

In the Matter of Impasse Arbitration	)	
	)	
between	)	Opinion and Award by
	)	Arbitrator
CITY OF HARVARD, Employer	)	Curtiss K. Behrens
	)	S-MA-11-235
and	)	FMCS No. 11-03418-8
	)	March 1, 2012
ILLINOIS FRATERNAL ORDER OF	)	
POLICE LABOR COUNCIL, Union	)	

I. APPEARANCES

For the Employer:

Carlos Arevalo, Attorney at Law and Spokesperson

Dave Nelson, City Administrator and Witness

Dan Kazy-Garey, Police Chief and Witness

Mark Krause, Deputy Chief and Witness

For the Union:

Gary Bailey, Attorney at Law and Spokesperson

Russell Vogt, Field Representative

V. Leard, Police Officer

T. Bauman, Police Officer

S. Dixon, Police Officer

T. Oczus, Police Officer

A. Palmer, Police Officer

## II. INTRODUCTION AND BACKGROUND

This arbitration was held Wednesday, November 16, 2011 at the Harvard City Hall, 201 West Diggins Street, Harvard, Illinois. The hearing was conducted pursuant to the impasse resolution provisions of the Illinois Public Labor Relations Act, 5 ILCS 315/1, *et seq.* (hereinafter referred to as “IPLRA” or “Act”), specifically Section 14, and was formally opened at 10:07 a.m. and recessed at 1:30 p.m. after both parties’ presentation of evidence and oral argument. This hearing was stenographically recorded and a transcript was produced. The parties agreed that they would submit post-hearing briefs to the arbitrator no later than the end of business Monday, January 23, 2012. The parties agreed that this award should be postmarked no later than Friday, March 16, 2012.

The City of Harvard (hereinafter referred to as “Employer” or “City”) is located in northeastern Illinois near the Wisconsin border and has a 2009 population of 9,120 (a 25.6% increase in population from 2000). (Union Ex., Tab #4). The Illinois Fraternal Order of Police Labor Council (hereinafter referred to as “FOP” or “Union”) represents a unit consisting of 13 police officers and 2 police sergeants. (Union Ex., Tab #5). The parties have bargained several contracts since the middle 1980’s with the most recent agreement (hereinafter referred to as “Agreement”) being for a five year term from May 1, 2006 through April 30, 2011. (Joint Ex.). The parties have been to impasse arbitration only once before, in August 2004, and that resulted in a three year contract dated May 1, 2003 through April 30, 2006. (Union Ex., Tab #10).

The parties reached agreement on several issues and have stipulated that the arbitrator would incorporate these tentative agreements into his award. These tentative agreements were submitted at the hearing as part of the Union exhibits and are hereby

incorporated into this award. (Union Ex., Tab #1 and Tab #9). The parties are in agreement that their next contract will be for a three year term from May 1, 2011 through April 30, 2014. Final offers on five issues were exchanged prior to this hearing. Of these five issues, three are economic (wages, retiree health insurance, sick leave conversion) and two are non-economic (discipline and paid days off). (Both Employer and Union briefs).

### III. STATUTORY DECISION CRITERIA

The Act's general charge to an arbitrator is that Section 14 impasse procedures should "afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes" involving employees performing essential services. Section 14(g) of the Act mandates that interest arbitrators "shall adopt the last offer of settlement (on each economic issue) which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in subsection (h)." Section 14(g) goes on to say that the "findings, opinions, and order to all other issues (the non-economic issues) shall be based upon" these same applicable factors.

Section 14(h) of the Act requires that an interest arbitrator base his or her decision upon the following criteria or "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.
- (4) The average consumer prices for goods and services, commonly known as the costs of living.
  - (5) 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.
  - (6) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
  - (7) 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.

Section 14(h) requires only that the Arbitrator apply the above factors “as applicable.” Enumeration of the eighth factor, “other factors,” in Section 14(h) reinforces the discretion of an arbitrator to bring to bear his or her experience and equitable factors in resolving the disputed issue(s). The undersigned arbitrator issues this award in consideration of the above-referenced statutory decision criteria.

#### IV. THE COMPARABILITY FACTOR

The Union notes that of the eight statutory factors, “comparability” is the factor that receives the most attention from the parties in Illinois. (Union Brief, pp. 5-7). The Union cites to, “A Practical Approach to Selecting Comparable Communities in Interest Arbitrations under the Illinois Public Labor Relations Act,” by Edwin H. Benn, published in *The Illinois Public Labor Relations Report*, Autumn 1998, p.1 and quotes Arbitrator Nathan regarding the importance of comparability:

The appropriateness of one offer over another is often not apparent without some measurement of the marketplace. The addition or deletion of many terms and or practices, or the precise remuneration, can often be best determined by analyzing the collective wisdom of a variety of other employees and unions in reaching their agreement. [footnote omitted] *Village of Rock Falls and IAFF, Local 3291*, S-MA-94-163 (Arb. Nathan 1995), p.20.

This aspect of comparability is often referred to as “external” comparability. There is also another aspect of comparability often referred to as “internal” comparability i.e., what compensation (raises) are the other employees within the same city/employer experiencing? The parties have spent more time discussing external comparability, and both are relevant.

As mentioned in the background, this is not the first time the parties have been to impasse arbitration. Arbitrator James R. Cox issued an interest arbitration award for the parties in 2004 and, in that award, he made a determination as to external comparables:

**The Union identifies seven municipalities as comparable to Harvard – Wauconda, Algonquin, Woodstock, McHenry Fox Lake, Antioch and Marengo – which as a group meet standard comparability tests better than does the comparability group chosen by the City.” [emphasis in original]. *City of Harvard and Illinois Fraternal Order of Police Labor Council*, S-MA-03-161 (Arb. Cox 2004), pp.3-4.**

The Union argues that this determination of external comparability should not be altered at this hearing.

The City has presented a “broader” list of additional comparable municipalities and argues that this provides a “bigger or clearer picture of where the City falls in terms of wages and other benefits.” (City Brief, p. 3).

The arbitrator is not persuaded that the external comparability determination made by Arbitrator Cox should be modified. The City’s proposed “broader” list sacrifices geographic similarities and does not add any “clarity” to an already difficult task. As

such, the arbitrator will focus on external comparability as previously determined by Arbitrator Cox.

V. ANALYSIS AND OPINION OF ARBITRATOR BY IMPASSE ISSUE

Wages

The parties agree on the wages increase for years two and three. An across-the-board increase of two percent (2.0%) in year two (May 1, 2012) and an across-the-board increase of three percent (3.0%) in year three (May 1, 2013). The Union is proposing a two percent increase (2.0%) in year one (May 1, 2011) whereas the Employer is proposing a one percent increase (1.0%) in year one.

External comparability is particularly difficult when there are multi-year contracts of different duration and different re-negotiation years. The most recent contract was a five-year agreement and was negotiated prior to the “Great Recession.” The May 1, 2009 and May 1, 2010 pay raises were four percent (4%) each year compared to the comparability group’s average of three point five four percent (3.54%) in 2009 and one point five four percent (1.54%) in 2010. The May 1, 2011 average pay increase for the comparability group is reported to be one point eight nine percent (1.89%). Four of the seven comparability cities have contracts that include an average pay increase for May 1, 2012 of one point nine zero percent (1.90%). No comparability cities have contracts extending to include May 1, 2013 increases. (Union Ex., Tab #13).<sup>1</sup> However, the

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<sup>1</sup> Marengo had not settled at the time of this evidentiary hearing. On December 30, 2011, Arbitrator Peter Feuille issued an award involving a three year contract with a two percent (2.0%) increase effective May 1, 2010, a two percent (2.0%) increase effective May 1, 2011 and a two percent (2.0%) increase effective May 1, 2012. The parties’ final offers had only differed regarding the first year increase. The City had offered a zero percent (0.0%) increase in year one and the Union had offered a two percent (2.0%) increase in year one. *City of Marengo and Illinois Fraternal Order of Police Labor Council*, S-MA-10-227 (Arb. Feuille 2011), pp. 7-26. The arbitrator has incorporated this information into the Union’s exhibit.

parties' agreement to a three percent (3.0%) increase effective May 1, 2013 must be a consideration.

When assessing the parties' arguments regarding wages and ability to pay and the interests and welfare of the public, the arbitrator finds that the cost difference between the two proposals is not significant enough to make these factors compelling.<sup>2</sup> As for cost of living, the Union projects that the CPI for the first year of the new collective bargaining agreement will be two point eight eight percent (2.88%). (Union Brief, p. 15). The City argues that a more realistic approach to CPI is to examine the CPI for a longer window of time, including the preceding years. The City observes that for at least three years prior to the expiration of the current contract, employees received four percent (4.0%) increases. In contrast, the Chicago CPI-U is reported to have been two point one percent (2.1%) in 2008, two point one percent (2.1%) in 2009 and two point one percent (2.1%) in 2010. (City Brief, pp. 5-6).

The Union's exhibit reporting percentage wage increases among comparables from May 1, 2008 through May 1, 2012 focuses on averages. (Union Ex., Tab #13). The arbitrator believes that it is important to note that for May 1, 2010 this exhibit reports that three comparables had zero percent (0.0%) increases and that for May 1, 2011 this exhibit reports that three comparables had one percent (1.0%) increases (two of them having been zero percent (0.0%) increases the year before and one of them having been a three point five percent (3.5%) increase the year before). This exhibit reports that for May 1, 2012 there is one comparable with a zero percent (0.0%) increase.

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<sup>2</sup> In its brief, p. 23, the Union calculated the total difference between the parties' final offers to be \$11,340. At the hearing, the city administrator stated that he had not calculated the difference between the proposals but that it would be approximately \$16,000. (Transcript, pp. 105-106).

The final offer on wages must also be considered in light of how the other issues at impasse will be resolved by the arbitrator and the entirety of the impasse award. The undersigned arbitrator concludes that the City's wages final offer more nearly complies with the statutory decision factors.

#### Retiree Health Insurance

The Union is proposing no changes to the current health insurance language (status quo) whereas the Employer is proposing to reduce the City's share of retiree health insurance premiums by ten percent (10%). (City Brief, p. 7).

There is insufficient support to alter the status quo on retiree health insurance on this record. As referenced in both parties' briefs, as a party seeking a change to the status quo, that party has to demonstrate: 1) that the old system is not working as when originally agreed upon; 2) that it is resulting in an undue hardship; 3) that the proposing party has offered a quid pro quo of sufficient value to justify the change; and 4) that the opposing party has unreasonably resisted any attempts to bargain over changes to this provision. (City Brief, pp. 9, citing to *City of Champaign*, Case No. S-MA-10-370 (Arb. Larney Sept. 11, 2011) p. 15) and Union Brief, p.17, citing to *County of Kankakee and Sheriff of Kankakee County and Illinois FOP Labor Council*, S-MA-07-046 (Arb. Kohn 2009).

Currently, only one retired police officer has elected to maintain his health insurance through the City. But that officer does not qualify under the current language, so he is paying the premiums in full. During the period of the next contract, only one officer would become eligible to retire and potentially be impacted by the City's

proposed change. (Transcript, p. 108). The City has not met its burden to demonstrate the need for a neutral to alter the status quo at this time.

#### Sick Leave Conversion

The Union is proposing no changes to the sick leave conversion language (status quo) whereas the Employer is proposing to change annual and retiree sick leave conversion benefits. The City's proposal essentially seeks to cap the number of days employees can accumulate to ninety (90) days and to reduce the maximum conversion to 22.5 days of severance pay. (City Brief, p. 9).

The undersigned neutral is unwilling to award the City's proposed changes to the status quo regarding sick leave conversion on this record. Further bargaining by the parties is the better resolution of this issue at this time.

#### Discipline

When the current five year contract was negotiated, in 2006, procedures regarding the appeal and review of discipline were not a mandatory subject of bargaining. In 2007, the Act was amended to make such procedures a mandatory subject of bargaining. Where an issue was not a mandatory subject of bargaining in prior negotiations, current practice is not considered "status quo" for purposes of interest arbitration analysis.

The Union's proposal is to change from the BOFPC tribunal to arbitration as the method to resolve discipline disputes. (Union Brief, p. 34). The City's proposal is to limit the use of the BOFPC tribunal to suspensions of five days or less and to accept arbitration of discipline involving suspensions of over five days and those involving discharge. (City Brief, p. 11). The City notes that arbitration of discipline matters is

“seemingly the way of the future,” but the City argues that permitting arbitration of suspensions of even one day will have a chilling effect on the issuance of minor discipline by the Chief and/or his designee. (City Brief, pp. 11-12).

This issue has been presented to Illinois impasse arbitrators many times since becoming a mandatory subject of bargaining. Arbitrators have almost always ruled in favor of adopting proposals that require discipline to be subject to appeal through the contractual grievance procedure and arbitration. The Union submitted most, if not all, of these decisions on a CD at the evidentiary hearing. Rather than repeating the parties’ arguments, I quote from Arbitrator Feuille’s most recent award in Marengo:

Specifically, I call the parties’ attention to the articulate analysis of this issue presented by Arbitrator Aaron S. Wolff in *Village of Shorewood and Illinois Fraternal Order of Police Labor Council*, ILRB No. S-MA-07-199 (Wolf, 2008). In his award, Arbitrator Wolff concluded that (1) this issue was not a *status quo* issue in light of the fact that the issue had been a non-mandatory subject of bargaining until 2007; so the then-current negotiations and arbitration in Shorewood were the first time the employer was required to bargain over the issue; and (2) Section 8 of the Labor Act requires that disciplinary issues be included in a grievance/arbitration provision in the collective bargaining agreement as an alternative to proceeding before a board of fire and police commissioners, unless the parties have mutually agreed otherwise, and in *Shorewood* the parties did not mutually agree otherwise. Wolf cited a plethora of other Section 14 awards that reached the same Section 8 conclusion in other jurisdictions where this same issue was taken to arbitration. He additionally noted that, of all of the prior Section 14 arbitration cases cited to him on this issue, he found only two cases where the arbitrators rejected the union proposal, and they did so when they deemed this issue to be a *status quo* issue and they found that the union did not carry its burden of proving the need for a change (*Shorewood*, pp. 13-22). *City of Marengo and Illinois Fraternal Order of Police Labor Council*, S-MA-10-227 (Arb. Feuille 2011), p. 54.

The undersigned arbitrator agrees that the Union’s proposal on discipline more nearly complies with the statutory decision factors.

### Paid Days Off

The Union is proposing no changes to the paid days off language (status quo) whereas the Employer is proposing to eliminate the current language and replace it with one sentence: “Twenty-five percent (25%) of the Department may be on paid days off at any time regardless of shift assignments and rank.” The City’s proposal is intended to reduce the number of employees who can be off work on paid days off. (Transcript, p. 116).

The City argues that the current language causes scheduling problems and that, on any given day, up to six officers can be on paid time off. (City Brief, p. 13). The Union argues that the City’s offer eliminates the use of seniority from choosing time off. (Union Brief, p. 44)

The parties agreed that this is a non-economic issue and, as such, the arbitrator is not limited to choosing from the two final offers. While the arbitrator has the authority to draft alternative language, it would not be appropriate on this record. The current language has been mutually agreed to for many years. (Transcript, p. 115). There is insufficient evidence on this record to justify a neutral modifying this language at this time.

VI. AWARD

The undersigned arbitrator awards the following outcomes as more nearly complying with the decision factors prescribed in Section 14(h) of the Act:

Wages: A one percent (1%) across-the-board increase May 1, 2011, a two percent (2%) across-the board increase effective May 1, 2012 and a three percent (3%) across-the-board increase May 1, 2013.

Retiree Health Insurance: No change to current language.

Sick Leave Conversion: No change to current language.

Discipline: Change from BOFPC tribunal to arbitration.

Paid Days Off: No change to current language.

In addition, all of the parties' resolved issues and status quo provisions are incorporated by reference into this Award.

Dated this 1<sup>st</sup> day of March  
2012, Sycamore, Illinois.

Respectfully submitted,

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Curtiss K. Behrens  
Arbitrator