

BEFORE THE ARBITRATOR

In the Matter of an Interest Arbitration Between

CITY OF DECATUR

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL #505

FMCS Case No. 100707-04036-A

Appearances:

Clark, Baird, Smith, LLP, by Ms. Jill D. Leka and Mr. Benjamin E. Gehrt, on behalf of the City.

Cornfield & Feldman, by Mr. J. Dale Berry and Mr. Andrew B. Epstein, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein “City” and “Union,” were signatories to a collective bargaining agreement which expired on April 30, 2010. The parties engaged in negotiations over a successor agreement which resulted in reaching agreement on all issues except for language relating to possible layoffs, as they agreed to 2% wage increases on May 1, 2010, May 1, 2011, and May 1, 2012, along with higher employee health insurance contributions

Pursuant to Section 14 of the Illinois Public Labor Relations Act, herein “Act,” the parties selected Amedeo Greco as the neutral member of the tri-member arbitration panel. The other two panel members are Adam Ruderman who was selected by the Union and Wendy Morthland who was selected by the City. A hearing was held in Decatur, Illinois, on June 13 and November 16, 2011, and February 10, 2012, at which time it was transcribed. The Union on February 10, 2012, amended its Final Offer over the City’s objection after the General Counsel

for the Illinois Labor Relations Board issued two declaratory rulings stating that the Union's prior two Final Offers included permissive subjects of bargaining (Joint Exhibits 6 and 11). The parties subsequently filed briefs which were received by May 16, 2012.

BACKGROUND

This dispute arises out of the City's severe fiscal and budgetary crisis in 2009-2011 which was caused by the county's worst economic crisis since the Great Depression.

The City for fiscal year 2009 saw its General Fund Balance drop from about \$4,500,000 to about \$2,800,000 because of declining revenues and it had a projected revenue shortfall of \$5,000,000. The City therefore stopped filling vacant positions; limited its discretionary spending as much as possible; and took many other steps to cut costs.

The City for the 2010 fiscal year projected a \$5,000,000 drop in revenues and cut about seven vacant positions from the budget; implemented a hiring freeze; cut about \$875,000 in operating expenses; transferred about \$1,040,000 from several funds to pay for increased pension costs; and made a \$2,000,000 inter-fund loan to ward off a projected negative fund balance of \$600,000. The City also offered a voluntary severance plan which was accepted by about 41 City employees over the next few years, thereby saving the City about \$1,400,000.

The City for fiscal year 2011 reduced its expenses by \$500,000 in part by obtaining about \$150,000 in contract concessions from AFSCME Local 268 and the Decatur Police Benevolent and Protective Association, herein "PBPA," who respectively represents the City's general service workers and police officers. The PBPA agreed to defer a one percent wage increase for a year and AFSCME Local 268 agreed to reduce one percent of a three percent wage increase in exchange for an additional year of the contract with a one percent wage increase. Neither union asked for, or received, a guarantee that there would not be any layoffs of their members.

The City for the 2011 fiscal year also laid off seven AFSCME workers;¹ eliminated several management positions; restructured some of its operations; froze salaries for all non-represented employees; reduced all departmental budgets by 10%; and eliminated or reduced many services.

In order to help reduce its Fire Department budget, the City in March 2010 unilaterally implemented a brownout policy which provides for taking fire engines out of service and reassigning personnel if certain manpower levels are not met which otherwise would require the payment of overtime if those engines were kept in service.² The City has saved between \$600,000 - \$700,000 through brownouts which have occurred on about 22% of the calendar days.

Because of its cost-cutting measures, the City now has about 60 fewer employees than it had in 2008 (City Exhibit 53), and the City has managed to improve its fiscal situation to the point of where it projects that it will have a General Fund balance of about \$4,200,000 in fiscal year 2012.

City Manager Ryan McCrady throughout this time held public meetings to explain the City's fiscal problems and he also met separately with the local union leadership and City employees because he believed them to be partners "in trying to solve the problem."

The parties negotiated over a successor agreement with the Union stating on February 22, 2010, that the then-existing layoff language "was not an issue" and that the Union was not trying to change it. The Union subsequently stated on July 29, 2010, that it wanted a no layoff clause in

¹ Six of these employees subsequently found other jobs with the City.

² The City delayed implementing the brownouts for several months because of discussions it was having with the Union.

exchange for the City's proposal for a one year wage freeze which would have saved the City about \$70,000. The City refused to agree to a layoff clause because it feared that the state government might retain some local dollars which are shared with local governments, thereby requiring the City to cut its expenses even more. It therefore countered with a one-year wage freeze and increased insurance premium contributions, which was rejected.

The City currently has two more budgeted firefighter positions than it had in 2008, and the City during the parties' 33 year bargaining history has never laid off any firefighters.

FINAL OFFERS

The Union's Final Offer seeks to add the following language to Article 6 of the agreement, entitled "Reduction In Personnel":

Prior to implementing any involuntary layoff of any active firefighter(s), the City shall provide at least 60 days written notice to the Union together with a statement of the reasons supporting its proposed action. When the proposed decision to lay off is motivated primarily by economic constraints or other reasons affecting working conditions that are amendable to bargaining, the Union may require the City to negotiate as to its proposed alternatives to the proposed layoff by serving a demand to bargain within 10 days of receiving the City's notice. Negotiations as to such alternatives may include proposals that address or alleviate the economic conditions precipitating the layoffs, including mutually agreed modifications of existing wage and benefits provided to members of the bargaining unit, other labor costs or early retirements to avoid or limit the scope of the layoff. Negotiations shall continue for a period of 45 days or longer if the parties mutually agree to extend negotiations.

If no agreement is reached, either party may invoke interest arbitration in accordance with Section 14 of the Act and the time limits of the Act shall be strictly adhered to unless the parties mutually agree otherwise.

After the conclusion of the 45 day negotiation period or any agreed extension, nothing in this Section shall limit the City's decision to implement its proposed layoffs.

The City's Final Offer seeks to add the following language to Article 6 of the agreement:

Section 4. Prior to implementing any involuntary reduction in force or reduction in rank of any active firefighter(s), the City shall provide at least 30 days written notice to the Union. The City at its discretion, shall determine whether furloughs are necessary. Although not limited to the following, the City may furlough/reduce in rank any employee, whenever such action is made necessary by reason of a shortage of work or funds, the abolition of a position, or because of changes in the organizational structure

POSITIONS OF THE PARTIES

The Union states that its offer should be adopted because it is “essentially a ‘good practice’ procedure that actually arises from the same principles underlying the approach applied by the City Manager” in dealing with the City’s unions which reflected “the City’s duty to bargain under the Act,” and that the Union merely seeks to codify that practice here. The Union also claims that its proposal protects “the interests and welfare of the public, while addressing the City’s financial concerns” because it would enable the Union under the threat of negotiations to propose “creative ideas to maintain fire service levels during difficult times” and because it requires the City to publicly disclose its reasons for implementing possible layoffs.

The Union adds that its proposal is “highly similar” to language found in some of the comparables; that its proposal “at most, minimally restrains” the City’s authority, and that the panel “should not accept the City’s red-herring argument that the Union’s proposal constitutes a breakthrough” which changes the status quo. The Union adds that the City wrongly seeks “the Union’s waiver of its Section 7 rights to engage in decisional bargaining over a mandatory bargaining subject mid-term,” and that its proposal “has no direct cost to the City” and that the arbitration panel can amend it because it constitutes a non-economic issue.

The City contends that the Union is proposing a major change and that its “breakthrough proposal is not justified or supported by any quid pro quo” because there is no substantial and compelling need for it, and because the City has not resisted attempts to bargain changes in the status quo as shown by its own offer. It further states that the external and internal comparables support its offer; that the interests and welfare of the public support it because the Union’s offer would generate delay and uncertainty; and because the public is “already well-informed and is an active voice in the City’s deliberate process.”

In addition, the City states that the statutory factor relating to overall compensation and stability of employment favors its proposal because the firefighters here “consistently rank in the top 50% of the comparable communities” and because they have “continuity and stability of employment” since none have ever been laid off in the parties’ 33 year bargaining history. The City also maintains that the Union’s proposal cannot be modified by the panel because it is economic in nature since the City “is only required to bargain over economically motivated layoffs” and that even assuming arguendo that it is not economic, the panel nevertheless should not modify it because “Subtle differences” in contract language may convert the proposal into a permissible subject of bargaining.

DISCUSSION

The first issue to be addressed here is whether the Union’s proposal is non-economic and therefore can be amended by the arbitration panel with the Union contending, and the City denying, that is the case.

Since the Union acknowledges that bargaining over its proposal would only occur “if there was an economically motivated layoff and the City says we’re X amount short on the

budget,”³ its proposal has an economic impact. For as the City correctly points out: “If the only time that the City can be required to bargain over layoffs is when the layoff is economically motivated, then, by extension, the Union’s proposal to limit the City’s layoff rights is an inherently economic issue.” The Union’s proposal also prohibits the City from laying off firefighters for at least sixty days, thereby requiring the City to incur the costs of carrying firefighters during that period at an estimated cost of \$7,743 per firefighter which also is an economic item (City Exhibit 1).

I therefore find that the Union’s proposal is economic in nature and cannot be amended.⁴

Moreover, even if the Union’s proposal is not economic, it is unwise for the panel to unilaterally amend it at this late date without prior input from the parties in order to avoid any unforeseen consequences. For as Arbitrator Robert Perkovich stated in refusing to create alternative language, great care must be taken to avoid risking that “the solution crafted is without a factual foundation and indeed, perhaps unwise or harmful to the parties, their bargaining process, and potentially the public.”⁵

The statutory factors which must be considered here are set forth in 5 ILL Comp. Stat. 315/14 § (g) (2006), and state:

1. The lawful authority of the employer.
2. Stipulations of the parties.

³ Transcript of February 10, 2012, hearing, herein “Transcript,” p. 20.

⁴ See Village of Elk Grove, S-MA-93-164, (1993), where Arbitrator Harvey Nathan ruled that a proposal regarding minimum staffing levels was economic because it impacted the number of employees employed, which is the same situation here.

⁵ City of Decatur, S-MA-93-212, (Perkovich, 1994).

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 proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (A) In the 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 of private employment.

Statutory factors 1, 2, 5 and 7 above relating to the lawful authority of the employer; the stipulation of the parties; the CPI; and changes during the pendency of this proceeding are not in issue.

As for factor 4 relating to external comparability in the public sector,⁶ the parties have agreed for the limited purpose of this proceeding and subject to their right to submit additional evidence from other communities, that the following 16 communities constitute the external

⁶ Comparability in private employment in other communities is not in issue.

comparables pursuant to a prior interest arbitration award issued by Arbitrator Marion Hill in 2008: Alton, Bloomington, Champaign, Danville, DeKalb, Galesburg, Granite City, Kankakee, Moline, Normal, Pekin, Peoria, Quincy, Rockford, Rock Island and Springfield.⁷

The Union acknowledges that “no Illinois firefighter Local currently has layoff language replicating the procedure which the Union has proposed . . .”⁸ In addition, none of the external comparables provide for interest arbitration if employees are laid off and only three – Champaign, Kankakee and Peoria – provide for prior notice before proposed layoffs. Furthermore, none of these comparables have a 60-day notice provision, with only one providing for a 30-day notice.

The Union points out that many of these comparables contain various restrictions on an employer’s ability to lay off such as minimum staffing levels or requirements that layoffs can only occur when there is a lack of work, or lack of funds, or other legitimate reasons. If the Union’s proposal here were similar to the ones there, it would be supported by those external comparables.

But that is not what the Union has proposed. It, instead, has proposed mid-term bargaining and possible interest arbitration for possible layoffs which is not supported by one external comparable or any other community in the State of Illinois.

The external comparables therefore support the City’s offer.

⁷ City of Decatur, IL and IAFF Local 505, FMCS Case No. 07-0302-02060-A (Hill, 2008).

⁸ Union Brief, p. 18.

As for internal comparability, neither the AFSCME nor the PBPA contract provides for interest arbitration in case of layoffs. Furthermore, the PBPA contract gives the City broad authority to lay off and the AFSCME contract, (City Exhibit 30), is similar to the language in the City's proposal because it states in pertinent part:

The City at its discretion, shall determine whether furloughs are necessary. Although not limited to the following, the City may furlough any employee, whenever such action is made necessary by reason of a shortage of work or funds, the abolition of a position, or because of changes in organizational structure. (City Exhibit 30)

...

The Union argues the City's language is different than the AFSCME contract because the "City seeks the right to unilaterally terminate firefighters simply by providing only notice . . .," with no opportunity for the Union to engage in bargaining.

In fact, the City's proposal does not propose to "terminate" any firefighters, but rather, only covers furloughs which are temporary separations from employment. Secondly, any claimed distinctions between the AFSCME language and the City's proposal here are distinctions without a meaningful difference because the AFSCME contract does not provide for the interest-arbitration mechanism proposed here.

The internal comparables thus favor the City.

Statutory factor 6 relating to "the continuity and stability of employment" also supports the City's Final Offer because no firefighters have been laid off for at least the last 33 years and because the City recently has demonstrated that it will not lay off firefighters unless that is an absolute last resort.

Next to be considered is the statutory factor relating to which proposal best serves the “interests and welfare of the public.”

The Union maintains that its proposal serves the public because it allows for negotiations and “creative ideas to maintain fire service levels during difficult times,” and because it requires the City to disclose its reasons for implementing layoffs, thereby enabling the public to know of the City’s financial condition; the City’s treatment of its workforce; and the City’s fiscal priorities. The Union also points to the City’s recent brownouts and claims: “Unannounced brownouts, in effect, are the same as the City’s proposal to lay off firefighters without detailing its reasons for doing so.”

But there was no secret about why the City implemented brownouts. It needed to save money to help meet its fiscal crisis and brownouts did that by saving the City about \$600,000 - \$700,000 in overtime costs without any harm to public safety. The brownouts therefore helped alleviate the need for firefighter layoffs, which was a good thing.

And, while the Union’s proposal could foster “creative ideas” over how layoffs might be avoided and help insure that the public would know about any City plans to lay off firefighters which is in the public interest, it also is true that that can occur without adopting the Union’s proposal since the record establishes many examples of where firefighter locals throughout the State of Illinois have done just that.

The City also correctly points out that the Union’s proposal will unnecessarily tie the City’s hands during a time of fiscal crisis when a speedy decision-making process is essential and when the City needs to know with certainty the legal ramifications of whatever actions it takes.

For the City under the Union's proposal faces a Hobson's Choice. It can either decide to unilaterally implement needed layoffs over the Union's objections after 60 days in order to save needed money but at the possible expense of having to pay back pay if an interest arbitrator overturns its decision or, it can retain those firefighters at considerable cost during the pendency of the arbitration proceeding to make sure no back pay is awarded. Since an interest-arbitration proceeding can take 6 – 12 months from start to finish as in the case here, the City throughout that time can be effectively prevented from taking needed action.

The City also is entitled to know before taking any such action what legal standard will be applied in such a proceeding. But here, the Union acknowledges that it is unknown how an interest arbitrator under its proposal will weigh all the Section 14 factors since there is no body of case law which spells out how an arbitrator will weigh and balance layoffs.⁹ Indeed, the Union acknowledges that “part of the reason for doing this is to create . . . some uncertainty on the part of both parties as to what would happen and that motivates settlement.”¹⁰

But uncertainty is the very last thing that is needed when it may cause paralysis on the City's part which can be costly to taxpayers or, alternatively, a decision to lay off which subsequently is deemed wrong by an arbitrator and which can be costly to taxpayers in the form of back pay.

Neither of these alternatives is in the public interest, which is why the statutory factor relating to the interests and welfare of the public support the City's offer.

⁹ Transcript p. 33.

¹⁰ Id., pp. 33-34.

As for other factors to be considered, it is axiomatic that a party proposing a change in an interest arbitration proceeding must establish there is a substantial and compelling need for the change; that its proposal reasonably addresses that need; and that a quid pro quo ordinarily must be offered in exchange for that change.¹¹

Both parties point to data from various communities in support of their respective positions as to why the Union's proposal is or is not needed.

Some of those communities - such as Alton, Bloomington, Champaign, Galesburg, Granite City, Moline, Normal, Quincy and Rock Island - were able to either limit or avoid layoffs without resorting to interest-arbitration, thereby supporting the City's claim that the Union's proposal is unnecessary.

The Union, in turn, has established that firefighters throughout the state have come up with innovative solutions and that they have engaged in concessionary bargaining in order to ward off layoffs, and that its proposal here is reasonably aimed at that goal. It points out that the City of Waukegan "has similar language which affords the union with a procedure to contest proposed cuts in shift-manning levels" which has worked well in the past. There, the parties agreed to three separate so-called "variance agreements" where the firefighters made numerous concessions and agreed to "silver spanner" furloughs whereby firefighters agreed not to be paid while on duty to respond to emergency calls and to wage freezes for two years in order to avoid

¹¹ See St. Clair County and Ill. FOP Labor Council, S-MA-99-660 (Finkin, 2000); University of Ill. at Springfield and Ill. FOP Labor Council, S-MA-00-282 (Perkovich, 2002); and Office of the States Attorney Appellate Prosecutor, FMCS No. 90-18199 (Greco, 1991).

15 layoffs in the face of an \$8,500,000 projected budget shortfall. The City of Springfield's firefighters also similarly worked with that employer to help avoid layoffs, and firefighters elsewhere were able to avoid layoffs after discussions.

The Union argues that its proposal is not a breakthrough and does not change the status quo because the City engaged in negotiations with AFSCME and the PBPA over possible budget cuts and layoffs as opposed to having mere discussions, and that City Manager Ryan McCrady acknowledged it was better to negotiate before the City carries out its plans.

But he also explained that while there was impact bargaining with AFSCME over the layoffs, "there was no requirement on anybody's part to negotiate this. So it was a discussion" regarding other possible concessions by the unions involved. Furthermore, while discussions and negotiations generally should occur before such decisions are made, it must be remembered such decisions are tentative in nature and that they always can be changed after a union provides input on how such layoffs can be avoided. Indeed, firefighters elsewhere have been able to either reduce or totally eliminate scheduled layoffs after such discussions or negotiations occurred without resorting to an interest-arbitration.

The City also has taken extraordinary steps to work with its three unions to minimize or avoid layoffs. That is why AFSCME and the PBPA agreed to concessions which saved the City about \$150,000, and that is why the City repeatedly met with the Union over possible

concessions but to no avail. And yet, despite being unable to reach any agreement with the Union, the City still did not lay off any firefighters. The parties also met and were able to resolve a difference regarding EMT-1's.¹²

The City thus rightly points out that the “public is already well-informed and is an active voice in the City’s deliberative process” since this record represents a textbook example of what a municipal employer should do in the face of a budget crisis. The City therefore did everything possible by holding a press conference and by sending a copy of its 2011 budget to all City employees, and by involving as many stakeholders as possible to resolve it which is why some City employees applauded City Manager McCrady when he told them that there might be layoffs. They thus appreciated his efforts to treat them fairly and to minimize layoffs while the City battled to dig itself out of its fiscal ditch, as he stated: “I’ve pulled just about every rabbit out of my hat that I could for - as far as short-term fixes go.”

This situation therefore is similar to the one addressed by Arbitrator George Larney in City of Champaign¹³ who ruled:

The Arbitrator is of the view that the Union’s offer is strictly anticipatory of what might occur with respect to the possibility of layoffs of firefighters without taking into account the extensive history of the last twenty (20) years in Champaign that there have not been any layoffs of firefighters. It would seem that in light of this historical record of firefighter employment that the layoff procedure as currently structured in the predecessor collective bargaining agreement(s) has been sufficiently adequate in protecting against the City instituting layoffs of firefighters for reasons that are either unjustified or indefensible . . . With respect

¹² The Union also earlier worked with the City by being partly responsible in bringing about a change in the City’s third party health administrator which resulted in about an \$875,994 cost savings to the City. See Hill Award, supra, p. 26.

¹³ Case No. S-MA-10-370 (2011).

to the current layoff procedure, there is not a hint based on past experience that the City would institute layoffs of firefighters without having the necessary justification to do so. (Emphasis in original)

Here too, as in City of Champaign, there has been an “extensive history” showing that the City has never laid off any firefighters for at least the last 33 years even as it faced the worst economic crisis since the Great Depression. The City also now has two more firefighters than it had in 2008 even though the City has about 60 fewer employees, thereby showing the City’s commitment to retain as many firefighters as possible. Arbitrator Larney’s finding in City of Champaign that “there is not a hint based on past experience that the City would institute layoffs of firefighters without having the necessary justification to do so” also is applicable here.

The Union states that it merely wants to be “a good faith partner” with the City in helping alleviate the City’s “possible verified financial hardship,” but “seeks to preserve its right to challenge the Employer’s decision to layoff, should the Union perceive that the City is using the threat of layoffs as a mere ‘shakedown tactic.’”

But again, the panel’s decision here must be based upon the facts in this record which establish that the City has been a “good faith partner” with all of its unions without the Union’s proposal. That is why there is no evidence – nary an iota nor a scintilla – showing that the City has ever tried to “shakedown” any of its unions. The Union’s proposal therefore is - again in Arbitrator Larney’s words - “strictly anticipatory” of something that never has happened in this bargaining relationship.

The Union claims that the City of Kewanee’s past experience represents another reason for why its proposal is needed. There, Arbitrator Harry Graham ruled that the city violated the contract when it laid off three firefighters because it did not adhere to the contractual

requirement that such layoffs had to be based upon “bona fide economic reasons.”¹⁴ The Union thus argues: “If the facts establish that the claims are not bona fide, as they were in Kewanee, the Union’s language offers a necessary shield against overreaching City administrators.”

While this point may be well taken for Kewanee and elsewhere, it is not true for this City administration which has taken extraordinary steps to avoid layoffs. In addition, if the Union wanted protection that layoffs would be based only on “bona fide economic reasons,” it could have proposed language to that effect without also proposing interest-arbitration. Furthermore, the City’s Final Offer gives the Union at least 30 days’ advance notice during which time the Union can present its “creative ideas” on how to maintain fire service levels and why layoffs should not occur.

The Union therefore has failed to prove that there is a substantial and compelling need for the change it seeks. When that is combined with the Union’s failure to offer any quid pro quo for its requested change, these other factors also support selection of the City’s offer.

The Union also claims that layoffs under Illinois law constitute mandatory subjects of bargaining; that the Act “contemplates a robust statutory right to negotiate mid-term as to reopeners and other subjects not covered by express contract language”; and that the City’s proposal is not “consonant” within prior case law and that it unlawfully seeks to waive the Union’s statutory right to bargain.

But Article 6 of the agreement already gives the City the right to furlough firefighters. It states in pertinent part:

¹⁴ IAFF Local 513 and the City of Kewanee, FMCS No. 041209-0954-A (Graham, 2004).

REDUCTION IN PERSONNEL

Section 1. If the classified fire service of the department is reduced, such reduction in numbers of employees and later reinstatement thereof shall be done in strict compliance with department seniority. The last employee certified shall be the first furloughed and the employee last furloughed shall be the first reinstated and furloughed employee shall be given preference in filling vacancies before resorting to eligibility lists of new employees. When a vacancy is to be filled, the eligible furloughed employee shall be given notice thereof by registered mail. Written application for reinstatement must be made within 15 days after such notification by registered mail.

Section 2. Following an overall reduction in force as specified in Section 1 of this Article, if it is necessary to reduce employees in rank to avoid furloughing additional employees or to properly man fire fighting facilities, said reduction shall be based on seniority within the position classification. The last employee certified to the affected position classification shall be the first employee reduced in rank and the last employee reduced in rank from a position classification shall be given first preference in filling vacancies in the position classification.

. . .

Accordingly, the Union in the past has bargained over layoffs and the language in Article 6 is the result of that bargain.

The Union now seeks to modify that bargain by placing limits on the City's right to furlough firefighters and to put in place an interest-arbitration procedure to resolve any disputes which may arise after negotiations have failed. While the Union certainly can seek a modification of that language under the Act, nothing in the City's proposal represents an unlawful waiver since the parties have bargained over this issue during their last round of negotiations and since this proceeding is the proper mechanism for determining which party's proposal should be adopted.

While it is unnecessary to respond to all of the comments made in fellow panel member Adam Ruderman's dissent, it is necessary to point out that the dissent errs in claiming on p. 4: "The Union's proposal, contrary to the Chairman's interpretation, is not aimed at "discussions" rather it is directed to "negotiations" which must occur before a decision."

In fact, the Award repeatedly recognizes that the Union's proposal deals with bargaining negotiations and not discussions. That is why p. 5 therein states that the Union's proposal would enable the Union "under the threat of negotiations" to make proposals and "to engage in decisional bargaining"; why p. 6 states that "bargaining over [the Union's] proposal would only occur" if there was an economically motivated layoff; why p. 9 states that the Union's proposal is aimed at "mid-term bargaining"; and why p. 18 states that the Union's proposal seeks to put "in place an interest-arbitration procedure to resolve any disputes which may arise after negotiations have failed."

CONCLUSION

In conclusion, the record establishes that the statutory factors relating to the external and internal comparables; the continuity and stability of employment; the interests and welfare of the public; and other factors all support the City's offer, while none support the Union's offer.

The City's Final Offer therefore should be adopted and be incorporated into the parties' agreement.

Accordingly, the panel issues the following

AWARD

The City's Final Offer is hereby adopted and it shall be incorporated into the parties' agreement.

Dated at Madison, Wisconsin, this 3rd day of August, 2012.

Amedeo Greco /s/

Amedeo Greco, Chair

CONCURRING OPINION

I concur with Arbitrator Greco's opinion, awarding the City's final proposal on the sole issue in dispute in this case: the layoff language in Article 6 of the collective bargaining agreement. The Union's proposal would have made a radical, unwarranted change to the *status quo* layoff language. In light of the City's history of proactively working with all of its unions, including the IAFF, to avoid layoffs whenever possible, the Union's proposal was a drastic solution in search of a problem. Notwithstanding the fact that the *status quo* language has already afforded the Union adequate protections against the possibility of layoffs, the City's proposal has gone a step farther and given the Union a new contractual right and protection against possible layoffs.

I am writing this concurring opinion to respond to the July 24, 2012 dissent submitted by Mr. Ruderman. In his dissent, the Union's delegate to the arbitration panel contends that the Arbitrator "imputes a permissive subject of bargaining into the parties' contract." This argument is defeated by the Union's own on-the-record admission that the City's proposal is not a permissive subject of bargaining:

Q. [By Arbitrator Greco] On the record. It's my understanding, even though I've never asked it, that the Union is not claiming that any part of the City's proposal is a permissive subject of bargaining. I am assuming that because the Union has never told me otherwise. Is my understanding correct, Mr. Berry?

A. [By J. Dale Berry] Right..... I'm not going to contest that her proposal is permissive. I just think it's not as good as ours.

See Feb. 10, 2012 Tr. At 10-11. In light of this admission, the Union cannot claim at the 11th hour that the City's proposal is in any way a permissive subject of bargaining.

The City's proposal is a mandatory subject of bargaining. That proposal is fully supported by the factors cited in Section 14 of the Illinois Labor Relations Act. I therefore concur with Arbitrator Greco's decision and award.

Respectfully submitted,

By Wendy Morthland /s/
Wendy Morthland

DISSENTING OPINION

For the following reasons, I dissent from the Arbitration Award issued in this matter between the City of Decatur ("Decatur" or "City" or "Employer") and International Association of Firefighters, Local #505 ("Union" or "Local #505") by Chairman Amedeo Greco.

BACKGROUND

This dispute concerns a single issue: a layoff procedure. (Tr. I: 6)¹

¹ References to the transcript will be as follows: for June 13, 2011 proceedings, the Union will refer to "Tr.I:[p]."; for November 16, 2011 proceedings, the Union will refer to "Tr.II:[p]."; for February 10, 2012 proceedings, the Union will refer to "Tr.III:[p]."

The Union proposed a change to Article VI of the parties' collective bargaining agreement. (Jt. Ex. 10; Tr. III:10-12.) The Union proposed to modify the City's layoff procedures by affording the Union with prior notice of and an opportunity to engage in decisional bargaining with the City in regards to proposed layoffs of Local 505 personnel. (Jt. Ex. 10; Tr. III:10-12.) The City also proposed a change in Article VI of the parties' agreement. The City's proposal consisted of modifying its layoff procedures by only affording the Union with prior notice of the City's implementation of layoffs of Local 505 personnel. (Jt. Ex. 5.)

ANALYSIS

I. THE AWARD EVISCERATES BARGAINING RIGHTS SECURED BY THE ACT BY ELIMINATING THE UNION'S RIGHT TO DECISIONAL BARGAINING AS TO THE SUBJECT OF ECONOMICALLY MOTIVATED LAYOFFS.

The implicated issue before the Arbitration Panel concerns the Union's right to engage in decisional bargaining as to the City's economically motivated proposals to layoff fire fighters. Such proposals are clearly mandatory subjects of bargaining under the Illinois Public Labor Relations Act ("Act"), 5 ILCS 315/1 *et seq.* (1984), as amended. Illinois courts hold that the Union has a legitimate interest in being able to present cost saving alternatives before the decision to layoff is made. *See Dep't of Cent. Mgmt. Servs. V. Illinois Labor Relations Bd.*, 384 Ill. App. 3d 342, 347 (4th Dist. 2008); *see also Forest Preserve Dist. Of Cook County v. Illinois Labor Relations Bd.*, 369 Ill. App. 3d 733, 758 (1st Dist. 2006); *see also Am. Fed'n of State, County & Mun. Employees v. Illinois State Labor Relations Bd.*, 274 Ill. App. 3d 327, 333 (1st Dist. 1995).

The Chairman's Award waives these interests and in doing so makes errors as to facts and legal analysis. These errors including the following:

(1) The term “discussion” is not synonymous with the word “negotiate.”

In the Chairman’s Award, he refers to the Union’s use of the cities of Waukegan and Springfield as examples in which unions avoided proposed cuts in shift manning and layoffs, respectively, “**after discussions.**” (Award at 14; boldface added.) The Illinois Supreme Court definitively distinguished between “discussions” and “negotiations” in *Central City Educ. Ass’n v. IELRB*, 149 Ill. 2d 496 (1992). In that case, and as briefed by the Union, the Court analyzed the legislative history behind the Act and concluded that the

Illinois’ [labor] statute was patterned in large part after the Pennsylvania [labor] statute but differed in one important way: the Pennsylvania statute requires that an employer meet and discuss matters affecting wages, hours, and terms and conditions of employment, while in Illinois the employer must bargain over decisions that directly affect wages, hours and terms and conditions of employment. (Compare Pa. Stat. Ann. Tit. 43, § 1101.702 (1991), with Ill. Rev. Stat. 1986, ch. 48, pa. 704.)” 149 Ill 2d at 513

(Union’s Brf. At 15-16.)

The Union’s proposal, contrary to the Chairman’s interpretation, is not aimed at “discussions” rather it is directed to “negotiations” which must occur before a decision is made. *Forest Preserve Dist. of Cook County v. ILRB*, 369 Ill. App. 3d 733, 753 (1st Dist. 2006). In *Forest Preserve*, the Illinois Appellate Court again determined that

[a]fter weighing the benefits and burdens, it becomes clear that a decision to layoff employees due to a decrease in State funding truly invites the use of the collective bargaining process. A bargaining representative is frequently in the best position to provide alternatives which may alleviate economic conditions and avoid employee layoffs. Not only is the representative authorized to negotiate on behalf of the employees, but he or she often possesses information which may not be available to management and which could influence management’s *decision* to reduce its force.

Forest Preserve, 369 Ill. App. 3d at 753 (emphasis added) quoting *Am. Fed'n of State, County & Mun. Employees, v. SLRB*, 274 Ill. App. 3d 327, 333 (1995).

(2) The Chairman's rejection of the Union's proposal because it is "strictly anticipatory" emasculates the Union with regards to bargaining preventative measures.

The Chairman Arbitrator's perspective represents a fanciful view of reality. As a result of the Award, the Union is relegated to waiting to be injured before it can take action. By the Chairman's logic, he would deny the Union the right to negotiate a limit to the Employer's discretion to discharge without just cause because no one had yet been discharged.

In fact, the Chairman undercuts his position by commenting favorably on the City of Kewanee's limitation on layoffs for "bona fide financial reasons." (Award at 17.) But the Chairman fails to acknowledge the fact that such language was added to that contract decades before any layoff had occurred.

(3) The Chairman's analysis of the external comparables "fails to see the forest for the trees."

Chairman Greco parses the language that the Union proposed and hangs his hat on the Union's concession that "no Illinois firefighter Local currently has layoff language replicating the procedure which the Union has proposed. . ." (Award at 9.) It appears that to Chairman Greco a comparable is one that contains only identical language.

Chairman Greco goes further in acknowledging that

[t]he Union points out that many of [the Union proposed] comparables contain various restrictions on an employer's ability to lay off such as minimum staffing levels or requirements that layoffs can only occur when there is a lack of work, or lack of funds, or other legitimate reasons . . . But that is not what the Union has

proposed. It, instead, has proposed mid-term bargaining and possible interest arbitration for possible layoffs which is not supported by one external comparable or any other community in the State of Illinois.

(Award at 9.)

The Union's position is that the contractual provision of comparable communities is supported because each of its named comparables places restrictions on an employer's discretion to layoff which is essential for good faith bargaining. (Tr.I:137.) Chairman Greco recognized the purpose of the Union's comparables in his colloquy with Union's Counsel:

Arbitrator Greco: Well, let me ask you this question, because I've been--based on these exhibits you've been giving me—they all to some degree or another put a limitation on-management's right to lay off by using language like-bona fide lack of funds. I don't know what you've got in Waukegan, but—

Mr. Berry: **Layoffs in there, it's a right to go to interest arb.**

Arbitrator Greco: Okay.²

(Tr. 137-38; boldface added.)

Indeed, contract provisions regarding shift manning requirements are arguably more restrictive. Granite City, with regards to shift manning, has the same procedure that the Union has proposed here for layoffs, which is notice, a period of negotiations, and arbitration. (Tr. I: 72-74.) The Chairman misses the "forest" because he fails to acknowledge other contracts which have provisions restricting management's decision in laying off fire fighters. Thus, the comparables as named by the Union fully support its offer.

² This exchange demonstrates the serious deficiencies in the Chairman's recollection of the record facts when he states in the Award that the Union "has proposed mid-term bargaining and possible interest arbitration for possible layoffs which is not supported by one external comparable or any other community in the State of Illinois." (Award at 9.)

- (4) The potential for the Union to contest an adverse employer action to an impartial third party by referral to grievance arbitration or to interest arbitration cannot be a legitimate basis to reject the Union’s offer because remedies are protected rights under the Act.**

Arbitrator Greco uses pejorative metaphors like “Hobson’s Choice” and “ties hands” to characterize the substance of the Union’s offer. (Award at 11 & 12.) But both grievance rights and interest arbitration rights are protected under the Act, 5 ILCS 315/8; 5 ILCS 315/2.

The Chairman’s Award ignores an essential tenet of Illinois labor law: under the Act, the fact that security employees such as the fire fighters here have a coterminous no-strike clause and grievance arbitration clause does not preclude a finding that the Union retains its statutory right to interest arbitration mid-term. *Dep’t of Cent. Mgmt. Servs. v. Illinois Labor Relations Bd.*, 373 Ill. App. 3d 242, 257-59 (4th Dist. 2007). Any litigation poses a risk of loss. That is why the Union’s proposal contains an incentive for the parties to negotiate and to settle prior to reaching interest arbitration. In fact, the practice of arbitrators is to reinforce the uncertainty inherent in any arbitration by encouraging parties to settle before hearings begin on a particular matter.

- (5) There is no basis in the record or common sense to support Arbitrator Greco’s conclusion that restrictions on the Employer’s unilateral discretion are “unnecessary.”**

Arbitrator Greco claims the Union’s proposal is unnecessary. (Award at 13.) Again the Chairman engages in flights of fancy. The record is heavy with examples of settlements that were reached through negotiations conducted under the pressure of a remedy via grievance arbitration (e.g., DeKalb and Sterling) or interest arbitration (e.g., Waukegan and Granite City). To suggest otherwise is to defy not only common experience but the entire structure of the Public

Labor Relations Act which is based upon affording fire fighters mandatory recourse of either grievance arbitration (under Section 8 of the Act) or interest arbitration (under Sections 2 and 14 of the Act) to resolve conflicts.

The Union's proposal is fully supported by the contracts of external comparables that provide for interest arbitration, grievance arbitration or alternative restrictive language on shift manning, e.g. Granite City. Their contract provisions provided the context within which each of those unions were able to negotiate alternatives to layoffs of their members. The results could be achieved because each of these restrictions placed pressure on both parties to a collective bargaining agreement. In fact, Union's counsel testified that the experience in the comparable communities (to which Arbitrator Greco gave no weight such as Alton, Bloomington, Champaign, Galesburg, Granite City, Moline, Normal, Quincy, and Rock Island) shows that the unions and the employers were able to

reach . . . common ground, because we both recognized there was a financial deficiency. We both didn't want a cut of service. And so this context provided . . . the sufficient pressures on both sides. You know, we're on pressure because we don't want to get laid off. The City's under pressure because it doesn't want to have to go to an arbitration, and maybe, you know, delay the layoffs or have them be overturned. So there's a need to look for a mutually agreeable solution that's middle road. And again, . . . **you get good faith bargaining when both parties are under pressure. If one party has unlimited discretion and power, you don't get good faith negotiations. You just get flat.**

(Tr.I:126-27; boldface added.)

Specifically, at the hearing the Union pointed out that without the threat of interest arbitration in Waukegan, the parties would not have been able to reach a settlement. (Tr. II:52.) Specifically, at the hearing the Union pointed out that without the threat of grievance arbitration, the unions in DeKalb and Sterling would not have been able to avoid layoffs. (Tr. I:161-63; Union Ex. 18; Tr.II:211.)

Each of the Union's comparables demonstrates that both parties must be under pressure to successfully engage in good faith bargaining. Always, the Union is under pressure: it wants to avoid the layoffs of its members. The City is under no pressure unless it has a duty to bargain and has an incentive to avoid a legal challenge. Here, the Chairman's Award relieves the City from any pressure.

(6) There is no basis in Article 6's language to support the Chairman's ruling that the Union waived its right to decisional bargaining before a layoff is implemented.

Section 1 of Article 6 begins with the conditional "if." Thus, the contract language regarding "Reduction in Personnel" only addresses the procedure to be applied **after** a decision is made. The contract, as has been argued by the Union consistently, is silent as to the procedure to be followed when the City is first considering laying off fire fighters.

Further, the Chairman fails to recognize that waiver of a statutory right under the Act cannot be implied, it must be explicit and in writing. For contract language, in particular, to serve as a waiver of a union's statutory rights, the contract must evidence a clear and unequivocal intent by a party to relinquish its right to bargain as to the subject matter at issue. *Am. Fed'n of State, County and Mun. Employees v. State Labor Relations Bd.*, 274 Ill. App. 3d 327, 334 (1st Dist. 1995); *Chicago Transit Auth.*, 14 PERI ¶ 3002 (ILLRB 1997). In this matter, the Chairman is not sitting as a grievance arbitrator construing existing contract language. Rather, it is his duty as an interest arbitrator to fairly consider proposals by the parties and to add language that clarifies the procedure to be followed by the parties **before** layoffs are implemented.

CONCLUSION

Because the Arbitration Award is deficient for the above-stated reasons, I respectfully dissent from the Arbitration Award in this matter. I would award the Union's proposal in its entirety.

Respectfully submitted,

Adam J. Ruderman /s/

**ADAM RUDERMAN, MEMBER OF
ARBITRATION PANEL**

July 13, 2012

UNION PANEL MEMBER'S RESPONSE TO CHAIRMAN'S ADDITIONAL COMMENTS

The Chairman's Award which has been joined by the City's appointed Panel member, includes additional comments in response to the Union's Dissenting Opinion as stated on page 19 of the Award. These comments impute upon the Union a waiver of its statutory right under the Act – that is, the Union's Section 7 right to midterm bargaining negotiations regarding the Employer's decision to layoff – and such a waiver is a permissive subject of bargaining. Village of Wheeling, 17 PERI ¶ 2018 (IL SLRB 2001); see Cook County Pharmacists Ass'n and County of Cook, 15 PERI ¶ 3009 (IL LLRB 1999) (holding that waivers of statutory rights are permissive subjects of bargaining). This action was not within the lawful authority of the Arbitration Panel pursuant to 5 ILCS 315/14(h)(1). Because the Award imputes a permissive subject of bargaining into the parties' contract, the provision will lapse upon expiration of the contract. Village of

Wheeling, 17 PERI ¶ 2018 (IL SLRB 2001); see Cook County Pharmacists Ass'n and County of Cook, 15 PERI ¶ 3009 (IL LLRB 1999) (holding that waivers of statutory rights are permissive subjects of bargaining).

The Award, as issued, will in the future have to be revisited to address the Union's right to mid-term negotiations regarding a mandatory subject of bargaining.

July 24, 2012

Adam J. Ruderman /s/

Adam J. Ruderman