

**IN RE ARBITRATION BETWEEN:**

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**AFSCME COUNCIL 5**

**and**

**CITY OF AUSTIN, MN**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS CASE # 05-PN-772**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**March 28, 2006**

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AFSCME Council 5,

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City of Austin, MN,

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DECISION AND AWARD OF ARBITRATOR  
BMS CASE # 05-PN-772

**APPEARANCES:**

**FOR THE UNION:**

Teresa Joppa, Staff Attorney  
Dan Wilson, Fire Chief  
Jon Erickson, Public Works Director  
Captain Curt Rude

**FOR THE CITY:**

Cy Smythe, Labor Relations Consultant  
Tom Dankert, Director of Administrative Services  
James Hurm, City Administrator  
Charles Moline  
Jim Berg  
Jim Priebe

**PRELIMINARY STATEMENT**

The above matter came on for hearing on February 21 and 22, 2006 at Austin City Hall. The parties presented testimony and documentary evidence at which time the record was considered closed. Post-hearing Briefs were served on March 8, 2006 and received by the arbitrator on March 9, 2006.

**ISSUES PRESENTED**

The Bureau of Mediation Services certified the following issues to be determined:

1. Employer authorization
2. Waiver Clause
3. Grievance procedure – resolved prior to hearing
4. Sick leave pay-out
5. Health Insurance Plan
6. Insurance – Employer Paid Cap
7. Insurance Opt out
8. Longevity
9. On-Call Pay
10. Wages – Fire Chief
11. Wage adjustment for 2005
12. Wage adjustment for 2006
13. Wage adjustment for 2007
14. Uniform/Safety Glasses
15. Car allowance – resolved prior to hearing
16. Duration – effective date of contract
17. Compensatory time

The parties resolved the car allowance issue, Issue # 15, and the waiver clause issue, Issue # 2, and those will not be discussed here. The rest of the issues remain for determination in this proceeding. Also, because the parties did not present the issues in the same order, they are not necessarily listed in this decision and award as they appeared on the BMS listing of them. Compensatory time will be discussed first since it was clearly the most important issue to these parties.

## COMPENSATORY TIME

### UNION POSITION:

The Union made it clear that this was the real reason the matter was going forward in the first place and was the lynchpin issue that prevented the others from being resolved. The Union initially argued that this should not even have been certified by BMS since there was little if any negotiation about it during the mediation phase of the negotiations for the contract. Moreover, there is currently a grievance pending before a different arbitrator on this very issue.

The Union pointed out however, that even though it did not submit this issue for certification, the employer did. That makes it an arbitrable item under M.S. 179A16, subd. 5 which provides in part as follows: “ ... the arbitrator or panel has no jurisdiction or authority to entertain any matter or issue that is not a term and condition of employment, unless the matter or issue was included in the employer’s final position.” Here obviously, it was thus making it a negotiable, and thus arbitrable term and condition of employment.

The Union also argued that the issue of compensatory time has already been determined to be a term and condition of employment. Citing *LELS and City of Spring Lake Park*, BMS # 00-PN-1538 (Jacobs 2000); *LELS and City of Moundsvieiw*, 00-PN-1018 (Miller 1999). In both cases, the arbitrators determined that overtime pay for sergeants was arbitrable as wages.

The Union argued that the issue of compensation time is one that goes back several years. The Union also argued that there exists a binding past practice as that term has been defined by both arbitral and legal pronouncements on this issue which require the City to negotiate with the Union prior to changing or abolishing such a practice. The precipitating factor was the City’s unilateral attempt to change the compensatory time practice in June of 2004 from what it had been for many years. The Union sought to compel the City to negotiate over this item but the City refused, thus giving rise to the grievance. That grievance is currently set to be heard by another arbitrator on April 3, 2006.

The Union further argued that the question of whether an employee is exempt or non-exempt under FLSA has no bearing whatsoever on whether on the arbitrability of issues under PELRA. They are, according to the Union, totally separate questions. Here, as noted above, the employer put this issue before the arbitrator and as such it is now an arbitrable matter.

Prior to June of 2004, the employer had in place a well-settled policy of allowing the accrual of comp time by these employees. Under the policy in effect prior to June 2004, see Union book at page 157, employer book at Tab 17D, comp time was accrued in lieu of payment of hours worked over 40 hours per week. The exempt employees accrued it on an hour for hour basis to be used later, at the discretion of their supervisors.

Under the new policy placed in effect in June 2004, this was abolished and no comp time was allowed. Further, despite repeated attempts to get the City to negotiate this change, the City refused.

Finally, it is well settled that the FLSA sets a floor for benefits, not a ceiling. Parties may always negotiate benefits for employees which is greater than those guaranteed by FLSA. The Union argued that this is all that has happened here; that the parties over time essentially through a binding past practice, agreed to benefits greater than that guaranteed by FLSA. The fact that the City no longer wants to do it does not obviate its obligation under PELRA to negotiate such benefits prior to changing it.

The Union seeks an Award of the following language to be added to the contract: The City will make no change in comp time benefits usage and accrual for 2005, 2006, and 2007. Pre-2004 policy on comp time accrual and use will continue and be made part of this agreement. Members of this bargaining unit may continue to accrue and use comp time as they did in the past (hours over 40 per week shall be accrued as comp time at straight time rates for later use by the employee). Employees can use their comp time hours with the approval of their supervisor. Once the employee submits a resignation or retires, comp time hours will not be paid out or otherwise used by the employee.

## **CITY'S POSITION**

The City took the position that this is contained squarely within management's inherent rights. The City argued that the question of compensatory time for exempt employees has been recognized for years as a permissive subject of bargaining and not a mandatory one. The City cited no particular support for this. The City asked for a determination by the arbitrator that this is in fact a permissive subject of bargaining under PELRA.

The City further asserted that the policy of granting comp time to these employees was just that – a policy. As such it was not negotiated into the collective bargaining agreement and no language appears in that document about it.

The City also pointed out that in prior years, the Austin Administrators Organization, AAO, (the predecessor organization to the current collective bargaining agent for these employees) position was that tracking of hours was not allowed and may even have been illegal under FLSA. The AAO position was, according to the City, actually contrary to that being asserted by the Union now. No provision for comp time appears in the 2002-2004 contract. The Overtime provision, Article XV, provides only that overtime at time and one half is to be granted for hours worked in excess of 48 in a week, provided that the department head approves the hours in advance. This is the only contractual provision pertaining to overtime in the contract; there is nothing in it about comp time. That, the City asserted, is a matter of policy and as such subject to unilateral change without the obligation to negotiate about it.

Moreover, the pre-2004 policy was unilaterally put into effect well after the AAO was certified as the collective bargaining agent for these employees. The AAO is the predecessor organization of AFSCME. They did not object when this policy granted these benefits to the employees and never claimed that the City had no right to grant it or that the City had to negotiate it then. The Union is simply now being duplicitous by arguing that the City has the obligation to negotiate this item now that the City made the determination that the benefit was not achieving the desired effect.

The City thus argues that this is not a true binding past practice at all. As such, the City is not obligated to negotiate it at all with the Union, A) because it is not a binding past practice; B) because it is not a term and condition of employment and C) because it is not a mandatory subject of bargaining and never has been so considered by any Minnesota labor Union or public employer

The City therefore asks the arbitrator for a determination that comp time for exempt employees is a permissive subject of bargaining only and for an award of the City's position, i.e. no change in the labor agreement.

## **MEMORANDUM AND DISCUSSION OF COMP TIME**

This matter presents a great many unique factual, procedural and legal issues. It is clear from the evidence that this is indeed the issue that precipitated the case having to go to hearing. The evidence showed that prior to June 2004 the City indeed had a policy allowing the accrual and use of comp time for these employees. It is also undisputed that they are exempt employees under the FLSA.

Initially there was the question of whether this matter was even arbitrable. The City argued that it is not and that the question of comp time for exempt employees has been traditionally regarded as permissive, not mandatory, by “every labor Union and Minnesota employer out there.” There was no legal or arbitral authority for this assertion, however, it should be noted that the person making it has been dealing with almost all of them for a long while.

The Union on the other hand asserted that the question has been decided and cited two arbitration awards to that effect. Those arbitrations however dealt with the question of whether overtime pay was a mandatory subject of bargaining, which is a different issue than comp time. Neither party was able to cite clear and convincing authority for the proposition of whether comp time for exempt employees is permissive or mandatory. The question of whether comp time for exempt employees is a permissive or mandatory subject of bargaining is one which is best left for a judicial determination and should not be decided in this matter. More importantly, on these facts, the question need not be decided. The matter is arbitrable for other reasons.

The evidence showed that the matter was certified at the request of the employer and that both sides put the question of whether the contract should contain a comp time provision before the arbitrator. M.S. 179A.16, subdivision 5 provides in relevant part as follows: “ ... the arbitrator or panel has no jurisdiction or authority to entertain any matter or issue that is not a term and condition of employment, unless the matter or issue was included in the employer’s final position.” Here it is clear that for whatever reason, the employer placed this matter before the arbitrator for decision. In accordance with the statutory language cited above, the matter is thus arbitrable.

The next and perhaps thornier question is what to do with it under these remarkably unique circumstances. The parties made it abundantly clear that the issue is whether the comp time policy is or is not a binding past practice as that term has been used and interpreted by the Minnesota courts and by arbitrators under the purview of PELRA throughout the years. The Union asserted that it was and that as such should have the full force and effect of contractual language. The City on the other hand asserted equally strenuously that it was not and that it was merely a policy subject to unilateral change or abolition at the sole discretion of the City. If that were all, the interest arbitrator would be placed in the somewhat unusual position of trying to decide what would essentially constitute a grievance over the question of whether the City had the right to unilaterally change the practice in 2004. here, however, a grievance is already pending over this very question and will be heard by another arbitrator on April 3, 2006.

Under these truly unusual circumstances it would be highly inappropriate to usurp the grievance process on a pending matter in this forum. More importantly, the question of whether this policy is or is not a true binding past practice was not fully litigated by these parties. Certainly considerable reference was made to it during the course of the hearing but it was clear that certain relevant facts were not fully explored by these parties making it impossible to determine the question on a fully developed record.

Still though an issue placed before an interest arbitrator deserves some resolution; in fact the statute requires it. Here the question of whether the comp time policy/practice should be in the contract must be deferred to the determination of the grievance arbitrator. It should be noted that no decision is or can be made here as to whether the practice of granting comp time prior to June 2004 was or was not a binding past practice. That question is best left to the grievance process and the findings of the grievance arbitrator.

Here too it was clear that no attempt to repudiate the practice, if any, was made by the City. It is well settled too that a past practice does not necessarily outlive the contract upon which it is based. A properly timed notice of repudiation of that practice, even if the City disagrees that it is a true binding past practice, could have been sent to the Union during these negotiations. Here was no evidence that such a notice was sent.

Past practices are part of a collective bargaining agreement. They must draw their essence from that agreement and as such may be eliminated or modified by one party giving the other notice of the intent to terminate the practice at the end of the current contract. The great weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice **is** subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract. This must generally be done during contract negotiations. Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.

Arbitrator Mittenthal states as follows: Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For ... if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. at p. 643-44, Citing Mittenthal, *Past Practice and the Administration of Collective bargaining Agreements*, proceedings of the 14<sup>th</sup> Annual Meeting of the NAA. See also, *SEIU Local 284 and ISD 272, Eden Prairie Schools*, BMS CASE # 03-PA-819 (Jacobs 2003).

It is thus clear from this discussion that a party can, if it wants to, repudiate a practice by sending proper notice to the other party in the negotiations advising it of the intent to repudiate the practice. Past practices only last the term of the contract upon which they are based, unless they are repudiated properly. It is also clear that the practices *can* survive from contract to contract, if indeed they are determined to be truly binding past practices, unless the notice is sent and the parties do not negotiate something different in the current contract. The bottom line is that the notice must however be sent and if it is not, the practice, to the extent it exists at all, may well run from contract to contract.

The City's sole position was that there is no binding past practice; it is a matter of policy and therefore the City had every right to change it. If the City is found to be correct in that assumption then it is clear that there is no binding past practice and that the policy did not arise to the level of contractual force and effect. If the grievance arbitrator determines that to be the case then the City's position in this matter would have to be awarded.

If, on the other hand, the grievance arbitrator determines that the Union is correct and the grievance arbitrator determines that there *is* a binding past practice on the comp time issue then it must therefore be the case that the practice does have the force of contractual language and would be a term and condition of employment in the 2002-2004 contract. Under that scenario, since there was no repudiation of the practice by the City in negotiations, there would therefore be a binding practice in place with regard to the comp time issue for the 2005-07 contract. (See discussion below as to the term of the contract.) Note finally that such a finding would not be affected by the change in the waiver clause. It is clear that a practice can survive a waiver, or zipper clause, see *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the County argued that the zipper clause prevented the application of any practice which was outside of the strict language of the contract. The arbitrator disagreed and the Supreme Court affirmed the award holding essentially that of the award draws its essence from the labor agreement the intent of the parties will outweigh a waiver or zipper clause.

### **COMP TIME AWARD**

The question of comp time is thus deferred to the grievance arbitrator. If she determines that the City is correct in its assertion that there is no binding past practice then the City's position in this matter will be awarded. If she determines that the Union is correct and that there does exist a binding past practice then the Union's position will be awarded. In making this determination I do not feel it is necessary to retain jurisdiction over this issue since the direction is clear as to the language of the contract depending on which way the grievance arbitrator rules on this issue. If the parties feel differently they can always contact the arbitrator for a clarification of the award under M.S. Ch 572.

### **EMPLOYER AUTHORITY**

#### **UNION'S POSITION**

The Union's position is no change in the current contract language. That language provides as follows: Article 3.1 The Employer reserves to itself all rights, power and authority exercised or had by it prior to the time that the Union became the collective bargaining representative of the employees here represented except as specifically limited by express terms of this agreement." The essence of the Union's position is that there is no reason to change it. There have been no particular problems noted by anyone, even the City with this provision and no compelling reason to alter its terms.

Moreover, the PELRA already provides ample protection to the City in this regard. To award this language could be to effectively take away the Union's right to bargain over proposed changes in the contract during the life of the contract. Finally, not all of the bargaining units in the City have agreed to this language. The Union argued that the Employer Protection clause and the waiver clause, discussed below should be left to further negotiations between the parties.

#### **CITY'S POSITION**

The City seeks to change the Employer Authority clause to the following: "The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; establish and modify the organizational structure; to select direct and determine the number of personnel, to establish work schedules; and to perform any inherent managerial function not specifically limited by this Agreement. Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate."

The City also notes that its proposed language is identical to the inherent managerial rights granted by 179A.07, subdivision 1 with the exception of the right to establish work schedules. That however has always been regarded as an inherent managerial right anyway. The City further notes that with the exception of the LELS unit, all other bargaining units have agreed to this language. This language is identical to most other collective bargaining agreements throughout the State of Minnesota, including many that are represented by AFSCME.

### **DISCUSSION OF EMPLOYER AUTHORITY**

This was a perplexing issue since both parties essentially argued the same thing. The proposed language is very similar in effect to statutory language governing managerial rights. In addition, the proposed language is very similar in effect to current language; it changes little in the relationship between the parties.

The Union raised a very real concern that the proposed language would negate the right to negotiate matters which may arise during the life of the contract which are otherwise negotiable. Upon examination however, if a matter is not a mandatory subject of bargaining, as perhaps determined through the legal or arbitral process, then there would be no inherent right to negotiate it anyway.

The Union's concern about giving up the right to negotiate about terms and conditions of employment is understandable. If indeed it is a term and condition of employment, and thus a mandatory subject of bargaining, the Union would certainly want to negotiate it if the employer sought to change it during the life of the agreement and it was not otherwise specifically in the contract.

Neither party was able to provide any evidence of a problem in this jurisdiction with the current language. The basis for the City's insistence on this language was essentially that almost everybody else has it and nobody seems to mind. The Union's objection was based more on the lack of any real showing of a need to change the language even though most of the other units within the City have the same language.

The language of PELRA provides protection to the City from having to negotiate those items within management's inherent rights. The operative language of the statute provides as follows. 179A.07, subd. 1: A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel. No public employer shall sign an agreement which limits its right to select persons to serve as supervisory employees or state managers under section 43A.18 subdivision 3, or requires the use of seniority in their selection."

Moreover, while one of the other bargaining units in this jurisdiction does not have the proposed language, most of them do. There was no showing of any particular problems in those units with this language or that the City was somehow abusing any rights granted to it through this language that would not have been granted to it using the old language. Further, the evidence showed that the LELS agreement does not contain this language in large part because the only matter opened for negotiation in that contract was health insurance.

Finally, it was clear that the Union's objection the Employer Authority and the Waiver Clause was based largely on the concern that if the effective date of those changes were to be January 1, 2005, it would have a potentially adverse impact on grievances filed in 2005, especially the comp time grievance which was discussed above. Given that the effective date of the changes in language and benefits will be April 1, 2006, based on these very unique facts, this concern has been obviated.

This a very close call. Typically a party must provide some compelling evidence to substantiate a change in language. Interest arbitration is intended to provide for an award which closely resembles what the parties would have negotiated had they been able to do so. Here it was clear that the language makes little difference either way and that the Union's concern was in large part driven by the existing comp time grievance and how an award of the employer's proposed language might impact that. Given that this change will not go into effect until April 1, 2006, it is clear that the changes in the employer authority and waiver clause will not affect that grievance in any way. Here the weight of the evidence did demonstrate by the thinnest of margins that the Employer Authority language should be changed to make it consistent with the language in the bulk of the other labor agreements in this City.

### **AWARD ON EMPLOYER AUTHORITY**

The City's position is awarded.

### **WAIVER CLAUSE**

#### **UNION'S POSITION**

The Union again took the position that there is no compelling reason to change the language of the contract. The current language has no waiver clause per se and the Union opposes adding one.

The Union's position was similar to that expressed with regard to the Employer Authority clause and was essentially that there is no compelling reason to support the change.

#### **CITY'S POSITION**

The City's position was also similar to its position regarding the Employer Authority clause and so will not be repeated here. The City's proposed language for the Waiver Clause is as follows: "Any and all agreements, resolutions, practices, policies, rules and regulations regarding terms and conditions of employment, to the extent inconsistent with the provisions of this Agreement, are hereby superseded. The parties mutually acknowledge that during negotiations, which resulted in the Agreement, each had the right and opportunity to make demands and proposals with respect to any terms and conditions of employment not removed by law from bargaining. All agreements and understandings arrived at by the parties are set forth in writing in the Agreement for the stipulated duration of this Agreement."

It claims again that most of the jurisdictions in the State have a similar clause, including many represented by AFSCME and there have been no real problems with it. Most of the other units within the City have it as well. The City also acknowledged that an effective date of April 1, 2006 will ease the Union's concern about how this language might affect the comp time grievance. The essence of the City's argument is thus that this language does nothing more than acknowledge that both parties had ample opportunity to bring up in negotiations anything it wanted to and that the language so negotiated supercedes anything inconsistent with the negotiated language.

### **DISCUSSION OF WAIVER CLAUSE**

The parties lumped these two items together for discussion but it is not that simple. There is a very real and substantive difference between these two clauses and while they may be related, the bases for including them are very different. Obviously too, they say very different things and have very different impacts in the relationship between the parties.

The Employer Authority clause already exists in some form in the labor agreement and has been a part of this relationship for several years. The change in that clause will have very little impact on that. Here however, the waiver clause could have a very different impact indeed depending on future circumstances, none of which can be perfectly predicted.

Moreover, there is nothing in PELRA that requires this type of clause, which is, of course, different from the management rights clauses and 179A.07, subd. 1 set forth above.

Here there must be a compelling showing by the party desiring the change to support the reasons for the change. No such showing was made here. The City argued that several other units agreed to this language. That may be true, a waiver clause is not a fringe benefit and the rationale for making such terms of employment consistent across employer units does not exist here.

A review of the other labor agreements provided by the parties for this jurisdiction shows that some have this language and many do not. There was no showing of why the other units agreed to this language or whether there was any sort of quid pro quo for doing so. There was little discussion of the history of bargaining in those other units to demonstrate why such a clause would be agreed to now.

The question here is thus whether there was sufficient evidence to support an addition of a clause such as this into the contract on these unique facts. There was not. Accordingly, the Union's position is awarded on this issue.

### **AWARD ON WAIVER CLAUSE**

The Union's position is awarded.

### **SICK LEAVE PAY OUT**

#### **UNION'S POSITION**

The Union opposes the change proposed by the City to cap sick leave pay out to 50% for new hires. The Union argued that this unit is made of department heads and should therefore be compared to the Austin Public utility, which it acknowledges is a separate unit of government. However the Union asserted that this is the only true comparable with in the City. Currently, the language of Article VII provides for 100% of accrued sick leave up to one year to be paid upon retirement from the City. This is essentially the same language found in the public utility contract for their supervisors as well.

The Union argued that this issue should be considered separately from the other health insurance and wage issues. The essence of the Union's argument is thus that this issue is separate from anything else and that these employees should be compared to the public utility employees, who do not have the 50% language in their labor agreement.

#### **CITY'S POSITION**

The City proposes changing the language to make this consistent with other units, such as the police supervisors that call for only a 50% pay out of sick leave upon retirement for new hires after January 1, 2005. It provided evidence that the cost to the City is far out of line with the statewide average and for comparable cities.

More to the point, the City argued that this 50% for new hire language was voluntarily negotiated with the 3 essential groups, police supervisors, firefighters and police plus the clerical workers. Moreover, Arbitrator Flagler in the recent UAW arbitration with the City awarded it to the City as well. The City also noted that this issue must be considered together with health insurance and wages, just as Arbitrator Flagler did.

Further, the City asserted that the Public Utility is a separate unit of government from the City of Austin. The internal comparables are thus those units that actually work for the City of Austin rather than the Austin public utility. The City urges the arbitrator not to confuse the two.

The City, in something of an odd twist, used external comparables to further justify its position and pointed to Albert Lea, Faribault, Owatonna and Winona and argued that Austin's benefits are far higher than any of those comparable jurisdictions. The main argument here is that the other units have all agreed to this language and the arbitrator in the UAW matter clearly sided with the City and awarded the City's proposed changes in sick leave pay-out.

### **DISCUSSION OF SICK LEAVE PAYOUT**

Here the greater weight supports the City's position. Initially, it should be noted that the Public Utility is a separate entity. If this were the sole comparable in the City, perhaps the result would have been far different. Here however, the true internal comparables clearly support the City's position. The vast bulk of the internal bargaining units have either agreed to or been compelled to accept the City's position on sick leave payout.

It is generally well accepted that internal comparables carry far greater weight in determining fringe benefits, such as sick leave, than do external comparables. Here Arbitrator Flagler recognized this and awarded the City's position with regard to the UAW contracts. In so doing he used the other internal settlements as at least one very strong basis for that award.

Even externally, the evidence shows that the City's sick payout will remain somewhat above the average for comparable cities in the area as well. This was frankly a far less relevant consideration but did provide some measure of support for the City's position here.

Finally, while the City's position will be awarded, the effective date of this will be April 1, 2006, not January 1, 2005 as urged by the City. As will be discussed below on the question of the duration and effective date of the contract, the effective dates of the various changes in language and benefits should be consistently applied across the board. Thus any new hires after April 1, 2006 will be subject to the new language on sick leave payout, while those hired prior to that time will be subject to the "older" language providing for the greater benefits.

### **AWARD ON SICK LEAVE PAYOUT**

The City' position is awarded with an implementation date of April 1, 2006.

### **HEALTH INSURANCE**

#### **UNION'S POSITION**

The Union acknowledged that given the facts and circumstances of this matter, they would end up with the same plan as the other City of Austin employees. The other units have either agreed to the changed health insurance plan or have had it awarded by arbitration.

The Union therefore urges that the insurance plan go into effect only after the arbitrator's decision in this matter and that the change in premium costs go into effect only on that date and no sooner. The Union picked May 1, 2006 assuming that the arbitrator's award would come out sometime in April of 2006. The Union also asks that the City make the same contributions to the health reimbursement account, HRA, for these employees as were made for other employees who first agreed to the HRA.

#### **CITY'S POSITION**

The City argued that the City has undertaken to change their health insurance program to bring down the costs of such insurance. The City's argument is for internal consistency and argued further that the arbitrator should render an award that brings these employees into line with the other employee groups. The City pointed out that they have all either agreed to the change or been awarded that change in arbitration.

Regarding the date of implementation of the changes, the City noted that Arbitrator Flagler did not make his award retroactive. The City noted that the other units have all agreed to prospective dates of implementation and urged the arbitrator to do the same here.

### **DISCUSSION OF HEALTH INSURANCE**

As noted above, the parties were in general agreement on this issue and the Union acknowledged that the greater weight of arbitral precedent would compel that the insurance be the same as that negotiated or awarded for the other employee groups. There is thus no real issue here that the City's position on that insurance will be awarded. It is well settled that internal consistency is the major factor in determining fringe benefits such as health insurance. While it is not the only factor an arbitrator is allowed to consider, it is certainly the most important. Here too there were no factors that would mitigate in favor of a review of external comparables. Accordingly, the City's position on health insurance will be awarded.

The only real issue was the implementation date of this change. Here, it was clear that the other units who either settled or were awarded this change had that date of implementation set prospectively. Here, as will be discussed more below, the appropriate implementation date is determined to be April 1, 2006. This is based on the unique facts and circumstances of this matter and of course that these costs will go into effect on April 1, 2006 and not sooner.

### **AWARD ON HEALTH INSURANCE**

The City's position is awarded with an implementation date of April 1, 2006 for the changes in the health insurance plan.

### **HEALTH INSURANCE – EMPLOYER CAP & OPT OUT**

#### **UNION'S POSITION**

The Union acknowledged that these employees will receive the same benefits regarding the employer cap and the opt out provisions as the other employee groups. The Union's position is thus similar to its position stated above for health insurance generally. The question is when. The Union again argued that this should not be retroactively applied as that would create a hardship and considerable additional cost to the employees as a result and argued that this change should be implemented on May 1, 2006

#### **CITY'S POSITION**

The City's position with regard to these two changes is again the same as it was for health insurance generally. It argued that all the internal groups have either agreed to this change or been awarded it through interest arbitration. The employer too seemed to argue that these changes should be applied consistently with the implementation dates applied for other groups respectively as they either settled their contracts or had them awarded.

The employer cap and opt out provisions should now be consistent with the other employees i.e. an employer cap of \$965.00 per month for family coverage and \$368.78 per month for single coverage and an employee opt out provision of \$208.00 per month if they choose not to select the City's health insurance program.

### **DISCUSSION OF HEALTH INSURANCE – EMPLOYER CAP & OPT OUT PROVISIONS**

As noted above, the parties were in general agreement that the benefits would be awarded consistently with the other employee groups. It makes very little sense to reiterate those arguments here. Again, it was clear from the evidence that what the City proposed was consistent with the other groups and that its position should be awarded here.

Also, for the same reasons stated herein, the implementation date will be April 1, 2006 consistent with the implementation date of all other benefits discussed in this award.

### **AWARD ON HEALTH INSURANCE – EMPLOYER CAP & OPT OUT PROVISIONS**

The City's position is awarded for both the employer cap and opt out provisions as set forth above. Implementation date for both employer cap and opt out provisions will be April 1, 2006.

### **LONGEVITY**

#### **UNION'S POSITION**

The Union requests an addition to the contract language adding longevity pay for these employees. The Union argued that this is a benefit that many of their peers receive. The Union argued that the police officers, police supervisors and firefighters all receive longevity pay. See Union exhibit 104-107.

Externally, the Union pointed to Winona and Faribault where all employees including department heads receive longevity. Moreover, in Owatonna, several supervisory personnel receive this benefit. See Union exhibit 103. See also Tab B of City's exhibit booklet under the Longevity section.

The Union argues that since some employee groups in the City of Austin receive this, the supervisors should as well. This is especially true of the Fire Chief since, as the Union argues in that section of the case, the Fire Chief is underpaid and this would bring his salary into line with comparable jurisdictions in the area.

The Union seeks the addition of longevity pay consistent with the police and fire contracts which provide for 2% after 7 years; 3.5% after 14 and 4.5% longevity pay after 21 years of service.

#### **CITY'S POSITION**

The City argued that it has never had longevity pay for any group other than police and fire. There are historical reasons for that which simply do not apply to the supervisory group. The City also argues that longevity as a practice is archaic and that most jurisdictions in Minnesota are phasing it out in favor of a performance based pay plan. In addition, the City asserted that the arbitration precedent over 20 years has been to deny the addition of such pay for those groups that did not have it and to delete it on occasion where it did. The City cited no particular precedent or authority for this but argued that the Union did not cite any authority for the proposition that this should be added either.

The City also argued that pay equity could be adversely affected by such an award. Since this is a male dominated class of employees such an award could well run afoul of DOER rules granting additional pay for such classes compared to female dominated classes of employees.

Based on the fact that the City has never had longevity for any group other than police and fire, the fact that such an award would be contrary to the great weight of arbitral precedent over 15 or more years and the fact that an award here might well run the City into pay equity trouble with DOER, the City strenuously objected to this request and urged the arbitrator to deny the Union's request.

### **DISCUSSION OF LONGEVITY**

The basis of the Union's argument here is that longevity is necessary to bring these employees pay into line with other employee groups. A review of those pay rates did not support this view however. Moreover, there was merit to the City's assertion that longevity has been for police and fire employees. For better or worse, police and fire employees have traditionally been treated different from other employee groups so the argument that these employees should have this benefit simply because the police and fire employees do is not persuasive on this record. The Union provided no other real basis for this claim.

Moreover, there was some merit to the City's assertion that the granting of a benefit like this might create problems under the LGPEA since this is a male dominated group. This was not frankly completely clear but neither was it clear that it would not create such a difficulty. For this reason as well as those stated above, the City's position is awarded.

#### **AWARD ON LONGEVITY**

The City's position is awarded. No change in the contract.

#### **ON-CALL PAY**

#### **UNION'S POSITION**

The Union argued that these employees are frequently called at home nights and weekends and at all hours for various purposes. The Union seeks an award of \$150.00 per week for one on call person in the Street and Sewer Department and the Park and Rec. Department. The Union argued and provided evidence that call-outs can be very irregular and sometimes frequent depending on what is happening around the City. These are for the most part in the Street and Sewer Department, for repairs, line breaks or other emergencies, and in the Park and Rec. Department, for building alarms or other recreation issues.

The essence of the Union's argument is that these employees already put a great many hours in and should be compensated for the hours they are required to carry pagers and be on call for emergencies and other reasons. The Union further asserted that the City certainly has the right to rotate whom this would be and is not seeking to usurp the City's power to assign the person it wants to be on-call. The Union is simply seeking to require the City to pay these individuals for having to take these calls when they are off duty.

#### **CITY'S POSITION**

The City argued that this is in reality an attempt to have the arbitrator insert himself in the staffing decisions made by the City. The City argued too that what the Union is really asking for is that the City mandate who is to be on call irrespective of the City's clear right to determine the alignment of the work force.

Moreover, the City asserted that for exempt employees there is no status as "on-call" and that this term has no real relevance under FLSA. On call pay, according to the City, is to compensate workers who otherwise have defined work hours who are required to remain on call for emergencies. It is not designed to compensate employees, like these, who by the very nature of their jobs are paid for their jobs and not for the number of hours they put in doing their jobs.

The City, of course urged the arbitrator to deny the Union's request.

#### **DISCUSSION OF ON CALL PAY**

The City initially raised the issue of whether on call pay would be an unlawful usurpation of its management right to direct and assign the workforce. Upon review of the Union's request here, it can easily be said unequivocally that this is not at all what the Union seeks to do. The Union seeks only to require pay for the hours the employees would be on-call. The City could certainly decide not to have these employees remain on call as it saw fit. This however, did not end the inquiry.

As noted above, there is nothing in the Union's request that compels the City to require an employee to be on-call. Neither is there anything in the Union's request that limits the City's right to assign that work in any way. It is merely a request to pay them once the City makes the decision to require them to be on call. Moreover, the fact that FLSA treats them as exempt is not dispositive of this issue; parties can always negotiate a greater benefit from that which is provide by the FLSA. The question now is whether on call pay for exempt supervisory employees is appropriate under these circumstances.

However, under these circumstances and facts, there was insufficient evidence to support the addition of this into the contract. These are, after all, exempt employees and as such are in fact as the City argued, paid a salary, which is not dependent upon the number of hours they work per week.

It was clear from the evidence that if the employees work more than 48 hours in a workweek they are entitled to premium pay. See Article XV. There was little in the way of evidence introduced here at all but certainly an insufficient showing of the compelling need for the addition of such a benefit for these employees. Had they been hourly, non-exempt employees the considerations would likely have been very different. Here however, the very nature of this job requires that these employees work odd hours and that they be available and supervisory staff to be called out. Thus while the City's fears about the Union interjecting itself into its management rights purview were unfounded, the City's position still prevails on this record.

#### **AWARD ON ON-CALL PAY**

The City's position is awarded. No change in the contract.

#### **UNIFORM/CLOTHING ALLOWANCE AND SAFETY GLASSES**

##### **UNION'S POSITION**

The Union argued that due to the nature of their jobs, some of these employees are required to go into areas and situations where their eyes could be in danger due to flying objects or dust. Moreover, they are also many times in areas and doing work that is very dirty, oily, greasy and otherwise can ruin clothing. The Union argues that it is simply seeking a provision requiring the City to provide appropriate protective clothing for their employees.

The Union noted that the City's representative acknowledged at the hearing that the City does have the obligation to provide such protective clothing where appropriate. The Union also argued and provided evidence to show that the Union never limited the discussion to "uniform" but in fact always intended the negotiations to include protective clothing. The fact that the BMS certified the issue as "uniform allowance" is a semantic difference only and that on the facts, the parties were not talking simply about uniforms but about clothing. Thus the fact that these employees do not routinely wear a uniform, such as a police uniform or firefighters uniform does not limit the discussion to that. The Union argued that this is thus an arbitrable item.

Regarding safety glasses, the Union again argued that for years the City used to reimburse employees for their prescription safety glasses, i.e. hardened tempered safety glasses. The City stopped making this reimbursement, although it was not clear on this record when, and now argued that it provides safety goggles of the type worn in a high school shop class for example. The Union argued that given the nature of their jobs the employees may not have access to even these when they need them, resulting in an unsafe situation.

The Union argued that while the City acknowledged its obligation to provide such safety eyewear at the hearing it would still be best to have this written into the contract so that it is clear what the City has to provide in terms of uniform and safety glasses.

## **CITY'S POSITION**

On the question of clothing/uniform allowance, the City initially argued that the issue of clothing is not arbitrable since it was not a certified issue by the BMS. The issue, it claimed was "uniforms" and was never clothing allowance. The City further pointed out at the hearing that these employees do not typically wear uniforms and that those that do already have that provided by the City. See Article XVI, providing for uniforms for certain police and fire personnel.

The City further argued that state and federal OSHA law already mandate protective clothing and that the City provides this where appropriate. In fact the City pointed out that the Union acknowledged that it does provide protective clothing where needed so that these employees do not have to ruin their clothes if they are in a dirty situation.

Regarding safety glasses, the City argued that it cannot be required to pay for special prescription glasses for these employees when they are not required to pay for such eyewear for other employees. These employees also routinely need eye protection and they too are provided safety eyewear by the City pursuant to state and federal laws. The City objected quite strenuously to the claim that it should pay for prescription safety eyewear. The City claims that this would require it to provide a monetary benefit for those employees who do wear prescription glasses as opposed to those employees who do not. It provides safety eyewear to all employees who need it. The City argued that the Union provided no basis for the claim that it should pay for prescription safety glasses for these employees when they have no such obligation for other employees.

## **DISCUSSION OF UNIFORM/CLOTHING ALLOWANCE AND SAFETY GLASSES**

This was something of a mixed bag here. On the question of uniform/clothing allowance, the initial question was whether this could be arbitrated at all. The City claimed that the only issue certified to arbitration was uniform allowance, which it took to mean "uniform" the like of which are worn by police and fire personnel.

The Union asserted that they discussed clothing in negotiations and that the term uniforms should be read more expansively to include the discussion of protective clothing, not just uniforms. The evidence showed that the parties did discuss clothing as a part of this and that they did not intend it to be limited to uniforms for police and fire personnel. The fact that BMS certified the issue as "uniform allowance" is a semantic difference which does not on its own on these facts limit the discussion to a particular type of clothing, i.e. police and fire uniforms. The evidence showed, as noted above, that the parties discussed this and that the intent of the negotiations was to add a requirement to provide certain protective clothing. Thus, the matter is arbitrable on these facts and will be dealt with on the merits.

It was clear despite the disagreement above, that by the time the evidence was taken at the hearing and as stated in its Brief, the Union was not seeking to require the City to provide actual uniforms or a clothing reimbursement to these employees. It is also clear that these employees are on occasion required to work in areas that are dirty, greasy, etc. and can without some sort of protective clothing ruin one's personal clothes. No one really disputed that. The question was whether the City should have some obligation to provide protective clothing for that.

The City acknowledged that it already has the obligation to provide protective clothing under state and federal law and the Union acknowledged that as well. The Union in its Brief asserted that "the [City's representative] agreed that the City should be providing clothing and uniforms for those employees, but the Union would feel more comfortable if such an assurance was in writing, and in the collective bargaining agreement."

On these facts it would be inappropriate and without evidentiary support to require the City to provide a clothing allowance, such as a monetary allowance or payment to the employees for clothing and none is awarded here. It is however appropriate to require the City in the collective bargaining agreement to provide the protective clothing it acknowledged it had the obligation to provide under applicable state and federal law and where the employee's duties would require such clothing to avoid ruining the employee's personal clothing. It is thus based on these representations made at the hearing by the City's representative that this award is rendered.

Safety glasses: The City once again asserted that it has the obligation already under state and federal law to provide appropriate safety eyewear to protect employees' eyes. It strenuously objected to the provision of or reimbursement for prescription safety glasses since none is provided for anyone else in the City. This argument finds considerable support on this record and has merit. There was an insufficient showing to support an award requiring the City to pay for, provide or reimburse for prescription safety eyewear or glasses. Again, the City acknowledged its obligation to provide such eyewear at the hearing. A provision to this effect would be well placed in the labor agreement so that it is clear what the City's obligations are and to avoid any misunderstanding about this issue in the future.

Accordingly, the award on this issue will be to add a provision to Article XVI as follows: The City shall provide appropriate protective clothing and safety glasses/eyewear as required by state and federal law or where the employee's duties require the provision of such protective clothing or safety glasses or eyewear." It should be clearly understood that this provision provides for nothing more than what the City's obligations already are under existing law.

#### **AWARD ON UNIFORM/CLOTHING ALLOWANCE AND SAFETY GLASSES**

The award on this issue will be to add a provision to Article XVI as follows: The City shall provide appropriate protective clothing and safety glasses/eyewear as required by state and federal law or where the employee's duties require the provision of such protective clothing or safety glasses or eyewear."

#### **WAGES FOR 2005, 2006 AND 2007**

#### **UNION'S POSITION**

The Union is seeking 4% in each year of the contract. To its credit, the Union acknowledged that the phased in approach proposed by the City of 1.6% followed by a 2.4% increase would be acceptable to the Union as well. The Union provided considerable evidence that the City of Austin is doing quite well financially and that it has both the money and the tax capacity to afford the wage increases requested.

Internally the Union acknowledged that most of the other employee groups received some variation on the 4% increased as noted above. The UAW group apparently did not since they opted not to get a pay increase in 2005 for the chance to go to arbitration over health insurance. This unit did not take that chance and should not therefore be penalized.

The Union pointed to external comparisons and again argued that at where there are true comparable positions, many of the Austin Department Heads are underpaid. The crux of the Union's argument however is not directed at the size of the increase but rather when it is implemented. The Union argued that if the pay increases are not implemented on January 1, 2005, when many of the other internal groups got their increases and when most if not all of the external comparisons received theirs, the Austin group will fall even farther behind. Thus the true essence of the Union's argument here is on the date of the implementation of the increases, which it argued should be as of January 1, 2005 and not on some later date

## **CITY'S POSITION**

The City proposed a 4% increase, phased in as a 1.6% and 2.4% increase over time. The City actually argued that no more than a 3% increase could be justified given the external comparison groups but assented to the additional 1% increase in order to offset the cost of the health insurance that is now being borne by the City's employees. As a concession to that additional cost, the City granted the additional 1% wage increase, which it argued was more than generous.

The City further pointed out that the City of Austin, despite the evidence presented by the Union does not have a large tax base and is in fact one of the poorer cities in southern Minnesota. It therefore has a substantially smaller capacity to pay wage and benefits increases than do the comparison group of cities. Austin has a low market value per capita and that this severely limit its ability to simply pass on to taxpayers these increased costs, which, of course, translates to increased property taxes.

The City argued too that the internal groups have essentially all agreed to or been awarded the phased in 4%; either as 2.4% + 1.6% or the other way around, 1.6% + 2.4%. Externally too the City asserted that a 4% increase is much higher than can be justified given the increases given to those community's employees but that this was done here to offset the increased health insurance costs now paid by the employees.

Finally, the real issue for the City was the date of implementation. It argued that the date of implementation should be April 1, 2006. The City first argued that the implementation dates for the other group varied by when they either settled or had the increases awarded and that only the groups that settled before January 1, 2005 got an increase on January 1, 2005. Other groups that settled late got a later date of implementation of those increases.

Moreover, the costs of health insurance for these employees is now far less than it will be once the new health insurance program is in place. This of course is "saving" the employees considerable money. Further, a date of implementation for wages that is different from the date of implementation for other units, such as health insurance, would be both inconsistent and unjustifiable. Thus, the City argued that an April 1, 2006 date of implementation for the wage increase should be awarded.

### **DISCUSSION OF WAGES FOR 2005, 2006 & 2007**

The parties were essentially in agreement with the proposed wage increases here so it is probably not necessary to go into an exhaustive analysis of the internal and external comparisons and the other considerations traditionally used to determine wage increases. Suffice it to say that both considerations are relevant and that here both were seen as supportive of the proposed increase. Moreover, there was little dispute about the phased in approach proposed by the City as noted above so that too will be awarded.

Here the real issue was the date of implementation. The Union argued that many of its department heads are either at or below average when compared to comparable cities. Essentially freezing their wages for 2005 will drop them well below that average and will penalize them for asserting their statutory arbitration rights. The Union urges a date of implementation of the wage award retroactive to January 1, 2005. The City on the other hand argues, as noted above, that the date of implantation of the wage adjustments should be April 1, 2006. This was to offset the fact that these employees are currently enjoying a health insurance cost which is far lower than other employee groups in the City. To grant them a wage increase retroactively where others did not get that would be inequitable at best.

Typically, wage increases are awarded retroactively to the effective date of the contract. To do otherwise might well chill the employees and Unions' right to exercise statutorily guaranteed rights to arbitration. Some public employers have essentially argued that a later date of implementation should be used as a tool to force Unions to be more reasonable and to shift the risk of a later date of implementation of wage awards as a penalty for not settling earlier. This theory is and has been specifically rejected as contrary to the statutory intent expressed in PELRA of granting public employee Unions the right to seek redress in interest arbitration. Thus, it is only for the most compelling of reasons that a later date of implementation should ever be used. Moreover, the fact that other groups may have agreed to take a later date of implementation for their awards is only a factor to be considered by the arbitrator in determining the appropriate date of implementation for wage and benefits increases.

Here though these reasons do exist. First, this matter was scheduled for hearing several months ago and was continued at the request of the Union thereby causing a several month delay. Second, because of the unique juxtapositioning of the fairly radical changes in the health insurance program with the wage increases here, it would indeed be inconsistent to grant a date of implementation for the wages different from the date of implementation of the health insurance. More to the point, under these unique facts, the appropriate date of implementation for the health insurance changes is April 1, 2006; due to the effect that a different date might have on existing claims and the benefits available for claims made prior to April 1, 2006 but after January 1, 2005. No evidence was submitted on that and so no speculation can be made about it; making it all the more compelling to make the change prospective only.

Finally, as noted above, where other units represented by collective bargaining agents have agreed to different dates of implementation, this can be used as a factor in determining in interest arbitration the appropriate date of implementation here. Several units did agree to different dates depending on when their contracts settled. This may well have been due to the very issue raised above on the health insurance and the desire to be consistent. There was no evidence of this and no factual determinations can be made about it but the fact remains that in this City, the Unions either agreed to, or were awarded, various dates of implementation depending on the dates of settlement and/or award.

The units varied slightly in the phase in of wage increases. Some units received a 2.4% followed by a 1.6% increase while others received them in reverse order. The police supervisors received a 2.4% increase followed by a 1.6%, as did the IAFF unit for firefighters. Here since this is a supervisory unit and the police supervisors received 2.4% followed by a 1.6% increase it is determined to be more appropriate to award this progression.

**AWARD ON WAGES FOR 2005, 2006 & 2007**

Accordingly, the wage award is as follows: Effective April 1, 2006 the employees in this unit are awarded a 2.4% general wage increase and a general wage increase of 1.6% effective July 1, 2006. Effective January 1, 2007 the employees shall receive a 2.4% general wage increase and a 1.6% general wage increase effective July 1, 2007. As noted above, no retroactivity of wages is awarded due to the unique facts of this matter.

<b>Date</b>	<b>4-1-06</b>	<b>7-1-06</b>	<b>1-1-07</b>	<b>7-1-07</b>
<b>% Increase</b>	<b>2.4%</b>	<b>1.6%</b>	<b>2.4%</b>	<b>1.6%</b>

## **WAGE INCREASE FOR FIRE CHIEF**

### **UNION'S POSITION**

The Union seeks a one time lump payment to the Fire Chief of \$3,500.00 to bring his pay into line with the pay of comparable positions in comparable cities in the area. The Union argued that the Fire Chief position is grossly underpaid and needs to be adjusted to bring it into line with the market for comparable positions in surrounding comparable cities.

The Union introduced evidence that the average for 2004 in Faribault, Owatonna, Winona and Albert Lea for Fire Chief pay is \$71,264.00. The Fire Chief in Austin is paid \$65,832.00, obviously well below the average. Moreover, if there is no wage adjustment for 2005, this position will fall even farther behind the average. The Union also pointed out in contravention to the City's pay equity arguments, that an adjustment for the Fire Chief will not put the City out of compliance for pay equity. Moreover, this is not a pay equity issue per se but rather a market issue. External comparisons show that the pay for this position is simply out of line. It is not uncommon for public employers to make these types of adjustments where it is shown that the pay for a particular position is far out of line with comparable positions. Thus the fact that this position is or is not out of line with pay equity is not the whole story. Here, the pay equity line shows that the position is slightly underpaid. The Union argues thus that an increase will not adversely affect the City's pay equity status.

### **CITY'S POSITION**

The City argued that if one looks at the pay equity analysis for this it is apparent that the Fire Chief falls well within the pay equity progression line and while somewhat underpaid by that analysis is not at all "out of line" with what one would expect for the range of that pay. The City further argued that some positions are underpaid while others are overpaid using this analysis. Traditionally, the City argued, Unions and employers have not attempted to make adjustments to individual positions since doing so would entail a reduction in the pay of those positions that are overpaid using the regression line analysis.

The City argued too that the Union is not seeking to have the pay for those positions that are overpaid reduced and so should simply let this issue go away quietly. Further, the City introduced evidence to show that while the Fire Chief is underpaid using external market analyses; there are a great many positions using those comparisons that are overpaid. The City's Exhibit Book at Tab 10 shows that the pay for supervisory positions in Austin is 5<sup>th</sup> only twice on a list of market comparisons for comparable jobs while it is 1<sup>st</sup> for 8 such positions. The City argued that the arbitrator should not be interjected into this debate without also establishing a two-way street by also decreasing or freezing the pay of those individuals who are overpaid using either the pay equity or market analysis.

### **DISCUSSION OF WAGES FOR THE FIRE CHIEF**

This was frankly a very hard call. It was clear that the Fire Chief was underpaid by a significant amount when compared to comparable positions in the surrounding area. Further, it is not uncommon for a public employer to adjust a particular position if it appears that it is underpaid in order to bring it into line with that market. The essence of the Union's argument here is that the pay for this position is so significantly undervalued that an adjustment is necessary.

It was however also true that overall, the City of Austin pays at or near the top of the range for other supervisory positions. The evidence showed that 2 positions were at the very bottom of the pay range for comparable positions in comparable cities but that many were at the very top as well.

Moreover, it is simply not the case that pay equity considerations end the discussion here. There was no showing that the wage adjustment sought by the Union would place the City out of compliance with pay equity. It is also the case that interest arbitration is designed to render an award that reflects what the parties would have negotiated under PELRA for themselves.

The difficulty is that both parties' positions have merit. The evidence showed that the Fire Chief is significantly underpaid. The Union further argued that the Fire Chief would fall even farther behind the average if there is no wage increase for 2005. This is true of all the positions given the wage award herein and does not alone carry the day here. The City on the other hand argues that one simply cannot pay that position more without also cutting or at least freezing the pay rates for those positions that are above average, or as here, where several of them are at the very top.

The question is whether given these facts it is appropriate to increase the Fire Chief pay to bring it closer to the average of the comparable cities. It should be noted that there was a discrepancy with the numbers. The Union showed the 2004 pay in Faribault at \$73,116.00 while the City's numbers showed it at only \$70,304. On the other hand, the Union showed the 2004 pay for Albert Lea was \$73,130.00 while the City had it at \$75,324.00. These numbers change the average some depending on which ones you use but the result is still the same – the Fire Chief is significantly underpaid as compared to those cities.

On balance, taking all of the evidence into consideration it is determined that some adjustment should be made to the Fire Chief's pay and that the parties would likely have negotiated such an adjustment for themselves, especially if they could have negotiated their way out of the comp time issue. This result is further supported by the fact that it is so significantly underpaid when compared to other communities and by the lack of any evidence that adjusting it would place the City in an untenable position with regard to pay equity. For 2004 the Fire Chief salary was some \$5,277.00 under the average if one uses the City's figures and \$5,432.00 if one uses the Union's figures.

The City only provided information for the 2004 wages and did not provide anything for 2005 or 2006. Using the Union's numbers therefore, the average of the comparable cities for this position for 2005 is \$74,533.00. The 2006 average is \$76,273.00. Leaving the Fire Chief at \$65,832.00 for 2005 would be to place that position so low on the pay range as to make it virtually impossible for it to ever catch the other comparable positions and to create a very real market issue for the City. No other position in the City is that low compared to the comparable cities. It is therefore appropriate to adjust the Fire Chief pay by the \$3,500.00 requested by the Union. Thus, the base pay rate for the Fire Chief position for purposes of calculating the wage adjustments set forth above will be \$69,332.00. The lump sum wage adjustment awarded herein is to be made on or before April 1, 2006.

The City noted that it is willing to add additional money to the lower paid positions but that the arbitrator must then freeze those at the top of the list. The arbitrator does not have jurisdiction to do that since that was not an issue under consideration or certified by BMS for determination. Certainly that is something the parties could negotiate during the next round of bargaining. This matter can only deal with the limited issue of whether the Fire Chief position should be granted a one-time salary adjustment to reflect its significantly lower market position.

#### **AWARD ON WAGES FOR THE FIRE CHIEF**

The Union's position is awarded as set forth above. The Fire Chief position is granted a one-time lump sum salary adjustment of \$3,500.00 to be made on or before April 1, 2006. The base salary for purposes of calculating the general wage adjustments herein is thus \$69,332.00.

## **DURATION**

### **UNION'S POSITION**

The Union seeks a three-year contract for 2005, 2006 and 2007. As noted herein, the real issue was the date of implementation of the wage adjustments and other changes in the contract. The Union sought an implementation date of January 1, 2005.

### **CITY'S POSITION**

The City also seeks a three-year contract but urges an implementation date of April 1, 2006 for the changes in wages and benefits for the reasons already discussed.

### **DISCUSSION OF DURATION**

This has already been discussed in some detail. Normally, the implementation date of wage and benefits adjustments are retroactive to the effective date of the contract; here that would be January 1, 2005. For various reasons as set forth herein, the implementation date that makes sense given these facts and circumstances is determined to be April 1, 2006. Perhaps the most important reason is the fact that the employees are currently paying into a health insurance plan that costs them significantly less than the health insurance plan awarded or negotiated by the other groups. It would simply be inconsistent to award a date of implementation for wage changes that is different from the date of implementation for other benefits. Here the appropriate date of implementation of all of the changes in the contract is April 1, 2006.

### **AWARD ON DURATION**

A three-year contract is awarded for 2005, 2006 and 2007. The implementation date of the wage and benefits and language changes set forth herein is April 1, 2006

### **SUMMARY OF AWARD**

#### **1. COMP TIME AWARD**

The question of comp time is thus deferred to the grievance arbitrator. If she determines that the City is correct in its assertion that there is no binding past practice then the City's position in this matter will be awarded. If she determines that the Union is correct and that there does exist a binding past practice than the Union's position will be awarded. In making this determination I do not feel it is necessary to retain jurisdiction over this issue since the direction is clear as to the language of the contract depending on which way the grievance arbitrator rules on this issue. If the parties feel differently they can always contact the arbitrator for a clarification of the award under Minn. Stat. Ch 572.

#### **2. AWARD ON EMPLOYER AUTHORITY**

The City's position is awarded.

#### **3. AWARD ON WAIVER CLAUSE**

The Union's position is awarded.

#### **4. AWARD ON SICK LEAVE PAYOUT**

The City' position is awarded with an implementation date of April 1, 2006.

#### **5. AWARD ON HEALTH INSURANCE**

The City's position is awarded with an implementation date of April 1, 2006 for the changes in the health insurance plan.

**6. AWARD ON HEALTH INSURANCE – EMPLOYER CAP & OPT OUT PROVISIONS**

The City’s position is awarded for both the employer cap and opt out provisions as set forth above. Implementation date for both employer cap and opt out provisions will be April 1, 2006.

**7. AWARD ON LONGEVITY**

The City’s position is awarded. No change in the contract.

**8. AWARD ON ON-CALL PAY**

The City’s position is awarded. No change in the contract.

**9. AWARD ON UNIFORM/CLOTHING ALLOWANCE AND SAFETY GLASSES**

Add a provision to Article XVI as follows: The City shall provide appropriate protective clothing and safety glasses/eyewear as required by state and federal law or where the employee’s duties require the provision of such protective clothing or safety glasses or eyewear.”

**10. AWARD ON WAGES FOR 2005, 2006 & 2007**

Accordingly, the wage award is as follows: Effective April 1, 2006 the employees in this unit are awarded a 2.4% general wage increase and a general wage increase of 1.6% effective July 1, 2006. Effective January 1, 2007 the employees shall receive a 2.4% general wage increase and a 1.6% general wage increase effective July 1, 2007. As noted above, no retroactivity of wages is awarded due to the unique facts of this matter.

<b>Date</b>	<b>4-1-06</b>	<b>7-1-06</b>	<b>1-1-07</b>	<b>7-1-07</b>
<b>% Increase</b>	<b>2.4%</b>	<b>1.6%</b>	<b>2.4%</b>	<b>1.6%</b>

**11. AWARD ON WAGES FOR THE FIRE CHIEF**

The Union’s position is awarded as set forth above. The Fire Chief position is granted a one-time lump sum salary adjustment of \$3,500.00 to be made on or before April 1, 2006. The base salary for purposes of calculating the general wage adjustments herein is thus \$69,332.00.

**12. AWARD ON DURATION**

A three-year contract is awarded for 2005, 2006 and 2007. The implementation date of the wage and benefits and language changes set forth herein is April 1, 2006

Dated: March 28, 2006

AFSCME and Austin

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Jeffrey W. Jacobs, arbitrator