

**ILLINOIS LABOR RELATIONS BOARD
INTEREST ARBITRATION**

Before
PETER R. MEYERS
Arbitrator

In the Matter of the Interest
Arbitration between:

TEAMSTERS LOCAL 726,

Union,

And

**CITY OF MARKHAM POLICE
DEPARTMENT,**

Employer.

Case No. **S-MA-01-232**

DECISION AND AWARD

Appearances on behalf of the Union

James W. Green, Jr.—Attorney
Lynette Freeman—Sergeant

Appearances on behalf of the Employer

Steven R. Miller—Attorney
Joseph Bertrand—Human Resource Director

Also Present

Ramon Davis—Officer
William Barron—Commander

This matter came to be heard before Arbitrator Peter R. Meyers on the 9th day of September 2002 and 2nd day of October 2002 at the City Council Chambers, Main Floor, Markham, Illinois. Mr. James W. Green, Jr. presented on behalf of the Union, and Mr. Steven R. Miller presented on behalf of the Employer. The Employer's brief was received on November 4, 2002; and the Union's brief was received on September 15, 2003.

Introduction

The parties in this matter are the City of Markham, Illinois (hereinafter "the City"), and the State and Municipal Teamsters, Chauffeurs and Helpers Union, Local 726 (hereinafter "the Union"), which represents police officers and sergeants employed within the City's Police Department. The parties entered into collective bargaining negotiations over a successor agreement to their 1997-2001 contract. The parties engaged in extensive negotiations over the new agreement, and they were successful in resolving many of the issues between them. Because the parties were unsuccessful with regard to certain of the issues raised during negotiations, these unresolved issues were submitted for Compulsory Interest Arbitration with the Illinois Labor Relations Board. During the course of the arbitration proceedings, the parties settled additional open issues, leaving one issue unresolved.

Pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et seq.* (hereinafter "the IPLRA"), this matter came to be heard by Neutral Arbitrator Peter R. Meyers on September 9 and October 2, 2003, in Markham, Illinois. The parties subsequently filed written, post-hearing briefs in support of their respective positions on the single issue that remains in dispute. The Arbitrator received the final brief on September 15, 2003.

Relevant Statutory Provisions

ILLINOIS PUBLIC LABOR RELATIONS ACT 5 ILCS 315/1 *et seq.*

Section 2 It is the public policy of the State of Illinois to grant public employees

full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.

It is the purpose of this Act to regulate labor relations between the public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements.

It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all. To prevent labor strike and to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act. To that end, the provisions for such awards shall be liberally construed.

...

Section 8 The collective bargaining agreement negotiated between the employer and the exclusive bargaining representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. Any agreement containing a final and binding arbitration provision shall also contain a provision prohibiting strikes for the duration of the agreement. The grievance and arbitration provision of any collective bargaining agreement shall be subject to the Illinois "Uniform Arbitration Act". The costs of such arbitration shall be borne equally by the employer and the employee organization.

...

Section 14(h) Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order

upon the following factors, as applicable:

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

BOARD OF POLICE AND FIRE COMMISSION ACT

Section 10.2.1-17 Removal or discharge; investigation of charges; retirement. Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. The hearing shall be as hereinafter provided, unless

the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement. In non-home rule units of government, such bargaining shall be permissive rather than mandatory unless such contract term was negotiated by the employer and labor organization prior to or at the time of the effective date of this amendatory Act, in which case such bargaining shall be considered mandatory.

Impasse Issue in Dispute

The parties were unable to reach agreement as to a specific framing of the remaining issue to be resolved here, although they do agree that the sole matter at issue relates to discipline.

Discussion and Decision

The City of Markham is a non-home-rule municipality located in Cook County, Illinois. The Union represents a bargaining unit composed of police officers and sergeants working in the City's Police Department. The parties have a long history of negotiation, interest arbitration, and litigation on the very issue presented here, which revolves around the question of whether the City's police officers should be able to seek neutral arbitration of disputes over disciplinary matters.

During negotiations over their first collective bargaining agreement, the parties successfully reached agreement regarding two paragraphs of a proposed article governing discipline. The parties were unable to reconcile their competing proposals as to the third paragraph of this same article, so the matter was submitted to interest arbitration pursuant to Section 14 of the Illinois Public Labor Relations Act ("the IPLRA"). In May 1989, Arbitrator George Larney issued an Award adopting the Union's proposal on this third

paragraph, which called for allowing employees the option of appealing discipline either before the City's Fire and Police Commission, where the "cause" standard applies, or through the contractual grievance and arbitration procedure, where the "just cause" standard applies. As part of the language adopted by Arbitrator Larney's Award, an employee choosing grievance and arbitration would waive the right to appeal before the Fire and Police Commission.

There is no dispute that the City did not seek judicial review of Arbitrator Larney's Award. The record shows that the City instead chose not to comply with this Award. In 1990, the City refused to process a grievance over discipline and sued to have Arbitrator Larney's Award declared invalid. The Circuit Court of Cook County dismissed the City's suit, and the Illinois State Labor Relations Board (hereinafter "the ISLRB") found the City guilty of an unfair labor practice by refusing to process this disciplinary grievance. In 1992, a discharge grievance proceeded to arbitration before Arbitrator Fletcher, who found that the discharge at issue there was not for "just cause" and ordered the grievant's reinstatement. The City refused to comply with Arbitrator Fletcher's Award and sued to have it declared invalid; the Circuit Court dismissed the suit and imposed sanctions against the City. In 1993, the City again refused to process a discipline grievance, and the Union filed an unfair labor practice charge against the City relating to both the 1992 and 1993 disputes. The ISLRB ultimately found that the City had violated the IPLRA by refusing to comply with the Fletcher Award and by refusing to process the 1993 discipline grievance.

During the parties' negotiations over a successor agreement to the contract scheduled to expire on April 30, 1994, they again were unable to settle the question of whether disciplinary suspensions and discharges should be submitted to the grievance and arbitration process. The issue went to an interest arbitration a second time, and Arbitrator Berman's May 12, 1995, Award adopted the Union's amended final proposal on the issue. This amended final proposal departed somewhat from the language that Arbitrator Larney previously had approved, but it still allowed employees the option of pursuing a grievance and arbitration over disciplinary action, so long as the affected employee(s) expressly waived the right to appeal to the Board of Police and Fire Commissioners.

After the issuance of Arbitrator Berman's Award, the City again filed suit in the Circuit Court of Cook County, seeking an order to vacate Berman's Award. The Circuit Court upheld the Award, and the City appealed to the Appellate Court of the First Judicial District. The Appellate Court ultimately reversed the judgment of the Circuit Court, determining that a non-home rule municipality did not have the authority to bargain over disciplinary procedures because it could not bypass the mandatory procedures of the Board of Police and Fire Commission Act ("BPFCA"). The Appellate Court further found that Arbitrator Berman lacked authority to enter his Award, and it accordingly ordered that the Berman Award was vacated. The Illinois Supreme Court subsequently denied the Union's request for review.

In response to the ruling issued by the Appellate Court in the above-described case, the Illinois legislature amended the BPFCA, effective November 30, 1999. Among

other things, the amended BPFCA provides that grievance arbitration shall be a permissive subject of bargaining in non-home-rule municipalities, except for those non-home-rule municipalities that previously had negotiated alternatives to the BPFCA procedures. The amended BPFCA specifies that in non-home-rule municipalities where grievance arbitration had been “negotiated by the employer and the labor organization prior to or at the time of the effective date of this amendatory Act, . . . such bargaining shall be considered mandatory.”

When the parties engaged in their current collective bargaining effort, the same issue again arose, and the parties again were unable to reach any agreement regarding its resolution. The Union proposes that the language awarded by Arbitrator Berman in his May 5, 1995, Award, and which appeared in the parties’ 1994-1997 and 1997-2001 contracts, be included within their new collective bargaining agreement. The City essentially proposes that all disciplinary matters should be decided by the Board of Police and Fire Commission, and that there should be no contractual provision allowing for neutral arbitration of disputes over disciplinary matters.

This history forms the backdrop for the analysis of the dispute presented here. As both parties recognize, the statutory factors set forth in Section 14(h) of the IPLRA guide interest arbitrators in the consideration of competing proposals, but not all of the listed factors will be relevant in every case, nor will they apply with equal weight. Several of the statutory factors are directed at economic issues, and these have little or no practical significance with regard to a purely non-economic issue, as is presented here.

As they addressed the same dispute between these parties in prior interest arbitration proceedings, Arbitrators Larney and Berman focused on the lawful authority of the employer, trends in other communities relating to whether arbitration of disciplinary disputes is available to sworn police and fire personnel, and public policy considerations, consideration of which falls within the catch-all language of Section 14(h)(8) of the IPLRA. These same statutory factors apparently remain applicable to the instant proceeding, although they are not all entitled to great weight. Neither side has offered any evidence in this proceeding relating to what dispute resolution options are available to sworn personnel in other communities, for example, so there is no evidentiary basis for determining any current “trends” regarding the availability to sworn personnel of neutral arbitration for disciplinary disputes. The City’s lawful authority, as a public employer and non-home-rule municipality, to negotiate and reach agreement upon a contractual provision allowing for neutral arbitration of disciplinary disputes has been a major factor in all of the previous incarnations of the parties’ long-running dispute on this issue, and it remains a critical factor in this proceeding. Similarly, public policy has been, and continues to be, an important consideration in the analysis of the parties’ competing proposals on the handling of disciplinary disputes, in light of the statutory and judicial history of this issue. These two factors form the principal statutory foundation of the analysis of the instant dispute, and the reasoning found in the various interest arbitration awards and judicial decisions that have been issued over the years in the course of the parties’ dispute on this question also shall inform the following analysis.

The City's lawful authority to negotiate and enter into an agreement regarding an alternative method of resolving disputes over discipline has been a critical issue in the prior interest arbitration proceedings and in the litigation between these two parties. The Illinois Appellate Court's decision to vacate Arbitrator Berman's Award was premised upon its finding that the procedures set forth in the BPFCA were mandatory, and that the City was statutorily precluded from negotiating and entering into any dispute resolution that departed from the BPFCA procedures. The subsequent action by the Illinois legislature directly addressed this finding; in amending the BPFCA, the legislature unequivocally expressed its intent to allow non-home-rule municipalities, under specific circumstances, to negotiate and agree upon alternative means to resolve disputes over discipline.

The legislature's amendment of the BPFCA represents the last, and most persuasive, statement on the question of whether non-home-rule municipalities may negotiate and agree on alternative means of resolving disciplinary disputes. Section 10.2.1-17 of the BPFCA, as amended, expressly provides in non-home-rule units of government, bargaining over an alternative process of handling disciplinary disputes, based upon impartial arbitration, is a permissive form of bargaining unless the employer and labor organization negotiated such a contract term either prior to or at the time of the amendment to the BPFCA, in which case such bargaining shall be considered mandatory. The language of this amended provision leaves no doubt of the legislature's intent: non-home-rule units of government absolutely may bargain over neutral arbitration as an

alternative means of resolving disciplinary disputes, and they are required to do so under certain circumstances.

Given this unequivocal language within the amended BPFCA, there is no basis for the City's initial assertion that this Arbitrator has no legal authority to resolve the parties' dispute over neutral arbitration of disciplinary disputes. Pursuant to the amended BPFCA, this issue is, at least, a permissive subject of bargaining, and it may be a mandatory subject of bargaining between these two parties. In either case, I find that this issue properly is before this Arbitrator for resolution.

The question that must be answered next is, of course, whether the issue of neutral arbitration of disciplinary disputes is a permissive or mandatory subject of bargaining between these two parties. The language of Section 10.2.1-17 of the BPFCA clearly and unambiguously distinguishes between situations in which this issue is a permissive subject of bargaining and situations in which it is a mandatory subject of bargaining. This issue is a permissive subject of bargaining in negotiations between non-home-rule units of government and labor organizations "unless such contract term was negotiated by the employer and labor organization prior to or at the time of the effective date of this amendatory Act, in which case such bargaining shall be considered mandatory."

The specific language that the legislature used to express its intent in this amended provision is critical. By providing that bargaining on this issue is mandatory if such a contract term was "negotiated" by the parties "prior to or at the time" that the amended Act became effective, the legislature deliberately avoided imposing any requirement that

such a provision had to be a valid part of a contract in effect at the time that the amendment took effect. Indeed, such a requirement would have defeated the apparent purpose of the amendment, which was at least in part to negate the impact of the Illinois Appellate Court's decision in the litigation between these two parties. The legislature demonstrated its disagreement with this judicial decision by amending the BPFCA to specifically allow for such bargaining without requiring that such a term had to be a valid part of an existing collective bargaining agreement.

It also is important to note that the legislature specified that for this issue to be a mandatory subject of bargaining, it is necessary only that the parties had "negotiated" such a term either prior to or at the time that the amendment took effect. The legislature did not expressly require that the parties had to have mutually agreed to include such a term in one or more of their contracts. This careful choice of words must be given its due, and the legislature must be understood as intending for the issue of neutral arbitration of disciplinary disputes to be deemed a mandatory subject of bargaining between a non-home-rule unit of government and a labor organization whenever such parties previously had negotiated over such a provision, whether or not the parties ultimately had agreed to include it within one of their contracts.

Applying these considerations to the parties here, there can be no question that they "negotiated" the issue of neutral arbitration of disciplinary disputes as they negotiated several of their collective bargaining agreements. In fact, the record demonstrates that this was a subject of negotiation in virtually every one of the parties'

contract negotiations. As discussed above, the fact that the parties have yet to reach any common ground on this issue is not relevant for purposes of the proper application of the amended BPFCA, nor is the question of the validity of any of the provisions calling for neutral arbitration of disciplinary disputes that were included in several of the parties' previous contracts. The undisputed fact that the parties did, indeed, repeatedly "negotiate" over contract terms calling for neutral arbitration of disciplinary disputes renders this issue a subject of mandatory bargaining between these two parties under the express terms of the amended BPFCA.

Accordingly, the legislature has resoundingly established that the City does have the lawful authority to enter into an agreement allowing for neutral arbitration of disciplinary disputes. Moreover, this is a mandatory subject of bargaining between these two parties. Contrary to the City's arguments, these IPLRA factors do not preclude adoption of the Union's proposal here.

The other IPLRA factor that is of particular importance here, public policy, similarly does not support the City's arguments. The legislature's amendment of the BPFCA demonstrates its determination that public policy is best served by allowing for bargaining on the issue of neutral arbitration of disciplinary disputes between non-home-rule units of government and labor organizations. This suggests that public policy also favors neutral arbitration of disciplinary disputes, even where there already exists a mechanism for handling disciplinary matters, such as the procedure before the City's Board of Police and Fire Commissioners. Indeed, as Arbitrator Larney expressed, in the

first Interest Arbitration Award between the parties on this issue, the arbitration process is the primary mechanism for handling such disputes, and public policy favors its adoption.

The Union's proposal here argues, more or less, for the maintenance of the status quo in that virtually every one of the parties' contracts have contained some provision calling for the availability of neutral arbitration as an alternative means of resolving disciplinary disputes. Even giving full consideration to the Illinois Appellate Court decision that vacated Arbitrator Berman's May 1995 Award, the overwhelming weight of authority nevertheless favors the continued presence of this provision in the parties' collective bargaining agreement. Given that the legislature removed the statutory basis for the Appellate Court's decision, there is no currently valid judicial or statutory precedent that supports departing from the status quo.

In fact, Section 8 of the IPLRA virtually requires the adoption of the Union's proposal here. Section 8 conclusively states that a collective bargaining agreement shall contain a grievance resolution procedure that provides for final and binding arbitration of disputes over the interpretation and administration of the agreement unless the parties mutually agree otherwise. Obviously, the parties have not reached any such mutual agreement otherwise, so Section 8 mandates the inclusion of a grievance process, with final and binding arbitration, to resolve all contractual disputes, including those relating to the assessment of discipline.

The City's suggestion that procedural difficulties would arise in connection with the administration of a neutral arbitration provision is both unfounded and insufficient to

overcome the weight of authority that favors the Union's proposal. Neutral arbitration of disciplinary disputes has existed side-by-side with BPFCA procedures for years, without any of the hypothetical difficulties associated with collateral estoppel and *res judicata* that the City asserts might occur. In fact, because the Union's proposal includes language that requires an aggrieved employee to expressly choose either the grievance and arbitration procedure or the Board of Police and Fire Commission procedures, but not both, collateral estoppel and *res judicata* do not come into play. Moreover, under the language proposed by the Union, which has appeared in the last two of the parties' collective bargaining agreements, a disciplinary grievance may be initiated only by the affected employee or by the Union on behalf of the affected employee, thereby eliminating the possible occurrence of at least one of the worst-case hypotheticals that the City described in its post-hearing brief.

Because neutral arbitration holds a well-established and widely accepted place as the primary means of resolving labor-management disputes, including disputes over discipline, it is evident that public policy considerations support the adoption of the Union's proposal in this proceeding. The City's police officers and sergeants deserve to have access to binding neutral arbitration as an alternative means of resolving disputes over disciplinary matters. I find that the City has failed to offer any valid, reasonable argument for changing the existing status quo by removing that option from the collective bargaining agreement, while the overwhelming weight of authority supports adoption of the Union's proposal on this issue.

Accordingly, this Arbitrator finds that the Union's final proposal on the issue of grievance and arbitration of disputes over disciplinary matters shall be adopted and incorporated into the parties' new collective bargaining agreement, and it is set forth in the Appendix hereto.

Conclusion

I find that the Union's final proposal on the issue of grievance and arbitration of disputes over disciplinary matters shall be adopted and incorporated into the parties' new collective bargaining agreement, and it is set forth in the Appendix hereto.

PETER R. MEYERS
Impartial Arbitrator

Dated this 3rd day of November 2003
at Chicago, Illinois.

APPENDIX

ARTICLE VI – DISCIPLINE

Section 6(a) Disciplinary Action. When the Employer believes just cause exists to institute disciplinary action the employer by its agents shall have the option to assess the following penalties depending upon the seriousness of the offense:

Oral reprimand
Written reprimand
Suspension
Discharge

The authority of the Police Chief to reprimand or suspend and the Board of Fire and Police Commissioners to suspend or discharge shall be exercised in accordance with the authority granted by the Municipal Code, 65 ILCS 5/10-2.1-17.

- (b) Grievance As To Disciplinary Action. Grievances may be filed with respect to any disciplinary action (other than oral reprimand) taken against an employee when an employee believes the disciplinary action taken is not for just cause. If the disciplinary action is a suspension ordered by the Police Chief, the grievance shall be filed in the first instance at Step 2 of the grievance procedure within ten (10) calendar days of the imposition of discipline, and shall thereafter be processed in accordance with Article VII of this Agreement. If the disciplinary action is ordered by the Board of Fire and Police Commissioners, the grievance may be appealed directly to arbitration within ten (10) calendar days after the issuance of the disciplinary decision.

Any appeal to arbitration of a disciplinary grievance shall be signed by the Union President or his designee and shall also contain a signed statement from the affected employee(s) waiving any and all rights they may have to appeal the subject action to the Board of Fire and Police Commissioners (in the case of disciplinary action imposed by authority of the Police Chief) or to seek judicial review pursuant to the Administrative Review Act (in the case of disciplinary action imposed by order of the Board of Fire and Police Commissioners). Any disciplinary action grievance filed without the required signed waiver shall not be arbitrable and the arbitrator shall be without jurisdiction to consider or rule upon it. An appeal for judicial review of an arbitrator's award shall be in accordance with provisions of

the Uniform Arbitration Act, 710 ILCS 5/1.

- (c) The parties agree that oral or written warnings shall be expunged from an officer's personnel and/or disciplinary file(s) one year after the warning is received by the officer so long as there has been no repetition of the offense within the one year period. Such expungement shall take place upon request by the employee given in writing to the Chief of Police.