BEFORE THE INTEREST ARBITRATION PANEL

THOMAS F. LEVAK, NEUTRAL

In the Matter of the Interest Arbitration Between:

CITY OF PASCO
THE "CITY"

and

IAFF LOCAL 1433
THE "UNION"

PERC NO. 8351-I-90-169
FMCS NO. 90-09735

OPINION AND AWARD
OF
THE NEUTRAL ARBITRATOR

This matter came for hearing before the Arbitration Panel on August 13, 14, 15 and 17, 1990. The Panel was composed of Neutral Arbitrator Thomas F. Levak, Union Arbitrator Michael J. McGovern and City Arbitrator Gary Crutchfield. The Union was represented by its attorney, Alex J. Skalbania and the City was represented by City Attorney Rubstello. The proceedings were tape-recorded by Arbitrator Crutchfield. Testimony and evidence were received. The parties' post-hearing briefs were received by the Arbitrators on September 8, 1990. Based upon the evidence, the arguments of the parties and an application of the statutory criteria thereto, the Arbitrator decides and awards as follows.

I. BACKGROUND.

This is a uniformed personnel interest arbitration proceeding falling under the terms of RCW 41.56.450, et. seq. The City is an agriculturally based community of some 17,820 persons located in Eastern Washington on the Columbia River, and adjacent to the cities of Richland and Kennewick, as a part of the "Tri-Cities" area. The City's Fire Department is composed of a chief, an assistant chief, and a 21-person bargaining unit made up of a captain, a lieutenant, firefighter/paramedics and firefighters.

For a number of years, the parties have been signatory to a continuous succession of written collective bargaining agreements, culminating in their last Agreement in effect for the period of January 1, 1988 through December 31, 1989. Collective bargaining and mediation for a new agreement was unsuccessful in part, and issues were subsequently submitted to the Panel for final determination.

II. WITHDRAWAL OF ISSUES BY PERC.

By letter dated August 29, 1990, the Arbitrator was notified

by PERC Executive Director Marvin L. Schurke that because the "union business" and "removal of fire code inspection duties" issues were the subject of pending unfair labor practice complaints (Case Nos. 8124-U-89-1760 and 8521-U-90-1841), he was thereby withdrawing both issues from the interest arbitration proceedings pending the resolution of the underlying disputes in the unfair labor practice forum.

By letter dated September 7, 1990, the City filed a written objection with Mr. Schurke to his withdrawal action, and on the same date notified the Arbitrator of the filing of that objection and the rationale therefor. On the same date, the Union notified the Arbitrator that in view of Mr. Schurke's determination, the Panel is without authority to make a determination on the two withdrawn issues.

The Arbitrator has reviewed the arguments of the parties, and believes that he must defer to Mr. Schurke's withdrawal determination. While the statute may not explicitly vest the Executive Director with statutory authority to withdraw issues after certification to arbitration and the close of the hearing, such authority may very well be implicit. Since, at the least, the Executive Director arguably possesses such authority, the Arbitrator believes that he should defer to the Executive Director's directive.

III. THE ISSUES.

IV. WITNESSES.

A. Union Witnesses:

State Representative Douglas Sayan
Professor Wolfgang Franz
Fire Captain Pat Henrickson
Attorney Richard McMenamin
Firefighter/Paramedic Jeff Eliason

B. City Witnesses:

Fire Chief Larry Dickinson
Assistant Fire Chief John Fifer
Finance Director Dan Underwood
Building Inspector Richard Lintz
Insurance and Investment Consultant John R. Williams

V. EXHIBITS.

A. Union Exhibits:

1. RCW 41.56.460
2. Governor's Address, May 19, 1987
3. Franz Resume
4. Franz 7/31/90 Report
5. Tri-Cities Wage Survey 4/88
6. Rubstello Letter 5/7/90
7. Washington Council Wage Data 1988
8. Union Comparator List #1
9. Union Comparator List #2
10. Union Comparator List #3
11. 1989 Salary Comparisons
12. 1990 Salary Comparisons
13. Comparators' Collective Bargaining Agreements
14. RCW 41.04.180
15. RCW 48.46.180
16. RCW Ch. 48.52
17. RCW 48.62.040
18. Conniff Health Plan Memo 5/17/90
19. Hager Memo
20. Morris Grievance 10/29/79
21. Hager Grievance Memos
22. Dickinson Telephone Memo 8/27/85
23. S.O.P. 5-1
24. Dickinson City Facilities Memo 1/29/90
25. 1990 Department Goals
26. Chief's Calendar
27. City's Arbitration Proposal
28. Alarm Information
29. Incident Alarms
30. The Jobs Rated Almanac
31. Union Proposals
32. Article: We're Getting Healthier
33. Article: Illness at Work
34. Article: Keep the Fat out of the Fire
35. Article: Stress Factors
36. Article: Promoting Physical Fitness
37. Article: Firefighter Fitness
38. Article: Physical Exercise Program
39. Healthpath Excerpts
40. Wellness Survey
41. Summary of City Proposals
42. Haney Arbitration
43. Court Decision

44. Supreme Court Decision
45. Life Insurance Cost
46. Memo 11/1/89
47. Union Proposals
48. 8 Auditor Findings
49. MFPA Fire Inspector Qualifications
50. Miscellaneous Newspaper Articles
51. Negotiation Ground Rules

B. City Exhibits:

1. Employer's Comparators - Selection Process
2. Union's Proposed Comparators
3. 1989 State Population Statistics
4. 1990 State Population Statistics
5. City of Pullman Survey and Collective Bargaining Agreement
6. Mountlake Terrace Survey and Collective Bargaining Agreement
7. Mount Vernon Survey and Collective Bargaining Agreement
8. Centralia Survey and Collective Bargaining Agreement
9. Ellensburg Survey and Collective Bargaining Agreement
10. Moses lake Survey and Collective Bargaining Agreement
11. Hoquiam Survey and Collective Bargaining Agreement
12. Wenatchee Collective Bargaining Agreement
13. Walla Walla Collective Bargaining Agreement
14. The Fire Chief's Survey Regarding Evening Hours in Wenatchee and Walla Walla and Fire Code Enforcement in Comparators
15. Pasco and It's Social Economic Characteristics
16. Emmployer Position Statement and Proposal
17. Comparison Chart
18. Excerpt from Clark County PERC Decision
19. Enumclase Education Association, PERC Decision
20. Employer Position Statement and Proposal
21. Comparison Chart
22. Comparison Chart
23. LaCugna Arbitration Opinion and Award
24. Bryholdt Arbitration Opinion and Award
25. Burke Arbitration Opinion and Award
26. Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements"
27. Arbitration Decision Concerning Changed Circumstances
27A. Arbitration Decision Concerning Mutuality and Changed Changed Circumstances
28. Arbitration Decision Concerning Mutuality
29. Employer Position Statement and Proposal
30. Portland Firefighter Association v. City of Portland
31. Proposed Employer Leave Scheduling Policy
32. Average year - Time Allocation
33. Time off Data
34. Time off Data from Daily Shift Reports
35. Comparison Chart - Overtime Rate of Pay
36. Overtime Abuse/Manipulation
37. Overtime Comparison Before and After LaCugna Decision
38. Employer Position Statement and Proposal
39. Current Fire Department Shift Schedule

40. S.O.P. 5-1
41. Washington Cities Insurance Authority Annual Review Summary and Recommendations for Pasco Fire Department
42. Citation and Notice from Washington State Department of Labor and Industries
43. Advantages of Evening Drills and Training
44. Saturdays and Sundays
45. Advantages of Special Scheduling for New Hires
46. Training During Special New Hire Schedule
47. Pasco High School Athletic Events/Emergency Stand-by
48. Comparison Chart - Evening Training
49. Comparison Chart - Physical Fitness time
50. Employer Position Statement and Proposal
51. Comparison Chart
52. Employer Position Statement and Proposal
53. Employer Position Statement and Proposal
54. Comparison Chart - Seven Comparators
55. Comparison Chart - Nine Comparators
56. Consumer Price Indexes
56A. Excerpt from Krebs' 1990 City of Pasco and Pasco Police Association Interest Arbitration and Award
57. Internal Wage Increases 1990
58. Employer Position Statement and Proposal
59. Cost to Employer
60. Fire Chief's Report on Physical Fitness Committee
49. Comparison Chart
61. Employer Position Statement and Proposal
62. Employee Health Care Costs Escalation and Containment
63. History of Pasco Self-Insurance Plan/Union Agreement
64. Chart of Medical Insurance Caps in Collective Bargaining of Other City Bargaining Units
64A. Chart - Health Insurance - Who Pays Premium?
64B. Washington Research Council Public Policy Brief Concerning Employee Contributions for Health Care Premiums
65. Comparison Chart - Pasco Comparators - Premium Caps
66. Comparison Chart - Pasco Comparators - Employer's Selection of Insurance Carrier
67. Comparison Chart - Pasco Comparators - Employee Selection of Optional Plans
68. Employer Position Statement and Proposal
69. Comparison Chart - Pasco Comparators - Paid Leave v. Unpaid Leave
70. Comparison Chart - Pasco Comparators - Education Benefits
71. Employer Position Statement and Proposal
72. Memorandum from Fire Chief - Interrelationship Between Uniform Building Code and Uniform Fire Code
73. Comparison Chart - Pasco Comparators - Life Insurance
74. Fire Chief's Work Sheet
75. Fire Chief's Telephone Call Notes (8/13/90)
76. Fire Chief's Telephone Call Notes (July '90)
77. City of Bothell Survey
78. City of Puyallup Survey
79. City of Port Angeles Survey
80. Richland Interest Arbitration

81. Staffing Comparison -- Pasco-Kennewick-Richland
82. Stations Comparison -- Pasco-Kennewick-Richland
83. FLSA Handbook
84. Henrickson Memo 2/2/88
85. IAFF v. City Motion and Correspondence
86. Tri-Cities Data 1987-90
87. Tri-Cities Data Salary Comparators 1987-90
88. Burn Memo 8/16/90 with attachments
89. Uniform Building Code Table of Contents
90. Uniform Fire Code Table of Contents

VI. UNION WRITTEN OBJECTIONS.

On the morning of August 15, 1990, the Union presented six written objections to the City's conduct during the proceedings. The City responded to those objections at the beginning of its post-hearing brief. The Arbitrator hereby rules as follows on those objections.

a. Local 1433 objects to the City's violating applicable WACs and committing an unfair labor practice by proposing "comparables" never previously disclosed to Local 1433 in this hearing.

The objection is overruled. Regarding the allegation of an unfair labor practice, the Arbitrator deems it sufficient to note that interest arbitrators do not have responsibility or jurisdiction to adjudicate unfair labor practice charges. Spokane Fire District 1, Decision 3447 (PECD 1990). Regarding the assertion that the City violated applicable WACs, the Union did not identify those WACs or present evidence in support of its assertion. In any event, it appears to the Arbitrator that the City supplied its list of comparators in accordance with the WAC 391-55-220 time table. It further appears that there could be no prejudice to the Union since every comparator claimed by the City is also claimed to be a comparator by the Union.

b. Local 1433 objects to the City's violating applicable WACs and committing an unfair labor practice by putting forth proposals to the neutral arbitrator that were never previously discussed with the Local during mediation or negotiations.

The objection is overruled. Again, the Arbitrator has no jurisdiction to resolve an unfair labor practice charge. Regarding the alleged WAC violation, the Arbitrator finds no violation of WAC 391-55-220 for the reason that the City simply offered amended proposals that were progressive in nature rather than regressive. Spokane Fire District 1, supra.

c. Local 1433 objects to the City's violating applicable WACs by presenting "documentary" evidence without authentication of any sort and without agreement of Local 1433 that evidence would be presented in this fashion.

The objection is overruled. RCW 41.56.450 and WAC 391.55.230 do not require authentication of documentary evidence in an interest arbitration proceeding, nor do they require the agreement of an adverse party that evidence be presented in such a fashion.

d. Local 1433 objects to the City's violating applicable WACs by presenting case law and argument to the arbitrator at the hearing in violation of the parties' agreement that they would not present briefs to the arbitrator until three weeks after the close of the hearing.

The objection is overruled. There was no convincing evidence of any such agreement between the parties. The parties' agreement to submit briefs after the close of the hearing did not foreclose the City from presenting case law and argument during the hearing.

e. Local 1433 objects to the City's violating applicable WACs by failing to submit a proposal to the arbitrator relative to life insurance seven days in advance of the hearing.

The objection is overruled. The record demonstrates that the City was simply responding to the Union's life insurance proposal. In any event, the Union is not prejudiced by the City's response.

f. Local 1433 objects to the City's violating applicable WACs by creating a situation where, without the agreement of Local 1433, the City Attorney, who is an advocate presenting the City's case, is also the primary witness for the City with respect to preparation and authentication of documents upon which the City is relying in support of its position herein.

The objection is overruled. The Arbitrator is unaware of any WAC that prevents a party's attorney from submitting summary documentation and survey documents which are verifiable from other documentation, such as comparator collective bargaining agreements, or are self-authenticating. In this case, as in most interest arbitrations, the City Attorney was intimately involved with the preparation of the questioned documentation. Furthermore, Chief Dickinson's testimony verified and corroborated the bulk of the questioned documentations.

VII. ISSUE NO. 1: TERM OF AGREEMENT, ARTICLE XXV.

Article XXV of the Expired Agreement provided:

> This Agreement shall be effective as of the 1st day of January,1988, and shall remain in full force and effect through the 31st day of December, 1989.

a. The Parties' Proposals.

The Union proposes to amend Article XXV to read as follows:

> This Agreement shall be effective as of the 1st day of January, 1990, and shall remain in full force and effect through the 31st day of December, 1991.

The Employer proposes to amend Article XXV to read as follows:

> Except as may be otherwise expressly stated herein to the contrary, this agreement and each provision hereof, shall be effective upon ratification by both parties, as shown by their signature affixed hereto, and shall remain in full force and effect through the 31st day of December, 1991.

b. Union Argument.

The City concedes that the Agreement should be made effective retroactive to January 1, 1990 for economic purposes. It is only logical and consistent that the Agreement be made retroactive for all purposes. Furthermore, the ratification language proposed by the City might delay the effective date should one of the parties refuse to ratify the Agreement.

c. City Argument.

First, under RCW 41.56.470, conditions of the Expired Agreement continue until the arbitration award, so there is no gap between the expiration of the Expired Agreement and the New Agreement. Second, only wage and monetary provisions should have a retroactive date; other provisions should not be retroactive since such could cause confusion and ex post facto contractual agreements.

d. Award.

The New Agreement shall contain the language proposed by the Union. First of all, by making the entire Agreement effective on the day following the expiration of the Old Agreement, it is made clear that no gap exists in the coverage and protections afforded by the Expired Agreement and the New Agreement. In the second place, the City's concern that confusion or ex post facto contractual agreements might result is unrealistic, since arbitrators will not enforce language changes, as opposed to economic changes, on a retroactive basis.

VIII. ISSUE NO. 2: WAGES, ARTICLE XXVI.

The top step firefighter salary at the City for 1989 was

$2,479. The parties have stipulated that their respective comparator analysis shall be based upon top step firefighter salaries at proposed comparators.

a. The parties' proposals.

For the first year of the Agreement, the Union proposes a 10% increase in hourly rates over those rates prevailing in 1989. For the second year of the Agreement, the Union proposes a percentage increase equal to 100% of the any specific index figures selected by the Neutral Arbitrator. The City proposes that wages increase 3.24% in the first year of the New Agreement, and for the second year of the Agreement, an increase equal to 90% of the percent of increase in the CPI-W, West Coast Index for the year ending October 1990, with a 3% floor and a 5% maximum.

b. Union Argument.

The Union proposes twenty-one statewide comparators and the two labor market comparators of Kennewick and Richland. The statewide comparator list is composed of all City departments and districts 50% smaller and 100% larger than the City, considering population, assessed valuation and size of bargaining unit. The twenty-one proposed comparators are: Hoquiam, Walla Walla, Centralia, Port Angeles, Puyallup, Longview, Ellensburg, Wenatchee, Pullman, Spring Glen, Mt. Vernon, Mountlake Terrace, Moses Lake, Bothell, University Place, Parkland, South Renton, Spanoway, Silverdale, Apple Lake and Maple Valley.

For 1989, and after adjustment for cost of living, the City is 2.98% behind the average of the twenty-one comparators, 5.9% behind Kennewick and .14% behind Richland. For 1990, not adjusted by the cost of living, the City falls to 7.66% behind the twenty-one comparators, 10.15% behind Kennewick and 7.86% behind Richland. Utilizing the twenty-one comparator list, Pasco is 7.,82% behind the average for 1990.

The Arbitrator should adopt the Union's comparators and reject those proposed by the City since the City has not faithfully followed the mandate of the statute. First, the City did not include any fire districts within its list of comparators which conflicts with the legislative intent as described in the unrebutted testimony of State Representative Doug Sayan. Second, the City did not take into account the cost of living in making its wage comparisons. As testified by Professor Wolfgang Franz, the only expert who testified at the hearing, the cost of living analysis is essential to a comparative study. Third, the formula utilized by the Union was more appropriate than that utilized by the City. The 50%/50% standard proposed by the City leads, as Franz noted, to incongruous results, since it would eliminate the City as a proposed comparator to some departments on the comparator lists. As Franz also noted, the City's list of only seven comparators constitutes an insufficient number in order to make a meaningful statewide comparison as required by the statute. Fourth, the Union's methodology for implementing

its proposed formula in order to develop a list was more reliable than any methodology utilized by the City. Negotiator Pat Henrickson testified in substantial detail as to the Union's methodology, and his testimony was credible, and straightforward. On the other hand, many ambiguities remain as to how the City developed its list. Indicative of the City's approach is the fact that it offered to agree to two of the Union's comparators, Wenatchee and Walla Walla, at the time of hearing. Fifth, the City has ignored the economic realitites of the Tri-Cities area by arguing that Kennewick and Richland should not be considered as comparators. As Professor Franz noted, the Tri-Cities constitute a single economic entity and labor market so acknoweldged by the Washington State Employment Security Department. Further, their departments offer very similar services and coordinate their activities. The argument that non-fire personnel employed by Kennewick and Richland are paid lesser salaries than those paid by the City is irrelevant since the statute requires a comparability study based upon wages of "like personnel." Sixth, the figures that were used by the Union in compiling its comparators are sufficiently accurate to support its wage demands. The City's own figures in this regard are of themselves often contradictory. Even if the City figures were more accurate than those of the Union, this would be of minimal importance for the purpose of determining which set of comparators should be adopted by the Panel. The assessed valuation figures are not in question and the figures for population served and bargaining unit size are essentially identical. Seventh, the City is able to pay the Union's wage demand. No ability to pay defense has been raised, and the evidence establishes a positive ability to pay. Eighth, the Union's proposed increase is relatively comparable to the wage increases received by the Union's comparators during 1990. Ninth, the figures for all U. S. western cities support the position of the Union.

c. <u>City Argument.</u>

First, the parties have effectively stipulated, within the meaning of the statute, to nine comparators, all City departments: Hoquiam, Centralia, Ellensburg, Pullman, Mt. Vernon, Mountlake Terrace, Moses Lake, Wenatchee and Walla Walla. The nine stipulated comparators are sufficient, even considering Franz' testimony. Further, the stipulated comparators had been historically utilized by the parties, even after the 1987 amendment to the Act. In addition, the nine stipulated comparators fall within a 50%/50% standard in the areas of population, bargaining unit size and assessed valuation. The Union's selection of a 50%-/100%+ standard is purposely slanted to provide a lopsided list heavily weighted with higher paying employers. Sixteen of the twenty-three comparators proposed by the Union are larger in population served than the City; eighteen of the twenty-three have larger assessed valuations. Each one of the twelve additional comparators proposed by the Union, with the exception of Longview, have a higher monthly wage than does Mountlake Terrace. Importantly, too, the comparators themselves

were compiled by the Union with no apparent objective study. Franz himself could not testify for the accuracy of the Union's raw data. Franz was unable to justify the inclusion of Kennewick and Richland as comparators. Surveys submitted by the Union show a wide range of wages surveyed for each position or occupation listed. Franz also admitted that "local labor market" is not designated by the statute as a criterion, but was merely a principle of economics. Richland and Kennewick are just too large in all three categories, population, assessed valuation and bargaining unit size, to be included. The revenue base has historically enabled them to pay wages higher than the City in all positions, management and non-management alike. Also, both employ personnel in their departments for which there is no comparable classification in the City's department. Further, both have two stations, and Richland is building a third, while the City has only one.

Absent special circumstances and specific evidence, City fire departments are not comparable to fire districts. Arbitators have so ruled in the past. In this case, the Union has failed to maintain its burden of coming forward with evidence to show that its districts should be compared to the City's department. For example, the Union did not show how many of these districts operated with substantial numbers of volunteers.

The CPI-W, West C Index is more appropriate. Further, that index supported internally: the operating engineers contract with the City provides for an increased based upon 85% of that index, and the police contract provides for an increase based upon 90% of that index.

The City agrees that it has the ability to grant a reasonable and fair wage increase. The question is what is fair and reasonable considering the statutory criteria. One criterion that should be considered is that of settlements between the City and other bargaining units. For 1990 non-represented employees of the City, including management, as well as police department clerks received a 3% increase. Operating engineers received an 3.74% increase and police officers received a 3.24% increase, both based upon their second year formulas.

Finally, it should be considered that there was no testimony at the hearing indicating an internal problem at the City.

d. Arbitrator's Award.

The first two paragraphs of Article VII shall be amended to read:

> The wage rates under this agreement for January 1 1990 through December 31, 1991 shall be as set forth in Appendix "A" attached hereto, representing a 4.5 % increase in hourly rates of pay over those wage rates prevailing in 1989.

> For January 1, 1991 through December 31, 1991 wage rates shall be as set forth in Appendix "B" attached hereto, representing a percentage increase in hourly rates of pay over those prevailing in 1990 equal to 90% of the percent of increase in the CPI-W, West Coast -C Index for the year ending October 1990, published by the Bureau of Labor Statistics, provided that the minimum increase shall be 4% and the maximum increase 8%.

First of all, the first criterion ordinarily considered is that of comparability. That criterion attempts to insure that wages will not vary greatly within a labor market. Thus, the primary task of a neutral is to determine, where possible, the labor market in which the employer competes. Ordinarily, the labor market is composed of those employers of similar size within a geographical proximity, and with a similar socio-economic base. The traditional comparator list would be composed of employers that the average resident would consider to be a part of the labor market in which he works and shops. Where police and fire personnel are concerned, arbitrators tend to look at a wider labor market, or at a primary and a secondary market, because recruitment and turnover tend to be on a wider basis than with other employees. For example, a firefighter who leaves his department may look first to the local labor market, but has a very real option of seeking work throughout the state; while an office clerical ordinarily will limit a job search to the local market.

Second, population is ordinarily the principal demographic factor utilized in selecting comparators; and the 50% over and 50% under test is the most commonly utilized, although it not be slavishly adhered to. In fact, the Arbitrator cannot recall seeing other percentages used. Other demographic characteristics considered important are assessed valuation, per capita income, median family income, assessed valuation per capita, and assessed valuation per employee. The 50/50 standard is also commonly applied to those demographics.

Third, it may be appropriate to consider wages paid by somewhat larger comparators within an immediate labor market. Such is particularly true where the boundaries of the comparators are contiguous. However, those larger comparators should not be compared on an equal basis but should be down-weighted on a percentage basis.

Fourth, the comparability criterion does require that an employer pay the average wage paid by its comparators. An award need not be sufficient to bring wages up to the average paid by comparators, but need only be within the "range of reasonableness" of wages paid by those comparators. Normally, it is sufficient under the statute that any increase awarded be sufficient to maintain the relative standing of the particular

entity on the comparator list. The only generally accepted exception is where an entity is at the bottom of a comparator list by a long way and merits a "catch up" increase.

Fifth, a comparator list properly may include cities or districts of an adjacent state, where those cities and districts are commonly considered to be within the labor market.

Sixth, a list of historical comparators would be considered to have prima facia validity. However, because an interest arbitration is de novo and relates to current bargaining, it is not appropriate to simply allow the "tail" of prior negotiations to "wag the dog" of current negotiations. Historical comparators will not be continued where the the party asserting a change is able to demonstrate through evidence that a change in comparators is appropriate. For example, such may be the case where populations and assessed valuations have changed significantly in recent years.

Seventh, evidence concerning internal comparability is secondary under the statute. The statute requires comparison with "like personnel". Internal comparability becomes a greater factor where an ability to pay problem exists, particularly where to grant a large increase to one group of employees will result in other employees of the employer receiving a decrease.

Eighth, increases implemented by comparators during the subject year should always be considered. However, increases are of lesser value where they are the result of a contract formula, as opposed to actual negotiations over economic conditions in existence during the subject year.

As should be apparent from the above stated arguments of the parties, it has been somewhat difficult for the Arbitrator to apply these basic principles to the argument and evidence in this case.

First of all, both comparator lists do not relate to a readily apparent labor market, for example, the southeast quadrant of the State, with perhaps the cities of Hermiston and Pendleton, Oregon included, but rather are located all over the state. Such patently dissimilar cities as Mountlake Terrace, located on the hub of the Seattle labor market, Centralia, located on the I-5 Corridor and Hoquiam, located in the Pacific Coast port of Grays Harbor, are jointly proposed. If the Arbitrator were working from scratch, he would have utilized a more local labor market. But because neither side is proposing a comparator list based upon a local labor market, the Arbitrator has turned to the historic list as a starting point.

As the City has argued, that historic list, with the addition of Walla Walla and Wenatchee, constitutes a de facto stipulation on comparability. With the exception of giving weighted status to Richland and Kennewick, the Arbitrator can see no reason to deviate from that "stipulated" list. Eleven

comparators are more than enough. Utilization of a greater number would simply become unweildly.

The Union has attempted to convince the Arbitrator that a greatly widenend list should be utilized. Frankly, there appears to be no basis for the expanded list except to utilize the 50/100 formula which would have the effect of adding comparators of significantly higher populations, assessed valuations and salaries paid. The 50/50 standard utilized by the City is patently more reasonable.

On the other hand, the Arbitrator agrees that some use must be made of Richland and Kennewick as comparators because of the distinct relationship of the three cities and the extent to which the fire departments for the cities cooperate and interact. Accordingly, the Arbitrator has half-weighted those jurisdictions. The result is that the awarded wage increase is 0.4% higher than would otherwise have been awarded.

The Arbitrator would further note that the evidence presented by the Union is insufficient for the Arbitrator to make a comparison of fire districts it proposes as comparators. The Arbitrator would also note that the increase he has awarded will allow the City to maintain its status among the stipulated comparators, while allowing some additional increase based upon the City's relationship to Kennewick and Richland. Thus, the Arbitrator's award is clearly within the range of reasonableness.

Turning to the second statutory criterion, and the disagreement over the CPI to be utilized, the Arbitrator agrees with the City that the CPI-W West-C Index will more accurately reflect the current CPI rise at the City. Further, that CPI is the one that is overwhelmingly utilized by Washington and Oregon interest arbitrators. The Arbitrator further agrees that the higher rise in real estate values in California cities can be mitigated by utilizing a percentage of the change in the index, as has been done under the City's contract with the Police Union. The Arbitrator has awarded higher floor and ceiling on the second year formula increase because of current projections in increases in the CPI.

With regard to the third statutory criterion, the Arbitrator has given little or no real weight to the evidence concerning internal comparability since no ability to pay defense has been raised. In any event, the evidence regarding external comparability and the CPI greatly overweighs the internal comparability evidence.

IX: ISSUE NO. 3: HEALTH INSURANCE.

The Expired Agreement provides for employer-paid employee and dependent medical coverage. Since 1987, the City has maintained a city-wide self-insured plan.

a. The parties' Proposals.

The Union proposes to amend Article XXIX to allow employees the option of being covered by the Washington State Council of Firefighters Health and Welfare Trust. Its proposed language reads:

> SECTION 29.1. EMPLOYEE MEDICAL COVERAGE. Employees covered by this agreement shall have the choice of not less than two (2) policies or plans. Specifically, one plan shall be the Washington State Council of Firefighters Health and Welfare Trust. The other will be of the City's choosing.

The City opposes the Union's proposal, and further proposes a $267 premium cap, with addition premium sharing by employees. Its proposal provides:

> Existing language, except that a cap of Two Hundred Sixty-Seven Dollars ($267.00) on the employer's obligation for the monthly premium for medical insurance shall be included; and further providing that the cost difference, if any between the actual monthly premium and the Two Hundred Sixty-Seven Dollar ($267.00) cap will be shared fifty-fifty by the city and the employee.

b. Union Argument.

First, the Washington Council Trust offers a superior, ERISA-regulated plan. However, the ultimate issue is not comparability of the two plans but the right of firefighters to a choice, grounded in the American way. It is improper to force a bargaining unit into a pool of unrelated participants.

Second, Washington law demands that the City offer an alternative plan. RCW 4.04.180. The City's reliance on RCW 41.56.905, and cases relating thereto, is misplaced. The City's plan is illegal; the City has no authority under which to self-insure.

Third, the City's request for a cap should be denied. The City's proposal is not supported by the factor of comparability. In addition, the City possesses the ability to fund a plan on its own. Finally, it is the City itself that controls the rates that itcharges to its employees.

c. City Argument. A proposed cap is necessary in this age of spiraling health care costs and escalating medical insurance premiums. The concept of cost-sharing serves as an incentive to employees to be prudent health care shoppers. The proposed cap is supported by the factor of comparability. The City's program has maintained effective insurance with a rate increase of well

below the average in the industry.

Second, firefighters are needed in the city-wide plan. As testified by the City's local insurance consultant, removal of the firefighters' unit could have grave effects on the plan itself.

Third, there was no evidence by the Union that the City's health plan is second rate, not comparable to comparators or underfunded. Neither is there any objective evidence that the City's plan violates Washington law.

Fourth, and most importantly, the Union failed to present any evidence of what its plan is and what it is going to cost. It simply proposes that the Arbitrator require the City to write a blank check. The Employer, on the other hand, offered evidence showing that its proposal is fair and reasonable. The City has proposed a cap that, by the estimates of the City finance director, will not be exceeded during the contract period. Thus, only a slight risk exists to employees. It should also be noted that a cap already exists on the firefighters' dental plan.

c. Arbitrator's Award.

The Arbitrator awards no change in the language of Article XXIV. First of all, regarding the City's proposal, the Arbitrator is in general agreement with the concept of a cap. However, in the absence of strong comparability evidence, and in the absence of consultant testimony and supporting evidence indicating that a cap will, in all likelihood, be necessary during the term of the ensuing bargaining agreement, there is no basis for awarding a cap. In the instant case, the evidence on comparability is relatively neutral, and there was no evidence that a cap could reasonably be expected to be necessary during the life of the ensuing agreement. Thus, it is appropriate to leave the matter to future bargaining when the question may be more than hypothetical in nature.

Also, the Union has failed to convince the Arbitrator that employees should have the right to an alternative plan. The Union's proposal strikingly lacks comparability support. More importantly, there is no evidence, indeed no contention, that the Employer's plan has failed to be satisfactory in all regard. As the City has argued, its plan has been very successful since 1987.

Regarding the Union's claim that the Legislature has mandated the offering of two plans, that the City's reliance on RCW 41.56.905 is incorrect, and that the City's own plan is illegal, the Arbitrator has reviewed the cited statutes and authorities with interest. However, the Arbitrator is convinced that he has no authority or jurisdiction to resolve the legal questions posed by the Union. Those questions would have to be resolved by a court of competent jurisdiction. Thus, the Arbitrator finds no basis for acceding to the Union 's request.

X. ISSUE NO 4: LIFE INSURANCE.

The Expired Agreement makes no reference to life insurance. Employees have the option to purchase additional coverage. The City currently covers firefighters under a City-wide group insurance plan in the amount of $2,500 per employee. The Union proposes a new article that would provide for $10,000 life insurance for each employee. The City opposes the proposal.

a. Union Argument.

Currently, life insurance costs the City only $9.72 per year per member of the bargaining unit. The Union's proposal would add a total cost of only $26 per member. Given the City's financial well-being at this time, it would be an ideal moment to increase this needed benefit. Witness Henrickson noted that the police currently have a $15,000 per employee plan.

b. City Argument.

There is no evidence for the Union's proposal. Its proposal is not supported by the factor of comparability; only one of the nine comparators provides life insurance.

c. Arbitrator's Award.

The Union's proposal will not be a part of the New Agreement. The Union has presented no evidence to justify its proposal. Life insurance is not supported by the factor of comparability. Neither is there any evidence that the Union has expressed a willingness during bargaining that the cost of the insurance be considered as part of any awarded percentage wage increase. The mere desirability of having a fully-paid life insurance benefit is an insufficient reason for an interest arbitrator to direct that the benefit be made a part of a bargaining agreement.

XI. ISSUE NO 5: MANAGEMENT RIGHTS AND PREVAILING RIGHTS, ARTICLES VII AND VIII.

Articles VII and VIII of the Expired Agreement provide:

ARTICLE VII. - PREVAILING RIGHTS

> All rights and privileges held by the employees at the present time which are not included in this Agreement shall remain in force, unchanged and unaffected in any manner.

ARTICLE VIII. - MANAGEMENT RIGHTS

The Union recognizes the exclusive right of

the City to make and implement decisions with respect to the operation and management of the Fire Department. Provided, however, that the exercise of any and all of these rights shall not conflict with any of the expressed provisions of this Agreement. Such rights include but are not limited to the following:

1. To establish the qualifications for employment and to employ employees;

2. To establish the makeup of the Fire Department's work force and make changes from time to time, including the number and kinds of classifications, and direct the work force towards the organizational goals established by the city;

3. The right to determine its mission, policies, and all standards of service offered to the public;

4. To plan, direct, schedule, control and determine the operations or services to be conducted by the employees of the Fire Department and city;

5. To determine the means, methods and number of personnel needed to carry out the departmental operations and services;

6. To direct the work force;

7. To hire and assign or transfer employees within the Department or fire-related functions;

8. To lay off any employees from duty due to insufficient funds;

9. To introduce and use new or improved methods, equipment or facilities;

10. To assign work to, and schedule employees;

11. To take whatever action necessary to carry out the mission of the City in emergencies;

12. To determine the department budget.

Any employee within the bargaining unit who may feel aggrieved by the unfair or discriminatory exercise of any of the

management rights specified above, may seek his remedy by the Grievance Procedure provided for in this Agreement.

The City proposes that Article VII, Prevailing Rights, be amended to read as follows:

> All rights held by the employees at the present time which are not included in this agreement and which are not in conflict with any specific agreement or management right recognized in this agreement, shall remaiin in force, unchanged and unaffected in any manner.
>
> A "right", in order to be binding on both parties, must be (1) unequivocal, (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed and established practice, (4) accepted by both parties, and (5) the underlying circumstances giving rise to the practice materially unchanged.

The City further proposes that the introductory paragraph and paragraph no. 6 of Article VIII, Management Rights, be amended to read as follows:

> The union recognizes the exclusive right and prerogative of the city to make and implement decisions with respect to the operation and management of the fire department without bargaining the decision with the union. Provided, however, the city shall impact bargain any management decisions affecting wages, hours, or conditions of employment; and, further provided, that the exercise of any and all of these rights shall not conflict with the specific agreements set forth in this agreement. Such rights include but are not limited to the following:
>
> ***
>
> 6. To approve and schedule all vacations and other employee leaves;

The Union proposes to maintain the current language of Articles VII and VIII.

a. City Argument.

The current Prevailing Rights language is far more liberal than the language that appears in the agreements of the City's stipulated comparators. Five of the nine comparators do not have a prevailing rights or past practice article, and the four that do contain limited language.

The Union's "scoreboard" approach to arbitration ignores the fact that the language should be changed. It is unreasonable that unspecified prevailing rights should prevail over clear and specific rights of management stated in the Managements Rights clause or other provisions of the Agreement. The City seeks only that the term "prevailing right" be given some parameters to facilitate dispute resolution without formal hearings, consistency in interpretation by arbitrators, and direction for the parties. Arbitrator LaCugna, in one of the cases between the parties, failed to honor the well-established "underlying circumstances" principle.

The City's Management Right proposal would add specific language addressing the deficiencies in the article recognized by Arbitrator LaCugna. The addition of the words "and prerogative" is in direct response to his arbitration decision. The City further proposes language consistent with its exclusive and prerogative to unilaterally act in those matters specifically stated in the Management Rights clause without decision bargaining. This language is necessary in light of PERC's long held view that a general management rights clause does not constitute a waiver of the right to bargain on mandatory subjects.

The City's proposed change to paragraph no. 6 of the Management Rights clause would eliminate duplicated language and add specific language to cover a specific problem. The City's evidence was overwhelming that the change would not unreasonably infringe upon unit members' ability to take accrued time off and that it would not be applied unfairly. Reimplementation of the two-man off policy will allow the City to protect the public's safety by utilizing fire suppression personnel in a more sufficient manner and to control overtime costs. Overtime costs since the LaCugna decision have increased substantially. The Union did not rebut the exhibits or testimony presented by the City that the three-man leave rule simply allows the Union to manipulate the work cycle and to increase overtime pay.

b. Union Argument.

The City's proposals would, in effect, write the Prevailing Rights clause out of the Agreement. It will waive the Union's right to "decision bargain" a unilateral decision of the City. Arbitrators have held that such would destroy the proper balance between management rights and prevailing rights.

It is fundamental that rights that have grown up through custom and practice are adhered to even though they may not be embodied in a bargaining agreement. The existing two articles now in dispute protect that fundamental right. The City has failed to present any persuasive reasoning that would justify its proposed alteration of those provisions.

c. Arbitrator's Award.

Article VII, Prevailing Rights, shall be amended to read as follows:

> All rights and privileges held by employees at the present time which are not included in this agreement and which do not conflict with any provision of this agreement shall remain in full force and effect.

The introductory paragraph to VIII, Management Rights, and paragraph no. 6 of Article VIII shall be amended to read as follows:

> The Union recognizes the exclusive right and prerogative of the City to make and implement decisions with respect to the operation and management of the Fire Department. Provided, however, that the exercise of any and all of these rights shall not conflict with any provision of this agreement. Such rights include but are not limited to the follows:
>
> ***
>
> 6. To approve and schedule all vacations and other employee leaves;

The Arbitrator is in agreement with the general principle that past practice and management right provisions should be written in such a manner that a balance is struck between inherent management rights and well-established customs and practices that have risen to the level of unwritten contract terms and provisions. In the instant case, the City has presented persuasive evidence that the two articles in question have, on occasion, been interpretive so as to unduly shift that balance in favor of employee rights. The prevailing rights provision is currently so broadly written that it is easy to see how it has been interpreted to superseded specific grants of management rights. The Arbitrator has attempted to re-write the prevailing rights article and the first paragraph of the management rights article to reinstate the appropriate balance between employee and management rights.

It is also the objective of the Arbitrator that the amended prevailing rights language would have the effect of reaffirming the elements necessary for the formation and maintenance of a past practice, as commonly utilized by the vast majority of arbitrators. In order for a custom and practice to be binding, it must be (1) unequivocal, (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. The mutual acceptance may be tacit - an implied mutual agreement - arising by inference from the circumstances. Furthermore, the underlying circumstances of a practice must always be considered:

a practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the Agreement. An ancillary circumstances principle is that the practice must also be carefully related to the conditions from which it arose, and whenever those conditions substantially change, the practice may be subject to termination.

With regard to the introductory paragraph to Article VIII, the modest change awarded by the Arbitrator will make it clear that both rights and prerogatives are covered by the article.

With regard to paragraph no. 6 of Article VIII, the City presented persuasive and compelling evidence that the new language is necessary to allow the effective utilization of fire suppression personnel and a more effective means of controlling overtime costs. The only evidence in this case is that overtime costs since the LaCugna decision have increased dramatically and substantially, and that the three-man leave rule allows the Union to manipulate the work cycles and to increase overtime pay to an inordinate extent. The awarded language will allow the fire chief to re-implement the two-man leave policy while managing operations with seven-man shifts. The compelling evidence is that re-implementation of that policy will not unreasonably infringe upon bargaining unit members' ability to take accrued time off.

XI. ISSUE NO 6: HOURS, ARTICLE X.

Article X, Hours, currently provides:

> The duty schedule for Suppression and Paramedic personnel shall consist of a twenty-eight (28) day work period wherein 192, 200 or 208 duty hours are scheduled on a regular, cyclical basis. This averages to a fifty (50) hour duty week. Shifts will commence at 8:00 a.m. and will terminate at 8:00 a.m. the following day. Normally, the cycle will be twenty-four (24) hours on duty followed by forty-eight (48) hours off duty with a Kelly Day (additional shift off) scheduled during every work period for a total of thirteen (13) annually.
>
> Kelly Days must be taken within the work period earned. The scheduled date of a Kelly Day may be changed provided a request is submitted to the Fire Chief at least forty-eight (48) hours in advance and said request is approved.

a. The Parties' Positions.

The Union proposes to maintain the current language and to

add the following additional language:

> On-duty employees shall maintain a productivity/standy-by schedule. Productivity time with scheduled work shall be from 0800 to 1600 hours Monday through Friday, with a lunch hour from 1200 to 1300 hours and fifteen minute breaks in the morning and afternoon. 1600 to 1800 hours shall be reserved for physical fitness activities. 1800 to 0800 hours shall be considered standy-by time. Saturdays, Sundays, and holidays shall consist of routine apparatus and station maintenance, followed by physical fitness and standy-by time. Productivity time shall not be scheduled during standy-by hours unless previously agreed to by the Union. Employees may be granted standy-by time during normal productivity hours in exchange for time worked outside of normal productivity schedules. Productivity and stand-by schedules shall not affect alarm/emergency response, which shall be maintained constantly.

The City also proposes to maintain the existing two paragraphs, except that it would add the word "normal" before the words "duty schedule" in the first line of the first paragraph of the existing language; and the City further proposes that the following new language be added to the existing article:

> The fire chief shall post the schedule in December for Kelly days to be taken for the following year. A draft schedule shall first be submitted to the chief by each shift captain following the procedure established by department rule.
>
> New hires may be assigned a five (5) day/ten (10) hour per day work week scheduled during the first four (4) months of employment to facilitate their training. Schedule changes shall normally be made two (2) weeks in advance so the new hire has adequate notice.
>
> Approval of any requests for time off from a scheduled work shift is subject to the discretion of the fire chief or his designee.
>
> On-duty employees shall maintain a productivity/emergency stand-by schedule. Productivity time with scheduled work or training shall normally be from 0800 to 1600 hours, with a lunch hour from 1200 to 1300 hours and fifteen minute breaks in the morning and afternoons. 1600 to 1800 hours shall

normally be for fire code inspection and enforcement, including company inspections. [However, if the arbitrator decides the fire code enforcement issue as proposed by the city, 1600 to 1800 hours shall normally be for physical fitness activity subject to emergency response requirements.] 1800 to 1900 hours shall be the dinner hour. 1900 to 2200 shall be for training/emergency stand-by time, including stand-by for emergency medical services at Pasco High School athletic events. 2200 to 0800 shall be considered emergency stand-by time, including stand-by for emergency medical services for Pasco High School athletic events.

Productivity and stand-by schedules shall not affect alarm/emergency response, which shall be maintained consistently.

b. Union Argument.

The Union simply seeks language that would guarantee the maintenance of a longstanding past practice and which would guarantee full-time employment to members of the Union. For a number of years, 8:00 a.m. to 4:00 p.m. has been "productivity time," 4:00 p.m. to 6:00 p.m. has been physical fitness time, and 6:00 p.m. to 8:00 a.m. has been "standy-by/alert time," during which routine work tasks and training exercises normally are not assigned. The maintenance of standy-by/alert time has been in recognition of the extremely stressful nature of the firefighting profession. The City has failed in its burden to demonstrate the need for any change in the longstanding standy-by/alert practice. All necessary tasks of the department are currently being completed in a timely manner under the current schedule, and all objectives for 1990 have been met. The Union would also note that a system is already in existence to allow for training during evening stand-by/alert hours. An individual assigned to such work is simply allowed comp time off during productivity time. In any event, the evidence demonstrated that three emergency alarms per shift occur during stand-by/alert time demonstrates that productivity activity occurs during those hours.

The City's proposal to add the word "normal" in front of the words "duty schedule" might also be interpreted to deprive Union members of guaranteed full-time employment. The reason for that language would be to allow the City to assign schedules consisting of less than one hundred ninety-two hours during a twenty-eight day work period, or to assign more than two hundred-eight duty hours during that period. Such could turn Union members into part-time employees.

The City's proposed schedule for new hires should be rejected. That proposal could be counterproductive since new

hires would not be assimilated into the overall department as quickly as they are now, and their training process would in fact be delayed.

b. City Argument.

The traditional duty hours currently in effect unreasonably restrict the assignment of duties and training during evening hours and on Saturdays, Sundays and holidays. New demands for training created by changes in state and federal laws, recommended training standards from professional organizations, and advances in equipment and safety procedures are not being met under the current duty hours which essentially stop at 4:00 in the afternoon on weekdays and earlier on weekends. The Employer proposal would allow a temporary five-day work week for new employees to facilitate their training. The proposal also accommodates Union concerns by requiring two weeks advance notice before schedule changes so that newly hired employees' work hours would not be changed on a daily basis and without adequate notice. The City's proposal also includes language specifically recognizing that requests for time off from a scheduled work shift is a subject that is in the discretion of the chief and not a subject left to the discretion of Union members. The City's proposal also incorporates a productivity/emergency stand-by schedule. It sets forth time periods for the work, drills in training that need to get done, and also allows time in the evening hours for classroom training, the watching of training videos, the conduct of safety meetings, etc.

If fire code enforcement is to remain in the bargaining unit, time needs to be assigned for the performance of those duties, including the resumption of company inspections which haven't been performed in years. The City's proposal further provides for the necessary stand-by for emergency medical service at high school athletic events.

The Union's argument that all scheduled work is getting done is not true. Tasks that should be done and should be given higher priority are not even on the goals list, or given a lower priority because of time restrictions in the current daily work schedule.

Finally, it should be noted that all of the City's comparators enjoy the availability of evening hours for training and drills. Furthermore, none of those comparators are contractually committed to provide on-duty physical fitness time.

c. Arbitrator's Award.

It is the award of the Arbitrator that the existing language shall be maintained and that the following new language shall be added to it:

> The fire chief shall post the schedule in December for Kelly Days to be taken for the

following year. A draft schedule shall first be submitted to the chief by each shift captain following the procedure established by the department rule.

New hires may be assigned a five- (5) day/ten- (10) hour per day work week scheduled during the first two (2) months of employment to facilitate their training. New hires shall receive fourteen (14) days advance notice of any schedule change.

Approval of any requests for time off from a scheduled work shift is subject to the discretion of the fire chief or his designee.

On-duty employees shall maintain a productivity/emergency stand-by schedule. Productivity time with scheduled work or training shall normally be from 0800 to 1600, with a lunch hour from 1200 to 1300 and fifteen (15) minute breaks in the morning and afternoon. 1600 to 1800 hours shall normally be for fire code inspection and enforcement, including company inspection. 1800 to 1900 hours shall be the dinner hour. 1900 to 2200 hours shall be for training/emergency stand-by time including stand-by for emergency medical services at Pasco High School athletic events. 2200 to 0800 hours shall be considered emergency stand-by time.

The City has presented clear and compelling evidence in support of its general position on this issue. First, with regard to new hires training, the City's proposal is a positive step in bringing new hires "up to speed" as rapidly as possible. A five-day schedule is similar to the "academy" approach utilized by numerous fire departments on the West Coast. However, two months of such training should be sufficient, and new hires on the five-day schedule should have a clear right to notice of any schedule change.

Second, the requirement that requests for time off be approved is an ordinary management right that, in this case, should be clarified by express language in the Agreement.

Third, the City has clearly and convincingly presented compelling evidence in support of its structured work schedule proposal. The Arbitrator was very impressed with the testimony demonstrating the need for fire code inspection time, so long as that work remains in the bargaining unit. The Arbitrator was even more impressed with the need for the utilization of evening hours for training purposes. It became painfully clear during the hearing that the combination of increased demands created by new laws and new training standards, on one hand, and by the

existing restrictive work schedule, require a change in the existing scheduling practices. The Arbitrator was also impressed by the need for language that would allow stand-by activity at community events.

On the other side of the coin, there is a dearth of evidence that the new language will have any detrimental effect on members of the Union. Not only do the City's comparators enjoy the availability of evening hours for training and drills, such availability is commonplace in fire departments and districts. Conversely, the Union's position does not find support even in its overly broad group of twenty-one comparators.

Finally, The Arbitrator is unaware of any studies that relate stress among firefighters or inefficiencies in performance to a requirement that training in other work activities be performed in the afternoon and evening hours. It is generally agreed that firefighter stress relates to emergency activity itself and that suddenness in which it occurs. In any event, it seems clear that forty-eight hours off constitutes sufficient time to "regroup" from even a very active twenty-four hour shift.

XII. ISSUE NO 7: WORK REQUIREMENTS, ARTICLE XXXIII.

Article XXXIII, Work Requirements, current provides:

> The City agrees that members of the Fire Department shall not be required to perform work normally performed by members of another Union or another City department outside of the station, except where danger to life and property exists.

The Union proposes to maintain the current language. The City proposes to maintain that language but also to add two new provisions:

> FAITHFUL PERFORMANCE. All employees shall be prompt in reporting to their assigned duties, and shall faithfully perform the duties assigned during any time of duty for which the employee is paid by the city.
>
> ASSIGNMENTS. The assignment of duties is the responsibility of the fire chief. Nothing herein shall restrict the fire chief in his discretionary delegation of duty assignments.

a. Union Argument.

As with its proposal on hours, the City is attempting to set aside a longstanding custom and practice without showing a demonstrated need therefor.

b. City Argument.

The current language is negative, while the City's proposal would include a positive statement of faithful performance of duties, and make it clear that the chief is the person responsible for the assignment of duties. The need for the language is apparent from the considerable amount of testimony at the hearing concerning duty assignments and the chief's ability to make changes in duties without extreme resistence from the Union.

c. Arbitrator's Award.

The Arbitrator can find no need for the City's proposed language. The "faithful performance" provision seems somewhat rhetorical, and the "assignments" proposal would be redundant in light of the Arbitrator's award on management rights and hours of work. Furthermore, there has been no dispute in this case over the types of work that the fire chief may in his discretion assign, and the Arbitrator therefore believes that it would not be appropriate to add language that might be construed to permit the assignment of types of duties not previously considered to be bargaining unit work.

XIII. ISSUE NO 8: TRAINING.

The City proposes a new article to provide as follows:

> TRAINING TIME. The employer and the union are committed to the principal [sic] of training for all employees and in order to improve the efficiency and effectiveness of the fire department. Said training shall be provided insofar as it does not adversely affect and interfere with the orderly performance and continuity of municipal services within the fire department. Training shall be scheduled by the fire chief of [sic] his designee. Employees will attend training sessions during their normal hours of duty, as assigned by the employer, subject to the agreements made in the "hours" Article of this agreement.

The Union opposes the proposal.

a. City Argument.

The evidence at the hearing demonstrate the need for a new training provision. The City's proposal is based upon a demonstrated need and should be adopted.

b. Union Argument.

The City's proposal should be rejected. It conflicts with

an established past practice and no demonstrated need has been shown forth.

c. Arbitrator's Award.

It is the award of the Arbitrator that the City's training proposal shall not be made a part of the New Agreement. The proposal appears in the main to be rhetorical in nature, and is unnecessary in light of the Arbitrator's award on management rights and hours.

XIV. ISSUE NO. 9: PHYSICAL FITNESS, ARTICLE XXVIII.

Article XXVIII, Physical Fitness, of the current Agreement provides:

> Aphysical fitness program acceptable to both the Union and the City, will be continued for all members of the department covered by this Agreement. All members covered under this Agreement will be required to participate. Physical fitness scheduled time shall be 1600-1800 hours. Standards shall be at least those currently in effect upon the execution date of this Contract.

The City made alternative proposals: first, to delete the existing article so long as fire code enforcement remains in the bargaining unit; second, to modify the existing language to provide for a more structured physical fitness program, should fire code enforcement move outside the bargaining unit.

The Union opposes both proposals.

a. City Argument.

The current program is not acceptable; it is unmanagable and unstructured. Further, the current shift cycle provides employees with ample off-duty time to engage in physical fitness activities. Also, the cost of the program and the number of hours that it takes from an already too few number of hours on a shift to accomplish needed duties, drills, training and other matters, is an unreasonable price to pay for the program. Finally, none of the City's comparators provide physical fitness time.

b. Union Argument.

This program was initially proposed by the City, and has proved to be beneficial to members of the bargaining unit. Firefighters have taken advantage of the opportunity to keep themselves in much better shape than they would be in if they did not have this physical fitness time to use. All documentary evidence established the need for firefighters to be in good

physical shape. Furthermore, because the local pays for the cost of the program, there is no monetary outlay by the City. This is simply another situation in which the City has failed to meet its burden to show a persuasive reason as to why an article should be deleted or changed.

c. Arbitrator's Award.

It is the award of the Arbitrator that the existing physical fitness article shall be deleted from the Agreement. The City has demonstrated by compelling and persuasive evidence that there is a need for more afternoon training, particularly in the area of fire code enforcement. Also, as has been previously discussed, increased demands imposed by new laws and by evolving standards demand that additional time be allowed for training.

On the other side of the coin, the Union has failed to convince the Arbitrator that on-duty physical fitness training is a requirement that should be maintained by management. Certainly, the Union's position is not supported by the factor of comparability, either among the eleven awarded comparators or among the broader Union proposed list of twenty-one comparators.

Furthermore, the Arbitrator is unconvinced that the recreation hours currently enjoyed by bargaining unit members constitute a true physical fitness program aimed at the improvement of strength, cardiovascular fitness, dexterity or flexibility. Indeed, if the parties are in the future able to agree upon a physical fitness article, it would seem that it would more appropriately be in the form of the alternative proposal advanced by the City.

Finally, the Arbitrator has admittedly great difficulty with the concept that employees on a twenty-four/forty-eight hour schedule do not have the time and opportunity to maintain their physical fitness on their own hours. Certainly, the Tri-City area offers every opportunity for unstructured outdoor and more formalized indoor, health facility programs. In light of that opportunity, and in the face of the demonstrated need for on-duty training time, no valid rationale exists to require the Employer to maintain two hours of the work day for recreation purposes.

XV: ISSUE NO. 10: PERSONNEL REDUCTION.

Article XXI, Personnel Reduction, currently provides:

> In the case of a personnel reduction within any classification, the employee with the least seniority shall be laid off first, date of employment - see Exhibit "A". However, an employee being laid off may choose to transfer to a lower classification and may do so provided he has more seniority than other employees occupying that classification.

The City proposes to modify that language so that it will read:

> In the case of a personnel reduction within any classification, the employee with the least seniority shall be laid off first. Seniority shall be determined by date of employment - see Exhibit "A". However, an employee being laid off may choose to transfer to a lower classification to which he is qualified and may do so provided he has more seniority than other employees occupying that classification.

The Union proposes to amend the existing language to provide as follows:

> In the case of a personnel reduction, the employee with the least seniority, regardless of classification, shall be laid off first. Seniority shall be determined by date of employment; see Appendix "A".

a. City Argument.

There is no need to change language that has been agreed to in the past where no demonstrated need therefor has been shown, except to modify the language to make it clear that an unqualified firefighter cannot bump a less senior firefighter/paramedic or officer who earned his position by competitive civil service examination or hours of extra training. Layoff in seniority by classification has been part of the parties' bargaining agreements for a number of years and has continued with the City's implementation of the paramedic program. Furthermore, a majority of comparators have language that coincides with the City's proposal.

b. Union Argument.

The Union seeks to remedy the inequitable situation where a longterm firefighter who has been employed by the City for many years would be subject to layoff rather than a paramedic firefighter who has only been employed by the department for several days. All employees should be treated equally for the purpose of personnel reduction, regardless of classification. Finally, no persuasive reason exists for altering the parties' agreement.

c. Arbitrator's Award.

The Arbitrator awards that the City's proposal shall be incorporated into the New Agreement. Clearly, the Union has failed to show a persuasive need for any change, while on the other hand the City has shown the need for the additional

clarifying language. It is axiomatic in labor relations that seniority provisions should be based upon qualifications. It is true that in certain industries non-qualified employees are retained in layoff situations where they can be trained in short order. Such is not the case within the firefighting profession. Paramedics require substantial training and officers are on a civil service competitive schedule. Accordingly, the City must prevail on this issue.

XVI: ISSUE NO. 11: EDUCATION, ARTICLE XXX.

Article XXX, Education, of the current Agreement provides:

> Employees not otherwise reimbursed, shall be eligible for reimbursement for the actual cost of books, fees and tuition and the payment of per diem for courses in fire science or advanced life support. A grade of "C" or better must be obtained and the following requirements are to be satisfied.
>
> 1. Training is to occur during off-duty time unless on-call status is required by the Chief.
>
> 2. Attendance is voluntary and requested by the employee. Said request is to be submitted at least fourteen (14) days in advance and must be approved by the Fire Chief.
>
> 3. Courses must be taken and at an independent trade school, institute of higher learning or non-City training program.
>
> 4. Fifty Dollars ($50.00) per diem will be paid if the course is four (4) or more hours in duration and fifty (50) or more miles distant from Pasco.

The Union proposes to amend paragraph no. 1 of the existing language to read as follows:

> Employees not otherwise reimbursed, shall be eligible for reimbursement for the actual cost of books, fees and tuition and the payment of per diem for courses in fire science, advanced life support, hazardous maaterials, or emergency medical service. A grade of "C" or better must be obtained and the following requirements are to be satisfied.
>
> 1. Training is to occur during off-duty time unless on-call status is required by the Chief, except that up to forty-eight on-duty

hours, per employee, may be used annually without loss of pay, provided that the use of such training hours does not compromise minimum manning standards, as set by the City.

The City opposes any change in the current language.

a. Union Argument.

The Union's proposal would be beneficial both to its members and to the City. The cost to the City would be minimal, and the City is currently in a beneficial financial position.

b. City Argument.

The Union has failed to show any justification for its proposal. First of all, its proposal is totally unsupported by the factor of comparability: none of the City's comparators provide such a benefit. In fact, the City's existing article meets or exceeds benefits provided by all but one of its comparators.

c. Arbitrator's Award.

The Arbitrator awards that the current language will remain unchanged in the New Agreement. The Arbitrator agrees that the Union has failed to come forward with any compelling evidence in support of its proposal. Furthermore, as noted by the City, the Union's evidence is totally unsupported by the factor of comparability. Accordingly, the existing language shall remain unchanged.

DATED this 4th day of October, 1990,

Thomas F. Levak, Arbitrator.

I join in the Award of the Neutral Arbitrator.

_____, Dated 10/15/90.

_____, Dated _____.

I dissent with the Award of the Neutral Arbitrator.

_____, Dated _____.

_____, Dated ---------.

BEFORE THE INTEREST ARBITRATION PANEL
THOMAS F. LEVAK, NEUTRAL

In the Matter of the Interest Arbitration Between:

PERC No. 8351-I-90-189
FMCS No. 90-09735

CITY OF PASCO

The City

NEUTRAL ARBITRATOR'S OPINION AND AWARD

and

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1433

The Union

On October 4, 1990, the Neutral Arbitrator (herein the Arbitrator) rendered an Opinion and Award between the parties covering a number of subjects. The subject of "fire code enforcement work," however, was not a part of that Award because that subject had been withdrawn from arbitration by the Executive Director of the Public Employment Relations Commission (herein PERC), pending the resolution of certain unfair labor practice matters involving the parties. Subsequently, by letter dated April 11, 1991, the Executive Director notified the parties and the Arbitrator that the withdrawal was terminated and that the matter was remanded to the interest arbitration panel for further proceedings.

The parties subsequently decided to litigate the remanded matter through written briefs. The City's brief was received on May 14, 1991, and the Union's brief was received on June 16, 1991. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows:

I. THE EMPLOYER'S PROPOSAL.

The Arbitrator's October 4, 1990 Award established the term of the subject collective bargaining agreement (herein the Agreement) as January 1, 1990 through December 31, 1991. The City proposes that the following provision be added to that Agreement:

FIRE CODE ENFORCEMENT WORK

The employer and the union acknowledge that enforcement of the Uniform Fire Code (UFC) is an

extension and part of the enforcement of the Uniform Building Code (UBC) and does not require a firefighter trained in the performance of emergency fire suppression or other emergency duties to perform the code enforcement duties. The employer and the union agree that fire code enforcement work may be performed outside of the bargaining unit at the direction of the employer.

The Union opposes the adoption of that proposal, and offers no counterproposal.

II. EMPLOYER CONTENTIONS.

First, this issue in not whether the City should employ a fire marshall; the issue is whether fire code enforcement work should be performed by the City's building inspection department, which is responsible for enforcement of the UBC, or by fire personnel.

Second, the evidence is that fire code enforcement duties do not require the skills of a firefighter, but can be performed by the building inspector. In fact, the building inspector had no difficulty enforcing the fire code along with the building code during the 2 years that those duties were in his office prior to June, 1989. There is no need for duplicate inspection work to be performed by a firefighter. Further, such duplication is very costly. Furthermore, the building inspector cannot perform UBC duties without training in the UFC.

Third, continuity of inspections is often interrupted because fire personnel work, at best, 1 24-hour shift out of every 3. Those shifts also interrupt fire code enforcement training programs, and will also result in overtime pay to lieutenants who attend training programs on their days off. Also, there simply is not sufficient time available for the adequate training of employees in the understanding and interpretation of the UFC. See Employer Exhibits 38 - 49.

Fourth, Union costs have not addressed the issue at hand. Those costs were aimed primarily at forcing the City to fill the vacant fire marshall position.

Fifth, the transfer of fire code enforcement work would not cost any bargaining unit members their jobs. In fact, it would free up time for physical fitness activity.

III. UNION CONTENTIONS.

Preliminarily, as a matter of factual background, during the 1970's and 1980's fire code enforcement was

performed by a bargaining unit member, the fire marshall. Thus a long history and past practice existed whereunder the disputed work was bargaining unit work. In 1984, the City promoted the person holding the fire marshall job to the position of assistant fire chief and unilaterally transferred the disputed work to that position. The Union grieved the matter and its position was upheld on May 21, 1987, when an arbitrator ordered the City to cease assigning the work to non-bargaining unit personnel. The City refused to honor the arbitration award, and the Union was required to seek court enforcement, which it obtained and which was affirmed on appeal by the Washington State Supreme Court. Still, the City made no attempt to comply with the award until several months after its petition for review was rejected in June, 1989. Since then, however, the City has assigned the disputed work to lieutenants and captains.

Turning to argument, the City has failed to come forward with the "strong evidence" required to justify the changing of a long established past practice. See Elkouri & Elkouri, How Arbitration Works, BNA 4th Ed., 1985, pp 817 and 843.

First of all, bargaining unit members have sufficient available time to perform the disputed work, particularly since the arbitration panel's earlier award allowed for 2 additional hours per day for the performance of that work. Further, Union Exhibit No. 27, examples of monthly activity reports, show that those duties have been performed easily within the time that is available

Second, the evidence established that bargaining unit members have been performing the disputed work without any apparent deficiencies in their training. The City's fears in that regard are just that: fears with no evidentiary support.

Third, the public is better served by having bargaining unit members perform the disputed work. The UFC and Employer Exhibit No. 90 (NFPA Standard No. 1031) make it clear that, at the very least, fire code enforcement should be done by someone who has firefighting training, knowledge and experience.

Fourth, firefighters have a special interest in seeing to it that the disputed work is performed correctly. It is their lives that are on the line.

Finally, the City produced no evidence that it is more costly to have bargaining unit members perform the disputed work. Even assuming, for the sake of argument, that it would be slightly more costly, that factor is outweighed by the public interest factor.

IV. ARBITRATOR'S AWARD.

The Arbitrator awards that the City's proposal shall not be incorporated into the new Agreement.

Preliminarily, the Arbitrator adopts the Union's factual background, summarized above in the first paragraph of the Union's contentions. Those facts establish the existence of a long standing custom and practice. The unilateral change in that practice and the ensuing interruption cannot be considered a break in that practice because the Union's position that the disputed work belonged to the bargaining unit was ultimately sustained through the final action of the Washington State Supreme Court. As the Union has correctly asserted, any change in such a long standing custom and practice through interest arbitration must be supported by strong evidence from the City. How Arbitration Works, supra, p. 817. In the opinion of the Arbitrator, the City has failed to come forward with such strong evidence.

First of all, while the parties' witnesses disagreed dramatically on whether the disputed work required the services of trained firefighter personnel, and also on whether it would best serve the public interest to keep that work in the bargaining unit, the only neutral evidence supported the Union's position. Specifically, as the Union argues, both the UFC and NFPA Standard No. 1031 indicate the desirability of having the disputed work performed by individuals who have firefighting training, knowledge and experience. The Arbitrator finds that evidence to be very persuasive.

Second, the City's primary argument at hearing -- that there is insufficient time available for training -- is not supported by the evidence. As the Union argues, the additional 2 hours per day carved out by the arbitration panel clearly creates the need time for training.

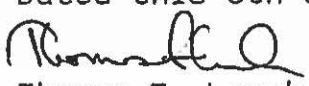
Third, there is no persuasive evidence that it is excessively costly for the City to provide the disputed work through the fire department rather than through the building inspection department. Such purported costs, if they do exist, have not been presented in a manner that is either understandable or convincing. Similarly, there simply is insufficient evidence to support the City's redundancy argument.

Fourth, There is some logic to the argument that firefighters have a special interest in seeing that the disputed work is performed correctly. While this factor, standing alone, would not be sufficient to sustain the Union's position, it is entitled to some weight. Further,

this factor tends to help outweigh the City's redundancy argument.

For all the above reasons, the Union's position is adopted.

Dated this 5th day of July, 1991,



Thomas F. Levak, Neutral Arbitrator,
Portland, Oregon.

I join in the Award of the Neutral Arbitrator.

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I dissent with the Award of the Neutral Arbitrator.

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_____, Dated _____.