

IN THE MATTER OF ARBITRATION	)	ARBITRATIN AWARD:
BETWEEN	)	FMCS 100629-03925-A
	)	
VILLAGE OF OAKBROOK	)	ILLINOIS STATE LABOR
	)	RELATIONS BOARD
AND	)	CASE NO. S-MA-09-017
	)	
ILLINOIS FRATERNAL ORDER OF	)	
POLICE – LABOR COUNCIL	)	

APPEARANCES

For the Union: Gary Bailey, Attorney

For the Employer: Mark Sterk, Attorney

PROCEEDINGS

The Parties were unable to reach a mutually satisfactory settlement of their negotiations and, therefore, submitted the matter to arbitration pursuant to the Illinois Public Employee Labor Relations Act. The Parties did not request mediation services. The hearing was held in Oakbrook, Illinois on December 7, 2010. At these hearings the Parties were afforded an opportunity to present oral and written evidence, to examine and

**cross-examine witnesses, and to make such arguments as were deemed pertinent. The Parties stipulated that the matter is properly before the Arbitrator. Final briefs were received on March 21, 2011.**

### **STATUTORY CRITERIA**

**(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 the wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:**

1. The lawful authority of the Employer.
2. Stipulations of the Parties.
3. The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
4. Comparison of the wages, hours and conditions of employment of the employees involved in the Arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

- A. In public employment in comparable communities.
  - B. In private employment in comparable communities.
5. The average consumer prices for goods and services, commonly known as the cost of living.
  6. The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
  7. Changes in any of the foregoing circumstances during the pendency of the Arbitration proceedings.
  8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, Arbitration or otherwise between the Parties, in the public service or in private employment.
- (I) In the case of peace officers, the arbitration decision shall be limited to wages, hours and conditions of employment and shall not include the following: (I) residency requirements; (ii) the type of equipment, other than uniforms, issued or used; (iii) manning; (iv) the total number of employees employed by the department; (v) mutual aid and assistance agreements to other units of government; and (vi) the criterion pursuant to which force, including deadly force, can be used; provided, nothing herein shall preclude an arbitration decision regarding equipment or manning levels if such decision is based on a finding

that the equipment or manning considerations in a specific work assignment involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties. Limitation of the terms of the arbitration decision pursuant to this subsection shall not be construed to limit the factors upon which the decision may be based, as set forth in subsection (h)

## FINAL OFFERS

### FINAL OFFER UNION

*Both parties have submitted final offers that change the status quo with regard to the procedure for resolving disciplinary disputes. Currently, all discipline is reviewed and/or imposed pursuant to the provisions of the Board of Fire and Police Commissioners Act, 65 ILCS 5/10-2.1-17.*

*The Union proposes to have all discipline imposed by the Chief and to have it reviewed through the grievance and arbitration provision in the Agreement. In order to perfect this change and make clear the intent of this alteration, the Union has made proposals to modify five (5) existing provisions of the Agreement. The Union has proposed the precise language that should be inserted and substituted in the Agreement.*

*The Village has proposed to keep the Oak Brook Fire and Police Commission (hereinafter referred to as "Commission") as the forum to resolve disciplinary disputes, but offers a number of*

*conceptual changes that it contends address some of the issues the Union has put forth as to why the commission-form of resolution is unfair. The Village's final offer is, however, vague and does not identify the precise provisions of the Agreement that it wants changed.*

EMPLOYER FINAL OFFER

*The only matter presented for arbitration is the issue of employee discipline. The Village has negotiated with the Illinois Fraternal Order of Police Labor Council (the "Union") on this issue as mandated by the Board of Fire and Police Commissioners Act in the Illinois Municipal Code (65 ILCS 5/10-2.1-17), but the parties have not reached agreement. The Village seeks to keep the status quo, i.e., the Board of Fire and Police Commission ("BFPC") system, with amendments as delineated in the Village's last best offer. The Union seeks to eliminate that system in its entirety and to require submission of all employee discipline issues to grievance arbitration under the parties' Collective Bargaining Agreement. Based on the submissions at the hearing in this matter, the Union has failed to meet its burden of proof that the current BFPC system (including the amendments offered by the Village) is essentially broken and in need of replacement. The Union offers nothing more than a philosophical preference for arbitration. There is no evidence that the current system is biased against the officers or otherwise unfair. The Village's last best offer must be adopted here.*

UNION POSITION

The following represents the arguments and contentions made on behalf of the Union:

In 1998 Arbitrator Kossoff issued an interest arbitration ruling that allowed discipline cases to go directly to the Police and Fire Commission absent mutual agreement. Once the decision was issued, however, officers may file grievances and proceed to arbitration for a de novo review. The Arbitrator dismissed the Village argument that, because it was not a home rule unit of local government and the Arbitrator lacked authority to create an alternate disciplinary procedure.

In 1998 the Fire and Police Commission Act was worded differently than it is today, and Illinois public employers were frequently arguing that non-home rule jurisdictions were required to have commissioners as the sole and exclusive forum to resolve disciplinary disputes. These arguments found sympathetic courts in late 1998. Later, an Illinois Appellate Court upheld that interest arbitration award where the local Fire and Police Commission was replaced with grievance arbitration as the forum to resolve disciplinary disputes. In 1999 amendments to the acts did not have the effect of putting to rest the home rule status. In 2007 further amendments made clear that home rule status would no longer be a shield to prevent an interest arbitrator from awarding an alternative disciplinary dispute system. Interest arbitration awards in 2009 and 2010 upheld this change. Locally courts have reversed decisions by the Oakbrook Fire and Police commission. This is also true of cases involving other jurisdictions.

With respect to external comparability, many interest arbitrators have cited this statutory factor as the most important in determining the appropriateness and reasonableness of a final offer. In this matter only the Union offered external comparables. It is the Village's position that external comparables are irrelevant to the resolution of this arbitration.

It is the Union's position that the comparables cited by Arbitrator Kossoff in the Oakbrook I decision are appropriate to this matter. They include Bensenville, Bloomingdale, Burr Ridge, Downers Grove, Elmhurst, Hinsdale, LaGrange Park, Lombard, Oakbrook Terrace, Westchester, Western Springs, Westmont and Willowbrook.

It is the Union's position that the prior arbitrators' decision with respect to external comparables are appropriate, particularly since no other external comparables were offered by the Employer. There is no merit to the Village's assertions that the Arbitrator should not consider comparability and should not adopt the external comparables offered by the Union as decided in a prior case.

In this matter the external comparables are a mixed bag, however, most of the comparables do offer arbitration under certain circumstances, and four of the comparables offer arbitration only. It is clear that access to grievance/arbitration is fast becoming the norm. The Act provides for internal comparability also as a factor for the Arbitrator to consider. Currently this is the first opportunity for the firefighters to bargain over this

**issue. In addition there is no evidence that many interest arbitrators have dismissed the limited usefulness of internal comparability when faced with police arbitration cases.**

**The Union has set forth many arguments as to why its proposal is more appropriate than the status quo. Commissioners are appointed by the Mayor of the Village of Oakbrook with the consent of City Council (or Village President with the consent of the Board of Trustees) for three-year periods, thus the Board has allegiances to the Village officials. The Union's position in this matter seeks a more level playing ground wherein the panel reviewing the alleged discipline has no allegiances to any party at the hearing.**

**Under the current system the Village pays for the cost of two attorneys - one to represent the Commission and one to represent the Chief of Police. The commissioners can punish officers in addition to punishment already imposed by the Chief. Commissioners can suspend an officer indefinitely pending a decision but not address the same time period in the remedy. Commissioners cannot consider evidence of disparate treatment. The burden of proof can be switched to the employee for a smaller suspension.**

**An evidentiary hearing is not required for smaller suspensions. The Commission can increase the discipline assessed by the Chief.**

**Based on the above, the traditional factors and collective bargaining as well as the interest and welfare of the public support the Union's final offer. The external comparables also support adoption of the Union's final offer. The Arbitrator has plenty**

**of evidence to issue an award freeing officers of the current unjust system.**

**The Village has proposed a final offer that tries to address some of the issues raised the Union concerning the inequities under the prior Board of Fire and Police Commission Act. This offer raised more questions than it resolves. The Commission is not party to the agreement. It has not consented to these restrictions suggested by the Village. Fire and Police Commissions across Illinois view themselves as independent administrative agencies. The Village proposes to keep the Commission involved in discipline and hopes it will accept the restrictions it wants to place on its power and authority. The Union noted several problematic issues that may result from this proposal.**

**The Union's final offer has already withstood judicial scrutiny. Whether or not a court would uphold variations to the Board of Fire and Police Commissioners Act is uncertain at best. Based on the above, the Village's offer is flawed and the Union's final offer makes more sense.**

**EMPLOYER'S POSITION**

**The following represents the arguments and contentions made on behalf of the Employer:**

**The Employer's last best offer addresses nearly all of the Union's arguments.**

- 1. A purported public policy preference for resolving labor disputes through arbitration as allegedly reflected in the Illinois Public Relations Act and in state and federal case law, including the Steel Workers' trilogy of cases from the United States Supreme Court;**
- 2. Uncertainty under the Board of Fire and Police Commissioners Act as to whether disciplined officers have a clear right to a hearing;**
- 3. The fact that an officer appealing discipline less than a five-day suspension bears the burden of proof to overturn the discipline;**
- 4. The BFPC's inability to consider disparate treatment in the discipline of other officers when reviewing a disciplinary matter before it;**
- 5. The authority under the Board of Fire and Police Commissioners Act to suspend an officer without pay pending his hearing and the danger that the officer will not be reimbursed following a successful appeal;**
- 6. The Police Chief's ability to suspend an officer for up to five days and still be able to file charges before the BFPC for further discipline against the officer for the same conduct;**
- 7. The potential preclusive effect a decision of the BFPC might have on a subsequent lawsuit against the Village by the disciplined officer;**
- 8. The authority of the BFPC to issue greater discipline to an officer even though imposed or requested by the Police Chief; and**

**9. The fact that commissioners are “unilaterally” appointed by the municipal employer and are not required to possess a certain amount of experience in employment matters.**

**The Village has offered a guaranteed right to a full hearing before the BFPC to any officer who received a suspension and requests a hearing. The Village has offered that on any challenge to a suspension the Chief will possess the burden to uphold the suspension by a preponderance of evidence. The BFPC shall consider all evidence offered of disparate treatment for similar infractions. The Commission will not be able to increase the suspension. The officers cannot be suspended without pay pending a hearing and decision by the Commission. No hearing before the Commission shall serve to collaterally estop a subsequent cause of action by the officer against the Village, its officers, agents or employees. The only issues not addressed by the Village’s offer is that there is a preference for arbitration over the BFPC system and that the commissioners are unilaterally appointed by the municipal employer without any particular experience in employment matters; however, the Union failed to meet its burden of proving that it is necessary to replace the system with grievance arbitration on these limited grounds.**

**The Employer would note that only bargaining on the issue of discipline is now mandatory. Nothing in the amended statute requires a particular forum or type of due process that must be employed by the Village. The BFPC system is entirely valid and still considered the norm as described in Section 10-2.1-17 even as amended. If the legislature so favored arbitration, the legislature could have simply amended the Act to make**

arbitration the required forum for disciplinary cases. There is no preference for arbitration where the Parties have not agreed to submit the matter to arbitration. The Seventh Circuit Court of Appeals has stated that there is no favor of one judicial forum over another. The Village and the Union have bargained. Nothing required the Parties to agree on and to incorporate an alternative disciplinary system. The comparables do not wholly support a position of grievance arbitration over the BFPC system. A number of municipalities still employ the BFPC system in one form or another. In a recent arbitration by Arbitrator Harvey Nathan, he rejected the contention the BFPC was flawed and accepted Westchester's final offer which left the BFPC system in place.

The Union has failed to meet its burden of proof to show that the BFPC system is essentially broken. There was no showing that the BFPC system has been biased or otherwise unfair. The Union only pointed to two cases to support its assertion. The lengths of Officer Petersen's two suspensions were reduced upon administrative appeal. There is not one case where the finding of liability by the Commission was reversed or vacated. There was no showing that the Commission or any commissioner has been biased in a disciplinary before it. The Union relied on just two out of ten cases in nearly 30 years to support its argument for a change. The evidence demonstrates that the system has worked. Even in Officer Petersen's cases, the system worked as intended.

The manner of appointment does not suggest the commissioners are unfair or dishonest unjust because the commissioners are unilaterally selected/appointed by the

municipal employer and need not have any experience in law enforcement. There is no evidence to suggest that a three-person adjudicatory board is not at the very least, if not more so, as fair as a single arbitrator. Commissioners in this village are experienced and qualified. Commissioners are subject to initial training after receiving their appointments and they meet as a board on an annual basis to carry out their statutory duties. The Village has been blessed with qualified commissioners who have held long tenures with the Commission. Two of the commissioners are practicing attorneys. The Commission also has the benefit of an experienced attorney representing it during disciplinary hearings as well. There is no reason to state that the commissioners are not qualified or equipped to make these decisions.

Finally, perceived cost savings by imposing arbitration is not a compelling factor for the imposition of arbitration. It is true that the Village pays for all expenses associated with conducting the hearing. Under the Union's proposal they would share such costs along with the cost of the arbitrator. The purported savings are not significant in what has been a relatively low disciplined department, therefore, cost savings are not a compelling reason. Based on the above, the Employer's offer should be accepted.

#### DISCUSSION AND OPINION

The role of an Arbitrator in interest arbitration is substantially different from that in a grievance arbitration. Interest arbitration is a substitute for a test of economic power between the Parties. The Illinois legislature determined that it would be in the best interest of the citizens of the State of Illinois to substitute compulsory interest arbitration for a potential strike involving security officers. In an interest arbitration, the Arbitrator must determine not what the Parties would have agreed to, but what they should have agreed to, and, therefore, it falls to the Arbitrator to determine what is fair and equitable in this circumstance. The statute provides that the Arbitrator must pick in each area of disagreement the last best offer of one side over the other. The Arbitrator must find for each open issue which side has the most equitable position. We use the term "most equitable" because in some, if not all, of last best offer interest arbitrations, equity does not lie exclusively with one side or the other. The Arbitrator is precluded from fashioning a remedy of his choosing. He must by statute choose that which he finds most equitable under all of the circumstances of the case. The Arbitrator must base his decision on the combination of 8 factors contained within the Illinois revised statute (and reproduced above). It is these factors that will drive the Arbitrator's decision in this matter.

The Arbitrator has more latitude when dealing with "non-economic" proposals. The Arbitrator has found over the years that the line between economic and non-economic is very blurred. An effective argument can be made that most of these "non-economic" proposals can and do have economic consequences. In addition, interest

arbitration is set up to encourage voluntary settlement. This Arbitrator has concluded that in the absence of the most extraordinary circumstances it is the Parties that should determine their respective proposals either of which would then be included in the Agreement.

The Arbitrator would, however, say to the Parties that interest arbitration is an essentially conservative process. The Arbitrator is bound by the criteria placed upon him by the State of Illinois and the Parties respective positions. The criteria for change, as noted in the above paragraphs, are difficult to achieve. Quantum leaps in interest arbitration are, therefore, difficult to attain. The Collective Bargaining/Interest Arbitration process in the public sector is generally one of small steps over a period of time to achieve an overall goal except under the most extraordinary circumstances.

Prior to analyzing the open issue, the Arbitrator would like to briefly mention the concept of status quo in interest arbitration. When one side or another wishes to deviate from the status quo of the collective bargaining agreement, the proponent of that change must fully justify its position, provide strong reasons, and a proven need. It is an extra burden of proof placed on those who wish to significantly change the collective bargaining relationship. In the absence of such showing, the party desiring the change must show that

there is a quid pro quo or that other groups comparable to the group in question were able to achieve this provision without the quid pro quo. In addition to the above, the Party requesting change must prove that there is a need for the change and that the proposed language meets the identified need without posing an undue hardship on the other Party or has provided a quid pro quo, as noted above. In addition to the statutory criteria, it is this concept of status quo that will also guide this Arbitrator when analyzing the respective positions.

Despite the above, this is not your typical status quo situation. The Arbitrator would note that the Union could not bargain this concept until lately due to a change in the Fire and Police Commission Act and it has made this an issue as soon as it possibly could. This, of course, does not alter the fact that the Union still bears the burden of proof in this matter as it is the entity that wishes to deviate from the status quo.

It is true that the Employer has addressed some of the Union's concerns in its offer. It is true that nothing in the statute or court decisions requires the Parties to agree, but it is interesting to note that, since the Parties did not agree, this matter will be settled in arbitration. The Union does not have to show that the BFPC is broken, only that grievance/arbitration is significantly preferable. This award should not be considered in any way disparaging toward the commissioners of Oakbrook, but certainly there is an appearance of potential bias. The commissioners are appointed by the Village without any

input from the Union or the bargaining unit, and it is hard for the Commission to overcome this perception. The Arbitrator would wonder why these particular unionized workers have no access to a grievance arbitration procedure where the vast majority of unionized workers do have such access. The Arbitrator would also note that, even if the Village's proposals were implemented, this does not necessarily mean that the Commission would choose to follow them. The Employer did try to make the process appear fair. There is, however, no guarantee that this would be adopted by the BFPC or the courts.

The Employer relies heavily upon an award by Arbitrator Harvey Nathan in the Village of Westchester case dated January 13, 2011. In that matter the Arbitrator found in favor of the Village of Westchester with respect to the Fire and Police Commission. This Arbitrator has the greatest respect for Arbitrator Nathan whom he has known for approximately 30 years, but in this matter this Arbitrator finds himself disagreeing with the conclusions made by Arbitrator Nathan with respect to the Westchester BPFPC. In that matter the Arbitrator found that the external comparables favored the Employer and no need for change. That is not the case regarding Oakbrook.

With respect to the discipline proposal, it is very difficult for an arbitrator of approximately thirty (30) years experience to argue against arbitration and in favor of a Police and Fire Commission. The facts are, in this Arbitrator's experience, that there is a clear trend of bargaining units in the public safety arena toward arbitration and away from fire and police commissions. This is understandable. Police/Fire Commissioners

are appointed by the people who are making disciplinary decisions which affect this bargaining unit. There is an appearance, perhaps not a fact, but at least an appearance that this is patently unfair; and this Arbitrator agrees.

In addition, this is the first time that this has been a mandatory subject of bargaining. There was no showing that an opportunity previously existed to allow this in the bargaining agreement. The fact is that arbitration is fair. Both Parties must agree on the arbitrator for an arbitration to proceed. Both Parties agree that arbitration is fair. Both Parties seem to agree that there is at least a perception that the Police and Fire commission is biased in favor of the Village.

Arbitrators are much more experienced in handling these types of cases than Police and Fire Commissions, particularly in a small village like Oakbrook with a small number of cases appearing before the Commission. The facts are that arbitrators know how to make rulings which have their basis in law, just cause, facts and fairness since both sides have a critical part in choosing the arbitrator and they have endorsed the process as being a fair and reasonable way to resolve a dispute. This Arbitrator finds himself in complete agreement with those arbitrators (Meyers, Briggs, and Perkovich and Wolf). The facts are that, as the Union stated, arbitration is private and avoids undue embarrassment. It can be a less expensive way to resolve these disputes. Arbitrators are much better equipped to deal with disciplinary matters than a commission. In addition, the internal and external comparables favor the Union's proposal and, therefore, it is that proposal that will be

**included in the contract which is in dispute in this matter:**

**AWARD**

**Upon consideration of all statutory factors and under the authority vested in the Arbitrator by Section XIV of the Illinois Public Employees Labor Relations Act the Arbitrator finds that the proposal which most nearly complies with Sub-Section XIV(h) is the Union's offer.**

**Dated at Chicago, Illinois this 6<sup>th</sup> day of April, 2011.**

**Raymond E. McAlpin, Arbitrator**