

INTEREST ARBITRATION BEFORE ARBITRATOR STEVEN M. BIERIG

IN THE MATTER OF THE INTEREST ARBITRATION BETWEEN: COUNTY OF LAKE AND LAKE COUNTY SHERIFF'S DEPARTMENT AND ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL	ISSUES: INTEREST ARBITRATION: WAGES, DRUG TESTING, AND FITNESS TESTING ILRB CASE NO. S-MA-11-066 FMCS CASE NO. 11-03189-A ARB. NO. 11-132
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Before: Steven M. Bierig, Arbitrator

APPEARANCES:

For Illinois FOP Labor Council: John R. Roche, Jr. Staff Counsel

**For Lake County and Lake County Sheriff's Department: A. Lynn Himes, Paul Ciastko,
Scariano, Himes, and Petrarca, Chtd.**

Date of Hearing: January 27, 2012

**Location of Hearing: 25 S. Martin Luther King, Jr. Ave.
Waukegan, IL.**

Briefs Exchanged: June 17, 2012

Date of Award: November 29, 2012

AWARD:

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Union's proposal for wages is granted. The Employers' proposals regarding drug testing and fitness testing are rejected because they constitute significant changes from the *status quo*, and sufficient compelling reasons were not presented to change it.

**Steven
Bierig**

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**Steven M. Bierig, Arbitrator
November 29, 2012**

The Interest Arbitration Hearing took place on January 27, 2012 at 10:00 a.m. at the County of Lake, located at 25 South Martin Luther King, Jr. Avenue, in Waukegan, Illinois. The Hearing took place before the undersigned Arbitrator who was selected to render a final and binding decision in this matter. At the Hearing, the parties were afforded a full opportunity to present such evidence and arguments as desired, including examination and cross-examination of all witnesses. A 175-page transcript of the matter was prepared. The Arbitrator exchanged Post-Hearing Briefs on or about June 17, 2012, at which time the evidentiary portion of the Hearing was declared closed. All parties stipulated to this Arbitrator's jurisdiction and authority to issue a final and binding Award in this matter.

PRE-HEARING STIPULATIONS AND AGREEMENTS

A summary of the pre-Hearing stipulations and agreements is as follows:

- A) **The Arbitrator's Authority:** The parties stipulated that the Arbitrator Steven M. Bierig has jurisdiction and authority to rule on the issues set forth below.
- B) **The Hearing:** The Parties agreed that the proceedings would be transcribed by a court reporter and that each party would be able to present evidence, either in narrative or through witnesses.
- C) **Impasse Issues:** The parties agree there are three issues (one economic, two non-economic) in this case and those issues are:
 - 1) what should the wage increases be for the bargaining unit employees for the term of the contract? (economic)
 - 2) what drug and alcohol testing should be applied to the bargaining unit? (non-economic)
 - 3) what Fitness testing should apply to the bargaining unit? (non-economic)

D) **Tentative Agreements and Final Offers:** The tentative agreements presented in this case shall be incorporated into the Arbitrator's Opinion and Award. Final offers on the remaining issues in dispute shall be exchanged by the parties at the start of the hearing. Once exchanged, final offers may not be changed except by mutual agreement, absent approval by the Arbitrator.

E) **Evidence:** Each party was free to present its evidence in narrative and/or through witnesses, with advocates presenting evidence to be sworn on oath and subject to examination. The FOP went first with its case in chief, followed by the Employers. Each party was able to present rebuttal evidence and neither party waived the right to object to the admissibility of evidence.

F) **Post-Hearing Briefs:** The Parties provided post-hearing briefs for the Arbitrator's consideration. No reply briefs were allowed.

G) **Decision—**The Arbitrator based his decision on the evidence and argument presented and the applicable factors set forth in Section 14(h).

H) **Continued Bargaining:** Nothing contained herein shall be construed to prevent negotiations and settlement of the terms of the contract at any time, including prior, during, or subsequent to the arbitration hearing.

I) **Record:** The Arbitrator shall retain the official record of the arbitration proceedings until such time as the parties confirm that the award has been fully implemented.

(Un. Ex. 1; Tr. 5-7)

ISSUES

As noted above, the issues submitted to the Arbitrator for resolution were:

- 1) What should the wage increases be for the Bargaining Unit employees for the term of the Contract? (economic)
- 2) What drug and alcohol testing policy should be applied to the Bargaining Unit? (non-economic)
- 3) What fitness testing policy should be applied to the Bargaining Unit? (non-economic)

THE PARTIES' FINAL OFFERS

The Union's Final Offer On Wages: The Union proposes that the bargaining unit employees' wages be increased across the board in the following manner:

December 1, 2010: 1.5%
December 1, 2011: 2.5%
December 1, 2012: 2.5%

The Union's offer is that wages be retroactive on all hours compensated to December 1, 2010.

The Employers' Final Offer On Wages: The Employers proposes that the bargaining unit employee's wages be increased across the board in the following manner:

December 1, 2010: 0%
December 1, 2011: 2.5%
December 1, 2012: 2%

The Union's Final Offer On Drug and Alcohol Testing:

The Union proposes that the *status quo* be maintained on this issue as currently set forth in the parties' Collective Bargaining Agreement.

The Employers' Final Offer On Drug and Alcohol Testing:

The Employer's final offer on drug and alcohol testing is to implement random testing and otherwise modify the existing policy per Employer Ex. 1.

The Union's Final Offer on Fitness Testing:

The Union proposes that the *status quo* regarding voluntary fitness testing be maintained.

The Employers' Final Offer On Fitness Testing:

The Employers propose to create a new section in the Collective Bargaining Agreement creating a mandatory physical fitness testing requirement which is contained at Employer Ex. 2. The fitness testing requirement explicitly states that no discipline will occur for failure "to successfully pass the annual physical fitness test."

STATEMENT OF FACTS

I. Introduction

The Bargaining Unit in the instant Interest Arbitration consists of police officers and law enforcement support staff employed by Lake County and the Lake County Sheriff's Department (collectively, the "Employers" or the "County"). The Bargaining Unit is represented by the Illinois Fraternal Order of Police Labor Council (the "Union"). The Bargaining Unit is comprised of 90 Highway Patrol Officers, 36 Court Security Personnel, 27 911 Communication employees, 21 Criminal Investigators, 4 Criminal Warrant Officers, 2 Crime Prevention Officers, and 1 Sheriff's Training Division employee. The Bargaining Unit was certified in 1986, clarified in 1993 and 1995, and again certified on March 6, 1995. The parties' previous Contract was in effect from December 1, 2006 through November 30, 2010. (Un. Ex. 5, 6; Er. Ex. 3(a))

Lake County is located north of Chicago. It has a population of 703,462 and is the third largest county in Illinois. Lake County consists of 53 municipalities and 18 townships. Sheriff Mark Curran is an elected official and head of the Sheriff's Department (the "Department").

Prior to the instant Interest Arbitration, the parties negotiated extensively, including mediation sessions that resulted in several tentative agreements regarding various contract provisions. Ultimately a Demand for Compulsory Arbitration was filed with the Labor Board. As noted above, three issues remain unresolved. This Interest Arbitration is the culmination of the above-mentioned process. (Un. Ex. 4)

As noted above, there are three issues in contention in this Interest Arbitration. The parties' proposals are summarized below:

<u>Wages</u>	<u>Employers</u>	<u>Union</u>
	December 1, 2010 0%	December 1, 2010: 1.5%
	December 1, 2011 2.5%	December 1, 2011: 2.5%
	December 1, 2012 2%	December 1, 2012: 2.5%
		retroactive to 12/1/10
<u>Drug and Alcohol Testing</u>	Random drug testing Er. Ex. 1	<i>status quo</i>
<u>Physical Fitness Testing</u>	Mandatory testing Er. Ex. 2	<i>status quo</i>

II. The County's Organizational Structure

The County's elected officials and administrators are charged with ensuring that the County can provide necessary services for its citizens. The County's 25 departments report through a committee structure to the County Board. All departments fall under the County's budget jurisdiction, rules and planning requirements. (Er. Ex. 14; Tr. 89-90)

III. The County's Budget

A. Budget Policy and Process

County Director of Finance and Administrative Services Gary Gordon testified regarding the County's budgeting process. Gordon testified that the County must look at the long-term fiscal capacity of the County to provide services. The County's fiscal year runs from December 1

to November 30. Typically, the budgeting process begins in June; the individual departments' budgets are due to the Finance and Administrative Services Department by July. From July through September, the finance department analyzes each department's data and determines how to allocate the County's available funds. (Er. Ex. 4; Tr. 93-94)

County administrators typically review prospective situations anticipated in the next 12, 24, 36, and 48 months. In October of each year, Gordon's staff compiles the proposed budget and Gordon presents a budget recommendation to the County Administrator's Office, subsequent to which the Budget proceeds to the County Board. The next step in the process allows the County's board committees to review the proposed budget and offer comments and input on the budget. At that point, the document becomes the Board's recommended budget which is ultimately passed in November and becomes effective December 1 of each year. (Tr. 94-95)

The budget policy requires that each department present a *status quo* submission to the Finance and Administrative Services Department that at a maximum, requests a monetary amount equal to that of the previous year. Growth is not built into the budget; the County has a separate process for increasing budget amounts. Due to the unpredictability of State funding, and if the total amount of budgeted funds are not available, each department is also required to prepare a contingency plan to identify areas of reduction if necessary. (Tr. 95-96)

If the County loses funding and/or reimbursement for specific services, departments are expected to identify reductions or revenue increases to offset funding losses. Further, Gordon indicated that currently, program expansions or new programs that require additional funds are not being considered. (Tr. 97, 99-100)

The County strives to pay for all current expenditures with actual existing revenues. Specifically, the County does not balance current expenditures at the expense of future years'

expenses; the County does not postpone expenditures or borrow from future years' revenues. Moreover, the County does not use one-time grants for ongoing expenses. The County maintains its assets at a level adequate to protect the County's capital investment and to minimize future maintenance and replacement costs.

The County's budget policy includes a "pay-as-you-go" process to fund its capital program. The County Board designates a monetary amount that must be retained in its reserves. Subsequent to the County's annual audit, the County fills the mandatory required reserves. If after the reserve is filled and money remains, the County uses that money to fund the County's capital program. (Er. Ex. 14; Tr. 99, 105-107)

B. The 2010-2012 Budget Process

1. The 2010 Budget

The fiscal year ("FY") 2010 budget totaled \$498 million and was \$6 million less than the budget for FY 2009. The economic situation at the time was difficult and required the County to address FY 2009 challenges and plan for the FY 2010 budget much earlier than the County normally addressed the matter. In 2010, the County experienced an approximately \$6 million revenue loss from State sales and business taxes. Unemployment rates in Illinois and Lake County significantly increased. Healthcare, insurance, and other risk related costs increased. Historically low interest rates caused a 50% reduction, which totaled approximately \$3 million, in interest income. Nonetheless, the County anticipated closing FY 2009 in the black and presented a balanced FY 2010 budget that was \$6 million less than that of 2009. (Tr. 114-116)

County departments cut a total of \$3.5 million from their 2010 approved budgets and identified new or increased resources. The County also reduced discretionary spending and suspended employee-relations activities. An Accelerated Retirement Option ("ARO") was

offered. No employee wage increases were included in the budget. The County reduced the purchase of replacement vehicles and negotiated utility rates and implemented conservation measures. The County did not need to resort to forced furlough days. The County did not have to lay off employees due to lack of funds; instead, only in departments in which services were less in demand did the County need to lay off employees. For example, due to the poor real estate market, relevant services were less in demand in both the Recorder of Deeds office and the Planning and Development Department and it became necessary for the County to lay off employees in those departments. (Tr. 119, 188-189)

2. The 2011 Budget

The FY 2011 budget was approved in November 2010, with an allocation of \$306 million. This amounted to \$9.3 million less than the budget for FY 2010. The County's departments worked together to close the budget deficit by maintaining vacancies, eliminating positions, cutting spending, renegotiating contracts, and implementing other cost saving programs, including the ARO, in which a total of 117 employees choose to participate. Non-union employees did not receive a wage increase. As a result of declines in income and sales taxes, and lack of funds from the State as well as cost increases, Lake County faced a shortfall of \$8 million at the start of the budget process. (Er Ex. 14; Tr. 120-122)

The State's budget crisis and payment shortages have also severely impacted Lake County's budget. For example, the County projected that it would lose \$1.2 million from the inheritance tax due to a change at the Federal and State levels. The County also anticipated receiving \$1.1 million less for salary reimbursements from the State for probation services. The State also cut funding levels from \$4.2 million in FY 2009 to \$3.1 million in FY 2011. (Tr. 122-123)

The County analyzed departmental spending and strived to increase fiscal efficiency by consolidating positions, conducting audits, and enforcing past-due collections via a collection agency. Nonetheless, additional measures were necessary to close the budget gap. The FY 2011 budget did not include funding for salary increases. County departments evaluated operations and identified positions for consolidation or elimination. (Tr. 123-124)

In total, since 2009, the County eliminated 42 positions and defunded an additional 72 positions for projected savings of over \$9 million in wages and benefits costs. As adopted, the FY 2011 budget was balanced and was \$9 million less than the adopted FY 2010 budget. (Tr. 124-125)

3. The 2012 Budget

The FY 2012 budget increased by 1.6% from 2011 due to improvements in the economy and increased demands for services. The projected 2012 budget is almost \$20 million less than the 2009 budget. While Personnel expenses comprise the largest portion of the 2012 budget, this area has shown the largest amount of savings since 2009. The County has saved approximately \$50 million in salary expenses between 2009 and 2011. Between 2008 and 2012, the County reduced its number of full-time positions from 2,744 to 2,551. At any given time, more than 100 positions remain vacant. The County has outsourced management of its nursing home, Winchester House, further reducing the County's payroll by 175 positions. (Er. Ex. 14; Tr. 126-128)

IV. Evidence Presented

I note that the parties presented significant evidence regarding wage comparability. The Employers' evidence of internal comparables included its contracts with the Illinois FOP Labor Council (Peace Officer Unit: 12/1/06-11/30/10), the International Brotherhood of Teamsters Local 700 (Corrections Division: 12/1/07-11/30/10, Corrections Sergeants: 12/1/07-11/30/10, Sergeants Law Enforcement Division: 12/1/07-11/30/10, and Lieutenants Law Enforcement Division: 12/1/09-11/30/10), AFSCME Council 31 (Winchester House Nursing Staff: 12/1/07-11/30/10, Winchester House Social Workers: 12/1/07-11/30/10, and the Coroner's Office: 12/1/07-11/30/10), IUOE Local 150 (Facility Operations Division: 12/1/08-11/30/11, Health/Maintenance Department: 10/22/10-11/30/12, Public Works Department: 12/1/08-11/30/12, and the Division of Transportation: 04/1/08-03/31/12). In addition, the Employers presented evidence of an external comparable, the contract between the DuPage County Sheriff and the Metropolitan Alliance of Police, Chapter #126 entered into on June 1, 2011. Conversely, the Union relied primarily upon the statistics of the Consumer Price Index (the "CPI").

V. The Statutory Factors

The Bargaining Unit in this case consists of sworn employees who are unable to strike, and is therefore covered by Section 14 of the Illinois Public Relations Act. Section 14(h) of the Act obligates the Arbitrator to consider the following factors in reaching a decision:

(h) Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- (1) The lawful authority of the employer
- (2) Stipulations of the parties
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (A) In public employment in comparable communities.
 - (B) In private employment in comparable communities.
- (5) The average consumer prices for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
- (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Each of these factors is relevant, although no one factor is determinative. An Arbitrator has discretion to rely on some factors more heavily than others where appropriate. The statute does not rank the factors in importance. In *City of Decatur and International Association of Firefighters, Local 505, S-MA-29* (Eglit 1986), Arbitrator Eglit observed that the importance of each statutory factor is not ranked: "... moreover, the statute makes no effort to rank these

factors in terms of their significance, and so it is for the panel to make the determination as to which factors bear most heavily in this particular dispute." Thus, some of the statutory factors may be deemed more significant than others, depending upon the issues and the evidence presented. In the instant case, I have considered all relevant factors in making my decision.

POSITIONS OF THE PARTIES

I. The Union

The Union first contends that its members are charged with protecting the population at the risk of their lives and safety. The Bargaining Unit members work under pressure, tolerate verbal abuse and attempt to maintain pleasant working relationships. The Employers have described the Bargaining Unit members as among the "finest men and women the county has to offer".

A. Economic Issue

The Union contends that because the Bargaining Unit falls under the aegis of Section 14, it is improper to compare it to internal comparables that do not qualify as Section 14 units. *City of Effingham*, S-MA-07-151 (McAlpin, 2009) Accordingly, the concessions that the Employers may have obtained from non-Section 14 units are not relevant because those bargaining units are not comparable and should not be considered. The Union notes that the Employers have bargaining relationships with other Section 14 units; however, said Section 14 units are currently negotiating regarding the relevant time frame. Thus, no comparable wage

data exists for the relevant internal comparables. The Union contends that internal comparability is therefore not relevant in this case.

The parties did not agree to any specific external comparables. The Employers only proffered DuPage County as an external comparable employer. However, the Employers never mentioned DuPage County during the course of negotiations. Furthermore, the wages for DuPage deputies had never been collectively bargained until the effective date of June 1, 2011. Wages not set by collective bargaining do not provide a valid basis for comparison. *City of Rushville, S-MA-97-147 (Meyers, 1998)*

The Union also notes that a single comparable is not statistically significant because of the possibility of aberrations. The other counties surrounding Lake, such as McHenry and Cook, are not comparable in any sense. Given the vast differences between the bordering counties, the unavailability of wage data from DuPage, and the dearth of other comparables, external comparability is not a relevant factor in this case.

The Union emphasizes that the CPI is the most relevant factor in this case. The Union notes that its members have not received a pay increase since December 1, 2009. Furthermore, since the Great Recession that began in 2008, Arbitrators have given great weight to the cost of living. *County of Boone, S-MA-08-010 (Benn, 2009)*, *County of Rock Island, S-MA-09-072 (Benn, 2010)* (“Instead of placing great weight on external comparability as in the past, to set wage and benefit levels during these uncertain times, I have focused more on the cost-of-living and inflation.”)

The Union asks for a 1.5% raise effective December 1, 2010. In support of that position, the Union notes that from December 1, 2009, the date of the last raise given to the Bargaining Unit, to December 1, 2010 the employees lost 1.47% to inflation. Thus, the 1.5% increase that the Union has proposed is consistent with the relevant CPI. The Union notes that

from December 1, 2010 through December 1, 2011, it lost 2.88% to inflation and that its 2.5% proposal, which is consistent with the Employers' offer, is actually less than the CPI. As for the period between December 1, 2011 and December 1, 2012, the Union contends that the cost of living is still increasing and thus diminishing the employees' income. The Union's requested 2.5% increase is fair and consistent with the projected CPI.

The Union understands the difficult economy and contends that it has offered wage proposals below the cost of living and has back-loaded its proposals. Arbitrators and scholars have approved this approach. The Union's wage offer is restrained and reasonable. The Union's wage proposal is fair, whereas that of the County is inequitable and is not justified by existing conditions, facts, precedent, or the statutory factors.

The Union provided a very detailed examination of Lake County's financial condition and the public's interest and welfare. The Union asserts that the instant situation is not one in which the County can reasonably state that it does not have the ability to pay. In fact, the County has admitted that it is financially sound. The Union highlights the County's own account of its economic strength that it used in support of its 2011 bond sale. The County highlighted its increase in population, growth in transportation, access to Lake Michigan and other lakes, highly educated and wealthy population, size and units of governments, corporation-friendly location, increased sales tax revenue, and growth in EAV, and the properties it owns.

The Union highlights the County's goal to promote public safety. Obviously, public safety is dependent on the work of the members of the Bargaining Unit. The same can be said for the other goals of the County. The Union correctly notes that while it has the burden to prove that its economic demands are reasonable, it is up to the Employers to prove an inability to pay, as opposed to a lack of desire to pay.

The Union has proven that the County's General Fund has consistently grown, with the exception of FY 2008. Furthermore, the unreserved portion of the total fund balance remains strong, and its liquidity ratio remains strong. The Union notes that the County itself states that its economic position is not only good, but favorable as compared to other government units. The Union presents evidence that the County generally underestimated revenues and overestimated expenses. Importantly, the Sheriff's Department has also come in under budget every year from 2004 through 2010.

Finally, the County instituted a ¼% sales tax for public safety and transportation purposes. The parties agree that at the end of 2009, this fund totaled \$32,153,259 and by the end of 2010, the fund contained \$55,031,191. A portion of this money was allocated towards roads, and the purchasing of land, equipment and vehicles. While the Union acknowledges that it is not its place to create a plan for the County's allocation of resources, these expenditures and the revenue stream demonstrate that the County has the ability to provide a reasonable raise to its employees.

In sum, the Employers' proposal is not equitable. The County has the ability to pay. The Union contends that acceptance of the County's wage proposal would demoralize the Department and undercut future bargaining. The Union's economic proposal should be accepted.

B. Non-Economic Issues

Random drug testing and mandatory physical fitness testing comprise the two non-economic issues in this case and constitute significant changes to the *status quo*. The current drug testing policy was negotiated to ensure that the Employers have the right to expect the employees to be free from the effects of drugs and alcohol. The current Contract discusses

random drug tests only for employees who are voluntarily assigned to a drug enforcement group and where the employee's job is related to drug enforcement. The policy specifically states, "There shall be no random or unit wide testing of employees, except random testing of individuals as authorized in this article."

The Employers have proposed random drug testing for all members of the Bargaining Unit. The Employers' proposal is a completely new procedure for the Bargaining Unit. No *quid pro quo* was offered for this change in the *status quo*. This significant change in the rights of the Bargaining Unit members is a breakthrough for which the Employers showed absolutely no need; no evidence was presented to show abuse of drugs in violation of the existing policy. The *status quo* should remain.

The same is true for the Employers' attempt to change the *status quo* regarding physical fitness testing of Bargaining Unit members. The current policy regarding physical fitness testing is voluntary and incentive based. Other than for new hires, there is no mandatory testing of employees. The current system allocates points to employees, who are awarded money based on those points, up to \$300. Again, there is no evidence of a *quid pro quo* for the requested change. Further, there is no evidence to justify this change; the Employers simply suggest that mandatory physical fitness testing and its consequent healthy employees would benefit the department. No evidence was presented of an increase in workers' compensation claims or excess usage of sick days to justify the Employers' proposal. The Union believes that physical fitness is a worthwhile goal; however, a worthwhile goal is not a sufficient justification for a significant change in the *status quo*. There was no evidence that the proposed changes will meet the objective of increased fitness.

The Employers did not offer internal or external comparables. According to the Union, mandatory physical fitness testing constitutes a breakthrough change and therefore should be

won in collective bargaining negotiations, not imposed onto the Bargaining Unit by an Interest Arbitrator without a *quid pro quo* for the change. When the parties return to the bargaining table, the County can continue negotiations regarding this matter. The Employers should not receive from an Interest Arbitrator what they could not win during collective bargaining. Accordingly, the *status quo* should remain for the non-economic issues.

II. The Employers

The Employers' have proposed a pay increase of 0% for 2010, 2.5% for 2011 and 2% for 2012. Regarding non-economic issues, the County's final offer includes a drug testing policy that mandates random drug testing for all employees. The County also proposes a mandatory policy regarding physical fitness testing that replaces the existing voluntary policy.

A. Economic Issue

The Employers urge the Arbitrator to credit their use of internal comparables over the Union's argument that the CPI is controlling. The Employers note that arbitrators historically consider internal comparables as a very significant factor. *Village of Arlington Heights, 2-MA-88-89 (Briggs, 1991)* In the instant case, the internal comparables favor the Employers. In FY 2010 and FY 2011, wage increases were not provided to non-union employees. It was not until FY 2012 that non-union employees received an increase, which amounted to 2.5%. The Employers emphasize the state of the budgetary concerns facing the County and the continued weak economy as support for its proposal.

The Employers also note that other bargaining units, specifically the non-sworn bargaining units, made concessions that included delaying wage increases, taking furlough

days, and in some cases agreeing to wage freezes. If a bargaining unit did not agree to concessions, the Employers used its Management Rights to lay off employees or contract out certain services.

The Employers look to the County of DuPage as the most appropriate external comparable. DuPage is the second largest county in Illinois, with Lake next in line as the third. DuPage County's household income and housing values are similar to those of Lake County. The County and DuPage County have a relationship in which they share job descriptions and salary information. DuPage sheriff deputies entered into an initial collective bargaining agreement that consisted of a 0% wage increase for FY 2011, and 2% for FY 2012 and FY 2013. Because the Union did not present any external comparables, this factor should favor the Employer.

The Employers next discuss the CPI. While the Union claims that the CPI supports its position, the Employers say that it does not appreciably favor either party's offer. The Employers note that the CPI is not a precise measurement, but is instead a "gauge of relative changes of an artificial benchmark". While the Union claims that it is not attempting to obtain more than its fair share of wages, all other County employees, union and non-union, have already "fallen back". There is no justification for a 1.5% increase in 2010 when the wages of all other employees were frozen.

The Employers argue that the Union relied on incorrect information when the Union claimed that the County is in sound financial shape, and the raise requested is only fair. It is true that the County's financial situation is sound, but due to the County's fiscally prudent behavior in the previous years. If all County employees had received the 1.5% raise in 2010, the cost to the County would have totaled an additional \$2,250,000, and it would have seriously impacted the County's financial situation. Granting the Union its wage proposal

would create an unjustified inequity between the Bargaining Unit members and the rest of the County's employees whose wages were frozen in 2010.

The County emphasizes that its budgeting priorities in these economically difficult times involve "tens of thousands of decisions". The County expects that each department will not increase its fund requests over that of the previous year. If a department loses funds from other sources, it is expected to make cuts. The County must be fiscally responsible and not balance the budget at the expense of future debt or borrowing from future revenues.

In 2010, the operating and capital budget totaled \$498 million, which amounted to \$6 million less than the previous year's budget due in significant part to less tax revenue. In addition to other serious losses, there was a greater need for social services. Given all of these hardships, the County had to lay off employees from various departments. It is with this background that the Employers froze pay for employees, in contrast to the Bargaining Unit's request for a 1.5% pay increase.

B. Non-Economic Issues

First, the Employers note that its current voluntary incentive based fitness policy is not fully utilized by the Bargaining Unit. The Employer's proposed plan would require each Bargaining Unit member to submit to a "power test" once each year, which would evaluate various physical abilities by examining such activities as running 1.5 miles within a specified period of time, a required number of sit ups per minute, sit and reach ability, and bench press ability. An individual's power test review takes into account the age of the employee. No discipline results in the event of failure. The Employers' proposed plan would allow employees to better understand their health and fitness levels, noting room for improvement.

The County hopes that the tests will have a positive effect on healthcare costs and in decreasing workers' compensation claims. The test will ensure that the employees are physically able to perform their duties. If Bargaining Unit members are not in above-average physical condition, the community could suffer financially. The advantages of a mandatory physical fitness test outweigh any disadvantages that the Union alleges. Therefore, the Employers point out the necessity of accepting its physical testing policy proposal.

The Employer has also proposed random drug testing for all Bargaining Unit members. The current policy involves "for cause" testing only. The County's proposal provides for testing any one employee no more than four times per year, with a maximum of ten Bargaining Unit members randomly chosen per testing cycle. Non-bargaining unit employees are already tested randomly. The Employers acknowledge that there have been no particular drug problems regarding the Bargaining Unit population; however, the County believes that a pre-emptive approach is prudent, especially considering the requirements of a public safety position. The County believes random testing will be more effective than the current policy and the Employers ask that the Arbitrator accept its proposal.

DISCUSSION

After a review of all of the evidence, stipulations, exhibits, testimony, post-hearing briefs and all of the factors contained in Section 14(h), I accept the Union's economic and non-economic proposals.

I. Economic Issue

In considering the wage increase proposals of both parties, I find that the statutory factors favor the Union. The Employers' non-Section 14 internal comparables are unpersuasive because none involve sworn officers without the ability to strike. I recognize that in 2010, both Union and non-union employees experienced difficult economic times with a pay freeze, furlough days and other sacrifices including layoffs imposed upon them. Nonetheless, Section 14 employees are simply not sufficiently comparable to non-Section 14 employees in determining that wages should be treated in the same manner. *See City of Effingham, S-MA-07-151 (McAlpin, 2009)* The contracts of the bargaining units referred to in the Section 14 internal comparables generally do not cover the same period that the instant Bargaining Unit is attempting to resolve, and most of these internal comparable bargaining units are currently involved in negotiations with the County for their next contracts. As such, I find that the Section 14 internal comparables are not sufficiently similar to rely upon. ¹

The Employers' use of DuPage County as its external comparable may in fact be the most comparable unit of government to Lake County. However, this is a single example, and the Employers never mentioned DuPage during negotiations. Furthermore, the DuPage

¹ I note that after the Hearing was concluded, the parties submitted three interest arbitration awards relating to the Coroner's Unit represented by AFSCME, Corrections Sergeants and Law Enforcement Lieutenants represented by Teamsters Local 700. I have reviewed these awards and the results do not change the outcome of this Award.

employees entered into their first collective bargaining agreement in 2011 and had not previously collectively bargained. This one example is not sufficient to rely upon as an external comparable. I find that there is no statistically significant external comparability in this case.

I find that the Union has established that the Employers have the ability to pay. This fact was not really in contention, as the Employers stated that the County was on sound financial footing. The County has worked very hard to keep itself fiscally sound and should be commended for doing so. After a review of the fiscal situation of the Employers, I find that the interests and welfare of the public, and the financial ability of the unit of government to meet the costs of the Union's proposal, do not weigh against the Union's position.

I find the CPI to be the most compelling factor in this case. The Union's proposal is consistent with the CPI. The Union's proposal of the 1.5% increase for 2010, 2.5% in 2011, and 2.5% in 2012 is very much in line with the CPI over the same time period. The Union presented evidence and arguments showing that its proposal was extremely close to the actual CPI during the relevant period, and was actually slightly less than the CPI. The Employers did not argue that the request was out of line with the CPI, but stated that either of the parties' proposals would put the employees in a position sufficiently close to the CPI over the last three years, and thus neither proposal is sufficiently different from the CPI. I find the Union's position to be more compelling and agree with Arbitrator Benn that in these difficult financial times, the CPI is an appropriate guideline for potential wage increases. *See, e.g., County of Rock Island, S-MA-09-072 (Benn, 2010)*

Evidence and arguments were not presented regarding any of the other statutory factors such as overall compensation of the employees and changes in circumstances. After a review of all the evidence, as noted above, I find that the most compelling factor in considering the wage increase proposals is the CPI and that the Union's proposal is most in line with that

factor. I accept the Union's wage proposal and the wage increases shall be retroactive to the effective date of the Contract.

II. Non-Economic Issues

I will address the two non-economic issues together. I find that the Employers, in proposing random drug testing and a mandatory fitness policy, are seeking a "breakthrough" change in the Contract. I will ordinarily not award to a party a contract term which they cannot obtain at the bargaining table. This is especially true where such a policy constitutes a significant deviation from the *status quo*.

An initial inquiry in the analysis of this Interest Arbitration involves whether the Employers' proposed changes to the drug testing policy and fitness policy qualify as a relatively minor change in the *status quo* of existing conditions, requiring a lower burden of proof, or whether the Employers' proposals constitute new or dramatically changed conditions that would be considered breakthrough issues, requiring a heightened standard of proof. The party seeking to change an existing provision of a contract bears the burden of proving the need for the change. In cases in which the proposal is to change the *status quo* of an existing condition, such as an increase in pay or amount of vacation time, arbitrators require a burden of proof that demonstrates that the change is preferable or more equitable, based on the factors identified in Section 14. *Village of Oak Brook and Illinois F.O.P. Labor Council*, Case No. S-MA-09-017 (McAlpin, 2011)

Conversely, where the requested change seeks to create an entirely new or a significant change in a benefit or procedure, arbitrators apply a higher standard or a breakthrough analysis before the Section 14(h) factors are considered. "The traditional way of conceptualizing Interest Arbitration is that parties should not be able to obtain in Interest

Arbitration any result which they could not get in a traditional collective bargaining situation." *City of Burbank and Illinois Fraternal Order of Police Labor Council*, Case No. S-MA-97-056 (Goldstein, 1998)

As established in *Will County Board and Sheriff of Will County*, Case No. S-MA-88-09 (Nathan, 1988) and *City of Burbank*, arbitrators typically apply a three-factor test that a party must meet in order to demonstrate that a major change in the *status quo* is needed:

- 1) the old system or procedure has not worked as anticipated when originally agreed to;
- 2) the existing system or procedure has created operational hardships for the employer or equitable or due process problems for the union; and
- 3) the party seeking to maintain the *status quo* has resisted attempts to bargain over the change (i.e., refused a quid pro quo).

City of Burbank, Case No. S-MA-97-056 (Goldstein, 1998)

After a review of the evidence presented in this case, I cannot find that the Employers have proven that the 3-part test can be fulfilled regarding either the drug testing or physical fitness testing. The Employers' physical fitness testing proposal would move from a voluntary policy with incentives to a mandatory testing policy. The Employers proffered reasons to justify why this change would be a "good idea". However, a "good idea" is not a sufficient justification to impose such a proposal in the context of interest arbitration. The party seeking to impose a change to the *status quo* should present compelling reasons for such a change. Absent such compelling reasons for a breakthrough change in interest arbitration, the party seeking the change must attempt to obtain its objective at the bargaining table and not from an interest arbitrator.

The Employers in this case presented sensible reasons for mandatory physical fitness testing; healthy employees cut costs and are more effective. However, the Employers did not show an excess in workers' compensation or sick day usage, nor did they show any real nexus between the proposed testing and controlling health care costs. Interest arbitration is "a very conservative process which does not impose terms and conditions on parties which may amount to 'good ideas' from a party's (or even an arbitrator's) perspective." *County of Cook & Sheriff of Cook County and AFSCME* (Benn 2010).

There was insufficient evidence that the Bargaining Unit members' health or physical fitness has been a problem such that there should be a breakthrough from the *status quo* in this case. I find that the *status quo* should remain regarding physical testing.

The same reasoning applies to the Employers' random drug testing proposal. Obviously, everyone has an interest in a drug free work place, especially for where law enforcement is involved. Nonetheless, the parties had previously negotiated a drug testing policy that did not include the random testing involved in the Employers' proposal. The Employers acknowledge that currently there is no evidence of existing drug problems, and proposes to act preemptively. This position is logical, but insufficient to change the *status quo*. I do not find the random drug testing policy in place for non-union employees to be a sufficiently compelling reason to award a significant change to the Employers absent a compelling showing of necessity regarding the Bargaining Unit members.

Thus, because the Employers' two non-economic proposals are breakthrough changes, I cannot find that the evidence presented by the Employers is sufficient to meet the heavy burden in such a situation. I find that the Union's proposals regarding the economic and non-economic issues are accepted.

AWARD

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Union's proposal for wages is granted. The Employers' proposals regarding drug testing and fitness testing are rejected because they constitute significant changes from the *status quo*, and sufficient compelling reasons were not presented to change it.

**Steven
Bierig**



Digitally signed by Steven Bierig
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Date: 2012.11.29 17:11:18 -0600

**Steven M. Bierig, Arbitrator
November 29, 2012**