ILLINOIS STATE LABOR RELATIONS BOARD
BEFORE ARBITRATOR ROBERT PERKOVICH

In the Matter of an
Interest Arbitration between

City of Harvey	)	
	)	
and	)	
	)	S-MA-06-288
Harvey Firemens' Association,	)	
Local 471	)	

INTEREST ARBITRATION OPINION AND AWARD

A hearing was held on December 12 and 13, 2006 in Harvey, Illinois before Arbitrator Robert Perkovich, having been jointly selected by the parties, City of Harvey ("Employer") and Harvey Firemens' Association, Local 471 ("Union"). The Employer was represented by its counsel, Ronald Kramer, and it presented its evidence in narrative fashion as well as calling William Bell, Jr. and Jason Bell to testify. The Union was represented by its counsel, Lisa Moss, and it too presented its evidence in narrative fashion and called Steven Ciecierski to testify. The parties also filed timely post-hearing briefs that were received on February 15 and February 17, 2006.

BACKGROUND

The Employer is a south suburb of Chicago with a population of approximately 30,000 people. It employs three fire captains, six fire lieutenants, seven engineers, and twenty-eight pipemen, more commonly known as firefighters, at four fire stations[1]. These employees work three shifts, red, black and blue, also known as the gold shift of twenty-four hours followed by forty-eight hours off. The Employer's Public Safety Administrator is William Bell and the fire chief is his son, Jason. The Employer also has a Deputy Chief, Willie Buie, and three Assistant Chiefs, with one of those positions currently vacant.

The parties' most current collective bargaining agreement expired on April 30, 2006 and after unsuccessful negotiations and mediation the Union filed a demand for compulsory interest arbitration with the Illinois Labor Relations Board. Prior to that time the parties have had a mature collective bargaining relationship dating as far back as the 1930's and the record reflects that since 1975, when they first began memorializing their agreements to writing, the parties have had eleven collective bargaining agreements. During this period the Union has served as the exclusive bargaining representative for the Employer's firefighters, engineers and lieutenants. During the duration of the last

[1] The Employer however does not operate an ambulance service, but rather contracts that service to a private entity.

agreement the Employer's captains joined the bargaining unit upon the filing of a Majority Support Petition with the Illinois Labor Relations Board.

The parties have been successful in large part in reaching voluntary agreements to the extent that prior to the instant dispute they have resorted to interest arbitration on only one other occasion, for their 1998-2000 agreement.

THE COMPARABLE COMMUNITIES

The parties agree that the following communities are comparable for the purpose of this interest arbitration: Chicago Heights, Dolton, Maywood, North Chicago, and Park Forest. They disagree however whether Streamwood should be included, as the Union urges, or whether Blue Island and/or Calumet City should be included, as the Employer argues.

The Union contends that Streamwood should be included among the comparable communities because Arbitrator Larney found it comparable in the parties' other interest arbitration and because the parties have used it since then in accordance with his findings. The Employer on the other hand argues that a *de novo* review whether to look to Streamwood is in order because, in its view, Arbitrator Larney "did not explain in depth why he decided that...Streamwood" was comparable. On this point the Union disagrees.

In reviewing Arbitrator Larney's award it is clear that he set forth the criteria on which he would determine the comparable communities and then he found that Streamwood would be representative of the Employer for comparability purposes. It is true, as the Employer argues, that he did not painstakingly review the particulars of each of the criteria, but he clearly set forth the standards and applied them as part of his conclusion. Thus, although another arbitrator might have framed the discussion differently, I cannot say that his finding was devoid of any reasoning that would compel me to reject it.

More importantly however, the record reflects that since then the parties have had one opportunity to revisit the inclusion of Streamwood, when they negotiated their last collective bargaining agreement, yet there is no evidence that the Employer sought to raise the issue then as it does now. Thus, there is a period of reliance and stability on the issue of external comparability that in my view should not be disturbed absent evidence to the contrary. I look now to see whether there is such adequate evidence.

When I do so I find that I cannot reject Streamwood as a comparable community nor the parties' reliance on it. There can be no doubt that the Employer has presented evidence as to the propriety of including Streamwood among the comparable communities, but its evidence on this point goes only as to a current comparison between it and the Employer. In other words, it has not shown how, if at all, Streamwood has *changed* since Arbitrator Larney deemed it comparable or that *if* it has changed, whether rthe change is sufficient to question it's continued inclusion as a comparable.

I find therefore that Streamwood should be and is included among the comparable communities for this interest arbitration.

As noted above, the Employer also wishes to add to the list of comparable communities Blue Island and Calumet City and the Union opposes the inclusion of both. In support of its argument the Employer cites the fact that both communities are within 35% of the Employer's population and within 50% of the Employer on various other measures described below. It also relies on the fact that both are within 15 miles of the Employer. The Union on the other hand argues that both differ significantly from the Employer on measures such as population, equalized assessed evaluation, and sales tax revenue.

Upon careful consideration I find that I must agree with the Union. First, I find the Employer's reliance on population comparison problematic because it has chosen a different percentage as its touchstone, 35%, than that used for other measures, 50%, and that it has done so without explanation. Moreover, even using the two different touchstones the population of Calumet City is almost three times that of the Employer. Also, when one compares both Blue Island and Calumet City to the agreed upon comparables some interesting conclusions become apparent. For example, with regard to population size, median household income and sales taxes per capita, Blue Island and Calumet City are, respectively, at or near the bottom or top of the list of agreed upon comparables. Thus, to include either or both would run the risk of skewing any comparability analysis[2]. Finally, simply the fact that Blue Island and Calumet City are nearby south suburban communities is not particularly helpful because by agreement the parties have deemed other more distant communities such as Maywood and North Chicago to be comparable.

Accordingly, I find that the comparable communities for the purpose of comparability analysis are Chicago Heights, Dolton, Maywood, North Chicago, Park Forest, and Streamwood.

THE ISSUES PRESENTED FOR RESOLUTION

A. Duration

The Union seeks a three year contract relying on the parties' course of negotiations prior to arbitration and the Employer has offered a four year contract relying on internal and external comparables, the parties' bargaining history, and the interests of the public.

The Employer relies on the internal comparables which show that its current agreement with it's AFSCME unit is for a term of four years. It concedes that the current agreement with its police unit is only for three years, but it argues that it cannot be considered because it is the first police contract since 1990 and therefore a shorter contract is not "surprising..so (the parties) could reopen negotiations sooner if a contract

[2] Moreover, on sales tax per capita, an important measure of a community's financial wherewithal, Calumet City, at 168.3%, far exceeds the highest among the omparables, Streamwood, at 70.5%.

provision was not working." Whatever might have been the purpose lying behind that contract term, the fact of the matter is that they chose a three year contract and the AFSMCE unit chose a four year term. Thus, with one internal comparable favoring each of the two competing final offers, it is my view that the internal comparables are not particularly helpful herein.

With regard to the external comparables, the Employer argues that they favor its three year proposal. However, they do so only if one views the duration, as the Employer does, from execution to expiration. I however am unaware of any such approach to comparability analysis on the issue of duration and the Employer has not cited to any other arbitrator doing so. On the other hand, when one views the duration of these contracts in the more traditional manner, from beginning date to end date, the external comparables favor the Union's proposal[3].

The Employer's final arguments turn on the parties' own bargaining history and the assertion that a longer contract term will better serve the interests of the public. First, I do not view the parties' bargaining history in the same fashion as does the Employer. It asserts that not since 1990 have the parties had a four year contract, but that is true only if you view the 1990 contract from its beginning date. If, on the other hand, one views it from its expiration date in 1993, then the course of the parties' bargaining history is not as determinative for a four year term as the Employer believes. With regard to the interests and welfare of the public one can surely say that a longer term contract provides for more stability than a shorter term, but I cannot say that would necessarily be true when the parties differ on the issue of duration by only one year. Moreover, the case cited by the Employer, *City of Chicago,* is, in my estimation distinguishable first because of the longer period of time those parties spent in negotiations and arbitration. Second, because the City of Chicago is so much bigger and less than nimble than this Employer, its ability to adapt to change and thus its need for stability could be markedly different than that herein.

Thus, I adopt the Union's proposal on the issue of contract duration.

B. Stipends

The record reflects that the parties have agreed to resolve this issue by including in their agreement the following language in Article VIII, Section D:

> Employees assigned by the Employer to the following positions shall receive the following stipends, which shall be added to the base salary and wages of each employee for as long as the employee holds the position:
>
> | | |
> |---|---|
> | Hazmat Coordinator | $1,000 |
> | Photo Coordinator | $1,000 |

[3] Chicago Heights (five years), Dolton (three years), North Chicago (four years), Maywood (three years and four months), and Streamwood (two years).

Arson Investigator	$1,000
Fire Prevention Officer	$1,000

C. Appendix B

The record reflects that the parties have agreed in principle that probationary employees hired on or after May of 1999 shall be entitled to vacation during their probationary period. The record also reflects that they have not yet agreed on the final contract language, to the specific employees who will receive this benefit, nor the amount each will receive. However, the record further reflects that they have exchanged information on this issue and they are continuing to resolve the matter. Thus, I remand this issue back to the parties for final resolution and retain jurisdiction in the event that their efforts are unsuccessful.

D. Uniform Allowance

The record reflects that the current uniform allowance, $275, has not been changed since the third year of the parties 1987-1990 contract. As a result, the Union has proposed that the allowance be increased to $375, arguing that the increase is necessary because of the period since it was last changed and because the external comparables support the change. The Employer on the other hand contends that the status quo is appropriate because there is no legitimate need for the increase.

I begin this analysis, as I must, with the recognition that as the party seeking the change the Union bears the burden of proof. Moreover, under most circumstances the Union would have appeared to meet its burden by the fact that the allowance has not been increased for so long and because of the fact that four of the five external comparables (Streamwood has no uniform allowance) have uniform allowances between $365 and $700.

However, the Employer has provided a compelling offset to those criterion with its evidence of the obligation it places on bargaining unit employees with regard to uniforms and the history of the use of the allowance. More specifically, the record reflects that the Employer provides fire suppression gear and a dress uniform to employees upon hire and allows employees to wear t-shirts or sweatshirts and casual pants while on duty in the fire station. Thus, the Employer appears to be correct when it asserts that unless an employee's weight fluctuates substantially or he or she loses clothes, the "only items that they must purchase themselves are casual work clothes..." The record further reflects that the cost of the shirts are $18 each and the cost of pants is $41.95 each. Thus, in any given year the cost of one t-shirt, one sweatshirt, and one pair of pants is $67.95 and under the status quo an employee could purchase up to four sets of such clothing.

The strength of the Employer's argument is borne out by the record evidence that only approximately 50% of bargaining unit employees overspent their allowance in recent years and then by only a small amount. The Union argues that these numbers are

simply a reflection of employees being "budget conscious and refusing to dip into their own pockets ...any more than necessary." I however, based on the numerical analysis described in the previous paragraph, see this data more as evidence of adequacy, as the Employer argues[4], rather than frugality, as the Union argues.

In light of the foregoing I adopt the Employer's proposal on the issue of uniform allowance[5].

E. Starting Time

Since some time in the 1970's the starting time for the bargaining unit was 7:00 a.m. However, in negotiations for their 1998-2002 the Union sought, and the Employer agreed, to change the starting time to 8:00[6]. In this proceeding the Employer seeks to return to the 7:00 starting time while the Union wishes to retain the status quo.

In support of its proposal the Employer relies on the fact that because command staff does not report until 8:00 a.m. they cannot meet with the management staff that completed its shift one hour earlier. It also asserts that because there is no command staff and only one assistant chief on duty between 7:00 a.m. and 8:00 a.m.[7], it cannot ensure that tasks to be completed by 8:00 a.m. are in fact completed. The Union replies that these concerns can be remedied by either better management and/or changing the starting time of managers.

Because it is the proponent of the change the Employer bears the burden of proof and I am compelled to find that it has failed to meet its burden. First, as noted above, the change to 8:00 is of relatively recent vintage. Thus, a longer history might provide a firmer basis for change. Second, and again because the change in the first instance is relatively new, other alternatives might prove to be useful to the Employer without changing a condition of employment arrived at in bargaining.

However, the most compelling justification for maintaining the status quo is the external comparables. The record reflects that of the five comparable communities only Streamwood has a starting time of 8:00 a.m.

Thus, I conclude that the Union's proposal on this issue be adopted[8].

---

[4] Arbitrator Hill, in *City of Blue Island,* S-MA-01-190 (2002) followed a similar analysis.
[5] I am mindful that the Union argues that when one considers the cost of a required survivor light, at $135, and the cost of a pair of shoes, at $87.50, the status quo is inadequate. However, the Union did not show that either or both of these items must be replaced each year.
[6] The record reflects however that the changed starting time was not implemented until November of 2003.
[7] There are three assistant chief positions but currently only one is filled.
[8] The Employer also relied on the fact that the Union's asserted reason for changing the starting time from 8:00 a.m. to 7:00 is not supported by the record. As is apparent from the above, I have found it unnecessary to rely on that rationale.

F. Wages

On the issue of wages the Employer has offered a first year wage increase of 3% effective May 1 and 2% effective November 1 for firefighters and for captains 8% and 7% effective on the same dates. In the second year it proposes that all bargaining unit employees received a 3% wage increase in May and a 2% wage increase in November and in the third year, a 3% wage increase followed by a 1% wage increase effective on those same dates. The Union on the other hand proposes in the first year wage increases between 4.1% and 13.4 percent, depending on the position, for firefighters and 12.22% for captains. In the second year it proposes a range between 4.4% and 8.3% for firefighters and a wage increase of 7.3% for captains. Finally, in the third year it offers a range between 4.2% and 7.7% for firefighters and 6.6% for captains.

With their respective final offers thus drawn I consider the reasonableness of the two competing offers and when I do so I find that I must accept the final offer of the Employer.

First, I consider the Union's argument that it essentially seeks to maintain parity with the Employer's police officers. On this point I am compelled to conclude that, in accordance with my award in *Village of Brookfield,* FMCS#99-0527-11849-A (2000), the Union has failed to meet its burden to prove that a parity relationship exists and that it must be preserved. In *Brookfield* I held that the party making the parity argument must show that there is in fact a historical salary relationship between bargaining units or that there is a pattern such that the parties can expect a parity result. In my view the Union has not met either test for two reasons. First, the record shows that between 1990 and 2001 the Employer's police officers were either not represented or were represented by a union that was unable to reach a collective bargaining agreement. Thus, wage increases were either unilaterally set by the Employer or were, at a minimum, not the product of a mutual agreement. Under those circumstances I cannot find that the parties herein were in a position to expect that the firefighters could or would expect the same result. Second, since 2002 when the Employer and its police union reached a collective bargaining agreement wage increases for the police were 7%, 7%, 8% and 16.2% while wage increases for the fire fighter unit were, during that same period, 5%, 5%, 6%, and 6%. Accordingly, there is no pattern or evidence of parity that commands that the Union's final offer be adopted.

This same analysis is also applicable to the question of internal comparables because since the police unit was not successfully represented by an exclusive bargaining representative it cannot be regarded as a true measure of comparability. That flaw however does not apply to the Employer's bargaining unit represented by AFSCME and the record reflects that unit received during the relevant period wage increases of three percent. Thus, where internal comparables are useful they clearly favor the Employer's wage proposal[9].

[9] The Union argues that vis-à-vis the AFSCME unit the firefighters have "averaged proportionally higher wage increases" than the AFSMCE unit. Although that is true, the disparity has not been so large as to justify selecting the Union's final offer under an internal comparability analysis.

An external comparability analysis also leads me to conclude that the Employer's final offer is the more reasonable of the two because among the comparables the average wage increases were between 2.39% and 3.82% from 2002 to 2006. The Union of course argues, and the Employer does not seriously dispute, that even with its own proposal the bargaining unit remains at or near the bottom of the comparables in terms of salary. To look at external comparability in this fashion would lead one to accept the Union's final offer. However, to do so ignores that by way of its final offer the Union is attempting to "catchup" and that "catchup" wage proposals have been disfavored among interest arbitrators in Illinois, including this one. This is particularly true where, as is the case herein, the "catchup" final offer greatly exceeds the percentage wage increases among the comparables and the cost of living, described below. Finally, the instant case is not one where the employer has been disinclined to make some effort to ameliorate the pay discrepancy. Rather, the record reflects that the Employer's final offer herein is the highest in terms of percentage wage increase among the comparables.

I turn next to a cost of living analysis and note that both parties' final offers exceed the real and projected cost of living (between 2.2% and 4.2% by various measures). However, the Union's proposal does so by a far greater amount and therefore the Employer's proposal is the more reasonable of the two.

The next major point on which the parties disagree is which of the two competing final offers best accommodates the interests and welfare of the public. On this point the Employer and the Union's disagreement turns essentially on whether the Employer's resources are best directed disproportionately toward crime and law enforcement or fire suppression[10].

In my view this is a decision ill-suited for any interest arbitrator, especially when it has been couched in the arguments set forth by the parties herein. For example, the Employer relies on high police turnover and low police recruitment but the Union couches the difficulty in terms of political management of the police department. Another example that the issue of fund allocation between police and fire should be best left to the parties is the Employer's reliance on high crime rates when the Union cites public proclamations of the mayor that the city is a safe place to live. In my view no interest arbitrator is in a position to weigh these contentions. Rather, they are best left to the Employer, in those instances when it can act unilaterally, and the Employer and its unions, in those cases when action requires mutual agreement. Ultimately then, the final arbiter is not the interest arbitrator, but the voting population of the city of Harvey.

Instead, I rely on those factors traditionally used in interest arbitration to choose between the two competing final offers. When those traditional factors, internal and

[10] The parties have also couched this issue in terms of the pay of firefighters versus the amount of time off they enjoy and vis-à-vis the amount of work they perform. I however believe that the issue as drawn between them is better described as set forth above.

external comparability, the wisdom on unilaterally imposing "catchup" offers, and the cost of living, are considered, I am compelled to choose the Employer's final offer[11].

G. Minimum Manning

The parties first negotiated a minimum manning provision into their collective bargaining agreement in 1980, agreeing that the requisite number would be eleven full-time firefighters. In 1992 the Employer, with the Union's agreement, ceased providing ambulance services to the community and instead contracted out that service. Thereafter fire calls dropped in number and the parties agreed in their 1993-1998 collective bargaining agreement that in 1997 the requisite minimum manning would drop to ten. That number has been unchanged since that time.

The Employer proposes that the minimum manning requirement be reduced to nine full-time fire fighters, relying on internal and external comparables and the interests and welfare of the public. The Union on the other hand argues that the Employer has failed to meet its burden of proof and that therefore the status quo should remain unchanged[12].

I note first of all that as the party seeking to change the status quo the Employer bears the burden of proof and, as described more fully below, I find that it has failed to carry its burden[13].

First, the comparables. The Employer relies on the fact that of the comparable communities Chicago Heights has a contractual minimum manning requirement of seventeen, Streamwood has a minimum manning practice, rather than a contractual requirement, of ten, Maywood has a contractual requirement of eight, North Chicago a practice of seven, Park Forest a practice of 5 and Dolton a contractual requirement of 4. However, as the Union points out, the Employer's evidence on this point is silent as to the degree to which, if at all, these communities use paid on call fire fighters and therefore they are of little help.

---

[11] However, the Union has argued that the portion of the Employer's final offer that provides for semi-annual wage increases without compounding must be rejected because neither internal comparability, external comparability, nor the parties' bargaining history justify it. I disagree. The parties stipulated as to the issues presented for resolution and they did not stipulate that this was a separate issue. Thus, because it is an integral part of the parties' final offer and because they did not segregate it from the wage issue generally, I find that it would not be proper for me to consider it standing alone.

[12] Both parties agree however that the Deputy Chief should be added to the list of positions included in the contractual definition of "full-time fire fighter."

[13] The Employer argues that because minimum manning is a permissive subject of bargaining the quantum of proof that it must bear is less that it would be otherwise. I disagree. First, the Employer has cited no authority for its proposition. Second, and more importantly, I believe that the Employer has mischaracterized the nature of the issue. Minimum manning is indeed a permissive subject of bargaining, but it is not for those who have historically negotiated, as have these parties, over this subject. Thus, it is my view that when the General Assembly declared this dichotomy between those who have negotiated minimum manning in the past and those who have not, it essentially told those parties in the former category that if they deemed the subject important enough to bargain about it in the past then it would remain important for them. Thus the distinction the Employer attempts to draw might be persuasive if the parties had never bargained about minimum manning before but, for whatever reason, *chose* to do so now.

The Employer next argues that all the comparables provide ambulance service such that the number of fire calls in those communities are higher and that in some cases they have a larger population than the Employer. The Union argues however that call volume and population are poor indicators of comparability. With regard to call volume, the Union relies on the fact that because the Employer does not provide ambulance services a better measure of comparability would be the number of structural fire calls that are dealt with in the comparable communities. Yet, the Employer did not provide that evidence. Similarly, the Union argues that the ratio between the number of fire fighters the number of residents yields no meaningful data because structural fire calls can, and often do, involve buildings that are vacant or do not have "residents[14]." Upon careful consideration, I agree with the Union.

Similarly, internal comparables are of little assistance because the evidence shows that the Employer's has a contractual requirement of minimum manning with its police unit at six, but none at all with its AFSCME unit. However, to compare the absence of a minimum manning requirement in a public works unit with a fire fighter unit would, in my estimation, be of little help.

I am left then with the Employer's argument that reducing minimum manning from ten full-time firefighters to nine would be in the best interests of the public. On this point the Employer argues that doing so would reduce overtime costs and would not impair the safety of the public or its fire fighters.

First, the question of overtime. It cannot be denied that if the Employer were required to use fewer employees on each shift then each time an employee reported off there would be less likelihood that it would need to call back another employee to meet the minimum manning requirement. However, the Employer's attempt to demonstrate the impact because, as the Union points out, its evidence as to the amount of sick time used by bargaining unit employees in 2005 and 2006 did not exclude employees on long-term injury and those on military leave and did not distinguish between those who called in sick versus those who were injured. Thus, I am left only with the logical, but speculative, observation at the beginning of this paragraph and that does not, in my estimation, meet the Employer's burden of proof[15].

I also cannot agree with the Employer that reducing the minimum manning requirement will not affect safety concerns. First, the Employer relies on the "two in-two out" requirement of the Occupational Safety and Health Administration (OSHA) and argues that reducing the minimum manning requirement to nine will not violate that standard because even with nine fire fighters there will be enough to fight up to two simultaneous fires in the community. However, the Union relies on the Employer's own version of the "two in-two out" approach which, in my view, is broader than that required by OSHA. For example, the Employer defines the circumstances under which the policy will apply in broad terms, including in its definition of an "immediate danger to life and

[14] For example, fires to industrial buildings.
[15] See also, *City of Maywood,* S-MA-95-167 (Malin, 1996)

health" (IDLH) circumstance those situations that "would cause irreversible or delayed adverse health effects." Second, and more importantly, it requires that in IDLH situations there be two, two person teams and one pump operator. Thus, the Employer could not comply with its policy in the event that there were two simultaneous fires in the community if minimum manning were reduced to nine. Finally, I find that its argument that even with the status quo it cannot comply with this requirement less than persuasive. Simply put, exacerbating a problem is to be avoided, not sought.

The Employer attempts to meet these arguments by asserting that the chances of two simultaneous fires is low and that it can rely on its mutual aid pacts with other communities. However, as the Union argues, on two occasions in the one month before the arbitration hearing in this matter such a situation occurred. It also argues that communities are not obliged to answer mutual aid pacts and that even when they do, fire fighters from those communities may require more time to arrive at a fire scene than the Employer's own fire fighters[16]. I agree with the Union that these risks, in light of the evidence of external comparability and in light of the Employer's less than compelling evidence as to savings, requires that the Employer's proposal to reduce minimum manning be rejected.

H. Kelly Days[17]

The Employer proposes to reduce the frequency with which fire fighters earn Kelly days from every seventh shift to every ninth shift, citing the external comparables and the best interests of the public. The Union urges that the status quo remain unchanged, arguing that the Employer has failed to meet its burden of proof to upset the status quo.

The external comparables show that with the status quo the Employer is near the middle of the comparable communities as Dolton provides a Kelly day off every fifth shift, Maywood every seventh shift, North Chicago and Streamwood every ninth shift, and Chicago Heights and Park Forest every twelfth shift. Thus, because the Employer's placement is not disproportionate, and would actually support the Union's position that the status quo be preserved, I look for other reasons to adopt the Employer's proposal[18].

---

[16] The Employer points out that thus far communities with whom the Employer has mutual aid pacts have never refused such a request for fighting fires and have done so only when the request was to man fire stations while its own fire fighters were at fire scenes. In my view this evidence only demonstrates that those communities have indeed regarded their obligations as discretionary and that reducing the parties' minimum manning requirement will only enhance the potential costs if they chose to refuse to respond in more dire circumstances.

[17] Kelly days, known at the Employer as "Haines" days, are scheduled days off at periodic intervals which affect an employee's normal FLSA work cycle and are designed to reduce the number of hours in a regular cycle to avoid FLSA overtime which would normally occur in many firefighter schedules. See e.g., *City of Rock Island,* S-MA-03-211 (Nathan, 2004).

[18] Again, because it is the Employer that seeks to disrupt the status quo it bears the burden of proof. Moreover, on this issue, as the Union points out, the parties have historically and without deviation negotiated over time *increases* to the number of Kelly days. Therefore, I believe the Employer's burden on this issue may very well be greater.

On this point the Employer again argues that decreasing the amount of time off will decrease the amount of overtime needed to staff its fire department and again it relies on sick time usage to demonstrate the savings. However, its evidence again fails to raise this argument above speculation, as described above.

Finally, the Employer contends that its offer on this issue should be adopted because it has offered to the Union a *quid pro quo* – wage increases (that I have adopted) in excess of those it agreed to for its AFSCME unit. Although this is true, the argument fails to recognize that its final offer to reduce Kelly days would go a long way toward negating the wage increases that I have awarded.

I find therefore that the Employer's proposal to reduce Kelly days must be, and is, rejected.

I. Extra Seniority Days Off

Under the parties' current collective bargaining agreement bargaining unit employees receive one additional day off at their eleventh year of service, two additional days off at their thirteenth year of service, three additional days off at their sixteenth year of service, four additional days off at their nineteenth year of service and five additional days off at their twenty-first year of service. The Employer proposes to abolish this benefit for employees hired before December 1, 2006 and for those hired after to freeze the current level into the future. The Union proposes to maintain the status quo.

The Employer relies on the fact that in none of the comparable communities do fire fighters receive such a benefit. With regard to the internal comparables, the Employer concedes that its police and public works bargaining units do in fact receive the same benefit, but it argues that their circumstances are different because they do not receive Kelly days and because minimum manning requirements are different or nonexistent. In addition, it argues that it will enjoy a monetary savings and that its proposal does not harm employees currently receiving the benefit. The Union on the other hand, while conceding that this benefit is unique among the comparables, argues that it is a city-wide benefit, that any savings are few, if any, and that current employees will be harmed.

Upon consideration I find that I must reject the Employer' proposal. Again, as the proponent of changing the status quo, a condition that is long-standing and also provided to other of its employees, I cannot find adequate reason to upset the status quo. Moreover, what might have been the most compelling argument in favor of the change, monetary savings, was undermined by the Employer's admission that during the life of the contract before me it is doubtful that there would be much savings to the benefit of the Employer.

In view of the foregoing I find that the Employer's proposal must be rejected.

J. Promotions[19]

Background

Prior to the passage of the Fire Department Protection Act, which became effective in August of 2003, the parties had never before negotiated over promotions to any significant extent. Thereafter, sometime in 2005, the parties successfully negotiated a side letter of agreement to their 2003-2006 collective bargaining agreement that governed this issue. There the parties agreed that the promotional process would consist of a written exam, a value for seniority, a value for ascertained merit, and a value for chief's points and they agreed that the weight for each of the components of the promotional process would be, respectively, 60%, 20%, 10%, and 10%. They did not include in their side letter any concept of an overall passing score needed for promotion.

In late 2005 and early 2006 the Employer conducted an exam pursuant to the side letter for promotion to the ranks of lieutenant and engineer. In so doing it used an overall passing score of 70% and as a result only one candidate passed the lieutenant exam, Jason Bell, who was the department chief and the son of the Employer's Public Safety and Fire Administrator. Similarly, there was only one successful candidate on the engineer exam, Jason Anderson. The Union grieved the Employer's use of the overall passing score and the matter was heard in arbitration by Arbitrator Peter Meyers. Arbitrator Meyers dismissed the grievance finding that although the Union was correct that the parties had not negotiated an overall passing score in their side letter, the Employer had a practice of using one, that its practice did not conflict with the FDPA, and that nothing in the parties' collective bargaining agreement nor their side letter prevented the Employer from using such a device.

It is the parties' experience with these last two exams that has caused them to draw their final offers as stated below on various issues relating to promotions.

The Interplay Between the Parties' Contractual Agreements and the Rules and Regulations of the Employer's Civil Service Commission and Its Other Applicable Rules, Regulations, and Orders

On this issue the Union's final offer is that the parties' collective bargaining agreement should supercede any or all of the Employer's rules, regulations, orders of its Civil Service Commission, and its rules, regulations, and orders generally. The Employer on the other hand offers that the Agreement should supercede those proclamations only when they are in conflict.

[19] On this issue the parties agree to language governing eligibility (Section 14.2), written exam (compare Union's proposed Section 14.5 and Employer's proposed Section 14.4), ascertained merit (compare Union's proposed Section 14.7 and Employer's proposed Section 14.6) and maintenance of promotional lists (compare Union' s proposed Section 14.8 and Employer's proposed Section 14.9)

The Union's primary argument in support of its final offer is that it will eliminate the very sort of conflict that brought them before Arbitrator Meyers and it offers a number of examples of differences between the parties' agreement and the Employer's rules and regulations that may or may not rise to the level of a conflict. Thus, according to the Union, the Employer's final offer in those cases would not provide the refuge of certainty, unlike the Union's final offer, for the parties. In addition, it contends that its final offer finds some support among the external comparables in that the agreements in Dolton and Streamwood provide that the agreements supercede the FDPA[20].

In my view the Union's final offer should be adopted. First, it provides certainty for the parties, something they have not enjoyed in the short, tortured history of their post –FDPA experience with promotions (see discussion below of the remaining issues on this point), including the type of dispute that placed the parties in litigation before Arbitrator Meyers. Second, the final offer enjoys some support among the external comparables. Finally, I note that although the Employer proffered a final offer on this issue, it provided no argument in support of its final offer or in opposition to that of the Union.

Right of Review

On this issue the Union proposes that the parties' collective bargaining agreement read that in the event there are any alleged errors as to exam eligibility, exam results, or veterans' preference, those errors are to be reviewed by the "appointing agency." It also proposes that if following that review there still remains a dispute, such dispute will be resolved through the parties' grievance and arbitration procedure. The Employer made no final offer on this issue nor did it address the propriety of the Union's in its post-hearing brief.

The Union supports its final offer by relying on the only external comparable, Dolton, that deals with this subject and whose terms are substantially the same as that offered by the Union. It also argues that its final offer is consistent with the FDPA and codifies the relevant portions of the FDPA into the parties' collective bargaining agreement.

In light of the support found for the Union's final offer among the external comparables, and because consistency with, and codification of, the FDPA is an appropriate goal in collective bargaining, I adopt the Union's final offer on this issue.

Posting Requirements

The Union's final offer here is that the parties' agreement should require the Employer to post a notice of the impending exam no less than ninety days before the exam date and that it must post the seniority and ascertained merit points of each applicant within fourteen days of his or her application to take the exam. The Employer has proffered no final offer on this issue nor has it expressed a view on the propriety of the Union's final offer.

---

[20] Only one of the external comparables, Chicago Heights, provides support for the Employer's final offer.

In support of its final offer the Union argues that the portion of its final offer as to posting notice of the exam is a codification of the FDPA and that the portion that relates to posting of seniority and ascertained merit points clarifies the FDPA which provides only that they be posted "in advance" of the exam. Moreover, it asserts that in the past employees found themselves sitting for the written exam without knowing the amount of seniority and ascertained merits points that they had.

As noted above, consistency and clarity with regard to the FDPA is a worthwhile goal. Moreover, it seems to me only fair that employees have some idea where they stand as to other portions of the promotional process when taking the written exam as it may affect the degree to which they prepare and perform on the exam. Thus, the Union's final offer on this issue is adopted.

The Necessary Score for Passing

On this issue the Union proposes to eliminate the passing score on promotional exams and to simply rank all applicants against one another from highest to lowest score. The Employer on the other hand proposes that there be passing score and that it be an overall aggregate score of seventy.

As a threshold matter the Employer contends that the Union is seeking a major breakthrough and it therefore has a substantial burden of proof. I however cannot agree. The record shows that although the Employer has historically used an aggregate passing score it did so before the parties bargained about the matter of promotions. Moreover, once they did bargain over this subject the parties left the matter of an aggregate score out of their letter of agreement. Thus, the matter is much like the issue of residency where arbitrators, including myself, have held that a unilaterally practice does not rise to the level of a *status quo* for purposes of breakthrough analysis because it was not a matter of mutual agreement. However, I do find that the Union is seeking to change the current terms and conditions of employment, though not by way of a breakthrough, and it therefore bears the burden of proof.

First, the comparables. Unfortunately, they are of little help in choosing between the parties' final offers because there are three (Park Forest, North Chicago, and Chicago Heights) that have no minimum passing score, but three others (Dolton, Maywood, and Streamwood) have minimum passing scores of seventy, sixty-five, and seventy, respectively. As a result, the external comparables favor neither final offer. I turn therefore to the parties' substantive arguments in favor of their final offers.

In this regard the Union's primary argument is that if the overall minimum score were eliminated there would have been more candidates for promotion, a serious concern in light of the fact that the prior promotional exam, using a minimum passing score, yielded only one successful candidate for lieutenant and only two for engineer when there were a total of nine vacancies in those two positions over the past two years. Secondarily, the Union contends that because the overall scores on the exams were low,

an emphasis on seniority and education will "ensure candidates' skill and familiarity" with the work of lieutenants and engineers. The Employer replies that simply because a promotional exam will yield more candidates it is not the best solution to the problem of finding enough candidates to fill vacancies that exist because if employees were to uniformly score low the Employer would be faced with the best among them, rather than the best as measured by an objective standard. Moreover, it points out that historically the Employer has not faced the dilemma of a paucity of candidates compared to the number of vacancies. With regard to the utility of using seniority and education as primary determinants of promotion in light of low scores on the prior exams, the Employer points out that candidates for promotion were provided with sufficient notice of the content of the exams and study materials and that they were reimbursed for any costs they may have incurred to obtain training to prepare them for the exam.

When considering these arguments I am compelled to rule in favor of the Employer because, simply put, a promotional exam that yields more successful candidates only when they are measured against one another is not the preferred methodology. Such a methodology is commonly known in human resources as comparative ranking and is in fact used in some instances. However, it is also commonly held that it has as its flaw the fact that candidates are not ranked against an objective standard that once surpassed demonstrates that a candidate is in fact capable of performing the job in question. Instead, comparative ranking simply ranks candidates against one another and only tells us which candidates are better vis-à-vis one another. (See e.g., *Human Resource Management: Gaining a Competitive Advantage,* Noe, Hollenback, Gerhart, and Wright, Irwin-McGraw Hill Publishers, 5th edition at page 343.) Such a ranking yields the desired result, determining who is capable, only when all or most of the candidates are proven performers. On the other hand, if all or most of the candidates are not proven performers, we only know, with comparative ranking, who is the "best" among those who are not proven performers[21].

In light of the foregoing, I adopt the Employer's final offer.

Eliminating Chief's Points and Affording Seniority More Weight

The Union proposes in its final offer to eliminate chief's points and increasing the value accorded to seniority from ten percent of the aggregate score to twenty percent. The Employer on the other hand proposes that chief's points still be used and that they, as well as seniority, be weighted at ten percent each[22].

As noted above, the parties recently negotiated the matter of promotions. In those negotiations they disagreed on the matter of chief's points, with the Union seeking their abolition because of its fear that awarding the points would be too subjective.

---

[21] I am mindful of the Union's argument, and it carries with some appeal, that longevity and seniority, especially combined with education, positively affect the knowledge, skills, abilities and other characteristics of the candidates. However, those alone are not the only determinants of success on the job.

[22] The parties agree however that the promotional process include the written exam, weighted at sixty percent, and ascertained merit points, weighted at twenty percent.

Nonetheless, the parties agreed to retain chief's points, valuing them at ten percent of a candidate's final score. In the Union's view the first promotional exam demonstrated that its fear was well placed. The Employer's Public Safety and Fire Administrator awarded the chief's points and he awarded the highest number of points to a candidate that was his son. In addition, another employee was a candidate on both the lieutenant and engineer exams yet he was awarded a different number of chief's points on the two exams. Finally, another candidate was awarded a low number of points by the Administrator allegedly because he had damaged Department property, yet the evidence at the hearing showed that he wrote in chalk the words "Elmo's house" on a construction trailer that was destined for demolition. The Union thus argues that promotional processes should be fair and objective and perceived as such and that only the elimination of chief's points and valuing seniority more will achieve that goal because "seniority is a far better and more objective gauge of one's commitment, experience, and ability..." The Union also finds some support for its final offer among the external comparables and repeats its arguments that its final offer will yield more successful candidates for promotion.

The Employer on the other hand argues that there were legitimate reasons for the awarding of chief's points in the prior exam and that awarding too much weight to seniority might "unfairly skew" the exam results. It too repeats its arguments about the wisdom of more, but not necessarily better, candidates for promotion.

I begin first with the issue of the impact of seniority. As I stated above, see *infra* footnote 20, there can be no question that longevity and seniority impact job performance and often in positive ways, but that it alone is not the best determinant of success in the future. Rather, I agree with the arbitration panel in *City of Edwardsville,* S-MA-92-226 (1995) that although time spent on the job is absolutely associated with greater experience and knowledge, the skills, experience, and knowledge of an applicant are also measure by other components of the testing process. In other words, time spent on the job does not absolutely guarantee that an applicant actually will possess the heightened skill, experience, and knowledge that would be expected in a more senior applicant. (See e.g., *City of Edwardsville, supra* at 9-10.) Thus, I cannot adopt the Union's final offer to eliminate chief's points and value seniority at a higher amount[23].

However, the parties have agreed that the issue of promotions is non-economic and thus, under the law, I am not restricted to choosing either of the two final offers. Moreover, the Union has raised a valid and legitimate interest that the promotional process must be fair and objective and perceived as such and that, based on the record herein, that goal may not have been obtained in the last promotional exam. Thus, I also find that the parties' contractual agreement as to the awarding of chief's points must include language that the party awarding the points shall recuse him or herself from the process when there is a real or perceived conflict of interest or compromise to fairness and objectivity, that a candidate for an exam can seek recusal of that person if he or she believes the process is or will be compromised, that if recusal is rejected it be

[23] I also note that the external comparables do not support the Union's final offer in that only Dolton values seniority at twenty percent but Chicago Heights, Maywood, and Streamwood all value seniority at ten percent.

accompanied by a written explanation, and that the matter be subject to the right to review provisions of the parties' agreement.

Seniority Points

Under the parties' most recent agreement they grant five points to each candidate on the promotional exam for each year of service up to twenty years. The Employer proposes that instead each candidate receive ten points for each year of service up to ten years. The Union on the other hand asserts that the status quo should remain unchanged.

As a proponent of a change to the current state of affairs the Employer bears the burden of proof and in order to meet its burden it repeats its arguments made in support of the status quo with regard to chief's points and the value to be placed on seniority. However, those arguments are far less persuasive here because on that issue the dispute was whether to value seniority to the exclusion of chief's points. Here the issue is simply what weight to give seniority and even the Employer proposes that seniority be given some weight. Moreover, the Employer's final offer on this issue fails because it implies that there is no value to be placed on an employee's service after the tenth year. Whether or not that is true, the record contains no basis for that conclusion[24].

Finally, the Union's final offer on this issue enjoys some support among the external comparables.

Thus, I adopt the Union's final offer.

AWARD

1. The Union's final offer on duration is adopted.
2. The parties' agreement on Stipends, Article VIII, Section D is adopted.
3. The parties' agreement on Appendix B is adopted, but the matter is remanded to the parties for further negotiations in accordance with my findings, *supra* at page 5.
4. The Employer's final offer on uniform allowance is adopted.
5. The Union's final offer on starting time is adopted.
6. The Employer's final offer on wages is adopted.
7. The Union's final offer on minimum manning is adopted as is the parties' agreement to include among the list of positions in the contractual definition of "full-time fire fighter" the position of Deputy Chief.
8. The Union's final offer on Kelly days is adopted.
9. The Union's final offer on extra seniority days off is adopted.
10. On the issue of promotions I find as follows:

[24] I am mindful of course that under the status quo the parties appear to have reached the same conclusion with regard to an employee's twentieth year of service and beyond. The difference however is with regard to that point in time the parties agree. With regard to the tenth year of service they do not and, as noted above, the burden is on the Employer to support the change.

a. that the parties' agreements on the issues of eligibility, written exam, ascertained merit and maintenance of promotional list are adopted,
b. that the Union's final offer on the interplay between the parties' Agreement and the rules and regulations of the Employer's Civil Service Commission and its other applicable rules, regulations and order is adopted,
c. that the Union's final offer on right to review is adopted,
d. that the Union's final offer on posting requirements is adopted,
e. that the Employer's final offer on the necessary score for passing is adopted,
f. that the Employer's final offer on eliminating chief's points and the weight to be afforded seniority is adopted with the proviso that the parties' contract language on these issues include language that the party awarding chief's points must recuse him or herself when there is a real or perceived conflict of interest or compromise to fairness or objectivity, that a candidate for an exam can seek the recusal of the person who will award the points, that if recusal is rejected that the rejection be accompanied by a written explanation and that the decision on recusal can be reviewed as provided elsewhere in the parties' Agreement,
g. that the Union's final offer on seniority points is adopted.

11. The parties' tentative agreements reached in bargaining before the arbitration are adopted and are to be included in their final agreement.

DATED: April 4, 2007

Robert Perkovich, Arbitrator