February 4, 1994--more than a month prior to the date that the parties' first collective bargaining agreement was executed on March 7, 1994. The Employer acknowledges that the number of police officers receiving performance stipends has decreased but notes that stipends are still being received. The Employer points out that the number of officers eligible for a stipend has also declined, from 13 in 1992 to 11 for 1994-1996. Since the Union signed the contract knowing of the new evaluation system and its probable impact on the receipt of performance stipends, the decrease in the number of officers receiving the performance stipend should not be given any weight, the Employer argues. According to the Employer, "Interest arbitrators in Illinois have rather uniformly rejected efforts by either party to significantly change compensation plans previously agreed to in arm's length negotiations." Lowering the standard for a stipend to merely "Meets Standards," the Employer argues, "would virtually insure that every police officer who had the requisite years of service would receive the designated stipend." The Employer stresses management's philosophy regarding compensation that "there needs to be a different reward for continuing to perform at a high level as opposed to continuing to perform or merely performing at an average level." The Employer contends that doing away with the performance component of the stipend program would restrict its ability to motivate employees to do more than merely meet standards.

The Village further argues that the substantial increases it has included in the performance stipend and external comparability data also support acceptance of its final offer. Nor, the Employer asserts, has any jurisdiction which did not have performance/longevity pay in 1995 adopt it thereafter or vice versa. The Employer argues that the evaluation system is a fair one and is administered fairly.

Analysis and Conclusions

The critical fact in this case is that the bargaining unit was aware approximately a month before the first collective bargaining agreement was signed that the method of evaluation was being changed. Thus Officer Molloy testified that a memo about a sergeant's meeting held on February 3, 1994, to discuss performance evaluations was put in his box "Sometime right after the meeting." The memo contained the following statement:

The past practice of the majority of employees getting exceeding standards or excellent ratings will no longer be the case. Some employees may receive above standards or excellent ratings but they will more than likely be in the minority.

According to Molloy, the language about the change in the evaluation method was highlighted on the memo given to him. It would not be reasonable to believe that the content of the memo did not become common knowledge at about the time Officer Molloy received it.

The burden falls on the party wishing to change existing contract language to produce compelling evidence justifying the change. The chairman thinks that the record falls substantially short of meeting that burden in this case. For example, the evidence regarding comparable jurisdictions shows that approximately half of them either have no longevity or performance stipend or, if they do, that it is based on merit. This is not therefore a situation where an overwhelming number of comparable municipalities have a contract provision similar to the one desired by one party and resisted by the other. In addition, the Union has offered no quid pro quo which might justify an arbitrator in adopting a proposed change in a negotiated contract provision over the strong opposition of the other party.

The existing contract has a very strong management rights clause, indicating that directing the work force and establishing work and productivity standards are very important to the Employer. Whether to raise salaries solely on the basis of length of service or to include a merit component and, if so, to what degree, go to the heart of the management function. An arbitrator must hesitate before taking the right to make such decisions away from management after it has succeeded in negotiating specific contract language reserving such right to itself.

Finally the chairman finds troubling the failure of the Union or the bargaining unit to file a grievance challenging either an unfair evaluation system or the application of that system in individual cases if, as it claims, the system or its

application is unfair. If grievances have been filed, they certainly have not been taken to arbitration. The contract expressly provides the right to grieve arbitrary, unreasonable, or discriminatory actions by the Employer with respect to performance stipends. The chairman believes that the language is broad enough to include challenges to both the method (for example, the fairness or validity of the evaluation document) and the application of the method with respect to individual officers. There was some testimony about an officer being "scared" to file a grievance, but no evidence was presented that officers have a reasonable basis for fearing retaliation should they grieve an evaluation with which they disagree. The chairman will adopt the Employer's last offer on the performance stipend issue.

Issue 4 - Retroactivity

The Employer proposes to withhold retroactivity from all bargaining unit employees not on the payroll as of the date of this award, except for employees who retired. The Union requests retroactive payment for all persons who were employees during the term of retroactivity, whether presently on the payroll or not and, in the latter case, regardless of the reason that the individual left the Village's employ.

The chairman adopts the Union's last offer on retroactivity. The example cited by the Employer of the signing bonus in the last contract, which was payable only to persons employed on January 1, 1993, and the date of ratification is not parallel to this situation. The ratification bonus was not based on hours worked or a benefit previously earned under the terms of the contract and, therefore, could not be tied into past service performed for the Employer. The present retroactivity clause speaks of retroactive pay "on an hour for hour basis. . . ." It clearly relates to actual work performed or to a benefit earned under the terms of the collective bargaining agreement. It is difficult to rationalize withholding from someone payment for work performed or otherwise earned merely because he or she is no longer employed by the Village. The signing of the contract is an acknowledgement that a fair rate of payment for the work performed in 1996 and 1997 was above what the Village actually paid for that work. Whoever performed that work is entitled to the higher payment, not only those who retired or who are still employed as of the date of this opinion. In addition, to withhold payment from those individuals tends to encourage delay in reaching settlement of a contract and executing it. As at least one of the five arbitration cases cited by the Union in support of its position noted, it is also unfair to penalize an employee for the parties' delay or delay built into collective bargaining or the interest arbitration procedure. For the reasons stated the chairman adopts the Union's last offer on the

issue of retroactivity.

Issue 5 - Fair Share

Employer Offer

The Employer's final offer on fair share is to retain Article III, Section 2 without change.

Union Offer

The Union final offer on fair share is to delete a paragraph from the 1993-96 collective bargaining agreement and add the following sentence:

An exception to the fair share obligation shall be allowed for PAUL STADWISER during his current tenure of employment except that he may choose to pay fair share fees on his own initiative.

The paragraph which the Union seeks to delete provides as follows:

The foregoing fair share fee obligation shall not apply to any employee in the bargaining unit as of the date this Agreement is ratified by both parties who is not a member of the Union on that date.

The impartial chairman is persuaded that the paragraph the Union wishes to remove was intended to apply only to police officers in the bargaining unit who were not members of the Union on the date the original agreement was ratified. It was not intended to apply to employees not in the bargaining unit at the time of ratification of future contracts. Accordingly the chairman will adopt the Union's offer on this issue with the following modification. The chairman agrees with the argument in the Employer's brief that the proposed new language could be stigmatizing to the individual named therein. He therefore directs that more general language be used to accomplish the Union's purpose. For example, language such as the following may be used (or anything similar thereto which satisfies the Union's purpose):

The foregoing fair share fee obligation shall not apply to any employee in the bargaining unit as of the date of ratification of the 1993-96 collective bargaining agreement between the parties who was not a member of the Union on that date.

Issue 6 - Discipline

Employer's Final Offer

The Employer proposes to maintain the status quo with regard to discipline. Accordingly the Employer would retain the following language which appears as Article XIV, Section 7 of the 1993-1996 Agreement:

ARTICLE XIV - MISCELLANEOUS

* * *

Section 7. Discipline. The parties agree that all disciplinary matters shall be subject to the jurisdiction of the Village of Oak Brook Board of Fire and Police Commissioners and shall not be subject to the grievance and arbitration procedure set forth in this Agreement (Article V).

Union's Final Offer

The Union proposal is to delete the existing language and to substitute the following in Section 7 of Article XIV.

ARTICLE XIV - MISCELLANEOUS

* * *

Section 7. (a). Disciplinary Action. When the Employer believes just cause exists to institute disciplinary action, the Employer by its agents shall have the option to assess the following penalties depending upon the seriousness of the offense:

Oral reprimand
Written reprimand
Suspension
Discharge

The authority of the Police Chief to reprimand or suspend and the Board of Fire and Police Commissioners to suspend or discharge shall be exercised in accordance with the authority granted by the Municipal Code, 65 ILCS 5/10-2.1-17.

(b) Grievances As To Disciplinary Action. Grievances may be filed with respect to any disciplinary action (other than an oral reprimand) taken against an employee when an employee believes the disciplinary action taken is not for just cause. If the disciplinary action is a

suspension ordered by the Police Chief, the grievance shall be filed in the first instance at Step 3 of the grievance procedure within ten (10) calendar days of the imposition of discipline, and shall thereafter be processed in accordance with Article V of this Agreement.

If the disciplinary action is for a suspension or discharge within the authority of the Board of Fire and Police Commissioners (hereinafter "Board"), a grievance as to such disciplinary action may be filed and referred to arbitrator [sic] according to the following procedure:

1. At the time that the Chief files charges with the Board, he shall notify the affected employee and the Union of such action.

2. The employee and/or the Union may then file a grievance contesting the just cause of such charges. Such grievance shall be filed within seven (7) days of receiving notice and shall be initially filed with the Chief with a copy to the Board.

3. If a grievance is filed, it may be referred to arbitration in accordance with the provisions of §5.2 Step 4, except that the notice of referral to arbitration shall be given within ten (10) days of the date the grievance is filed.

4. If the grievance is referred to arbitration by the Union, the following additional conditions shall apply:

- A. The notice to refer the disciplinary grievance to arbitration of a disciplinary grievance shall be signed by the Union Secretary or his designee and shall also contain a signed statement from the affected employee(s) waiving any and all rights he/she may have to appeal the subject action to the Board (in the case of disciplinary action imposed by authority of the Police

Chief) or to seek judicial review pursuant to the Administrative Review Act (in the case of disciplinary action imposed by order of the Board). Any notice of referral to arbitration filed without the required signed waiver shall not be arbitrable and the arbitrator shall be without jurisdiction to consider or rule upon it. Any appeal for judicial review of an arbitrator's award shall be in accordance with provisions of the Uniform Arbitration Act, 710 ILCS 5/1.

B. Upon receipt of such notice referring the grievance to arbitration, the Board may issue a final order implementing the Chief's disciplinary action specified in the Chief's charges filed with the Board without further hearing. After the Board has entered its order, the grievance as to whether such Board action is supported by just cause shall be heard before an impartial arbitrator as provided in Step 5 of the grievance procedure (Article V, §4) unless the grievance is settled upon terms acceptable to the Union, the employee and the Village.

5. If no grievance is filed or the Union does not refer the grievance to arbitration, the charges shall proceed to hearing and determination by the Board.

The Union's Position Regarding Discipline

In the arbitration proceeding the Employer made known its position that because Oak Brook is not a home rule jurisdiction, it does not have the lawful authority to adopt any disciplinary procedure other than the one specified in the Board of Fire and Police Commissioners Act (hereinafter "BFPCA"). The Union disagrees with that position and contends that City of Decatur v. AFSCME, Local 268, 122 Ill.2d 353, 522 N.E.2d 1219 (1988) (hereinafter "City of Decatur"), supports its position that making discipline subject to the contractual grievance

procedure is a bargainable issue regardless of whether the municipality is a home rule jurisdiction.

The Union maintains that its final offer on discipline does not supplant the disciplinary procedures provided for in the BFPCA but "impacts only on optional rights reserved to the employee with respect to the statutory procedures, to wit: (1) the right to a hearing before the Board before final disciplinary action is ordered; (2) the right to seek 'judicial review' of the Board's decision pursuant to the Administrative Review Act; and (3) the right to appeal the Police Chief's order of suspension of five days or less to a hearing before the Board" The Union argues that its final offer is consistent with the accommodation provision in Section 7 of the IPLRA because its proposal for grievance arbitration of discipline is not a substitute for disciplinary action by the Board but, rather, supplements the employee's optional due process rights. Its interpretation of Section 7, the Union asserts, coincides with the Illinois Supreme Court's interpretation in City of Decatur.

Although the City of Decatur is a home rule jurisdiction and Oak Brook is not, the home rule status of Decatur was not a determinative consideration in the Court's decision in the Union's view. The essential point made by City of Decatur, in the Union's interpretation, is that the civil service statute, which the City relied on, was itself discretionary or optional. In the same vein, the Union argues, the review or appeal provisions in the BFPCA are discretionary with the employee since he has no obligation to contest charges in a hearing before the board of fire and police commissioners or to appeal or seek review of disciplinary action taken against him.

The Union stresses that the IPLRA does not distinguish between employers based on whether they are home rule or not home rule jurisdictions or afford employees of the latter municipalities lesser rights to collectively bargain. It argues that the Employer has cited no authority which renders the City of Decatur decision inapplicable here. Parisi v. Jenkins and Village of Worth, 236 Ill. App.3d 42, 603 N.E. 2d 566 (1992) is distinguishable, the Union asserts, because it summarily defined cause for discharge and did not allow for a hearing or any determination of the issue by the police board whereas the Union's proposal in this proceeding preserves without modification the employees' statutory rights to a hearing before the board of fire and police commissioners. In addition, the Union points out, Parisi does not even mention City of Decatur, and the case which the Parisi court found dispositive of the issue, Weisenritter v. Board of Fire and Police Commissioners, 67 Ill. App.3d 799, 385 N.E.2d 336 (1978), predated the IPLRA by six years and involved a home rule city. A second case relied on by Parisi, the Union notes, County of Cook v. Illinois Local Labor

Relations Board, 204 Ill. App.3d 370, 561 N.E.2d 1089 was reversed by the Illinois Supreme Court, 145 Ill.2d 475, 482 (1991), on the basis of City of Decatur. In addition, the Union relies on a decision by Judge Michael Brennan Getty involving a non-home rule municipality, in City of Markham v. IBT Local 726 (November 26, 1996), which upheld language very similar to the Union's final offer in this case.

The Union maintains that Rockford School Dist No. 205 v. Illinois Educational Labor Relations Board, 165 Ill.2d 80, 649 N.E.2d 369 (1995), relied on by the Employer, is also distinguishable because Rockford is based on Section 10(b) of the Illinois Educational Labor Relations Act (hereinafter "IELRA"), which is more restrictive than the accommodation provision of Section 7 of the IPLRA, relied on in City of Decatur. In Rockford the Court held that the implementation of the "just cause" provision of the parties' collective bargaining agreement with respect to a "notice of remedy" issued to a tenured teacher was inconsistent and in conflict with Sections 10-22.4 and 24-12 of the School Code and that therefore an arbitration award pursuant to the just cause provision violated Section 10(b) of the IELRA.

The Union argues that the rights of police officers before the board of fire and police commissioners are very different from the rights available to teachers under the School Code in the following ways: 1) the board of fire and police commissioners is not an impartial body such as the hearing officer under the School Code and the Union's arbitration proposal; 2) the board of fire and police commissioners may uphold discipline in situations where, under a just cause standard, the discipline would not be allowed; 3) the statutory scheme allows the Employer to increase the penalty against employees who choose to challenge a suspension ordered by the police chief and is inconsistent with a just cause standard and a substantial deterrent to employees' exercising their appeal right.

The Union argues that since City of Decatur there has been an increasing trend among employers and arbitrators to recognize the just cause standard as an enhanced level of due process that should be afforded to police officers and fire fighters. It contends that at least some members of the Oak Brook police department lack confidence in the impartiality of the Commission. The Union calls attention to the fact that in the hearing before the Circuit Court on police officer Martin Zelisko's appeal of his 30 day suspension, the judge stated, "I further find that no reasonable unbiased trier of fact could have reached the conclusion reached by the Board of Fire and Police Commissioners as to any of the allegations." The Union also notes the dissenting opinion of Commissioner John W. Craig in the Zelisko disciplinary proceeding. The Union, in addition,

questions the fairness of disciplinary action taken against police officer Don Malec.

The Union takes the position that the fact that it first presented its proposal regarding the disciplinary procedure on October 23, 1996, when this matter was first scheduled for interest arbitration before a different arbitrator is not a basis for depriving the arbitration panel of jurisdiction over the discipline issue. It asserts that there is no statutory or contractual time limit on raising contract issues and that Section 14 of the IPLRA "contemplates a dynamic rather than a static bargaining process." The Union's proposal on discipline, it states, "cannot be postponed for two or three years without the prospect of bargaining unit members incurring injury." The Union asserts that following the scheduled October 23, 1996, arbitration, which, instead, was utilized as a mediation session, the Village had a period of over six months, including three bargaining sessions, during which it had the opportunity to engage in bargaining regarding the discipline issue.

The Employer's Position Regarding Discipline

The Employer contends that since discipline was not a disputed issue when the parties initiated interest arbitration, the Union has waived its right to raise that issue in this case. The Employer asserts that the Union presented comprehensive proposals at the outset of negotiations in November, 1995, but first placed discipline on the table at the October 23, 1996, mediation session. It is contrary to the good faith bargaining obligation, the Employer maintains, to raise an entirely new issue nearly a year after the parties commenced negotiations for a new contract.

The Employer further argues that the arbitration panel has no authority to issue an award based on the Union's proposed disciplinary procedure since it directly conflicts with the disciplinary procedure specified by Illinois statute which is mandatorily applicable to non-home rule jurisdictions with a population of 5,000 or more. Non-home rule municipalities like Oak Brook, the Employer asserts, lack any inherent governmental powers not specifically provided by the State ("Dillon's Rule"). Therefore, the Employer maintains, when the State mandates through the BFPCA that the Village follow certain disciplinary procedures in disciplining employees, the Village has no power to do otherwise. Just as the Village lacks power to ignore the legislative mandates in the BFPCA and create alternate procedures for disciplining employees, the Employer argues, likewise an interest arbitrator possesses no such authority.

The Employer rejects the Union contention that a police officer can waive his right to judicial review of a decision of

the board of police and fire commissioners imposing suspension or discharge and seek arbitral review instead. Illinois courts, the Employer stresses, have held that the Administrative Review Law is the exclusive means of reviewing a final decision rendered by a board of fire and police commissioners. This exclusive means of review is predicated upon important policy considerations, the Employer argues, quoting the following explanation from a 1994 Illinois Appellate Court decision: "(1) the elimination of conflicting and inadequate common law and statutory remedies for the judicial review of decisions of administrative agencies and the substitution therefor of a single, uniform and comprehensive remedy; and (2) to make available to persons aggrieved by administrative decisions a judicial review consonant with due process standards without unduly restricting the exercise of administrative judgment and discretion essential to the effective working of the administrative process.

The accommodation provision of Section 7 of the IPLRA does not help the Union's case, the Employer contends, because the BFPCA specifically mandates that "The provisions of the Administrative Review Law . . . shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners hereunder." Therefore, the Employer's argument continues, "because the discipline of police officers is 'specifically provided for' in the BFPCA, it is excluded from bargaining pursuant to Section 7 of the IPLRA and the Arbitrator has no authority to rule otherwise."

The City of Decatur decision, the Employer maintains, fully supports its position. The Employer notes that City of Decatur rejected the ISLRB's broad reading of Section 7, which would have eliminated any potential conflict between another statute and the bargaining duty prescribed by the IPLRA. Further, the Employer asserts, the Court held that to determine whether a statute overrides the bargaining duty imposed by the IPLRA, the nature of the other law must be considered. The critical fact in City of Decatur, as the Employer reads the decision, is that the other law was "an optional scheme and not one imposed by the State on any municipal body" so that the city was free to alter or eliminate the features in the civil service system upon which the union sought to bargain. By contrast, the Employer emphasizes, the BFPCA is mandatorily applicable to Oak Brook, and Oak Brook, as a non-home rule municipality, has no inherent authority to alter or abolish BFPCA. It follows therefore, the Employer contends, "that because the BFPCA is mandatory on non-home rule entities, employee discipline in such municipalities is not a proper bargaining subject" and the arbitrator "has no authority to award such a contract provision."

The Employer argues that the Circuit Court opinion in City of Markham is in error in holding that it is "in accord with

the decision of the Supreme Court in City of Decatur" The City of Markham decision, the Employer argues, ignores language in City of Decatur which rests the decision on the home-rule status of Decatur and also ignores the Supreme Court's holding in AFSCME v. County of Cook, 145 Ill.2d 475, 584 N.E.2d 116 (1991), which reaffirmed its holding in City of Decatur. County of Cook, the Employer points out, rested its holding that the county had a duty to bargain with the union over its civil service commission's examination requirements on the fact that the civil service provisions at issue were not mandatory and, therefore, the county, with home-rule powers, could unilaterally alter, amend, or abandon the provisions. The County of Cook decision, the Employer argues, shows that Decatur's home rule status was not merely collateral to the Court's ruling as the Circuit Court found in City of Markham.

Also supporting its position, the Employer asserts, are Parisi v. Jenkins, 236 Ill. App.3d 42, 603 N.E.2d 566 (1st Dist. 1992), appeal denied 148 Ill.2d 644, 610 N.E.2d 1267 (1993) and Rockford School Dist. No. 204 v. Illinois Educational Labor Relations Board, 165 Ill.2d 80, 649 N.E.2d 369 (1995). These cases hold, the Employer asserts, that a bargaining proposal which does not merely supplement but conflicts with or abrogates an act in the Illinois statutes is not an appropriate subject for collective bargaining. In this case, the Employer argues, the Union's final offer does not supplement the BFPCL, but instead supplants it and makes it inapplicable, because it allows an employee to appeal both suspensions of less than five days and suspensions of more than five days and terminations to arbitration as long as the Union concurs.

On the merits, the Employer contends that there are at least five compelling reasons why the arbitration panel should not disturb the parties' voluntarily negotiated agreement concerning the forum for disciplinary appeals: (a) the parties' collective bargaining history supports acceptance of the Village's final offer; (b) the Union has not carried its burden of proving a compelling need to change the status quo; (c) the Union has not offered the Village a quid pro quo; (d) the comparability data do not support the Union's proposal; and (e) there are significant problems with the disciplinary procedure suggested by the Union.

Regarding the last point, (e), the Employer asserts that an employee who was given "a full blown evidentiary hearing before the Village's Board of Fire and Police Commissioners would have the right to a second full blown evidentiary hearing before an arbitrator." Other objectional features of the Union's "option approach," the Employer argues are that it would encourage forum shopping; permit the development of conflicting lines of precedent; result in duplicative proceedings and conflicting decisions where two or more employees were the

subject of disciplinary action arising out of the same incident; require the handling of disciplinary procedures under two different sets of rules and regulations; and bifurcate judicial review in that decisions of the board of fire and police commissioners would be reviewed pursuant to the Administrative Review Law and arbitration decisions, in accordance with the Uniform Arbitration Act.

Finally, the Employer contends that the interest arbitration awards relied on by the Union are all distinguishable.

Analysis and Conclusions

The Union's final offer on the issue of discipline would establish a just cause standard for all discipline imposed by the Village. The Village's final offer would maintain the status quo wherein there is no requirement that discipline be consistent with a just cause standard.

Of the 11 comparable jurisdictions with collective bargaining agreements, excluding Oak Brook, 8 require that all discipline be for just cause. The eight include Bensenville, Westchester, Bloomingdale, Downers Grove, Elmhurst, Lombard, Oakbrook Terrace, and Westmont. The three municipalities without a just cause provision in their labor contracts are Hinsdale, Western Springs, and Willowbrook.

Of the eight factors set forth in the IPLRA on which the arbitration panel must base its findings, item 4, comparisons with comparable communities, clearly favors the inclusion of a just cause provision in the parties' Agreement. The same is not true, however, as shall be discussed below, with regard to the part of the Union's final offer which would permit employees to choose arbitration to contest discipline. Most of the comparable communities have excluded discipline matters from the grievance procedure.

The chairman shall proceed to consider the other seven factors. Item 1, the lawful authority of the employer, will be left for later. Item 2, stipulations of the parties, has no application here. Item 3 has two parts: the interests and welfare of the public and the financial ability of the governmental unit to meet the costs. The discipline issue is not an economic question, and financial ability is not a pertinent consideration.

The chairman believes that the interests and welfare of the public are better served by a just cause standard of discipline. The chairman is of the opinion that when police officers know that any discipline meted out to them will be

reviewable on a just cause standard, their morale will be better than under the statutory standard which, for example, permits a police officer, who is suspended for five days or less and who appeals his suspension, to have his discipline increased up to and including discharge. See 65 ILCS 5/10-2.1-17. The chairman also thinks that most members of the public would want the police officers who serve them to be treated fairly, including to have discipline of the officers administered and reviewed on a just cause standard. The chairman finds that the third factor favors a just cause standard.

As for the other part of the Union's final offer, the right to arbitrate disciplinary disputes, the chairman believes that what he has said about a just cause standard applies also to arbitration as a means of seeking review of disciplinary action. As discussed more fully below, the Union and the bargaining unit appear to believe that they are not getting a fair hearing before the board of police and fire commissioners. Right or wrong, if that is their good faith belief, it is not a salutary situation to compel them to submit all disciplinary disputes to the board.

Nor does the arbitrator believe that a just cause standard together with the right of arbitration would adversely affect the administration of the police department or result in unfair treatment of the department. The chairman believes that arbitration as an institution does not favor the interests of unions over management, or vice versa, and that it is easier to administer the affairs of the department with a satisfied work force than a dissatisfied one.

The chairman notes that in Village of Schaumburg and Schaumburg Lodge No. 71, Illinois Fraternal Order of Police Labor Council (September 15, 1994), arbitrator George R. Fleischli stated that adoption of the union's proposal on discipline, which would permit arbitration of disciplinary action instead of relegating discipline to the exclusive control of the police chief and the board of fire and police commissioners, together with judicial review, "could easily lead to expensive litigation, contrary to the interests and welfare of the public."

As a balance to that consideration, however, it should be pointed out that the current system in Oak Brook also entails substantial litigation costs. The litigation costs involved in the discipline of officer Martin Zelisko is a good example. According to the evidence in the record, Officer Zelisko sought review of his suspension in the Circuit Court of DuPage County and, when he was victorious there, the Village appealed the case to the Appellate Court. The current arrangement can therefore hardly be characterized as being free of expensive litigation. Moreover, it is generally accepted that arbitration is speedier and less expensive than judicial review.

In addition, in AFSCME, Council 31 v. County of Cook, 145 Ill.2d 475, 584, N.E.2d 116, 119 (1991), the Illinois Supreme Court referred to the "legislature's preference for arbitration as a means of dispute resolution, as expressed in section 8 of the" IPLRA. To the extent that the Illinois legislature acts in the interest and welfare of the public, this would be another basis for finding that the Union's final offer is in the best interests and welfare of the public. For the reasons stated the chairman finds that the Union's final offer on discipline better serves the interests and welfare of the public than the Village's.

The fourth standard, comparison with other communities, has been discussed briefly above and will be discussed more fully below. The fifth factor, the cost of living, is not applicable to the discipline issue. Nor is the sixth factor, overall compensation, pertinent. With regard to the seventh factor, changes during the pendency of the arbitration proceedings, no change relevant to a determination of this issue has been brought to the attention of the arbitration panel.

The eighth factor, "Such other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, . . . arbitration or otherwise between the parties, in the public service or in private employment," has elements which in some respects support the Village's position and in other respects the Union's.

The Employer's position is supported by the absence of a quid pro quo on the Union's part. The chairman has read the various interest arbitration awards submitted by the parties in support of their respective positions, and the quid pro quo criterion is not a uniform standard. Although it is relied on by arbitrator Fleischli in City of Park Ridge and Local 2967, IAFF (October 30, 1990), involving the issue of the performance of animal control duties by fire fighters, and by arbitrator Ray McAlpin in Lincoln County, 97 LA 786, 789 (1991), many arbitration decisions do not mention that criterion. For example, in Village of Arlington Heights and Firefighters Association Local 3105 (1991) (Union Ex. 36), quid pro quo is not referred to by arbitrator Briggs in his discussion of the issue of Employee Discipline. Similarly arbitrator Berman does not mention quid pro quo in his decision in City of Markham and State and Municipal Teamsters Local 726, also involving the discipline issue.

The chairman thinks it instructive that arbitrator Fleischli, who is cited by the Village in support of its position on quid pro quo, himself did not require a quid pro quo in Village of Schaumburg and Schaumburg Lodge No. 71, Illinois Fraternal Order of Police Labor Council (September 15, 1994),

with regard to the issue of discipline. The case arose in a posture similar to the present case in that the contract in question was the second one between the parties. They had negotiated their first contract for the period 1990-1993 without resort to interest arbitration but were unable to reach final agreement on the terms to be included in a successor contract.

In the Schaumburg case the parties had reached tentative agreement on a complete contract, but the membership voted against ratification. The tentative agreement provided that the article dealing with the authority of the fire and police commission was to remain unchanged. The original agreement stated that "Notwithstanding any other provision of this agreement, any dispute or difference of opinion concerning any matter or issue which is subject to the jurisdiction of the fire and police commission, including all employee disciplinary matters, shall not be subject to the grievance and arbitration procedures set forth in this agreement." Instead such disputes were to be brought before the fire and police commission for resolution.

After the tentative agreement was turned down by the bargaining unit, the parties were unable to reach agreement and resorted to interest arbitration. The union then, for the first time, proposed to reverse the status quo with regard to the jurisdiction of the fire and police commission over disciplinary matters. The collective bargaining agreement contained a just cause provision, and the village of Schaumburg, fearful that the arbitrator might rely on that provision as a basis for granting the union's final offer on discipline, as a different arbitrator had done in a case involving Springfield, Illinois, proposed to delete the just cause provision. Like the original Schaumburg agreement, the contracts of a strong majority of the comparable jurisdictions provided that the terminal step for disciplinary appeals was the fire and police commission.

Arbitrator Fleischli prefaced his decision with the following observation:

While the undersigned realizes that the Village's reason for proposing a change in the status quo, ironically, stems from a desire to preserve it, this issue must, therefore, be approached on the basis that neither party seeks to maintain the status quo. Under these circumstances, the undersigned believes that it is appropriate to consider whether the Union's proposal, the Village's proposal, or some compromise proposal (including the status quo) should be adopted as the most reasonable under the statutory criteria.

The arbitrator did not decide to retain the status quo, but, even though no quid pro quo was forthcoming from the union, and even

in the absence of any proof that unfair treatment had resulted under the existing disciplinary arrangement, ruled that the employees should have the right to utilize the contractual grievance and arbitration procedure for disciplinary matters "[i]f and when it is established, by legislative enactment or decision of the Illinois Supreme Court, that it is lawful to make disciplinary matters subject to the grievance and arbitration procedure set forth" in the agreement. He further provided that "Immediately after such enactment or decision, the parties shall meet for the purpose of reaching agreement on the manner in which that right shall be exercised."

Arbitrator Fleischli explained his holding as follows:

. . . . In the view of the undersigned, except for the legal impediment, the Union makes a valid case for change. The statutory procedure was not established by voluntary agreement. Under a collective bargaining arrangement, employees ought not be required to accept a preexisting procedure for resolving disciplinary matters, if they lack confidence in that procedure and prefer the voluntary procedure which is nearly universal under collective bargaining agreements, i.e., arbitration.

Arbitrator Fleischli held as he did despite no indication in his decision that there was evidence that the commission lacked neutrality or expertise. In the present case there is a basis for the Union or the bargaining unit to be concerned on this point. The fire and police commission, on December 15, 1994, found police officer Martin Zelisko guilty on two of three charges brought against him by the chief of police. Officer Zelisko sought judicial review of the decision before the Circuit Court, DuPage County, Illinois.

The circuit court judge reversed the guilty findings on both counts. The judge delivered her decision in open court on January 4, 1996. She stated that she "did spend a great deal of time over the weekend and last night reviewing the extensive transcripts." She explained her reasoning on the basis of which she concluded that "the findings of the Board was contrary to the manifest weight of the evidence." The judge then added:

And I further find that no reasonable unbiased trier of fact could have reached the conclusion reached by the Boards of the Fire & Police Commissioners as to any of the allegations.

The board of police and fire commissioners appealed the circuit court's decision, and the Appellate Court of Illinois reversed the lower court on the ground that one of the commissioners, John Craig, who dissented from the board's decision, was not made a

party to the review proceeding before the time limit for doing so had run out.

There has thus been no appellate review of the circuit court's findings on the merits, and the chairman finds troubling the court's comment that no reasonable unbiased trier of fact could have reached the conclusion reached by the board of fire and police commissioners as to any of the allegations. Commissioner Craig's dissent also raises serious questions about the fairness of commission proceedings. For example, according to Commissioner Craig the Department admitted in the proceeding that "many times over a period of 22 years" other officers had failed to locate a complaint or accident but no other officer was ever disciplined for such failure." One of the allegations in the first charge against Officer Zelisko was that he "failed to perform his duty by responding to the accident at York Road and I-88 in a proper fashion in that he failed to locate the accident, displayed reluctance to perform his assigned duty, failed to exercise diligence, intelligence and interest in the pursuit of his duties and . . . his conduct was below acceptable standards."

It is significant also that the Statement of Charges brought by the Chief of Police listed three charges against Officer Zelisko, and the total penalty requested on all three charges was a 30 day suspension. The board of commissioners acquitted Officer Zelisko of the second charge but nevertheless imposed a 30 days' suspension. According to paragraph 36 of the Complaint for Administrative Review, "The testimony of Chief James R. Fleming revealed that he originally intended his request for a 30 day suspension to be based on 10 days for each of the three charges."

The chairman makes no judgment and does not comment on the merits of the charges against Officer Zelisko. Nevertheless the Circuit Court's comments, the dissent, and the imposition of the full penalty requested despite acquittal of the officer on one of the three charges against him at least provide a basis for understanding why the Union and apparently the bargaining unit believe the existing disciplinary procedures to be unfair. The objective evidence supporting the Union's and employees' apprehension about the fairness of the present disciplinary procedure lends some urgency to the need to adopt contract language in line with arbitrator Fleischli's declaration that "[u]nder a collective bargaining arrangement, employees ought not to be required to accept a preexisting procedure for resolving disciplinary matters, if they lack confidence in that procedure and prefer the voluntary procedure which is nearly universal under collective bargaining agreements, i.e., arbitration." Arbitrator Fleischli's comment finds support in the public policy of Illinois, as expressed in Section 2 of the IPLRA:

It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.

Section 8 of the IPLRA shows a legislative preference for arbitration as a means of resolving disputes concerning the administration or interpretation of the agreement.

Arbitrator Fleischli did not permit the immediate establishment of arbitration for review of disciplinary actions because of what he perceived to be legal impediments thereto. Other arbitrators differ with him on this point and have permitted employees to choose between arbitration and a final determination by the board of police and fire commissioners. The Village of Arlington Heights and City of Markham decisions, supra, are two cases in point. A third decision taking this approach is City of Springfield, Illinois and Policemen's Benevolent and Protective Association (Edwin H. Benn, April 30, 1990).

The City of Markham decision, moreover, was upheld in a well reasoned Memorandum of Opinion dated November 20, 1996, by Michael Brennan Getty, Circuit Judge. The chairman agrees with Judge Getty's opinion that City of Decatur does not turn on the fact that Decatur is a home rule jurisdiction. In AFSCME v. County of Cook, 145 Ill. 2d 475, 584 N.E.2d 116 (1991), the Illinois Supreme Court discussed the City of Decatur decision. AFSCME appealed the Appellate Court's reversal of the Local Labor Relations Board's decision that the county violated the IPLRA by refusing to bargain over the union's proposal regarding the civil service commission's examination requirement for a computer operator position. The Supreme Court summarized the bases for its holding that the City of Decatur had a duty to bargain with the union over the union's proposal that the city's employees be permitted to submit disciplinary grievances to arbitration:

The court so held in reliance upon (1) the public policy of the State "'to grant public employees full freedom of association, self-organization, and designation of representatives * * * for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.'" [citation omitted] (2) the optional, rather than mandatory, nature of the civil service system adopted by the city and the city's power, as a home rule authority, to unilaterally alter, amend or eliminate any of the terms of that system [citation omitted]; and (3) the legislature's preference for arbitration as a means of dispute resolution, as expressed in section 8

of the Act"

The Court applied the rationale of City of Decatur to the case before it and concluded that the county was obligated to bargain with AFSCME over the effects of requiring the computer operators involved in the case to take the proposed civil service examination. In so doing, the Court found that the civil service system of the county was optional because the county was a home rule jurisdiction.

The Court then considered the county's argument that its case, unlike City of Decatur, did "not involve, as an additional consideration supporting a finding of a duty to bargain, the public policy favoring arbitration as a means of public labor dispute resolution.":

The county is correct as to the absence here of arbitration as a consideration supporting a finding of a duty to bargain. However, we do not find that distinction a sufficient ground upon which to conclude that City of Decatur is not dispositive of the issues here. In noting that this case does not involve arbitration, the county simultaneously ignores the first basis for our decision in City of Decatur. That basis, explicitly expressed by the legislature, was the public policy of the State to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection. (emphasis added)

The AFSCME decision, in the opinion of the chairman, provides the key to the resolution of the home rule issue in this case. From AFSCME it is clear that not all three bases relied on in City of Decatur are necessary to come within the coverage of that decision. In AFSCME only two elements were present, namely, the duty to bargain supported by public policy and the optional nature of the civil service system because of the county's home rule status. In the present case, two bases of the City of Decatur decision are met: the public policy of the State and the legislature's preference for arbitration as a means of dispute resolution, as expressed in Section 8 of the IPLRA.

It would appear to the chairman that these two grounds are no less cogent than the grounds relied on in AFSCME. This is especially true since in AFSCME the Court specifically pointed out that "the first basis for [its] decision in City of Decatur . . . was the public policy of the State to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment. . .

. " That same basis also applies in the present case.

The Employer argues that non-home rule municipalities, like Oak Brook, lack any inherent governmental powers not specifically provided by the State and that, therefore, when the State, through the BFPDA, mandates that discipline be carried out through a police and fire commission, Oak Brook has no power to do otherwise. The argument, however, assumes that the State has not permitted Oak Brook to use arbitration as part of the disciplinary procedure. In the chairman's opinion, that is an erroneous assumption. Such power, in the chairman's view, can be found in Sections 7 and 8, and, possibly, 15 of the IPLRA, which applies alike to home rule and non-home rule municipalities.²

The accommodation provision (the third paragraph) of Section 7 of the IPLRA does not bar arbitration of disciplinary issues, the chairman believes. The Union's final offer on discipline (as modified below by the chairman) would supplement rather than supplant §10-2.1-17 of the BFPDA. That section does not provide that judicial review shall be the only method of review of a decision by the board of police and fire commissioners. It states, "The provisions of the Administrative Review Law . . . shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners hereunder." (emphasis added) The Union final offer would substitute an alternative method of review, namely, arbitration for those officers who preferred that method. In harmony with the legislature's preference for arbitration as a means of dispute resolution, the chairman would construe providing arbitration as an optional method of review available to those who desired it, while retaining judicial review for those preferring the statutory scheme, as supplementing the review provisions in the BFPDA.

In its brief the Village quotes from Burgess v. Board of Fire and Police Commissioners of the Village of Evergreen Park, 275 Ill. App.3rd 315, 655 N.E.2d 1157 (1995), where the court declared that "all final decisions rendered by boards of fire and police commissioners constituted under the Act, including those regarding hiring, are reviewable exclusively under the Administrative Review Law." The Burgess case, however, was concerned only with the proper method of judicial review. It did not purport even to consider the question of whether a collectively bargained non-judicial optional method of review

²In the AFSCME case, the Court stated, "We need not address whether the county has that duty [to bargain] under section 15 of the Act . . . relating to conflicts between the Act's provisions and other laws, executive orders or administrative regulations relating to wages, hours and conditions of employment." 584 N.E.2d at 123.

would violate the BFPCA or be permissible under the IPLRA. That consideration was entirely extraneous to the jurisdictional issue before the Burgess court.

Indeed Burgess noted, "The Administrative Review Law provides that it 'shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts [its] provisions. . . .' 735 ILCS 5/3-102. . . ." 655 N.E.2d at 1158. (emphasis added) It is clear, therefore, that the Burgess court was aware that the Administrative Review Law deals only with judicial review and no other kind of review.

The Parisi case, the chairman believes, is readily distinguishable. In that case the collective bargaining agreement did not provide an alternative means of contesting discipline or termination decisions. Instead, by providing that inability to return to full unrestricted duties within 365 days of a non-work related injury was automatic cause for termination of the employment relationship, it deprived the police officer of his employment status without a hearing of any kind or a right of appeal. This was clearly a violation of the BFPCA and not a supplement thereto. Where the statute requires a hearing and a right of judicial review and the contract provides neither for a hearing nor review of any kind but, instead, automatic termination of employment, it is difficult to construe the contract provision as supplementary to the statute rather than a violation thereof.

The Village also relies on Rockford School Dist. No. 205 v. Illinois Educational Labor Relations Board, 165 Ill.2d 80, 649 N.E.2d 369 (1995), wherein the Court held that an arbitration award that found a "notice to remedy" issued to a teacher pursuant to disciplinary procedures in the School Code was not for just cause was unenforceable because the contractual provision permitting such arbitration was in violation of Section 10(b) of the Illinois Labor Relations Act. Section 10(b) provides as follows:

The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois. The parties to the collective bargaining process may effect or implement a provision in a collective bargaining agreement if the implementation of that provision has the effect of supplementing any provision in any statute or statutes enacted by the General Assembly of Illinois pertaining to wages, hours or

other conditions of employment. . . .

The Village argues that Section 10(b) of the IELRA is similar to Section 7 of the IPLRA. Consequently, the Village contends, just as Section 10(b) prohibits the parties to alter through their collective bargaining agreement the statutory provisions for discipline under the School Code, Section 7 forbids the parties by collective bargaining "to replace and supplant the role of the Board of Fire and Police Commissioners in deciding whether there is cause for a suspension or termination" or to provide a different avenue of appeal than judicial review under the provisions of the Administrative Review Law.

The chairman, however, is of the opinion that there are significant differences between Section 7 and Section 10(b) so that a ruling under the latter provision would not necessarily apply under the former. The most striking difference is the different emphases of the two provisions. Section 7 emphasizes the power and reach of collective bargaining. It extends to all aspects of wages, hours, and other conditions of employment not specifically provided for in any other law or not specifically in violation of the provisions of any law. This is an extremely broad application.

Section 10(b), by contrast, emphasizes the limited nature of collective bargaining in the area of education. It starts off by telling us what collective bargaining cannot do as compared with Section 7, which tells us what collective bargaining can do. The first thing we are informed of in Section 10(b) is that "the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois." Section 10(b) thus underscores the restrictive nature of collective bargaining in relation to statutory law in the field of education. It is not surprising, therefore, that in City of Decatur the Supreme Court provided an expansive role for collective bargaining, while in Rockford School District it permitted a more modest role.

In City of Markham, Judge Getty distinguished the Rockford case on the basis that Section 10(b) of the Illinois Educational Labor Relations Act proscribes a collective bargaining provision that is "in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly" and "is clearly broader than the accommodation provision of Section 7 of the Labor Act which only refers to matters specifically provided for in any law or in violation of the provisions of any law."

The Village disagrees with Judge Getty and asserts, "If an issue is inconsistent or conflicts with a statute, the statute

must specifically provide something to be inconsistent with" and that "The terms in both Section 7 and Section 10(b) provide for exactly the same thing." The fact nevertheless remains that the Supreme Court in Rockford apparently did consider the requirement of a conflict with a specific law to be a higher standard to meet, for it declared that "section 10 (b) is clear and unambiguous" and "unequivocally states that any provision in a collective-bargaining agreement that is 'in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois' shall not be effected or implemented." The Court continued, "There is no reference to a specific statutory directive, as advocated by the Board and the Association." The chairman believes therefore that the distinction pointed out by Judge Getty between Section 10(b) of the Educational Act and Section 7 of IPLRA is a valid one.

Judge Getty's decision in City of Markham is also supported by Forest Preserve District of Cook County v. Illinois Local Labor relations board, 190 Ill. App.3d 283, 291, 546 N.E.2d 675, 680 (1989), where the court stated:

. . . [W]e decline to adopt the District's narrow interpretation of the Decatur case as holding that the labor Act predominates over civil service rules only when the civil service scheme is optional. We believe the Board correctly interpreted the Decatur case as recognizing a policy favoring public employee bargaining laws over civil service rules.

The Village argues that Forest Preserve District is distinguishable from City of Decatur because the "case did not concern nor consider the distinction between home rule and non-home rule municipalities." However, the distinction between home rule and non-home rule municipalities with respect to the BFPCA and collective bargaining according to the Village is that the provisions of the statute are optional for home rule jurisdictions and binding on non-home rule jurisdictions. The Village argues that only where the statutory provisions are optional would the parties be free to negotiate collective bargaining provisions which would permit any variance from the statutory scheme. The quoted language shows that the Appellate Court in Forest Preserve District rejected that approach.

The chairman finds, for the reasons stated in the foregoing discussion, that the Employer has the lawful authority to negotiate a provision providing for arbitration of disciplinary disputes.

The Village argues that the Union has waived its right to raise the discipline issue because the issue was not included in the Union's original comprehensive proposals presented to the Village in November, 1995, and was raised for the first time in

October 23, 1996, mediation session. It cites a statement by ISLRB General Counsel Zimmerman in a case involving the village of Maywood that ". . . bad faith can be inferred from a party's introduction of significant new proposals late in the negotiations."

In the present case, however, the new proposal was made after a change in the Union administration following the imposition of a trusteeship on the local union. It is not unusual for a new administration to have a somewhat different perspective than the predecessor administration, and one cannot infer bad faith, in the chairman's opinion, when a new proposal is made under these circumstances. The Village had several months to bargain with the Union over the new proposal before the present arbitration hearing commenced. It therefore cannot claim that it was prejudiced by the timing of the Union's proposal.

Moreover, the chairman notes that in Village of Schaumburg, supra, the Union did not present a proposal concerning discipline until after a tentative agreement was reached between the parties which maintained the status quo regarding discipline. The tentative agreement was turned down by the bargaining unit in a ratification vote, and the union then added discipline to its proposals for change. Arbitrator Fleischli did not rule that the Union's proposal came to late, and he adopted part of the Union proposal. Under all of the circumstances the chairman rules that the Union did not waive the right to raise the issue of discipline in this case and that the issue is properly before the arbitration panel.

The foregoing discussion has considered three of the Village's five main arguments on the merits in support of its position that the arbitration panel should not disturb the parties' voluntarily negotiated agreement concerning discipline. These include (1) the parties' collective bargaining history; (2) the failure of the Union to show a compelling need to change the status quo; and (3) the failure of the Union to offer a quid pro quo.

With regard to these arguments, as was held in Village of Schaumburg, supra, the fact that the first contract between the parties did not provide for arbitration; the absence of specific evidence of lack of neutrality or expertise; and the failure of the union to offer a quid pro quo were deemed to be overbalanced by the principle that "[u]nder a collective bargaining arrangement, employees ought not be required to accept a preexisting procedure for resolving disciplinary matters, if they lack confidence in that procedure and prefer the voluntary procedure which is nearly universal under collective bargaining agreements, i.e., arbitration."

The chairman agrees with the reasoning of arbitrator

Fleischli and finds it persuasive in the present case in view of the declared public policy of this state "to grant public employees full freedom of association, self-organization, and designation of representatives * * * for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection" and, as noted in the AFSCME and City of Decatur cases, "the legislature's preference for arbitration as a means of dispute resolution, as expressed in section 8 of the" IPLRA. The chairman, in so finding, is also influenced by the considerations mentioned above which have provided a good faith basis for the Union and the bargaining unit to be concerned about either the fairness or expertise of the existing disciplinary procedure.³ In view of the chairman's judgment that there is no legal impediment to the arbitration of disciplinary disputes, he would permit the immediate adoption of a clause providing for arbitration instead of conditioning such an award on future legislative or judicial action.

The Village's fourth argument on the merits is that the comparability data do not support the Union's proposal. The chairman has already noted that the comparability evidence supports the Union's proposal with regard to a just cause standard for discipline. The majority of the 11 comparable jurisdictions, excluding Oak Brook, however, excludes disciplinary actions from the grievance-arbitration procedure. Nevertheless five of the 11 permit arbitration of some disciplinary actions.

Lombard, Oakbrook Terrace, and Westmont permit arbitration of all disciplinary disputes. Downers Grove and Westchester allow arbitration of suspensions of less than five days. Bensenville, Hinsdale, Western Springs, Willowbrook, Bloomingdale, and Elmhurst entirely exclude discipline from the grievance procedure.

Although the data support the Village's proposal, the evidence is far from one-sided. As noted, five of the 11 jurisdictions permit arbitration of some disciplinary disputes. In addition, arbitrators have permitted arbitration of discipline matters even in cases where the comparability factor strongly favored a contrary decision. This was true, for example, of

³The chairman does not find that there is either a lack of fairness or a lack of expertise on the part of the police and fire commission but, rather, that the Circuit Court oral opinion in the Zelisko case, the dissenting commissioner's opinion in the case, and the failure of the commission to reduce the discipline requested on the charges despite Zelisko's acquittal on one of the charges provide evidence that the Union is not merely stirring the pot to find an excuse for change but has a good faith basis for wanting to provide an alternative review procedure.

arbitrator Fleischli's opinion in Village of Schaumburg, supra; and of arbitrator Briggs's decision in Village of Arlington Heights, supra. In the latter case, arbitrator Briggs stated:

The Arbitrator recognizes that there is little support from the external comparables for adopting the Union's position on this issue. Only twenty percent of the comparable communities permit employees to choose between arbitration or a hearing before their respective fire and police commissions. However, the fundamental equity and fairness considerations woven into this issue have caused the undersigned to give controlling weight to the "other factors" statutory criterion. The obligation of employers to use the "just cause" standard in disciplinary matters, and the corresponding right of employees to have employer disciplinary decisions reviewed by a trained third-party neutral have been widely embraced by union and management negotiators alike. Indeed, even the Illinois Public Labor Relations Act at Section 8 recognizes the desirability of the arbitration process for resolving disputes over the administration of collective bargaining agreements. The Union here, and in its management rights final offer, was simply seeking for members of the bargaining unit a contractually guaranteed right to fair treatment. That objective is not unreasonable, nor is it out of line with the vast majority of collective bargaining agreements negotiated in both the public and private sectors.

Another reason given by arbitrator Briggs was that "those feeling more comfortable with an independent party--not appointed by anyone but mutually selected by the parties themselves--could choose arbitration." (emphasis in original) The arbitrator added, "The Union's final offer is simply more democratic in that it gives employees some say in decisions that will have a significant effect on them."

In Village of Skokie and Skokie Firefighters Local 3033 (Neil M. Gundermann, July 6, 1993), the expired contract contained a just cause provision but excluded discipline and discharge from the grievance-arbitration procedure. With respect to the new contract, the employer proposed to eliminate the just cause provision and the union wanted to retain the just cause language and add a provision making discharge and discipline subject to the grievance procedure. The arbitrator ruled that "the Union's final offer of having discharge and discipline subject to either the grievance and arbitration procedure or the Fire and Police Commission is awarded."

The Village would differentiate such decisions as

Village of Skokie on the basis that the prior contract contained a just cause provision, which is not the case here. Although that is true, the force of that point is considerably blunted by the fact that, in the present case, eight of the 11 comparable communities with contracts also have just cause provisions in their collective bargaining agreements. Comparison with comparable jurisdictions thus supports the inclusion of a just cause provision in the Oak Brook agreement.

In sum, the comparison factor favors the Union's final offer in terms of inclusion of a just cause provision, but supports the Village's final offer with respect to exclusion of discipline cases from the grievance procedure. Although the chairman is aware that just cause is not a separate issue in this case, as opposed to the general issue of the language of the discipline provision, the fact that the great majority of comparable communities have just cause provisions in their contracts nevertheless serves to lessen the significance of the fact that most of the comparable jurisdictions entirely exclude discipline from their grievance procedures. This is so because once a contract contains a just cause provision, arbitrators, when faced with the issue, tend to require that discipline matters be included in the grievance procedure. Village of Skokie (Neil M. Gundermann, 1993); City of Springfield (Edwin H. Benn, 1990).

Taking all of the statutory factors into account, the chairman concludes that the Oak Brook contract should provide that discipline is subject to the grievance procedure. To the chairman what makes the most sense is to take the approach of arbitrator Briggs in Village of Arlington Heights and arbitrator Gundermann in Village of Skokie who required that discipline be subject to review either by the board of fire and police commissioners or in arbitration as the disciplined employee might choose in any given case. Neither permitted a hybrid system with respect to any disciplinary action.

The Union has not taken that approach in this proceeding except in cases involving a suspension of five days or less or for written reprimands. In cases of suspension for more than five days and discharge cases the Union proposal requires that the chief of police first file charges with the board of fire and police commissioners, who must issue an order upholding or denying the charges, and that only then can the matter go to arbitration through the grievance procedure.

The Union proposal contains a sentence which states, "Upon receipt of such notice referring the grievance to arbitration, the Board may issue a final order implementing the Chief's disciplinary action specified in the Chief's charges filed with the Board without further hearing." Likely this provision was intended to meet the Village's objection to two

hearings, one before the board and one before the arbitrator.

The quoted sentence, however, is in direct conflict with §10-2.1-17 of the BFPCA, which provides, "The board of fire and police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof" The language "shall" is mandatory, and the board would not have the right to issue a final order implementing disciplinary action without a fair hearing. The procedure outlined by the Union is therefore unworkable.

One can only guess at the reason that the Union did not follow the lead of arbitrators Briggs and Gundermann and provide mutually exclusive disciplinary procedures. One possibility is that the Union is of the opinion that Illinois law mandates that suspensions in excess of five days and discharges be heard before the board of police and fire commissioners in all instances without exception. If the Union is of that opinion and is correct, then the arbitration panel would be doing a disservice to the Union were the panel to adopt a provision permitting the Village to bypass the board with respect to suspensions in excess of five days or discharge.

After careful consideration, the chairman is of the opinion that the best way to proceed, consistent with the Union's desire to include the board of fire and police commissioners in the disciplinary procedure for suspensions of more than five days and discharge, is to provide for de novo review of the record by the arbitrator on a just cause standard but not to hold a second hearing. In other words, the arbitrator would make his ruling based on the transcript and exhibits of the hearing before the board.

The chairman is aware that this will deprive the arbitrator of the ability to make credibility determinations on the basis of demeanor, but the chairman does not view this as a serious shortcoming. Most studies show that attempts to determine credibility on the basis of demeanor are very unreliable. The chairman will provide, however, that both parties may agree to waive a hearing before the board of fire and police commissioners and proceed directly to arbitration. In the absence of agreement, however, the parties would proceed first to a hearing before the board. The chairman will also provide that the parties may voluntarily agree to hold a second hearing before the arbitrator or to permit particular witnesses to testify before the arbitrator despite a prior hearing before the board.

Should the law later become clarified to make plain that arbitration may be fully substituted for a hearing before the fire and police commissioners without the necessity of a hybrid proceeding, the parties will be free to negotiate such a provision.

Before setting forth the provisions on discipline which the chairman believes should be adopted, he would like to comment briefly on the Village's remaining arguments. The Village states that the Union proposal will encourage forum shopping. This is another way of saying that it will provide employees with an alternative method of contesting discipline. The chairman finds nothing wrong with this where the alternative method is arbitration--a legislatively favored method of resolving disputes.

The Village warns that if the Union's offer is adopted, conflicting lines of precedent may develop. Most discipline cases turn on the particular facts of each individual case. The chairman is therefore not concerned that conflicting lines of precedent will develop. The possibility of duplicative proceedings or conflicting decisions where two or more employees are involved is not a reason for withholding the right of arbitration from employees who lack confidence in the present system. The requirement to handle disciplinary proceedings under two different sets of rules and regulations and two different methods of appeal--depending on whether the board of commissioners or arbitration is the forum--is not sufficiently onerous to justify denying employees the right to arbitrate disciplinary disputes.

The chairman adopts the following provision regarding discipline:

Section 7. Discipline. (a) Just Cause. When the Employer believes just cause exists to institute disciplinary action, the Employer by its agents shall have the option to assess the following penalties depending upon the seriousness of the offense:

Oral reprimand
Written reprimand
Suspension
Discharge

The authority of the Police Chief to reprimand or suspend and of the Board of Fire and Police Commissioners to suspend or discharge shall be exercised in accordance with the authority granted by the Municipal Code, 65 ILCS 5/10-2.1-17, except as expressly provided otherwise in this Section 7.

(b) Grievances. A grievance may be filed with respect to any disciplinary action (other than an oral reprimand) taken against an employee when the employee believes the disciplinary action taken is not for just cause. If the disciplinary action is a suspension ordered by the Police Chief, any grievance shall be

filed in the first instance at Step 3 of the grievance procedure within ten (10) days of the imposition of the discipline and shall thereafter be processed in accordance with Article V of this Agreement.

If the disciplinary action is a suspension or a discharge within the authority of the Board of Fire and Police Commissioners (hereinafter "Board") pursuant to charges filed by the Police Chief, a grievance regarding such disciplinary action may be filed and referred to arbitration in accordance with the following procedure:

1. At the time the Police Chief files charges with the Board, he shall notify the affected employee(s) and the Union of such action and provide them with copies of the charges.
2. The employee(s) or the Union may then file a grievance contesting the just cause of such charges. Any such grievance shall be filed with the Police Chief, with a copy to the Board, within seven (7) calendar days of receiving notice of the charges.
3. If a grievance is filed, the Employer and the Union may agree to waive a hearing before the Board on the charges and proceed directly to arbitration. Any such waiver agreement shall be made within ten calendar (10) days of the date of filing the grievance or any agreed upon extension of that time. The arbitrator shall be selected and the arbitration, conducted in accordance with the provisions of Article V, Section 4 of this Agreement.
4. If there is no waiver agreement, the matter shall proceed to hearing before the Board, who shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time.
5. The Board shall make its decision in writing on the charges and shall provide a copy of its decision to the affected employee(s) and the Union. The Union

shall have ten (10) calendar days after receipt of the Board's written decision to refer the matter to arbitration. Such referral shall be commenced by the Union Secretary or his designee asking the Employer in writing to join with the Union in filing a joint request with the Federal Mediation and Conciliation Service for a panel of five (5) arbitrators. The parties shall thereafter proceed to select an arbitrator in accordance with Article V, Section 4 of this Agreement.

5. Any referral to arbitration (whether of a disciplinary action by the Police Chief or the Board) shall be accompanied with a signed statement from the affected employee(s) waiving any and all rights he/she (they) may have to appeal the subject disciplinary action to the Board (in the case of disciplinary action imposed by the Police Chief) or to seek judicial review pursuant to the Administrative Review Law (in the case of disciplinary action imposed by order or decision of the Board). Any notice of referral to arbitration filed without the required signed waiver shall not be arbitrable and the arbitrator shall be without jurisdiction to consider or rule in the matter. Any appeal or judicial review of an arbitrator's award shall be in accordance with the provisions of the Uniform Arbitration Act, 710 ILCS 5/1 et seq.
6. In any arbitration involving a decision by the Board regarding discipline in which a hearing has been held by the Board, the arbitrator shall make an award based on his/her de novo review of the record made before the Board. However, should the parties desire to have the arbitrator hear the witnesses personally, they may voluntarily agree to hold a new hearing before the arbitrator or to have particular witnesses testify before the arbitrator. The arbitrator shall determine whether or not there is just cause for the discipline imposed.

7. The cost of the transcript of any hearing before the Board shall be borne on the same basis as in the past for disciplinary hearings before the Board. The cost of a transcript in an arbitration proceeding shall be on the same basis as in past arbitrations.
8. Where no grievance is filed or where a grievance is filed but not referred to arbitration, an employee's appeal rights shall be in accordance with §10-2.1-17 of the BFPCA.

7. Issues Agreed To by Parties

In addition to the foregoing provisions of the Agreement awarded by the arbitration panel, the panel also incorporates as part of this opinion and award the following contract terms agreed to by the parties:

A. ARTICLE _____

Section ____ . Union Representation. An employee subject to formal interrogation which the employee reasonably believes might result in his/her suspension without pay or discharge shall have the right to request the presence of either a Union representative or an attorney during said interrogation, and may request such representation at any time during interrogation. The employee shall be granted reasonable time to obtain the presence of a Union representative or an attorney.

During an informal interview, if two or more supervisors are present and the employee reasonably believes that the informal interview might result in his/her suspension without pay or discharge, the employee shall have the right to request the presence of a Union representative who is a member of the bargaining unit during said interview, and may request such representation at any time during the interview. The employee shall be granted reasonable time to obtain the presence of an employee Union representative.

The presence of a representative shall not interrupt or interfere with the Village's right to question employees, or the obligation of employees to respond to questions relevant to the matter being investigated. Notwithstanding the foregoing, the Village retains the right to question or interrogate

employees in emergency situations involving an immediate danger to the health and safety of one or more persons without any obligation to wait until a representative or attorney is present.

B. ARTICLE XI - SALARIES AND ECONOMIC BENEFITS

Add the following new Section 10:

Section 10. Mileage and Clothing Checks.
One check for mileage and clothing shall be paid quarterly, provided that the amount of the check is for at least \$25.00.

C. ARTICLE IX - LEAVES OF ABSENCE

Add the following new Section 6:

Section 6. Family and Medical Leave Act. In order to be in compliance with the Family and Medical Leave Act of 1993 ("FMLA") and applicable rules and regulations, the parties agree that the Village may adopt policies to implement the Family and Medical Leave Act of 1993 that are in accord with what is legally permissible under the Act and the applicable rules and regulations.

D. Article IX - LEAVES OF ABSENCE

Revise the last paragraph of Section 1. Sick Leave., to read as follows:

Effective on the date this Agreement is ratified by both parties, upon leaving the Village's employ for any reason other than involuntary dismissal, an employee with twenty (20) or more years of service as a sworn police officer shall be paid for twenty percent (20%) of the number of accumulated but unused sick leave days up to a maximum of 156 at his/her regular straight time hourly rate of pay at time of leaving the Village's employ. Example: An employee with twenty (20) or more years of service who has 100 accumulated but unused sick leave days at time of leaving the Village's employ shall be paid for twenty (20) sick leave days (i.e., 160 hours) at his/her regular straight time hourly rate of pay in effect at time of leaving the Village's employ.

E. ARTICLE XI - SALARIES AND ECONOMIC BENEFITS
Revise Section 3. Holidays and Personal Days. to read as follows

Section 3. Holidays and Personal Days. Effective January 1, 1997, the following are the holidays observed by the Village of Oak Brook Police Department:

New Year's Day
Easter Sunday
Good Friday ($\frac{1}{2}$ day)
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Day after Thanksgiving
Christmas Eve
Christmas Day
New Year's Eve ($\frac{1}{2}$ day)

In lieu of being granted time off on the holiday observed by the Village, each employee shall be credited with ten (10) eight (8) hour days off each calendar year (pro rata if employed less than one year). In addition, effective January 1, 1997, each employee shall be credited with two (2) personal days (i.e., two (2) eight (8) hour days) off each calendar year. Said twelve (12) days off without loss of pay shall be scheduled at the mutual convenience of the employee and the Department.

If an employee works on a day designated by the Police Chief as the holiday, in addition to his normal pay, the employee will receive an additional one-half hour's pay at his regular straight time hourly rate of pay for all hours worked on said holiday.

F. ARTICLE XVII - DURATION AND TERM OF AGREEMENT
Change Section 1. so that the first sentence thereof reads as follows:

Section 1. Termination in 1998. This Agreement shall be effective as of January 1, 1996, and shall remain in full force and effect until 11:59 p.m. on the 31st day of December, 1998.

G. ARTICLE VIII - HOURS OF WORK AND OVERTIME
Add new Section 11. as follows:

Section 11. Calendar Year 1998. In lieu of the provisions of this Article VIII that would otherwise be applicable, effective for calendar year 1998, the assignment of officers assigned to the Patrol Division shall be subject to the following:

1. Each of the three shifts shall consist of

permanent (as opposed to rotating) annual assignments. (First shift shall be considered the shift in which a majority of the hours fall between 7:00 a.m. and 3:00 p.m.; second shift shall be considered the shift in which a majority of the hours fall between 3:00 p.m. and 11:00 p.m.; and the third shift shall be considered the shift in which a majority of the hours fall between 11:00 p.m. and 7:00 a.m.)

2. The selection of permanent annual assignments on each of three shifts for calendar year 1998 shall be based on seniority, provided each shift must have the following specialties (one officer may fill not more than two non-conflicting specialties; e.g., juvenile officer and range officer but not Assistant Shift Commander and field training officer):

- 1 juvenile officer
- 1 field training officer
- 1 Assistant Shift Commander
- 1 breath/alcohol testing operator
- 1 range officer

Prior to the selection of permanent annual shifts, the Police Chief shall designate three (3) Assistant Shift Commanders who are willing to serve in that capacity. The most senior of the three shall select his/her permanent shift for calendar year 1998; the next most senior shall select his/her permanent shift from the two remaining shifts; and the designated Assistant Shift Commander who has the least seniority shall take the remaining shift.

3. All assignments on each shift shall be required to complete the full year -- exceptions may be granted for extenuating circumstances.
4. At the same time that officers bid for permanent shifts, they may also bid for any power shift positions. Power shift positions currently rotate between a 7:00 a.m. to 3:00 p.m. shift for one month and a 3:00 p.m. to 11:00 p.m. shift for one month. The canine officer shall be entitled to bid for one of the power shift positions.
5. For vacancies that develop mid-year, the Chief of Police will consider qualified volunteers, but the method of replacement for positions will be determined exclusively by the Chief of Police.

6. Officers who are serving as detectives who are returned to the Patrol Division shall be assigned to the shift of the officer who is being assigned as a detective and will remain on that shift until the next time shifts are bid as provided above. When it is known prior to the bid process that a Detective will be returned to the Patrol Division, the officer shall be eligible to participate in the annual bid process scheduled immediately prior to the year in which such return shall occur. Employees chosen to move from Patrol to Detective status shall not bid a shift selection during the annual bid process scheduled immediately prior to the year in which such change in status will occur.
7. The Chief of Police will determine the shift assignments of probationary officers.
8. Notwithstanding the foregoing, the Police Chief shall have the right to transfer employees who have been permanently assigned to a shift under this Section in order to meet the bona fide operational needs of the Department at any time (e.g., loss of an employee filling a specialty position, retirement, injury or other long-term leave, changes necessitated due to personnel problems adversely affecting operations, etc.). Employees shall be given as much notice as practicable of such transfers. If the reason for the transfer no longer exists and it would not adversely affect operations, the officer shall be given the right to return to the shift originally bid).

The selection of permanent annual assignments on each of three shifts for calendar year 1998 shall be implemented and evaluated as follows:

1. Prior to October 15, 1997, the Police Chief or his designee shall post all scheduled shift positions in the Patrol Division on a bulletin board in the briefing room.
2. Between October 15 and November 15, all non-probationary officers shall submit a written bid by placing his/her signature upon the appropriate shift, starting with the most senior officer, for a permanent shift commencing on the first shift change date in the following January and extending through the first shift change date twelve months thereafter.

3. Officers failing to exercise their seniority to select a permanent shift shall be assigned by the Chief of Police to any unfilled vacant shifts.
4. If all of the specialty positions have not been filled on each shift as a result of the foregoing, the Chief of Police shall make reassignments in order to have all such specialty positions filled on all shifts. Where it is necessary to make such reassignments, the least senior officers shall be reassigned. Example: If the midnight shift does not have a juvenile officer, the least senior officer who is qualified to be a juvenile officer and who is on a shift with two or more officers who are qualified to be juvenile officers shall be reassigned to the midnight shift and the least senior officer on the midnight shift shall be reassigned to the shift from which the juvenile officer was reassigned.

The foregoing provisions shall be applicable for calendar year 1998. Whether permanent shift assignments should continue beyond calendar year 1998 and, if so, whether there should be any changes or modifications to the foregoing provisions shall be subject to negotiations between the parties for the successor collective bargaining agreement. The fact that the parties agreed to the foregoing provisions for calendar year 1998 shall not be considered precedential or otherwise create a burden on any party seeking to negotiate changes.

H. ARTICLE XI -- SALARIES AND ECONOMIC BENEFITS

The following provision shall be added as Section 2 in place of the existing Section 2, which shall no longer be in force.

Section 2. Retroactivity. The increases in salaries shall be fully retroactive to the effective dates specified herein, i.e., January 1, 1996, and January 1, 1997, for employees employed after January 1, 1996. Payment shall be made on an hour for hour basis for all hours paid (including all court time and overtime hours) since January 1, 1996.

Such retroactivity payments shall be paid as soon as reasonably practicable after issuance of arbitrator Sinclair Kossoff's award, but in no event later than sixty (60) days after issuance of said award.

I. ARTICLE XII - INSURANCE

The following language shall be added to the appropriate section(s):

Effective July 1, 1997, the following modifications to the Village of Oak Brook Health and Dental Care Plan shall be in force:

1. Increase the deductible to \$250 for employee only, but maintain the \$300 deductible for employee plus one coverage and the \$450 deductible for family coverage.
2. Employees shall pay five percent (5%) of the cost of the differential between employee only and employee plus one coverage (currently \$7.50 per month--\$5.96 for health and \$1.54 for dental--for the 1996-97 insurance year) and five percent (5%) of the cost of the differential between employee only and family coverage (currently \$12.61 per month--\$11.07 for health and \$1.54 for dental--for the 1996-97 insurance year). The maximum amount that any employee shall pay for either employee plus one or family coverage shall be capped at no more than one percent (1%) of the maximum police officer base salary.
3. The Village shall continue to pay 100% of the cost for employee only coverage.
4. Implement a Section 125 plan which will enable employees to tax shelter the amount they pay towards the cost of employee plus one or family coverage, as well as tax shelter amounts used to pay for qualified unreimbursed medical expenses and qualified child care/dependent care expenses.
5. Add well baby care prior to discharge at 100%.
6. Add annual mammograms for women over 40, biennially for women 35 to 39, and once prior to age 35. This additional coverage shall be extended to employees and an eligible dependent if the employee selects employee plus one or family coverage.
7. Provide up to \$300 for a routine physical

once every two years for employees only.

8. Increase the maximum lifetime annual amount per covered person for orthodontia from \$1,000 to \$2,000.
 9. Add a prescription card with an employee co-pay of \$10 for brand name prescriptions and a co-pay of \$5 for generic prescriptions, supplemented by pharmacy by mail with an employee co-pay of \$15.00 for brand name prescriptions and \$7.00 for generic prescriptions for a 90-day supply for maintenance drugs (as opposed to the normal 30-days with the prescription card).
 10. Notwithstanding the foregoing, the above described changes in the Village of Oak Brook's Health and Dental Care Plan shall not be implemented unless the same changes are implemented for the Village's unrepresented employees, including the unrepresented employees in the Police Department. If the same changes are implemented for the Village's unrepresented employees, including the unrepresented employees in the Police Department, then they shall be implemented for bargaining unit employees on the same effective date.
- J. The following new article on drug and alcohol testing shall be added to the Agreement:

ARTICLE ____ - DRUG AND ALCOHOL TESTING

Section 1. General Policy Regarding Drugs and Alcohol. The use of illegal drugs and the abuse of legal drugs and alcohol by members of the Police Department present unacceptable risks to the safety and well-being of other employees and the public, invite accidents and injuries, and reduce productivity. In addition, such conduct violates the reasonable expectations of the public that the employees who serve and protect them obey the law and be fit and free from the effects of drug and alcohol abuse.

In the interest of employing persons who are fit and capable of performing their jobs, and for the safety and well-being of employees and residents, the Village of Oak Brook and the Union agree to establish a program that will allow the

Village to take the necessary steps, including drug and/or alcohol testing, to implement a general policy regarding drugs and alcohol.

Section 2. Definitions.

A. "Drugs" shall mean any controlled substance listed in SHA 720 ILCS 570/100, the Illinois Compiled Statutes, known as the Controlled Substances Act, for which the person tested does not submit a valid pre-dated prescription. In addition, it includes "designer drugs" which may not be listed in the Controlled Substances Act but which have adverse effects on perception, judgment, memory or coordination. Among the drugs covered by this policy are the following:

Opium	Methaqualone	Psilocybin-psilocin
Morphine	Tranquilizers	MDA
Codeine	Cocaine	PCP
Heroin	Amphetamines	Chloral Hydrate
Meperidine	Phenmetrazine	Methylphenidate
Marijuana	LSD	Hash
Barbiturates	Mescaline	Hash Oil
Glutethimide	Steroids	

B. The term "drug abuse" includes the use of any controlled substance which has not been legally prescribed and/or dispensed, or the abuse of a legally prescribed drug which results in impairment while on duty.

C. "Impairment" due to drugs or alcohol shall mean a condition in which the employee's ability to properly perform his duties due to the effects of drugs or alcohol in his body is diminished. When an employee tests positive for drugs or alcohol, impairment is presumed.

Section 3. Prohibitions.

Police Officers shall be prohibited from:

1. Consuming or possessing alcohol or illegal drugs at any time during the work day, unless pursuant to official assignment.
2. Using, selling, purchasing or delivering

any illegal drug at any time unless pursuant to official assignment.

3. Being impaired due to the use of alcohol, legal drugs or proscribed drugs during the course of the work day.
4. Failing to report to their supervisor any known adverse side effects of medication or prescription drugs which they are taking.
5. Failure to report the use, possession or sale of illegal drugs by other members of the Department to the employee.⁴

Violations of these prohibitions will result in disciplinary action up to and including discharge.

Section 4. The Administration of Tests.

A. Informing Employees Regarding Drug Testing

All current employees will be given a copy of these Drug & Alcohol Testing provisions upon execution of the agreement between the parties. All newly hired employees will be provided with a copy at the start of their employment.

B. Pre-Employment Screening

Nothing in this policy shall limit or prohibit the Village from requiring applicants for bargaining unit positions to submit blood and/or urine specimens to be screened for the presence of drugs and/or alcohol prior to employment.

C. When a Test May Be Compelled

There shall be no random, across-the-board, or routine drug testing of employees except as part of treatment

⁴The chairman calls to the parties' attention that item 5, as written, probably does not state what the parties intended to state.

following a voluntary request for assistance as provided in Section 9 or except as otherwise expressly agreed to in writing by the parties. Where there is reasonable suspicion to believe that an employee is either impaired due to being under the influence of drugs or alcohol while on duty or has violated the prohibitions specified in Section 3 that employee may be required to report for drug/alcohol testing. At the time the employee is ordered to submit to testing the Village shall notify the Union Representative on duty and if none is on duty, the Village shall make a reasonable effort to contact an off duty Union Representative. Refusal of an employee to comply with the order for a drug/alcohol screening will be considered as a refusal of a direct order and will be cause for disciplinary action up to and including discharge.

It is understood that drug or alcohol tests may be required at least under the following conditions:

1. When an employee has been arrested or indicted for conduct involving illegal drug related activity on or off duty;
2. When an employee is involved in an on-the-job injury causing reasonable suspicion of illegal drug use or alcohol abuse;
3. When an employee is involved in an on-duty accident involving a reportable injury to a police officer or another party or damage to police department equipment or to another party's equipment of at least \$1,000;⁵

⁵The chairman calls to the parties' attention that he changed item 3 by adding "'s" to the word "party" the second time it is used in the sentence and by adding the word "equipment" after

4. Where an employee has experienced excessive absenteeism or tardiness under circumstances giving rise to a suspicion of off-duty drug or alcohol abuse.

The above examples do not provide an exclusive list of circumstances which may give rise to testing. In addition, other circumstances may give rise to testing provided they conform to the reasonable suspicion standard. The reasonable suspicion standard for this purpose exists if the facts and circumstances warrant a rational inference that a person is impaired either by alcohol or controlled substances or has violated the prohibitions contained in Section 3. Reasonable suspicion will be based upon the following:

1. Observable phenomena, such as direct observation of use of alcohol and/or a controlled substance or observation of the physical symptoms of impairment as the result of such use;⁶
2. Information provided by an identifiable third party which is independently corroborated, or is from a source which is credible based on providing previous corroborated tips or information;

D. Order to Submit to Testing⁷

"party's". The chairman believes that this was the intent of the parties.

⁶The chairman calls to the parties' attention that he has changed the wording of this provision to more clearly express the intent of the parties.

⁷This is paragraph "E" on page 4 of the draft copy which appears after Tab 2 in the Union's brief. However, since the parties scratched out "D" and its heading, the chairman has changed

At the time an employee is ordered to submit to testing authorized by this Agreement, the Village shall provide the employee with the reasons for the order. A written notice setting forth objective facts which formed the basis of the order to test will be provided in a reasonable time period following the order. The employee shall be permitted to consult with a representative of the Union at the time the order is given, provided that such a representative is available within a 30 minute time period and the consultation is concluded within 45 minutes from the time the order is given. A refusal to submit to such testing may subject the employee to discipline, but the employee's taking of the test shall not be construed as a waiver of any objection or rights that he/she may have. When testing is ordered, the employee will be removed from duty and placed on leave with pay pending the receipt of results.

Section 5. Conduct of Tests.

The Village may use breathalyzer tests for alcohol testing. In conducting the testing authorized by this Agreement (other than by use of a breathalyzer, with respect to which only item h, below, shall apply), the Village shall:

- a. Use only a clinical laboratory or hospital facility that is licensed pursuant to the Illinois Clinical Laboratory Act that has been accredited by the National Institute for Drug Abuse (NIDA).
- b. Use tamper proof containers, have a chain-of-custody procedure, maintain confidentiality, and preserve specimens for a minimum of twelve (120 months).
- c. Collect a sufficient sample of the

"E" to "D."

same bodily fluid or material from a police officer to allow for initial screening, a confirmatory test and a sufficient amount to be set aside reserved for later testing if requested by the employee.

- d. Confirm any sample that tests positive in the initial screening of drugs by testing the second portion of the same sample by gas chromatography, plus mass spectrometry or an equivalent or better scientifically accurate and accepted method that provides quantitative data about the detected drug or drug metabolites.
- e. Provide the employee tested with an opportunity to have the additional sample tested by a clinical laboratory or hospital facility of the employee's own choosing, at the employee's own expense, provided the employee notifies the Human Resources Director in writing within seventy-two (72) hours of receiving the results of the test of the employee's desire to utilize another laboratory or hospital facility.
- f. Require that with regard to alcohol testing, for the purpose of determining whether the employee is under the influence of alcohol, test results that show an alcohol concentration of .04 or more based upon the grams of alcohol per 100 milliliters of blood be considered conclusively positive.
- g. Provide each employee tested with a copy of all information and reports received by the Village in connection with the testing and the results.
- h. Insure that no employee is subject to any adverse employment action except temporary reassignment with

pay or relief from duty with pay during the pendency of any testing procedure. Any such reassignment or relief from duty shall be immediately discontinued in the event of a negative test result, and all records of the testing procedure will be expunged from the employee's personnel files.

- i. Require that the laboratory or hospital facility report to the Village that a blood or urine sample is positive only if both the initial and confirmatory test are positive for a particular drug. The parties agree that should any information concerning such testing or the results thereof be obtained by the Village inconsistent with the understanding expressed herein, the Village shall not use such information in any manner or forum adverse to the employee's interests.
- j. Engage the services of a medical expert experienced in drug testing to design an appropriate questionnaire to be filled out by an employee being tested to provide information of food or medicine or other substance eaten or taken by or administered to the employee which may affect the test results and to interview the employee in the event of positive test results to determine if there is any innocent explanation for the positive reading.

Section 6. Cutoff Levels.

The initial test cutoff levels shall be in accordance with the then applicable cutoff levels established by the Department of Health and Human Services. All specimens identified as positive on the initial screening test shall be confirmed using GC/MS techniques (or scientifically equivalent or better techniques) at the cutoff levels in accordance with the then applicable cutoff

levels established by the Department of Health and Human Services.

Section 7. Right to Contest.

The Union and/or the employee, with or without the Union, shall have the right to file a grievance concerning any testing permitted by this Agreement.

Section 8. Confidentiality of Test Results.

The results of drug and alcohol tests will be disclosed to the Police Chief, the Village Manager, and such other officials on a strict "need-to-know" basis. In addition, if requested, the person tested with the designated representative of the Union shall be provided the results of drug and alcohol tests. Unless required by court order or as evidence presented by the Village in disciplinary proceedings involving the police officer who has been tested, test results will not be disclosed externally except where the person tested consents. Any employee whose drug/alcohol screen is confirmed positive shall have an opportunity at the appropriate stage of the disciplinary process to refute said results.

Section 9. Voluntary Requests for Assistance.

The Village shall make available a means by which the employee may obtain referrals and treatment. Such requests for assistance with drug and/or alcohol problems shall be held strictly confidential by the Village and no one in the Village shall be informed of any such request or any treatment that may be given unless the employee consents to the release of any such information, except that the Village Manager and Police Chief and/or Support Services Division Commander may be informed of the request for assistance when necessary to accommodate scheduling needs or when deemed necessary by the professional providing the assistance. Except as provided in the last paragraph of this Section, the Village shall take no disciplinary action against an employee who voluntarily seeks treatment, counseling or other support for an

alcohol or drug related problem.

While undergoing voluntary treatment or evaluation, employees shall be allowed to use accumulative sick and/or paid leave and/or be placed on unpaid leave pending treatment. Such leave shall not exceed twelve (12) calendar weeks. While undergoing treatment, the employee shall comply with and implement all conditions and recommendations of the program counselor or treatment team.

The provisions of this section shall not be applicable when the request for assistance follows the order to submit to testing or follows a finding that the employee is using illegal drug(s) or is under the influence of drug(s) or alcohol.

Section 10. Discipline for Positive Test.

Employees who test positive as defined herein for drug(s) or alcohol are subject to disciplinary action up to and including discharge. Such disciplinary action shall be subject to applicable appeal process.

A W A R D

1. The Employer's final offer on salary schedule structure is adopted.

2. The Employer's final offer on salary increases is adopted.

3. The Union's final offer on retroactivity is adopted.

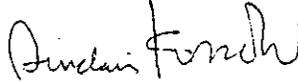
4. The Employer's final offer on performance stipends is adopted.

5. The Union's final offer on fair share is adopted, as modified herein.

6. The Union's final offer on discipline is adopted, as modified herein.

7. The contract terms agreed to by the parties, as set forth in part 7 of this opinion and award, are incorporated as part of the award in this case.

Respectfully submitted,

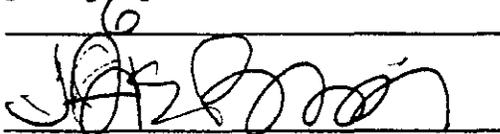


Sinclair Kossoff
Chairman, Arbitration Panel



Theodore R. Clark
Employer-Appointed Member
Concurring as to Award paragraphs:

1, 2, 3, 4, 5
and dissenting as to Award
paragraphs:



J. Dale Berry
Union-Appointed Member
Dissenting as to Award paragraphs:

#1, 2, 4
and concurring as to Award
paragraphs:

#3, 5, 6

Chicago, Illinois
January 22, 1998

