

IN THE MATTER OF ARBITRATION)
)
 – between –)
)
 THE VILLAGE OF SOUTH HOLLAND)
 ILLINOIS, EMPLOYER)
)
 and)
)
 IBT LOCAL 714, UNION)
 _____)

Hearing on Parties' Arguments
 Regarding the Effect to Give the
 Parties' Tentative Agreement

Marvin Hill, Jr.
 Arbitrator

Appearances

For the Village: Jim Baird, Esq.
 Seyfarth Shaw, *et al.*
 131 South Dearborn Street, Ste 2400
 Chicago, Illinois, 60603-5577

For the Union: Kevin Camden, Esq.
 Camden Law Office, LLC
 7501 S. Lemont Road, Ste 325
 Woodridge IL, 60517

I. BACKGROUND, FACTS, AND STATEMENT OF JURISDICTION

The facts giving rise to the matter are not in dispute.

On September 11, 2009, the parties met under the auspices of the Arbitration Panel in an attempt to resolve their contractual differences and/or to begin a hearing in this matter. The Panel was comprised of the parties' advocates, Messrs. Baird and Camden, and the undersigned Chairman.

After all-day discussions concerning their differences, and with the active involvement and assistance of the Chairperson and Neutral Arbitrator, and the arbitration panel members themselves, the parties, at approximately 3:45 p.m., were able to reach tentative agreement resolving all

outstanding issues. That tentative agreement resolved such issues as residency, wages, grievance procedure (discipline), compensatory time off, insurance costs, duration (contract to expire April 20, 2013), vacation increments and sick-leave vacation accrual, uniform compensation, EMT-B pay, two pending grievances relating to holiday staffing (to be arbitrated), and all other proposals which had been agreed between the parties.

On or about September 23, 2009, Union Counsel and Panel Member Kevin Camden, Esq., notified the Village's Panel Member James Baird that the Union had voted to reject the tentative agreement and, instead, refer this matter back to the arbitration panel for a full hearing. Amazingly, the vote was 22 against and 6 in favor of the tentative agreement (R. 10). The Union maintains that this is significant, as a great majority of the bargaining unit rejected the tentative agreement, even though the result may eventually mandate that a number of police officers (seven), who currently reside in Indiana, to move to Illinois. According to the Union, the two main items – the “800-pound gorilla in the room – are residency and compensatory time off (R. 10). The bargaining unit's perception is that the Village is bluffing with respect to striking or changing the existing residency. (R. 10).

On or about October 14, 2009, the Village filed a *Motion to Bifurcate the Arbitration Hearing and Issue an Order to Show Cause Why the Tentative Agreement Should Not be Controlling* (hereinafter “Motion”). On October 19, 2009, the IBT, through Counsel, filed a response opposing the granting of such a motion.

On October 20, 2009, the following decision on the motion was entered:

The Administration advances the better argument regarding its *Motion* to bifurcate the October 30th hearing. Not only did the parties reach a tentative agreement on all outstanding issues, including the important and critical issues of residency and compensatory time, but it reached a tentative agreement with full participation of the Neutral Chairman. Accordingly, the October 30th hearing is limited to a consideration regarding why the tentative agreement should not be credited by the Arbitration Panel. Evidence at the October 30th hearing will be limited to the circumstances surrounding the parties' tentative agreement and its subsequent rejection by the Union.

Having entered the above decision, a hearing was held on October 30, 2009, at the Village Hall in South Holland, IL. The parties appeared through their representatives and entered exhibits and testimony. The record was closed that same day after the parties closed by making oral arguments. A transcript was produced by Marianne Gustavson, CSR, on November 16, 2009, and made available to the parties.

II. DISCUSSION

A. **Background – the effect of a tentative agreement in interest arbitration**

In a prior interest arbitration I made it clear that a tentative agreement reached between the parties presumptively should be granted “great” or “serious” weight, unless certain mitigating factors can be shown by the party rejecting the tentative agreement, such as a mistake in calculation. *City of Waukegan & IAFF Local 473* (Hill, March 2001). The Union places significant reliance on *Waukegan* in asserting the parties should proceed to a full hearing on the rejected contract. The Administration also relies on *Waukegan* in asserting that the South Holland tentative agreement should be accorded significant weight.

In addition to *Waukegan, supra*, the City submitted a number of arbitration decisions at the hearing in support of its position that the parties’ tentative agreement should be accorded significant or “super” weight in this interest arbitration: *Village of Bensenville & MAPB (Police), Chapter 165*, S-MA-05-104 (Goldstein, 2005); *County of Ogle and Ogle County Sheriff & IFOP*, S-MA-03-051, et seq. (Goldstein, 2005); and *Village of Deerfield & ILFOP*, S-MA-07-148 (Briggs, 2009). The Police argue that those decisions do not stand for such a sweeping proposition regarding tentative agreements. Rather, like all decisions, they are correctly understood in relation to their facts.

The cases of *Waterloo and Illinois FOP Labor Council, ISLRB*, S-MA-97-198 (Perkovich, November 1999); *Oak Brook and Teamsters Local 714, ISLRB*, S-MA-96-73 (Benn, August 1996); and *Peru and Illinois FOP Labor Council, ISLRB* S-MA-93-153 (Berman, March 1995), are also especially relevant.

In the *Peru* decision, *supra*, Arbitrator Herb Berman did not find that the facts of the dispute warranted ascribing importance to the tentative agreement, but nonetheless held that “[a] tentative agreement may be considered, but it is not dispositive. The weight to be given a tentative agreement necessarily varies with circumstances, but it does not have the same weight as the facts set out in Section 14(g).” *Id.* at 18. In the *Oak Brook* decision, *supra*, Arbitrator Edwin Benn properly accorded a rejected TA weight. The fact that the tentative agreement was not ratified by the union merely mitigated against the employer’s burden of proof. In Arbitrator Benn’s view: “the parties’ well-framed arguments which are supported by authority serve to negate each other – the Village argues that the Union’s bargaining team agreed; the Union argues that the Village must demonstrate why a change in the *status quo* is required.” *Id.* at 5. Finally, in *Waterloo, supra*, Arbitrator Perkovich did not reject the importance of tentative agreements. He simply remarked that the tentative agreement was not relevant in that case, because “there is no evidence in this record that the Union acted for this purpose [to seek more than it agreed to] or in some other fashion indicative of bad faith.” *Id.* at 3.

Arbitrator Peter Meyers, in *County of Sangamon*, S-MA-97-54 at 6-7 (February 12, 1999), recognized the inherent paradox that would be created if one relied on a tentative agreement as evidence of the hypothetical agreement that the parties would have reached if left to their own devices:

Tentative agreements reached during the course of collective bargaining sessions are just what their name suggests, tentative. A tentative agreement on an issue has been reached by the parties' bargaining representatives does not represent the final step in the collective bargaining process; such an agreement instead is more of an intermediate step. For a tentative agreement to acquire any binding contractual effect, it generally must be presented to the parties themselves, ratified, and ultimately executed before it may be imposed as binding upon the parties' relationship.

Arbitrator Meyers went on to assert that tentative agreements cannot be given weight in a subsequent proceeding:

. . . [T]he tentative agreements cannot be given great weight, or even any weight at all, because they do not necessarily represent what the parties would have agreed to if they had successfully negotiated a complete collective bargaining agreement. The so-called "busted TA's" therefore will not be considered in the resolution of the impasse issues presented in the proceeding.

Arbitrator Meyers' blanket position does not reflect what I believe to be the better weight of arbitral authority. In *Village of Schaumberg and Schaumberg FOP Lodge No. 71*, S-MA-93-155 (Fleischli, September 1994), Arbitrator George Fleischli held that in certain circumstances tentative agreements may be relevant in assessing the reasonableness of a party's offer. In this context, the inquiry focuses on what the surrounding facts tell about the reasons for a party's rejection of a tentative agreement. His words are instructive in this proceeding:

It would be clearly inappropriate, under the law, to treat the terms of the tentative agreement as controlling. As the Union points out, both parties understood that the terms of that agreement were tentative in the sense that it was subject to ratification by both parties. However, the Village does not argue that the terms of the tentative agreement should be treated as controlling herein. Instead, it argues that they should be given great weight.

* * *

In dealing with this aspect of the dispute, a balance must be struck. On the one hand, it is important that the authority of the parties' collective bargaining team not be unnecessarily undermined. Specifically, in the case of the Union, its bargaining team ought not to be discouraged from exercising leadership. Some risk taking must occur on both sides, if voluntary collective bargaining is to work and arbitration avoided, where possible. Clearly, the Union's membership had the legal right to reject the proposed settlement.

However, the Union's membership (and the Village board) must understand that, while it is easy to second guess their bargaining teams, whenever a tentative agreement is rejected, it undermines their authority and ability to achieve voluntary settlements.

On the other hand, serious consideration should be given to the stated or apparent reasons for either party's rejection of a tentative agreement. **If, for example the evidence were to show that there was a significant misunderstanding as to the terms or implications of the settlement, those terms ought not to be considered persuasive. Under those circumstances, there would be, in effect, no tentative agreement. However, if the terms are rejected simply because of a belief that it might have been possible to "do a little better," the terms of the tentative agreement should be viewed as a valid indication of what the parties' own representatives viewed as a valid indication of what the parties' own representatives considered to be reasonable and given some weight in the deliberations.**

Id. at 33-34 (emphasis supplied). Arbitrator Fleischli subscribed to the view that interest arbitration is merely a continuation of the bargaining process, and, therefore, that "the function of the arbitrator should be to try and approximate the agreement the parties would have or should have reached themselves, knowing that either party could force the impasse into an interest arbitration proceeding." *Id.* at 34.

In *Waukegan* I ruled that Arbitrator Fleischli made the better argument regarding the weight to be accorded tentative agreements. Like Mr. Fleischli, I concluded that an interest Arbitrator should strive to award a position the parties would have reached if both parties were left to their own devices, including, but not limited to, a strike. See, Marvin Hill and Emily Delacenserie, *Interest Arbitration Criteria in Fact-Finding & Arbitration, Evidentiary & Substantive Consideration*, 74 MARQ. L. REV. 399 (1991)(herein "Hill & Delacenserie"). A tentative agreement indicates what the parties, or their duly-appointed representatives, *thought* was a result otherwise conducive to their interests. They are the insiders and presumptively know the environment and numbers better than any neutral. While certainly not dispositive (nor "*res judicata*") of a specified result in an interest arbitration, a party would be hard-pressed to argue that a tentative agreement should be ignored by an arbitrator. It is from this prospective, as outlined by Arbitrator Fleischli above, that the parties' final offers were analyzed in *Waukegan*.

Especially significant here is the decision of Arbitrator Elliott Goldstein in *County of Ogle, supra*. In that case Arbitrator Goldstein had this to say regarding the rejection of three (3) tentative agreements by the County Board:

The Union reasons that the basic principle in Illinois and in those other states with similar provisions for third party resolution of interest disputes is that the interest arbitrator's "core commission" is to "approximate the bargain" that the parties would have hammered out in good faith negotiations in a "strike driven" process.

What interest arbitrators do is to try to guess what a voluntary mutual agreement would contain, guided by the 14(h) factors. The “best evidence” of what that bargain would have been in the tentative agreements of the actual bargaining teams in this case, even if one party or the other (here, the Employer) finally rejects the negotiated “deal” during the statutory approval process, as was the case here, the Union insists. *Goldstein* at 11-12.

* * *

A tentative agreement was reached between experienced negotiators for both sides, I am thus persuaded, and the only intervening event that altered the course of ratification was a changing of the political guard in Ogle County. The employees and the Union should not be subject to the winds of politics – the County seat authorized negotiators to sit down with the Union and reach an agreement which they did. That agreement should be enforced, absent very strong facts dictating some other conclusion.

To hold otherwise would again open the door to what would verge on bad faith bargaining, I suggest. It is not enough to say that the parties will “review the entire deal” at the acceptance/rejection stage provided for under the Act. What is contemplated in this statutorily driven bargaining is that the bargainers be authorized to “make a deal” on all the issues and that deal, at minimum, has to be considered some evidence of what a freely struck deal would be, I conclude. To hold otherwise is inconsistent with the “core purpose” or commission under which I work to find that the tentative agreements are important evidence, to be considered as I try to find the closest equivalent of the bargain that would have been achieved through unilateral negotiations, if the process had not broken down, I again stress. *Goldstein* at 53.

Arbitrator Goldstein finished by reiterating the importance of a tentative agreement in ascertaining where the parties would land absent interest arbitration:

Yet, if the interest arbitrator’s role is to find the closest approximation of what the parties would bargain in a strike-driven impasse resolution setting, what better way to do that than to look with great care at what the parties’ duly authorized negotiating teams actually bargained, I am again constrained to point out. Given the Act’s impasse resolution structure, culminating in interest arbitration as the method to “simulate a bilateral negotiated agreement,” I am convinced that the strong presumption must be that the tentative agreements under review in this case must be given great weight, as the FOP has argued. *Goldstein* at 53-54.

Significantly, Arbitrator Goldstein found another factor favored the Union’s claim that the tentative agreements must be enforced – “there clearly was a *quid pro quo* for the Employer’s promise in all the tentative agreements that it would pay 50% of the retirees’ single health insurance premiums.” *Goldstein* at 54. Arbitrator Goldstein concluded that great and controlling weight should be accorded to the tentative agreements “in this particular case” (his words). *Goldstein* at 55.

In his 2002 decision in *City of Chicago*, Arbitrator Steven Briggs summed the positions of many Illinois interest arbitrators who had considered the issue of the weight to be accorded a tentative agreement:

In the relatively short history of Illinois public sector interest arbitration there have been a handful of cases where a tentative agreement was negotiated by the parties' representatives, recommended for ratification by the union bargaining team, then rejected by the union membership. The interest arbitrators to whom those cases were presented had to decide what weight, if any, should be given to the terms of the negotiated settlements. The parties to these proceedings cited each of those cases (citations omitted) and quoted selectively from them in their post hearing briefs. In the interest of brevity, the undersigned Arbitrator will not repeat those quotes here. Generally, Illinois interest arbitrators have concluded that the weight to be afforded a rejected tentative agreement depends upon:

- (1) the circumstances surrounding the negotiations that led to it (Was it negotiated in good faith by informed representatives?);
- (2) the nature of the tentative agreement itself (Is it an accurate reflection of the accord the parties would have reached in a normal strike-driven process? Is it based upon miscalculation or other error?); and
- (3) the reasons for the rejection (Legitimate concern over financial and other issues? A simply, unjustified desire for more? Internal union politics?).

B. The tentative agreement in this case is especially receptive to according it great and controlling weight

In the instant case there is no evidence that the representatives from either side were other than informed, responsible representatives. In fact, there is every reason to conclude that they were exceedingly informed and exceedingly responsible. Furthermore, to the extent they were not sure about an issue or some data, they reached out to other members, including bargaining-unit members that congregated in the parking lot, as the bargaining unit did in this case.¹ There is no

¹ An exchange makes this point:

Q. [By Mr. Baird]: Now, prior to the time this final agreement was reached, did I observe correctly that members of your bargaining team had the opportunity to talk with members of the bargaining unit who had gathered out in the driveway at various times?

A. [By Mr. Camden]: Yes. Without making yourself a witness, your observation is correct. And frankly it was done at Mr. Garcia's insistence. Because some of the bargaining unit members that were present did, in fact, reside in Indiana, I wanted to align a concern for the larger bargaining unit that it wasn't only an Indiana/non-Indiana issue. And I think for at least 30 minutes but more likely 60 or longer those three individuals were not only on the phone out in the parking lot behind us but there were officers coming through shift change and breaks and other things. So there was a significant amount of

miscalculation of the sort present in *Waukegan* in South Holland. Consistent with Arbitrator Goldstein's analysis, apparently some people changed their minds, and changing of your mind is not sufficient under existing precedents to toss a tentative agreement.

There is more: The cited case authority involves tentative agreements reached by bargaining teams. In South Holland there is something even greater, what can reasonably be termed a "super tentative agreement." South Holland's tentative agreement was reached with the undersigned Arbitrator and the members of the panel, Messrs. Baird and Camden, participating in the accord.² And while it cannot be asserted that the Union negotiator/panel member gave up the right of rejection, that right is strongly circumscribed by existing precedent *and the position of the parties as members of the arbitration panel*. As pointed out by Counsel for the Administration:

Here we are not taking the position that the deal was irrevocable. And we acknowledge that had there been mistake of fact, error of calculation, and one or two other considerations, there may be reason to revisit this tentative agreement, but they don't exist here. Instead, this super tentative agreement should be accorded even greater weight than a regular tentative agreement because it was a part of the arbitration process. (R. 77).

The Union came to the table with the goals of keeping residency in Indiana, retaining the comp time language, increasing wages, and getting discipline out of the Board of Fire and Police Commission and over to a neutral arbitrator. Relative to the external pool, the Board of Fire and Police Commissioners is the standard disciplinary resolution mechanism. The Village attempted to get help on comp time and, at the same time, obtain some certainty down the road and wage stability in a precarious economy (by retaining the current CPI-based wage formula which is internally

discussion with the bargaining unit as members came through.

Q. You mentioned a point that I just want to make clear. In addition to face-to-face discussions, there were telephone calls made from members of the bargaining team to members of the bargaining unit?

A. While I was not a party to those calls, that was the representation. That is further my understanding.

Q. And the purpose of all that was to see if you could get a consensus behind the tentative – the matters you were about to tentatively agree, am I correct?

A. Yes. Having familiarity with the weight of tentative agreements, it was a great concern of mine that we were not going to execute a tentative agreement if the greater bargaining unit was opposed to it. I was hoping to avoid a circumstance where a tentative agreement was rejected by the bargaining unit at large.

Q. And when this tentative agreement was reached, to the best of your knowledge at the time, you were confident that this agreement had the support of the majority of the bargaining unit?

A. Based upon the representations from the bargaining team to me, that is correct. (R. 37).

² At the time I arrived at the hearing the parties had succeeded in narrowing issues but still had a few key issues to be resolved. With the permission of the two panel members representing the partisans, the undersigned Chairman became actively involved and assisted the negotiating teams to each make compromises to reach a tentative agreement. From the Village's standpoint, a major compromise was to retain the status quo on residency, which would allow a number of officers to continue to live in Indiana, an untenable position for some "higher ups" who believe that police officers should be living within the State of Illinois. Significantly, under Illinois law, 5 ILCS 315(i), I would have been precluded from awarding the Union's status quo position. Retention of this item was significant for the Union, in my opinion.

comparable to other South Holland units), all at a time when the CPI had dipped precipitously and where the economy was in decline. A compromise was eventually reached. The Administration received two major items: One, it received help in the area of sick leave/vacation accrual (which Union counsel acknowledged would only apply to a very limited number of people and was not of great impact). The other item the Village received was improvement in compensatory time off, but not nearly what the Administration wanted. On several occasions the Village modified its position on comp time to ask for less in order to obtain an agreement. While it was a “slam dunk” for the Village to obtain an additional percentage insurance contribution for bargaining unit members, it agreed to retain the status quo.

Addressing “duration,” the City came to the table wanting a four-year collective bargaining agreement, while the Union wanted a three-year deal. At one point a meeting of the minds produced a four-year labor agreement. Late in the process the Union, not the Village, sought a fifth year, the result of mediation and prodding by the neutral. (R. 43). The result of this was to tie up insurance for five years, undoubtedly the reason the Union bought into the idea. As conceded by counsel, relative to the comparable pool, the existing dollar contributions are favorable relative to the benchmark jurisdictions. (R. 43). The downside for the Village, of course, was freezing the premium contributions. Five years from now 15 percent will look really small relative to the comparables. The Union’s representatives thought so much of the deal that it added a fifth year! ³ (R. 42).

There is no question that the bargain struck by the parties’ negotiators, with my assistance, was the result of a deliberate and consciousness resolve by the representatives to conclude a successor collective bargaining agreement. The resulting tentative agreement should not be ignored because now it is somehow improperly valued by the bargaining unit. This tentative agreement, whether characterized as “super” or otherwise, must and will be accorded great weight by this Arbitrator in this proceeding. As far as I can tell, the only intervening event between execution of the tentative agreement and the ratification vote is that the Union now desires a better deal. This “better deal” criterion has been rejected by numerous neutrals. In the words of Arbitrator Goldstein in the *Bensenville* case, *supra*, “The Village sent authorized negotiators to sit down with the Union and reach an agreement, which they did. That agreement should be enforced, absent any strong facts dictating some other conclusion, and I so rule.” *Goldstein* at 57.

³ The membership, by an overwhelming majority, did not see the wisdom of the insurance deal. As articulated by Mr. Camden: “While we understand the argument with respect to insurance costs, we think we gave up too much in earning power by way of loss of wages and that the fourth and particularly that fifth year is a big problem for us.” (R. 18). “The problem you have is the tentative agreement is asking you to uphold a wage scheme, a wage formula, that keeps the wages of this bargaining unit depressed, significantly depressed, relative to the external comparable pool.” (R. 19).

The record indicates that the May 1, 2008, starting salary will move from \$47,068 to \$48,525. Comparing South Holland’s compensation level, South Holland is the fourth highest starting salary of the nine bench-mark jurisdictions (R. 53). After five years, South Holland becomes the fifth highest salary of the nine. *Id.* And after ten years, South Holland is seventh of nine. *Id.*

I do not see South Holland’s salary situation as bleak as argued by the Union, especially when paramedic pay is factored in the matrix.

C. The Union's evidence does not begin to overcome the great weight accorded the parties' tentative agreement

The Union tendered several hundred pages of evidence, data and documents in support of its position that the tentative agreement should not be enforced on the merits. While impressive in its volume, the Union's evidence does not overcome the great weight to be accorded the tentative agreement in this case. Indeed, if anything, the Union's evidence on the merits points out the equity of the compromises reached between the parties with the participation and assistance from all three panel members resulting in the parties' tentative agreement. For example, the Union's evidence reveals that most of the agreed-upon communities do not allow bargaining unit members to reside outside the State of Illinois, while the tentative agreement does so. Also, most of the parties' agreed-upon comparables provide higher premium payments for insurance than are provided for in the tentative agreement, which, again, maintains the status quo for the next five years. Arguably, this is a significant benefit to the Union which it would require a great burden in hearing to receive. Comparable data also clearly demonstrates that the tentative agreement on submitting all matters to grievance arbitration, rather than the statutory mechanism of the Board of Fire and Police Commission, is a significant departure from what other jurisdictions do and is another significant achievement for the Union vis-à-vis the tentative agreement.

Furthermore, with respect to compensatory time off provisions, the Union's evidence of external comparability is mixed, at best. Finally, on the key issue of wages, while bargaining unit members appear to be paid a bit lower at certain steps, they are being paid a bit higher at others than their counterparts in the comparable communities, and it is clear their pay schedule – taken as a whole – is comparable to the other, agreed-upon jurisdictions. While neither the best or the worst, it is in this Arbitrator's opinion that the current wage system keeps the bargaining unit within the range of comparable jurisdictions' salaries. Moreover, the wage formula contained in the tentative agreement is the same formula contained in the Village's other union contracts, thus providing the added advantage of internal comparability.

In summary, based upon the Union's proffered evidence, there does not exist the kind of strong facts which would dictate a result to be reached other than that contained in the tentative agreement. I see no reason, consequently, to require the Village to proceed with its case-in-chief in this proceeding. Instead, for the above reasons, the following decision is issued:

III. AWARD

This tentative agreement, whether characterized as “super” or otherwise, is accorded great weight in this proceeding, and the Union’s evidence does not overcome this great weight. Consequently, I hereby order that the parties’ tentative agreement will constitute the parties’ agreement for its terms, as the Union’s presentation on the merits, while illuminating on multiple points, does not persuade the undersigned Arbitrator that the tentative agreement is based upon erroneous facts or mutual mistake that would require further hearing on the merits. If the Village decides to reject the tentative agreement, then I will declare there is no meeting of the minds and the hearing will reconvene on its merits. Otherwise, the voluntary agreement entered into by the parties’ negotiating teams will constitute the award in this matter.

Dated this 23rd day of November, 2009,
at DeKalb, IL 60115

Marvin Hill, Jr.,
Arbitrator

The record will reflect that Mr. Baird concurred with the award while Mr. Camden dissented.