Westchester Sergeants Arbitration Award

While examining this MAP arbitration award for the Westchester Sergeants, you can see that the arbitrator eventually split the baby. However, the big issues on insurance and wages went in MAP's favor. It's good to get some honest decisions.

MAP

ILLINOIS STATE LABOR RELATIONS BOARD

INTEREST ARBITRATION

In the Matter of the Arbitration

between

THE VILLAGE OF WESTCHESTER
Westchester, Illinois

and

METROPOLITAN ALLIANCE OF POLICE, WESTCHESTER SERGEANTS CHAPTER #504

Before

HARVEY A. NATHAN

Sole Arbitrator

ISLRB No. S-MA-10-035

Hearing Held: August 20, 2010

Briefs Exchanged: November 3, 2010

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

I. INTRODUCTION

A. Background

This is an interest arbitration proceeding held pursuant to Section 14 of the Illinois Public Labor Relations Act (5 ILL 315/14), hereinafter referred to as the "Act," and the Rules and Regulations of the Illinois State Labor Relations Board ("Board"). The parties are the Village of Westchester ("Village") and the Metropolitan Alliance of Police, Westchester Sergeants Chapter #504 ("Union"). The proceeding is for the completion of the parties first collective bargaining agreement ("Agreement").

The Village of Westchester is a non-home rule municipality in western Cook County, Illinois, just east of DuPage County and about 14 miles west of downtown Chicago. It 2009 it had an approximate population of 15,600.[1] The Village had 108 employees in 2009 most of whom are represented by labor organizations.[2] The Police Department has approximately 32 sworn employees, 7 of whom are classified as sergeants and make up the bargaining unit involved in this case. The Illinois Fraternal Order of Police, Local #21represents the Patrol Officers. The Firefighters are represented by the Service Employees International Union, Local 73.[3] Police Record Clerks and Telecommunicators are

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[1] This is a decrease from 16,800 in 2000 and 17,300 in 1990.

[2] The Village's brief represents that were 112 employees as of August 10, 2010.

[3] The Fire Department is about 3/4 of the size of the Police.

represented by the Combined Counties Police Association. The Clerks (clerical staff) are represented by the Combined Counties Police Association, Clerical Westchester Chapter. The Public Works employees are represented by Truck Drivers Local 705, International Brotherhood of Teamsters.

On August 7, 2008, the Union was certified as the bargaining agent for the Westchester Sergeants, and on August 27, 2009, the Union made a demand to bargain a first Agreement. Bargaining commenced on November 4, 2009 and there were six bargaining sessions, including two with a federal mediator. On June 1, 2010, the undersigned arbitrator was advised of his selection to hear and decide this case. Although many issues had been resolved, at the time of his appointment the parties were at impasse regarding about 20 unresolved items. By the date of the hearing the parties had resolved 12 of these issues. The eight issues submitted to the arbitrator are as follows:

1. Section 3.6 - Election of Procedures for Discipline cases.
2. Section 6.2 - Insurance
3. Section 6.7 - Sick Leave
4. Section 6.9 - Personal Day Off
5. Section 7.2 - Normal Work Week and Work Day
6. Section 7.6 - Compensatory Time
7. Section 10.5 - Layoff
8. Appendix C - Wages

Sometime in late 2009 the Union filed an unfair labor practice charge ("Charge") against the Village alleging that the Village was unilaterally changing terms and conditions of employment in violation of the Illinois Public Employment Labor Relations Act. On December 29, 2009, the parties settled the Charge and it was withdrawn. The Settlement Agreement lists a variety of employment practices the Village agreed to maintain during the period of collective bargaining. Because some of these are, or bear upon, issues in this proceeding the terms of this settlement and the description of the status quo are relevant. The specific items listed are as follows:

> 1. The Employer agrees to maintain the three established work shifts with regular, consecutive days off.
>
> 2. Unit employees may be offered the opportunity to change their work shifts without forfeiting their right to a regular work shift.
>
> 3. If there is a vacancy on a particular shift it will be offered to unit employees as overtime.
>
> 4. Street patrol sergeant duties shall be performed by unit employees exclusively.

B. Statutory Factors

Section 14(h) of the Act provides that the arbitrator shall base his findings, opinions and order upon the following factors, as applicable:

> "(1) The lawful authority of the employer.
>
> "(2) Stipulations of the parties.

"(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

"(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

"(A) In public employment in comparable communities.
"(B) In private employment in comparable communities.

"(5) The average consumer prices for goods and services, commonly known as the cost of living,

"(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, and 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 private employment."

C. Comparability

Comparability in this case is a saga in itself. It begins with a 1991 impasse case involving the Village and the FOP Patrol Officer unit. That unit was established in 1988. In 1991 the Village and the FOP went to interest arbitration before Arbitrator Steven Briggs. In those proceedings the parties disagreed on the appropriate comparability group. The Village suggested a

limited group of some of the municipalities that were part of the Village's mutual aid response and support group.[4] The Union wanted a larger comparability base that included some of the Village's group but also several other communities. Arbitrator Briggs selected the Village's group because of a paucity of data on the larger sample.[5]

In 1999 the issue came up again in a second impasse case between the FOP and the Village. Robert Perkovich was the arbitrator. The Village proposed the same five neighboring communities that were approved by Arbitrator Briggs. It also argued that these communities were similar to Westchester in such commonly used benchmarks as EAV, sales and property taxes, and crime statistics. The Union proposed a broader list of 12 communities based upon more recent data regarding the commonly accepted criteria for comparability. This was the group selected by Arbitrator Perkovich. These communities were Bellwood, Bensenville, Bridgeview, Brookfield, Darien, Elmwood Park, Forest Park, LaGrange Village, Palos Hills, River Forest, Villa Park, and Westmont. All of these communities were within a radius of ten miles from Westchester, except for Palos Hills which is just outside that circle. Darien, Villa Park and Westmont are located in DuPage County. The others are in Cook County. In the Perkovich case the unionization of officers was not a factor.

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[4] Bellwood, Berkeley, Broadview, Hillside and Maywood.

[5] Briggs also commented that these five communities were contiguous with Westchester, and were in an area enclosed by Interstate 294 and within Cook County.

In these present proceedings the Union proposes the 12 comparable communities used in the Perkovich case plus three other communities, North Aurora, Warrenville and Roselle. The Union argues that these other three communities have features that are similar to those in the Perkovich group. The Village opposes these three communities. The arbitrator agrees. These three municipalities are a much greater distance away from Westchester than the Perkovich 12. There are about 50 communities within the ten mile radius from the center of Westchester. Roselle, North Aurora and Naperville are clearly outliers not within the likely marketplace of employment for Westchester residents.

The Village objects to considering the data for 5 of the communities, Bellwood, Bridgeview, LaGrange, Villa Park and Westmont, because they do not have police sergeants in a certified bargaining unit. One reason to exclude these non-union communities, the Village argues, is that they do not have collective bargaining agreements to compare for each issue and the terms and conditions of employment that exist are not the result of collective bargaining with equal input by unionized employees.

As a practical matter the Village's argument makes sense. Other than wage rates that are published what is there to compare? Some terms and conditions may appear in an employee handbook but they might change at any time. This arbitrator agrees with the great majority of his colleagues, that

there can be no comparison between organized and unorganized employee units.

This assumes, however, that there are a sufficient number of organized bargaining units with comparable economic data to be statistically relevant as a group. A small comparability group produces "circumstances" not statistics. The group must be large enough from which one can find community standards. No two municipalities are the same. Politics, personalities and demographics shape terms and conditions of employment differently in each case. But when there are economic features that create a commonality among a significant number of communities, the analyst can deduce common standards that are the market. Comparability is an attempt to determine the marketplace of employment terms. It is the relationship of the proposed terms to that of the marketplace that establishes the appropriateness of that package. In this case data for seven communities in not statistically adequate. The data available for the five unorganized sergeant groups is necessary in this case. This consideration as well as Perkovich's findings, albeit for a different bargaining unit, persuades this arbitrator to utilize the available data for the 12 communities in the Perkovich group.

On the other hand, in cases where there are a measurable number of organized employees within a village, comparability among these units is a very significant consideration. Certainly this is true in a public safety bargaining unit

where different ranks are organized separately. The relationship of sergeants to other unionized ranks must be considered. Likewise, comparisons are often made between police and fire units. As sworn personnel they have more in common than they have with civilian employees. In any event, comparability is one factor and in this economic climate of 2009 and 2010 comparisons must take into consideration when the comparable groups last negotiated their contracts. A multi year Agreement negotiated in 2008 may be quite different from the ones negotiated in 2009 and 2010.

II. THE ISSUES

There are eight issues to be determined in this case.[6] The parties have agreed that six of them are economic. They also agree that the issue involving arbitration of discipline is non-economic. They do not agree to the categorization of the layoff issue. The arbitrator finds that the layoff procedure and the rights of employees in this regard is non-economic. Certainly being laid off has a stark economic effect on employees. But this is no different from the effects of being discharged, and no one would argue that discipline and discharge are economic issues. Of course, the lay off of employees is a significant economic issue for the employer. But so is every action taken by the employer. Economic issues are those which affect the direct costs of paying an employee for his/her work.

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[6] Issues will discussed herein in the order in which they appear in the Agreement.

1. Article III Grievance Procedure

Union

3.6 Election of Grievance Arbitration for Discipline

Prior to imposing discipline, the Chief of Police or the Chief's designee will set a meeting with the employee of the proposed discipline and the factual basis therefore, in writing. At the employee's request, the employee shall be entitled to Union representation at that meeting. After the conclusion of said meeting, the Chief or the Chief's designee will issue a Decision to Discipline, in writing, as to the proposed discipline ("Decision to Discipline"), to the affected employee and the Union. At the employee's option, disciplinary action against the employee may be contested either through the arbitration procedure of this Agreement or through the Board of Fire and Police Commissioners ("BOFPC"), but not both. In order to exercise the arbitration option, an officer must execute an Election, Waiver and Release form ("Election Form" attached as Appendix B). This Election Form and disciplinary process is not a waiver of any statutory or common law right or remedy other than has been provided herein. The Election Form shall be given to the officer by the employer, at the time the officer is formally notified of the Decision to Discipline.

The employee shall have three (3) calendar days to submit a copy of the Election Form and Decision to the Union for approval to arbitrate the discipline. The Union shall have an additional seven (7) calendar days to approve or deny the request for arbitration. If the Union authorizes an arbitration concerning the discipline, it shall notify the Chief or the Chief's designee in writing of the intent to arbitrate within ten (10) calendar days of the issuance of the Decision to Discipline. If approved by the Union for arbitration, the Election Form shall constitute a grievance which shall be deemed filed at the arbitration step of the grievance procedure. When a grievance is elected, the arbitrator will determine whether the grievance was imposed with just cause, and whether the discipline was excessive. If the arbitration is not approved by the Union within ten (10) calendar days of the Decision to Discipline, or is not elected by the employee, the employee retains his rights to appeal discipline before the Village of Westchester Fire & Police Commission in accordance with the Illinois Municipal Code, Division 2.1, Board of Fire and Police Commissioners, 65 ILCS 5/10-2.1 *et seq.*, as amended.

Village

3.6 Fire and Police Commission

It is understood that matters subject to the Fire and Police Commission, such as promotion, discharge or disciplinary suspension of five (5) days or more, are not subject to this grievance procedure. In the event that the Board of Fire and Police Commissioners of the Village of Westchester declines to exercise jurisdiction in the hearing of a disciplinary matter, both parties agree that such disciplinary matter shall be subject to the jurisdiction of the arbitrator, which jurisdiction is created by this collective bargaining agreement, and that the arbitrator's jurisdiction shall not require application of the grievance steps as enunciated in the collective bargaining agreement.

The option of choosing arbitration for discipline is a difficult issue for the parties because the Illinois Municipal Code was changed in 2007 to require non-home rule parties to a collective bargaining agreement to negotiate whether an arbitration procedure is appropriate for them rather than for the long standing statutory procedure of having serious discipline (more than a five day suspension) and discharge charges heard by the Board of Fire and Police Commissioners ("Board").[7] The Village argues that the Patrol Officers (FOP) chose not to have this provision when they negotiated their last bargaining agreement after this law went into effect. On the other hand, the Union points out, Westchester Firefighters have this provision allowing for arbitration of discipline and discharge. The Village argues that almost none of the comparables have what the Union has here proposed.

The Union represents that in all cases of interest arbitration involving

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[7] Chapter 24, par. 10-2.1-17 of the Illinois Municipal Code (65 ILCS 5/10-2.1-17) provides as follows (new language italicized):

> Removal or discharge; investigation of charges; retirement. Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. *The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental for of due process based upon impartial arbitration as a term of a collective bargaining agreement. Such bargaining shall be mandatory unless the parties agree otherwise. Any such alternative agreement shall be permissive.*

Similar language in the statute allows for arbitration of suspensions of five days or less.

public safety units decided, after the law went into effect, where the arbitration alternative was an issue, arbitrators have selected the arbitration procedure.[8] An exception has been where the community was home rule and therefore had the opportunity for arbitration in the past and did not select it.

The Union argues that the Board procedure for serious discipline is fundamentally flawed because the Board is politically appointed and operates at the pleasure of the locally elected officials. There is no requirement that Board members have expertise in labor relations or dispute resolution, nor that the standards generally applied by labor arbitrators are considered by the Board.

Comparability is somewhat of a neutered factor for this issue because the change in the law is relatively new and because the two other public safety units in the Village split in their decisions to adopt this procedure. None of the other statutory factors such as costs and public interest, the total package, the cost of living, etc. affect the consideration of this issue. It is a non-economic proposal to change a system that has been in effect for many years.

For this arbitrator a critical test in determining the appropriateness of changing non-economic provisions in a collective bargaining agreement is whether there is a need for change. Since at least 1988, the undersigned has followed standards to be used to change non-economic procedures in interest

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[8] Citations are not cited because the arbitrator did not receive copies of the awards.

arbitration. Will County Board/ Sheriff of Will County and AFSCME Council 31, S-MA-88-09 (Nathan, 1988). The party seeking the change must demonstrate that the system it seeks to change has not worked fairly, or even worked at all. The moving party needs to show that it has sought changes at the bargaining table unsuccessfully, and that only through arbitration will the change come about. This standard has been repeatedly adopted by other arbitrator since it was first enunciated in the Will County case.

In this case there has been no evidence of problems with the decisions of the Board, or that there even have been decisions involving current Board members. The Union argues that the authority of the Board and its very existence is controlled by factors other than those used in just cause cases decided by arbitrators. To reach this decision the arbitrator would have to assume partiality, prejudice or incompetence by the Board. There has to be a demonstrable reason for changing a system. This arbitrator is unwilling to accept the premise that Fire and Police Boards are incompetent, unfair, or dishonest simply based on how the members were appointed. There is no reason to believe, in the absence of evidence to the contrary, that Boards are not diligent, wise, and even-handed. Moreover these people are members of the community and understand the local standards that an outside arbitrator can never know. Indeed, most arbitrators have no more specialized knowledge of police work other than what is presented to them at a hearing.

The arbitrator is not suggesting that Fire and Police Boards always operate as wisely as labor arbitrators. Nor, however, does he take the position that the opposite is true. A decision in an interest arbitration case must be based upon proof, not theory. The Village's proposal for Section 3.6 is selected.[9]

2. Insurance

This issue involves the Village's health insurance program and the premium contributions to be made by each party. The parties disagree as to (1) the percentage contribution employees should make toward premiums for the Village's HMO and PPO plans, (2) the cap on employee contributions in the second year of the Agreement, (3) dental insurance rates, and (4) changing Section 125 plans. They agree on other language issues.

Section 6.2 Insurance

Union

At the request of any Employee, the Employer shall provide coverage under the PPO plan and under the dental insurance policy and a comprehensive medical insurance policy including major medical coverage as provided to the Employee, to any eligible dependent of the Employee participating in such plans. The Employer's contribution toward the cost of such dependent coverage will be at ***ninety-two percent (92%),*** and the Employee will pay an amount equal to ***eight (8%)*** of the cost through payroll deductions. Effective 05/01/11, the Employer will pay ***ninety percent (90%)*** of the cost of such coverage, and an Employee will pay an amount equal to ***ten percent (10%)*** of the cost through payroll deductions. The employee contribution shall be ***"capped" at 110% of the previous year's contribution for each year covered under this Agreement.***

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[9] The arbitrator has deliberately decided against tampering with the Village's proposal although he has the authority to do so as a non-economic proposal. The arbitrator believe that the parties should negotiate the best system that works for them without the arbitrator tampering with it merely because he has the power to do so.

Village

The Employer's present complete health and hospitalization coverage, provided to all employee covered by this Agreement, shall remain in effect during the term of this Agreement; provided, however, the Employer may change carriers or the program once annually during the term of this Agreement, or self-insure, if desired, provided the benefits remain substantially the same. Effective retroactive to May 1, 2010, for full-time employees hired before May 1, 2010, the Employer shall pay for employees who elect HMO coverage ***ninety-four (94%) percent*** of monthly premium cost for single coverage or ***ninety (90%) percent*** of the monthly premium cost for dependent coverage, and the employee shall pay ***six (6%) percent*** of the monthly premium coverage; and for employees who elect PPO coverage, the Employer shall pay ***ninety-two (92%) percent*** of the monthly premium cost for single coverage or ***eighty-eight (88%) percent*** of the monthly cost for dependent coverage, and the employee shall ***eight (8%) percent*** of the monthly premium cost for single coverage or ***twelve (12%) percent*** of the monthly premium for dependent coverage. For full-time employees hired on or After May 1, 2010, the Employer will pay ***eighty-five (85%) percent*** of the monthly premium cost for single or dependent coverage, and the employee shall pay ***fifteen (15%) percent*** of the monthly premium cost for single or dependent coverage, for whatever plan is selected by the employee. The employee's portion of the premium payment for either single or dependent coverage for either single or dependent coverage for either the HMO plan or the PPO plan shall not be increased in any year more than ***twenty (20%) percent*** over the previous year's portion, and the Employer shall be responsible for paying any balance.

[Dental Insurance: Present plan to remain in effect but the Village may change carriers and programs once during term of Agreement if the coverage remains substantially the same. Premium contributions: 96%/4% for single coverage and 92%/8% for family coverage .]

Section 125 Plan:

Union	Village
*** The Union maintains the right to change insurance carriers or otherwise provide for coverage as long as the level of benefits remains substantially the same.	*** The Village maintains the right insurance carriers or self-insure, to change plans or to otherwise provide for health and dental coverage, as long as the level of benefits remains substantially the same.

The differences in the proposals for health insurance are primarily the contribution rate. For 2010 the Union proposes that the Village pay 92% of the cost of any insurance coverage to decrease to 90% in the second year, but on condition that the employees will not pay more than 110% of what the paid in the prior year. The Village has a sliding scale of 94% for HMO single, 92% for PPO single, 90% for HMO family and 88% for PPO family. The Village proposes that in each subsequent year the employee contribution be no more than 120%

of what was paid in the prior year. This is a tricky computation because it provides no minimum increase and does not maintain the 2010 formulas to work from. Literally read, the employee's contribution "shall not be increased in any year more than 20% ..." means that even if the premiums did not go up at all the employee's contribution would go up 20%. Essentially, the Village's proposal would do away with the fixed percentage contribution for each year. Instead, whatever the employee paid in 2010 would be his base and could, at the Village's discretion go up by 20%. There is no correlation to what the Village is paying; only to what the employee paid last year.

This is not the only problem with the Village's proposal. It seeks a variance for employees hired after May 1, 2010. They will have to pay 15% of the monthly premium, whatever that is, for the length of the contract. There is no cap. If we knew whether sergeants were only promoted from the patrolman ranks the likelihood would be that it would be many years before a newly hired Patrol Officer became a sergeant. But what if a sergeant is hired as a new employee He would be getting a smaller benefit package that junior rank employees. Even if a new Patrol Officer was hired on the same date as the new sergeant the lesser ranked officer would be getting better benefits than the sergeant. There is no 15% provision in the FOP contract. I am simply not familiar with situations where sergeants are paid less than patrolmen.

The Village points out that a majority of the organized comparable

sergeant units have 10 or 15% contribution rates. It also notes that the clerical employee unit is now paying what the Village is proposing in this case.

The arbitrator will concede that the increase in payment percentages by public employees is probably an idea that fits well with the needs and interests of the public. The arbitrator also notes that the 15% cap is a comparable measure of what is going on elsewhere. It is probably inevitable that health insurance will be an increasingly costly benefit. However, from this arbitrator's standpoint the imposition of a 15% contribution rate upon new employees only in the sergeants unit and the unclear 20% increase in the second year of this Agreement operate as poison pills in the Village's offer. As the parties know economic issues are decided on a take it or leave it basis, all or nothing. The Union proposal for health insurance is accepted.[10]

3. Section 6.7 Sick Leave

The Village has a detailed sick leave and disability provision. It has been in effect for many years. One of the features of this program is the optional buy back of unused sick leave. The language, not in contention in this case, is as follows:

> At the option of the officer, to be exercised at the end of each calendar year, a sergeant may contribute a maximum of six (6) unused sick days per year to his disability leave accumulation of

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[10] There is some question as to whether health premiums increases are retroactive to the May 1, 2010 contract date. If the parties have provided for retroactivity with benefits it would apply to insurance. An agreement for retroactivity for wages does not carry over to benefits unless there is other indicia that the parties intended this result.

> receive, in the alternative, up to three (3) eight hour days' pay at his regular straight-time hourly rate to be paid on January 15th of each year.[11]

The Village's disability plan provides disabled employees a certain number of weeks at full pay and a certain number of weeks at half pay. Once exhausted the employee is not eligible for further coverage until he has been back at work for a year. The parties are satisfied with this provision although in these negotiations it added a procedure for the resolution of questions about an employee's ability to return to work. They were unable to resolve a proposal by the Village requiring employees to exhaust their sick leave before they are eligible to receive disability benefits.

The Village wants this provision in order to avoid the anomaly of a disabled employee being able to cash in unused sick leave at the end of the year. It is not hard to see such a situation as double dipping or pyramiding two benefits at the same time. That can be avoided by the Village's proposal that before receiving disability benefits the employee must use up his sick leave. The Union, on the other hand, sees this proposal as the loss of a long-standing benefit. It argues that there is no evidence of a problem and therefor no reason to eliminate it. Neither party refers to comparability, either internal or external.

The arbitrator is loathe to retract a benefit that has been part of the

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[11] Six days is the annual allotment of sick days each year.

employment package for many years. If there has been a problem with its administration, something employees have abused, or an unforeseen change in circumstances it is not unreasonable to substitute one benefit for another. But that is not this case and the Union's proposal for Sick Leave is granted.

4. Section 6.9 Personal Day Off

Sergeants in Westchester do not have any personal days. Patrol officers have one per year whereas other Village employees get as many as three. The Union is proposing that employees in this unit get one personal day to take effect in 2011. It proposes the following:

> Officers shall be entitled to receive, in addition to other days off specified herein, one (1) paid personal day off each calendar year, commencing effective January 1, 2011. The personal day off must be taken within the calendar year in which it is available, and may not be carried over to another year. Requests to use personal days off shall be consistent with the procedures for request to use compensatory days.

The Union argues that its proposal is identical to the provision in the patrol officers' contract. According to the Union, it is inappropriate for the Village to grant greater benefits to subordinate officers. Moreover, the Union points out, all other employees receive personal days off. In some cases this is pursuant to voluntary Village policy.

The Village's proposal is that the contract contain no reference to personal days. The Village argues that allowing each sergeant to have a personal day off would require that there be a hire back on each occasion. The cost of the days off and the hire backs at overtime rates would be about $5,000. For the

Village, these harsh economic times do not allow for a new benefit of this kind. The Village points out that its wage proposal is generous and should be taken into consideration by the arbitrator in deciding this issue.

While it may at first appear that the change sought by the Union is a change in the status quo, and therefore needs to be justified by the Union, in this case it is the parties' first contract. Each side is on equal footing under circumstances where the Union never agreed to the absence of a personal day. Moreover, inasmuch as all other employees of the Village have this benefit, the burden of proof is on the Village to show why the sergeants should be singled out for disparate treatment. In its argument the Village does not address the policy behind the absence of personal days. It merely states that it is too costly in these difficult economic times. This is not enough to meet the burden of proof for this issue. The arbitrator may even agree with the Village that personal days make no economic. However, it can be disruptive as a labor relations policy to deny one small unit a benefit that everyone else has. The Union's proposal for this issue is granted.

5. Section 7.2 Normal Work Week and Work Day

The arbitrator has determined that the issue of normal work hours is a non-economic issue. The gist of this issue is primarily the work schedule. There is an arguably economic feature in part of the Union's proposal (filling vacancies as overtime work), there is no disagreement that employees will be assigned

forty (40) hour weeks. Rather, the issue is what limitations, if any, should be applied when the Village needs to change shift times.

Union	Village
The normal work week shall be 40 hours per week and the normal work day shall be eight hours. The shifts, work days and hours to which employees are assigned shall be on a departmental work schedule. The Village shall not change the work schedule to avoid the payment of overtime. a. Members will continue to be assigned to a consistent work shift of 2300-0700 hours (M), 0700-1500 hours (D), or 1500-2300 hours (A), with regular, consecutive days off. b. Members may be offered the opportunity to voluntarily switch their work schedule from one shift to another during the course of a given month, and may choose to do so without waiving their rights to be assigned to a regular work shift. c. In the event that a vacancy on a particular shift requires the services of a Member, the vacancy on that shift will be offered to the Members as overtime. In the event of an emergency and to ensure public safety, the Village may make temporary changes to the work schedule.	The normal work week shall be 40 hours per week and the normal work day shall be eight hours. The shifts, work days and hours to which employees are assigned shall be stated on a departmental work schedule. Should it be necessary in the interest of efficient operations to establish different shift starting or ending times or schedules, the Village will notify the affected individuals of such changes, at least thirty (30) days before the effective date.

The Union contends that its language is consistent with the past practice in place before the bargaining unit was established. The Union points out that the Village attempted to unilaterally change working hours after the Union's organization, that an unfair labor practice charge was filed, and then settled according to terms that are the same as the Union's proposal in this case. From the arbitrator's point of view the settlement of an unfair labor practice does not

establish a precedent for collective bargaining. In all likelihood it only was an affirmation that no changes would be made while collective bargaining was open. As to the actual practice at the time, the most the Union can argue is that the Village chose not to change work days and hours when it had the power to do so. That the hours and days then in effect worked for the Village does not mean that it was abandoning its inherent management rights. On the other hand, it does indicate that the present hour/days set up has worked well and deserves some recognition in that regard.

The Union also argues that the arbitrator should not tamper with a system that has worked for the parties. Citing the Will County case, *supra.*, it argues that the party seeking a change in a contractual system that has worked has a heavy burden to carry. But, as the arbitrator mentioned, above, this is a first contract, and a past practice unilaterally set by one side, cannot be given the same weight as a practice previously negotiated by the parties.

The Village's argument is similar to that of the Union, that its proposal reflects the past practice. It is as if the Village's proposal is the "mirror image" of the Union's. It is the same argument but it appears "backwards." It may be that both parties are correct. The Union looks at it in terms of changes in days and hours not having been changed. The Village sees it as a matter of residual rights of an employer to control the work schedules.

The Village, however, makes two more salient arguments on this issue.

The first is that none of the labor agreements in the other comparable municipalities forbids schedule changes in the interests of efficiency or the needs of the department. Second, the terms of the Village's proposal are the same as what exists in the patrol officers' contract. In other words, both external and internal comparability support the Village. The Union does not challenge this.

The arbitrator believes that the Village must have discretion in changing work days and work hours to meet the needs of the department. In a small department, especially one with only six sergeants, management must have flexibility in meeting the needs of public safety. There are countless situations in a police department where changes must be made. In most situations the needs of the department must be able to trump employees' vested rights in a particular work schedule. On the other hand, the way in which schedule changes are made is a different issue than the power to adjust schedules for the public good. In an attempt to balance the Village's right to change schedules as needed with the right of employees to be able to rely on a set schedule around which their private lives can adjust to, the arbitrator awards the following language:

Section 7.2 Normal Work Week and Work Day

The normal work week shall be forty (40) hours per week and the normal work day shall be eight (8) consecutive hours. The shifts, work days and hours to which employees are assigned shall be stated on a departmental work schedule.

Employees shall be assigned to one (1) of three (3) consistent work shifts with two (2) regular consecutive days off.

Except in emergency situations as determined by the Chief, employees shall be given thirty (30) days advance written notice of a change in work schedules. If an employee is given less than thirty (30) days written notice of a change in schedule that employee shall be paid at overtime rates for the difference between thirty (30) days and the number of days of actual notice received.

6. Section 7.6 Compensatory Time

This issue concerns taking time off as compensation for overtime work. The language proposed by the parties is detailed and lengthy. There are a number of minor differences in language and one major disagreement. That disagreement is whether employees have an absolute right to take compensatory overtime if sufficient advance notice is given to the Village. Because this is an economic issue it is an all or nothing proposition. The arbitrator cannot pick and choose among the many details in the parties' proposals. He must select an entire offer. This may involve accepting language the arbitrator does not favor because the other proposal may be more onerous.

Because the decision on this issue turns on the right of employees to demand and receive compensatory time off, provided adequate advance notice is given, this will be the only portion of the language to be discussed. The following is the applicable language relating to this question.

Union	Village
***	***
The parties hereto agree that in consideration for the granting of compensatory time off that certain conditions under which an employee can use compensatory time shall apply. These include that compensatory time shall be granted at such times and in such time logs as are mutually agreed to between the involved sergeant and a supervisor; permission to utilize compensatory time shall not be unreasonably denied by the supervisor if operational requirements will not be adversely affected. The parties agree that a request to use compensatory time shall be granted, so long as the minimum staffing level of the Department can be met, at the time the request is made. The Department will provide the Chapter of reasonable advance notice of any changes to the minimum staffing as described by this section. The parties further agree that if granting the request would result in a staffing level below such minimum staffing level, such request will be denied except that a request made at least fourteen (14) days in advance of the day requested shall be granted, provided that only one sergeant shall be granted compensatory time per shift. Upon a denial of a request to use compensatory time, the Employer shall advise the employee of the next available date on which such request could be granted. Under such circumstances, the employee shall have the choice of accepting such alternate date, or withdrawing the request to use compensatory time.	The parties hereto agree that in consideration for the granting of compensatory time off, that certain conditions under which an employee can use compensatory time shall apply. These include that compensatory time shall be granted at such times and in such time logs as are mutually agreed to between the involved officer and a supervisor; permission to use compensatory time shall not be unreasonably denied by the supervisor if operational requirements will not be adversely affected. The parties agree that a request to use compensatory time shall be granted, so long as the minimum staffing level of the Department (as determined by the Employer) can be met, at the time the request is made. However, the parties agree that if granting the request would result in a staffing level below such minimum staffing level, such request shall be denied. Upon a denial of a request to use compensatory time, the Employer shall advise the employee of the next available date on which such request could be granted. Under such circumstances, the employee shall have the choice of accepting such alternate date, or withdrawing the request to use compensatory time.
***	***

As appears obvious, the difference in the proposals is that one creates circumstances where the employee, by requesting time off at least 14 days in advance, can insist and receive time off. The Union argues that its proposal requires the Village to set a minimum staffing level without input from the Union, that it does not ask what the staffing level is, but only requests that notice be give when a change occurs. It points out that the Village's offer requires no notice of any change in minimum staffing. The Union also argues that its proposal mandates compensatory time off when requested with sufficient advance notice and where no undue disruption exists. The Union asserts that its approach to compensatory time is consistent with current case law interpreting the right of public employees to have compensatory time. The advance notice allows the Village to prepare against any undue disruption.

The Village's proposal gives the Police Department the absolute power to deny requests "if operational requirements will not be adversely affected." If the request for a compensatory day off would result in a decrease in the minimum staffing level, the request may be denied. In such cases the Village will notify the employee of the next available date the request could be granted. It, too, cites decisions from federal courts recognizing that while employees have a right to compensatory leave it must be balanced against an employer's right to operate without undue disruption.

The Village asserts that the Union's proposal by merely requiring 14 days

notice as the only precondition for the time off simply sweeps aside the efficiency needs of the Department. For the Village, the need to operate its police force must always trump an employee's right to compensatory overtime if the leave would be disruptive to its operations. The Union argues, in effect, that while deference must be given to the Village's needs, after an accommodation the employee ultimately has the right to his leave. The Union expresses concern that possible "disruption" is too subjective and can be used to as a universal trump card whenever the Village so desires. The Union argues that if 14 days advance notice is given the employer has ample time to make adjustments, even if it requires other employees to work overtime. The Village argues the Union will abuse its privilege.[12] The Union claims, in effect, that the Village is simply trying to avoid having to pay other officers overtime rates in response to the comp time. It points out that courts have said the avoidance of overtime is not a valid defense against the right to compensatory time off. The Village argues that none of the comparables have provisions that grant employees an unequivocal right to compensatory time off. In all other villages, a request for comp time must be approved by management after examining the operational needs of the department.

As the arbitrator reads the statutes, regulations and case law, employees

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[12] "One can only imagine that every request will be at east 14 days in advance, resulting in the Department being required to grant every request. Such a system will unduly disrupt the operations of the Department." (Village Brief, p. 45.)

have an absolute right to have comp time. What they don't have is the absolute right to determine when that time can be taken. If, as a matter of course, the employer is arbitrary in its refusal to accommodate the employees' requests, routinely denying requests for particular days off, this may lead to costly legal challenges. There has to be a balancing of the needs and interests of both sides.

The problem with the Union's proposal is that in the end of the process the Union walks away with the prize merely by giving the 14 days notice without regard to other considerations. The arbitrator finds that in the business of public safety the public interest is for adequate police protection. The standard perception is that the size of the force relates directly to public safety. If the Village determines that it must have a certain number of employees on duty at all times, a practice of having less than that goes against public policy and the reason for the Department to be there in the first place. In a case such as this where only six sergeants are involved, the need for adequate field supervision is significant and must come first.

But the Village's right in this regard is subject to limitations and the proper use of discretion. The parties have simply not built a record demonstrating the way in which the Village, either fairly or unfairly, has handled comp time requests in the past. In a sense, the "default" assumption must be that the Village has the last word unless it can be shown that it has "*unreasonably*

denied" comp time requests, or has used some "arbitrary and inflexible" formula for determining minimum staffing.

Establishing the boundaries for compensable time is a subject for which the parties themselves are uniquely positioned to develop their own accommodations. They know how the Department works and the quirks in its manpower. For this Agreement, however, the Village's proposal for Compensatory Time is awarded.

7. Section 10.5 Layoff

This is the issue the arbitrator determined to be non-economic. The parties' proposals here are identical except for one final feature. Layoffs are provided upon fifteen (15) days notice. The Village agrees to consult with the Union about alternatives to the layoff. The Union has added to its proposal that before any sergeant is subject to layoff the Village must first layoff any part-time patrol officers The language is as follows:

Union	Village
If it is determined that layoffs are necessary, employees will be laid off or reduced in rank in reverse seniority order, as provided in 65 ILCS 5/10-2.1-18. Except in an emergency, no layoff or reduction in rank will occur without at least fifteen (15) calendar days notification to the Chapter and to all affected employees. The Village agrees to consult the Chapter, upon request, and afford the Chapter an opportunity to propose alternatives to the layoff, though such consultation shall not be used to delay the layoff or reduction in rank. **The Village agrees that all part-time police officers within the Village will be laid off before any sergeant is subject to layoff or reduction in rank.**	If it is determined that layoffs are necessary, employees will be laid off or reduced in rank in reverse seniority order, as provided in 65 ILCS 5/10-2.1-18. Except in an emergency, no layoff or reduction in rank will occur without at least fifteen (15) calendar days notification to the Chapter and to all affected employees. The Village agrees to consult the Chapter, upon request, and afford the Chapter an opportunity to propose alternatives to the layoff, though such consultation shall not be used to delay the layoff or reduction in rank.

This is another issue where the parties did not develop enough of a record for the arbitrator to assess the circumstances. Currently, there are no part-time patrol officers, nor is there evidence that there ever were. Nor is there a record as to what happens when the Department reduces a sergeant. Has it ever happened before? Do laid off sergeants automatically return to the ranks of patrol officers? If in the case of a reduction in the force of a sergeant because of economic circumstances, does that returning sergeant, now patrol officer, compete with more senior patrol officers who have never been sergeants for positions?

The arbitrator cannot break new ground and adopt a proposal the mechanics and practical results of which he does not understand. The Village's proposal for lay-offs is selected.

8. Wages

The parties' respective proposals for wages are as follows:

Union

Grade	S1	S2	S3	S4	S5
5/1/2010					
Hourly	$38.46	$39.23	$40.01	$40.81	
Annual*	$78,456.13	$80,025.25	$81,625.76	$83,258.27	
2.00%					
5/1/2011					eff 5/01/11
Hourly	$39.23	$40.01	$40.81	$41.63	$42.46
Annual*	$80,025.25	$81,625.76	$83,258.27	$84,923.44	$86,621.91

* Annual wage is based upon 2040 hours per calendar year. The Step plan and wages are retroactive to May 1, 2010. No employee shall receive a decrease in wages due to the implementation of this wage scale. Step movement shall occur on the anniversary of the sergeant's promotion date. Step 5 shall be implemented on May 1, 2011.

Village

	5/1/2010*	5/1/2011 (2.5%)
Step 1	$80,113	$82,116
Step 2	$80,947	$82,971
Step 3	$81,782	$83,827
Step 4	$82,616	$84,681
Step 5	$83,451	$85,537

* For 5/1/10, start with 2.5% for top paid sergeant with 1.0% differential between steps, going backwards from Step 5 (99%, 98%, 97%, 96%).

Mechanically, this is what the proposals are:

Union	Village
1. Add 3% to top Patrol Officer in 1st year to get Step 1 of Sergeant pay.	1. Add 2.5% to salary of highest paid Sergeant as of 4/30/10.
2. Add 2% to each step of a 4 step grid.	2. Create 5 step schedule with 1% differentials.
3. In second year increase each step by 2%.	3. In second year increase each step by 2.5%.
4. Add 5th step with a 2% increase.	

In the grand scheme of negotiating a first collective bargaining agreement, the parties ended up quite close in their final wage proposals. Indeed, as the Union has repeatedly pointed out, in total dollars and in increases in the first year, the Village proposal is more costly. Why then were the parties unable to reach an agreement? The differences are in the nuances. The Village has

proposed first year wage increases of between 2.5% and 5%. It has a 5 step scale with 1% separating each step. In the second year the Village would increase all steps by 2.5%. The Union has proposed slightly smaller base increases than the Village for the first year but has proposed a 2% step differential, with a new step added in the second year. The 2% differential is significant because if it is adopted in this award it will become the standard for the parties. In future negotiations the Union will have the benefit of the status quo. The effect of the Union's proposal is a type of back loading that ultimately favors the more senior employees. It appears to be a smaller wage package than the Village's but it creates a formula for greater increases in the future.

The Union argues that it needs the 2% step differential in order to catch up with the communities in its comparability group. The Union points out that since 2003 the Westchester sergeants' salaries have slipped in rank. This is particularly true regarding the more senior sergeants. The Union does not expect to "catch up" with one contract. However, in establishing a 2% step differential, the Union argues, senior employees will be able to reach a ranking as it used to have among the comparables.

The Village argues that its proposal represents more money for the sergeants over the term of the Agreement. It argues that the Union's proposal is unreasonable because it gives the highest paid (most senior) sergeants 4% increases in the second year and creates a distortion in the structure by

ensuring that the senior sergeants will continue to receive a disproportionate amount in future wage increases. The Village argues that its wage proposal generates wage stability within the bargaining unit whereas the Union's proposal is top heavy. The Village also points out that several of the comparable police departments do not have step plans at all.

The Union in its wage proposal has stipulated that its proposed wage scale is based upon 2040 hours. It argues that this is the formula always used for gauging sergeants' overtime. The Village argues that the correct formula should be 2080 hours but has not included that calculation in its proposal. The difference, of course, impacts overtime rates.

After much reflection, the arbitrator selects the Union's proposal as the most appropriate considering the standards set forth in the statute. First, it is the less expensive proposal overall. Second, it will have less impact on the Village in the 2010-2011 contract year. As the economy appears to begin an expansion, the Village is apt to be in a better position to pay more in the second year of the Agreement. Third, the Village's argument that the Union proposal will create disproportionate costs in the future is a bit of a "red herring." No one can predict what the parties will negotiate their next time around. The Village's fears about the future cannot be a basis for rejecting an otherwise stronger proposal. The parties are aware of what a 2% step differential might cause, compared with a 1% differential, and they will negotiate accordingly for the next

contract. Also, based on all of the economic data supplied by the parties, the arbitrator must conclude that there is no economic basis for the Westchester sergeants to be paid at the low end of the comparability charts. The arbitrator is not suggesting that the wage rate here awarded represents the great leap forward for the three senior sergeants. And no one knows whether they will be able to maintain this small advantage among their co-employees in the future. However, the awarded rate is the appropriate thing this year. Finally, The Village's proposal fails to address the issue of the number of hours in a work year. Its silence on this score will cause a dispute between the parties entailing further delay and additional expense.

The Union's proposal for wages is selected.

AWARD

1. Section 3.6	Fire and Police Commission	Village
2. Section 6.2	Insurance	Union
3. Section 6.7	Sick Leave	Union
4. Section 6.9	Personal Day Off	Union
5. Section 7.2	Normal Wk Week/ Wk Day	(See pp.23-24 Award)
6. Section 7.6	Compensatory Time	Village
7. Section 10.5	Layoff	Village
8. Appendix	Wages	Union

Respectfully submitted,

HARVEY A. NATHAN

January 13, 2011