

ILLINOIS STATE LABOR RELATIONS BOARD  
BEFORE ARBITRATOR ROBERT PERKOVICH

In the Matter of an  
Interest Arbitration between

City of Highland )  
 )  
 and ) #S-MA-06-159  
 )  
 Illinois Fraternal Order of Police )  
 Labor Council )

INTEREST ARBITRATION OPINION AND AWARD

A hearing was held in Highland, Illinois on April 27, 2007 before Arbitrator Robert Perkovich, having been jointly selected by the parties, City of Highland ("Employer") and Illinois Fraternal Order of Police ("Union"). The Employer was represented by its counsel, Cass Hansell and, on brief, by Noel Smith and Thomas Stewart. The Union was represented by its counsel, Thomas Sonneborn, and its Field Representative, Becky Dragoo. Both parties presented their evidence in narrative fashion, with their presenters sworn under oath. The parties filed timely post-hearing briefs that were received on July 12 and July 20, 2007.

STATEMENT OF THE ISSUES

The issue presented is whether, on the issue of residency, the final offer of the Employer (within the city limits), that of the Union (within twelve miles of the city limits), or another solution, shall be adopted as that portion of the parties' collective bargaining agreement?

BACKGROUND

The Employer is a municipality located in Madison County, approximately 35 miles east of St. Louis, Missouri and is a rural part of the Metro-East area that surrounds St. Louis. It has approximately 9,500 residents and its city government consists of a mayor, a city council, and a city manager. The Employer first dealt with the residency of its employees in an ordinance in 1973 that provided that all full-time employees shall establish a residence within the city limits no later than six months after they were hired. It exempted from that requirement however those persons who were living outside the city "by reason of marital status, i.e., single or living with parents" so long as they established a residence within the city if that status were to change. In 1976 the Employer expanded the exemption to include emergency medical technicians working for the city and grandfathered those living outside the city at the adoption of the ordinance, and it again expanded the exemption in 1983 to include those working in the Employer's

Electrical Utility Department so long as those employees lived within the area served by the Department<sup>1</sup>. Finally, in 1993 the Employer again revised the residency requirement so that the emergency medical technicians would be exempted so long as they worked in ambulance services.

The record also reflects that the Employer has dealt with the issue of residency in its collective bargaining agreements with unions representing bargaining units other than the bargaining unit involved in this matter. For example, it has agreed with the union representing its operating engineers that, but for employees living outside the city before the agreement, those employees shall establish a residence within the city limits no later than six months after hire. With the union representing its electrical workers, the Employer has agreed to a residency requirement as set forth in the ordinance of 1983, described above. With its firefighters union the Employer has agreed that the firefighters shall live within the city limits unless its ordinance, rather than any collective bargaining agreement, is changed. Finally, in an agreement with this very same Union for the Employer's telecommunicators, the parties have agreed to strict residency within six months of hire.

The record reflects that the Union herein was certified as the exclusive bargaining representative of the Employer's fourteen patrol officers in August of 2000. The parties successfully negotiated a collective bargaining agreement for the period 2000-2003 and another for the period 2003-2006 that included, with respect to the issue of residency, that the police would be required to establish a residence within the city limits no later than six months after hire. However, those agreements were struck only after the Union, in both negotiations, attempted to relax the residency requirement. In doing so the record reflects that the Union made a number of proposals for different distances within which the officers must establish a residence, proposals that turned on geographic benchmarks other than a strict number of miles, and/or proposals implementing the relaxed requirement over time. In addition, in negotiations for the collective bargaining agreement that is the subject of this dispute, the Union also asked that the Employer's city council meet with the officers in closed session so that they could understand the Union's, and the employees', strong feelings on the issue. Finally, the Union asked the Employer would *quid pro quo* would be sufficient for it to obtain the relief it sought. The record reflects however that from the very beginning, and without variation, the Employer's response to all of these proposals has been rejection<sup>2</sup>. Ultimately the parties reached an agreement for the period 2006-2009 that provides, with respect to residency, for strict residency but in which the Union reserved the right to pursue the issue in arbitration. With the parties so poised, the matter was presented in arbitration.

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<sup>1</sup> Neither this ordinance, nor any thereafter, continued the exemption for employees living outside the city due to their marital status.

<sup>2</sup> The Employers' city council did agree to meet with the Union's bargaining team, but it declined to meet with the officers.

## THE BURDEN OF PROOF AND THE APPLICABLE ANALYSIS

The parties disagree on whom the burden of proof lies and the appropriate quantum of proof that must be met. More specifically, the Employer argues that the Union is seeking a breakthrough and that it must meet a heightened quantum of proof and the Union argues to the contrary. In the alternative, the Union contends that even if the matter is regarded as a breakthrough, it has met the necessary heightened quantum of proof. The Employer, however, disagrees. It is to this threshold issue that I now turn.

The Union contends that when it agreed in 2000 and again in 2003 to residency within the city limits, it did so in reliance upon assurances from the Employer's negotiators that the residency requirement would be altered by way of the political process and subsequent changes to its Ordinance. Thus, the Union argues, when those assurances did not become a reality there was no negotiated status quo and the Union's attempt to alter the residency requirement in arbitration should not be considered a breakthrough. The Employer, on the other hand, denies that any such assurances were made and that the Union has failed to meet its burden of proving such.

To resolve this issue I find it unnecessary to determine whether or not such assurances were made. Rather, assuming *arguendo* that they were in fact made, there can be no dispute that the Union was not obligated to forego its right to contest the issue in arbitration. In other words it chose to refrain from arbitrating. This point is especially important because, had the Union rejected the assurance in 2000 there would be doubt that the matter of residency would not have been a breakthrough. See e.g., *Village of Cahokia*, S-MA-00-215 (Perkovich, 2003). Moreover, the impact of making this same choice a second time, in 2003, is critically important, because the Union made the choice to forego arbitration in 2003 after, at least in its eyes, the Employer did not fulfill its prior assurance. Under these circumstances I can only find that the Union did in fact negotiate a status quo and though it may now regret that choice, I cannot save it by deciding that residency is not a breakthrough issue at present. Thus, I find that the Union must meet the heightened scrutiny that a breakthrough issue demands.

To that end, it is well-settled, see *City of Burbank*, S-MA-97-56 (Goldstein, 1998), that a party seeking a breakthrough has the burden to prove that the status quo is dysfunctional, that the status quo has created hardships and/or inequities for employees, and that the other party has refused to entertain any *quid pro quo* that the party seeking the change has offered.

The Union asserts that it has met these tests. The Employer argues to the contrary. Before addressing these tests however, I first turn to the comparables.

## COMPARABILITY ANALYSIS

With regard to external comparables the parties agree that Collinsville is an external comparable and the Employer does not appear to reject Edwardsville<sup>3</sup>. Beyond that they are in disagreement, with the Union also offering the communities of Fairview Heights and O'Fallon and the Employer offering Columbia, Troy, Waterloo, and Wood River.

The parties' essential difference is that they use different benchmarks for determining what the comparable communities. The Union offers Fairview Heights and O'Fallon because, like Collinsville and Edwardsville, those four communities and the Employer belong to a hiring consortium in which they share recruitment, selection, and testing methodologies. Moreover, the record shows that virtually every officer the Employer has hired since 1988 has been hired through the consortium. Thus, the Union argues, these four communities comprise a labor market and it relies on a number of interest arbitration awards in which arbitrators have deemed the labor market in which an employer exists a relevant comparable criterion<sup>4</sup>. The Employer on the other hand uses nine criteria (including but not limited to relative equalized assessed valuation, relative revenues, and relative demographic data) that are often used by interest arbitrators to determine which communities are comparable.

I find myself in the odd position of agreeing with both. The Union is surely correct that interest arbitrators have used labor market analysis to determine comparable communities and the Employer is correct that many, if not all, of the criteria that it has examined have also been used. More importantly, the critical issue is how, if at all, does using all of the proposed comparable communities assist in weighing the parties' final offers.

Sadly, they are of little assistance. Of the four communities in the consortium (Collinsville, Edwardsville, Fairview Heights, and O'Fallon) three have relaxed residency allowing police officers to live anywhere from ten to fifteen miles, or in one instance within thirty minutes' response time. Of the four communities offered by the Employer that are not in the consortium (Columbia, Troy, Waterloo, and Wood River) only two have strict residency and the other two allow police officers to live anywhere between one and one-half to five miles outside the jurisdiction. Thus, of the eight communities offered between the parties five of them have relaxed residency and three have strict residency, a less than compelling consideration in choosing between the final offers.

Similarly, internal comparables are of little help. Of the six employee groups other than the police officers that comprise the internal comparables (emergency medical technicians, electrical utility department workers, operating engineers,

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<sup>3</sup> See Employer's post-hearing brief where, at page 9, it concedes that Edwardsville meets seven of nine criteria it has used to determine comparable communities.

<sup>4</sup> The Union has also provided a more traditional comparability analysis using as criteria relative population, median home value, and median household income. However, those factors are, in my view, an incomplete inventory of relevant comparability indices.

telecommunicators, firefighters, and other city employees) only four have strict residency. Therefore there is no uniform requirement among the internal comparables. Moreover, this lack of uniformity also demonstrates a willingness on the Employer's part to relax its residency requirement. Thus, I conclude that both external and internal comparables are inconclusive and I do not rely upon either in reaching my decision.

#### BREAKTHROUGH ANALYSIS: IS THE STATUS QUO DYSFUNCTIONAL?

On this point one cannot dispute that if the police officers live within the city limits they would be closer to any operational needs that the department might have. Therefore, one could easily conclude, certainly from the Employer's perspective, that the status quo works and should not be changed. That however does not mean that the Union's offer of residency within twelve miles of the city limits must be rejected. This is particularly true when one weighs the operational considerations against what two arbitrators have described, when the issue is residency, as "the actual here-and-now freedom...to exercise a basic right enjoyed by most unincarcerated US residents" (See, *Town of Cicero*, S-MA-98-230 (Berman, 1999) at pgs. 42-43 and "a substantial liberty interest in free choice of residence" (See, *Village of Markham*, S-MA-07-1100 (Hill, 2007)).<sup>5</sup> That is, when weighed in this fashion, the status quo, at least from the Union's viewpoint, is dysfunctional, especially when the Employer herein lies largely in a rural area with little prospect of traffic jams and/or ongoing road construction delays. Thus, I cannot conclude that a residency requirement that would keep the police officers within twelve miles of the city limits is unreasonable. Moreover, for this same reason I also conclude that the status quo is dysfunctional and find that the Union has met its burden on the first of the three breakthrough benchmarks.

#### HAS THE STATUS QUO CREATED INEQUITIES AND HARDSHIPS FOR EMPLOYEES?

On this point the Union relies on the fact that the Chief of Police is allowed to maintain a home in the Chicago area and that there have been a number of criminal complaints filed by police officers as victims of crimes. In reply the Employer asserts that relying on the Chief's situation is "...yet another baseless, speculative argument..." and that of all of the instances of crimes against police officers only one can be attributed to the fact that the victim was a police officer.

First, with regard to the Chief, I find that attempts in interest arbitration to contrast the terms and conditions of management, and especially upper level management, are simply unpersuasive. I believe this to be true because they are not bargaining unit employees, enjoy (or regret perhaps) the consequences of this different organizational status, and have available to them the option of negotiating terms and conditions of employment on a one-to-one basis with an employer.

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<sup>5</sup> Arbitrator Hill also found that "liberty interests of this weight will usually outweigh a municipality's asserted justification for a residency requirement."

On the issue of police officer safety, I cannot quarrel with the Employer's factual assertion and if the record before me contained evidence that officers were at risk because of their jobs, the Union's argument would be more compelling. However, I also believe that I cannot simply ignore the fact that police officers arrest and perhaps incarcerate their fellow citizens, or at least face the potential for doing so, and that the impact of this conduct, real or potential, is a fact of police work and one no other employees face. Moreover, this risk is exacerbated herein because the Employer's community is small in geographic scope and population. Thus, the dilemma is whether, in the absence of numerous real instances of harm or danger to officers and/or their families, an interest arbitrator should reject the potential for such. In other words, is it prudent to wait for officers in a community to be attacked or victimized before this factor can be given some weight? I think not. Rather, I agree with Arbitrator Briggs who said "it is reasonable to conclude that police officers have valid safety concerns related to their families living near those persons whom they arrest and incarcerate (and that) (n)o fair minded person could argue otherwise." *City of Calumet City*, S-MA-99-128 (2002).

I therefore find that the status quo has in fact created inequities or hardships for employees<sup>6</sup>.

#### HAS THE EMPLOYER STEADFASTLY REFUSED A *QUID PRO QUO*?

As a matter of record, the only factual conclusion to this inquiry is that the Employer has indeed steadfastly rejected all of the exchanges the Union has offered for relaxed residency. However, it is well-settled in labor law, both private and public, that every employer has the right to engage in hard bargaining so long as it bargains in good faith, and I have no reason to believe that this Employer has done anything to run afoul of that right. Accordingly, the issue is how to deal with the ramifications of a party who has bargained hard and in good faith, but who has steadfastly refused a *quid pro quo* offered for its agreement in bargaining to a breakthrough.

As noted by many interest arbitrators the entire premise lying behind the rejection of breakthroughs in interest arbitration is that a breakthrough should be obtained in bargaining because of its radical or unorthodox nature. Thus, the inquiry is not simply whether a party has exercised its right to bargain hard while bargaining in good faith, but whether in doing so that party has undermined the very premise compelling the rejection of breakthroughs in interest arbitration. That is, does the record show that the exchange so critical to the success of collective bargaining, and the avoidance of interest arbitration, has been fulfilled?

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<sup>6</sup> The Employer also argues that the Union has failed to meet its burden of proof that its final offer will serve to better meet the "interests and welfare of the public." Without expressing a view whether the Union, rather than the Employer, bears this burden (after all, it is the Employer, and not the Union, that is the duly designated representative of the public), I only note that application of this test is inconclusive. I reach this determination because if the status quo is not changed the interests and welfare of the public are not affected and if the Union's final offer is adopted then the public's police officers will be better served and, by extension, so will the public.

In the instant matter I see no such bargaining exchange of the type that is contemplated when interest arbitrators reject breakthrough proposals. Rather, based on the record evidence I must conclude that the Union has met its burden of proof on this third breakthrough test<sup>7</sup>.

### CONCLUSION

I find that the Union has met its burden of proof that the status quo is dysfunctional, that it has created inequities and hardships for employees, and that the Employer has steadfastly rejected any *quid pro quo* the Union has offered for the breakthrough.

### AWARD

The Union's final offer is adopted. Article 24, Section 5 of the parties' collective bargaining agreement is to read as follows:

All members of the bargaining unit covered by this Agreement, shall as condition of continuing such employment, establish and maintain a bona fide residence within twelve miles of the City limits of the City of Highland within six (6) months after commencing employment.

**DATED: August 27, 2007**



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**Robert Perkovich, Arbitrator**

<sup>7</sup> Indeed, the bargaining exchange between these parties on the issue of residency was much like the bargaining that led Arbitrator Goldstein to accept a breakthrough in *Village of South Holland*, S-MA-98-120 (1999) because, as he put it, "...the process of give and take could not work..." because the failure to reach agreement was not based on the parties' assessment of their respective interests, but rather on a philosophical basis.