
In the Matter of the Interest Arbitration Between

CITY OF HILLSBORO

And

S-M-12-119

ILLINOIS FRATERNAL ORDER OF
POLICE LABOR COUNCIL

APPEARANCES:

Baker, Baker & Krajewski, LLC, by Mr. John A. Baker, Attorney at Law, appearing on behalf of the Employer

Mr. William E. Jarvis, Staff Attorney, Illinois FOP Labor Council, appearing on behalf of the Union

ARBITRATION AWARD

City of Hillsboro, hereinafter the City or Employer, and the Illinois Fraternal Order of Police Council, hereinafter Union or FOP, reached impasse on in their negotiations for an initial collective bargaining agreement. Hearing in the matter was held on October 16, 2013, and thereafter the parties filed post-hearing briefs.

BACKGROUND:

In 2010 the parties bargained a new collective bargaining agreement to succeed the predecessor agreement. Hill testified that in 2010 she was an elected at large City Commissioner who was assigned to act as liaison between the City Commissioners and Police Department. In that role she participated in the 2010 contract negotiations with the Union as a member of the City's negotiating team. She testified that during bargaining with the Union the City indicated it was experiencing fiscal issues and did not have money for a wage increase. She stated that in those negotiations she asked the Union negotiators,

“do you have a – we need to barter here, you know, I don’t have any money, you want money. Okay. What can I give you if you give up your money, and – you know, so it was talks like that back and forth”.

She testified the Union responded that if the City met the items on its list they would forego any kind of monetary increase. She stated the Union wanted the City to agree to contract language providing that there would be 2 officers assigned to the 7 p.m. – 3 a.m. shift, as well as a short contract allowing for it to be re-opened so if the City’s “financial stability” improved the Union could come back and bargain for a wage increase. The City agreed to those Union proposals. Thus, the 2010-2012 collective bargaining agreement that was agreed to and ratified by the parties included language providing for two officers to be assigned to the 7 p.m. – 3 a.m. shift (Article XI, Section 11.1) and a contract wage re-opener effective 5/1/11 (Exhibit A). Hill also testified that she thought the Union’s proposal for two officers to be assigned to the 7 p.m. – 3 a.m. shift was a safety issue because of issues regarding any back-up that might be needed by the single officer assigned to that shift under the then City shift assignment practice of having only one officer assigned to the shift.

On October 31, 2011, the Union filed its Notice of Demand to Bargain a successor collective bargaining agreement to their 2010-2012 contract. The parties thereafter engaged in bargaining and reached tentative agreement on wages, insurance and term of agreement. The parties were unable to reach agreement on Article XI, Hours of Work and Overtime, Section 11.1 Work Week/Lunch Breaks.

The parties agreed to Ground Rules and Stipulations that included the following:

1. Arbitrator’s Authority: Pursuant to Section 14(p) of the Act, the parties agree to waive a tripartite arbitration panel and appoint Arbitrator Thomas Yeager as Arbitrator and Chairperson to hear and decide the issues presented. The parties have a disagreement with respect (sic) a minimum manning provision of the current contract with the City arguing that the arbitrator lacks authority or jurisdiction to consider such issues and the Union disagreeing arguing that the provision (as set forth in Section 11.1 of the current contract) is a mandatory rather than permissive subject of bargaining. Per agreement of the parties the City will have a continuing objection with respect to testimony and exhibits related to this issue.

* * *

5. Issues in Dispute: The parties agree that the only issue is minimum staffing as reflected in the Section 11.1 of the expired labor contract. Final offers shall be submitted on all of the issues at a date and time agreed to by the parties. Once exchanged at the start of the hearing, final offers on each issue in dispute may not be changed except by mutual agreement.
6. Comparables: The parties agree that under IPLRA Section 14(h)(4), the following six municipalities are deemed comparable to the employer: Pana, Vandalia, Greenville, Madison, Gillespie and Carlinville.

The parties' 2010-2012 collective bargaining agreement Article 11 – Hours of Work and Overtime, Section 11.1 Work Week/Lunch Breaks provided:

“The employer may schedule employees to work their regular schedule of eight hour shifts per day and 40 hours per week, * * *

There shall be no guarantee of the number of hours of work per week, however, it will be required that at least two bargaining unit officers work the 7 p.m. to 3 a.m. shift in order to reduce safety/security risks beyond those inherent in normal performance of duties.

* * *”

The City's final offer for a 2012-2016 contract, in addition to the parties' tentative agreements is:

“The City proposes the following language be deleted from Section 11.1 of the existing contract:

There shall be no guarantee of the number of hours of work per week, however, it will be required that at least two bargaining unit officers work the 7 p.m. to 3 a.m. shift in order to reduce safety/security risks beyond those inherent in normal performance of duties.”

The Union's final offer on this item is to amend/modify the 2010-2012 Article XI, Section 11.1 language as follows:

There shall be no guarantee of the number of hours of work per week, however, it will be required that at least **two officers, including the Chief**, work the 7 p.m. to 3 a.m. shift in order to reduce safety/security risks beyond those inherent in normal performance of duties.

DISCUSSION:

The City, as evident from the parties' stipulations, argues that the undersigned “lacks authority or jurisdiction to consider the Union's final offer, which proposes to

continue in the 2012-2016 contract, with modifications, the language of Article XI, Section 11.1 of the 2010-2012 collective bargaining agreement requiring two officers be assigned to the 7 p.m. – 3 a.m. work shift. It argues that there is no legal authority that permits the issue to be resolved through interest arbitration. It asserts that it is axiomatic that a dispute can be the subject of an interest arbitration award only if that award deals with a mandatory subject of bargaining. It contends that whether a final offer in fact deals with a mandatory subject of bargaining is generally determined according to the balancing test set forth by the Illinois Supreme Court in Central City Education Association, IEA/NEA v. Illinois Educational Labor Relations Board, 149 Ill. 2d 496, 599 N.E. 2d 892, 174 Ill. Dec. 808 (1992). But, it avers the balancing test established therein by the Court for determining whether something is a mandatory or permissive subject of bargaining is not applicable in this case.

It argues if the undersigned concludes he has jurisdiction to consider the Union's final offer that Section 14 of the Illinois Public Labor Relations Act (5 ILCS 315/14) establishes the negotiability of certain subjects of bargaining for firefighter and peace officer bargaining units, and limits the issues that can be resolved through interest arbitration. Section 14(i) of the Act provides

in the case of peace officers, the arbitration decision shall be limited to wages, hours, and conditions of employment * * * and shall not include the following: * * * iii) manning; * * * provided, nothing herein shall preclude an arbitration decision regarding equipment or manning levels if such decision is based on a finding that the equipment or manning considerations in a specific work assignment involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties. * * *

It believes that language precludes the undersigned's consideration of the Union's final offer regarding Article XI, Section 11.1 because the Union has not produced any evidence to support a finding that the minimum staffing language contained in the Union's final offer involves an issue of serious risk beyond that which is inherent in police work. It asserts that the Union has not demonstrated that there exists a serious risk to officer safety were there not a minimum mandatory staffing requirement, as the Union proposes.

The City argues that there is no legal authority to support the Union's contention that Section 14(i) of the Act applies only to issues/matters that are not currently dealt

with in a collective bargaining agreement, and that any existing provision/language of a collective bargaining agreement should continue to be subject to collective bargaining and interest arbitration even if that language pertains to a matter deemed to be a non-mandatory subject of bargaining. It contends even if such an interpretation of Section 14(i) would make for good public policy the reality is that such a determination needs to be made by the Legislature through the legislative process and not through an interest arbitration award.

The Union argues that the staffing language of Article XI, Section 11.1 is a mandatory subject of bargaining because it was bargained for in prior contract negotiations in exchange for a wage freeze, and the language is consistent with the long-standing practice of the City having at least two officers on the power shift. The Union asserts the language was inserted into the contract because of specific concerns regarding officer safety above and beyond those experienced by peace officers in everyday police work

The City's argument that the undersigned lacks jurisdiction/authority to adopt the Union's final offer that would continue, as modified, the language of Article XI, Section 11.1 of the 2010-2012 contract requiring it to assign two officers to the 7 p.m.– 3 a.m. shift presents a threshold issue that must be resolved prior to any discussion of the merits of the Union's final offer. The Union acknowledges that, "in the normal course of things 'manning' would be a permissive subject of bargaining". But, it argues that because the City agreed to include the language in the 2010-2012 collective bargaining agreement in return for the Union agreeing to forego a pay increase for officers the language should be treated as dealing with a mandatory subject of bargaining. It contends that the City obtained a significant concession on wages in return for agreeing to include the language in the 2010-2012 contract, and should not now be allowed to renege on a lawful agreement. It believes that permitting the City to do so negates stability and reliability that are goals of collective bargaining. It also notes that it was not able to locate any Illinois cases dealing with the subject of what happens to permissive subjects of bargaining included within a contract when that contract expires.

What is clear is that the Illinois Public Labor Relations Act at 315/7 establishes that a public sector employer is obligated to bargain with an exclusive representative of its employees over the wages, hours and conditions of employment of those employees.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The Act in 315/4 also establishes that a public sector employer is not required to bargain with an authorized representative of its employees about "matters of inherent managerial policy".

Sec. 4. Management Rights. Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives, except as provided in Section 7.5.

To preserve the rights of employers and exclusive representatives which have established collective bargaining relationships or negotiated collective bargaining agreements prior to the effective date of this Act, employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act, except as provided in Section 7.5.

The Illinois Supreme Court in Central City Education Association, IEA/NEA v. Illinois Educational Labor Relations Board, 149 Ill. 2d 496, 599 N.E. 2d 892, 174 Ill. Dec. 808 (1992), stated that it would apply a balancing test in determining if a matter is a mandatory subject of bargaining. Central City Education Association, IEA/NEA v. Illinois Educational Labor Relations Board, 149 Ill. 2d 496, 599 N.E. 2d 892, 174 Ill. Dec. 808 (1992). The Illinois 1st District Court of Appeals in The Village of Oak Lawn v. Illinois Labor Relations Board, state Panel, and Oak Lawn Professional Association of Fire Fighters, Local 3405, International Association of Firefighters, 2011 Ill App103417

(1st District 2011) stated that the Supreme Court’s articulated balancing test is that when a

“matter concerns wages, hours, or terms and conditions of employment and is also a matter of inherent managerial authority, the matter will be deemed a mandatory subject of bargaining if the benefits that bargaining will have on the decision making process outweighs the burdens it will impose on the employer’s authority.”

However, as argued by the City, the Act at 315/14(a) establishes binding interest arbitration as the means to resolving collective bargaining impasses in the case of peace officers, but also provides at 315/14(i) in bargaining disputes involving peace officers where either party has requested arbitration

“the arbitration decision shall be limited to wages hours, and conditions of employment * * * and shall not include the following: * * * iii) manning * * *

The appellate court stated in Village of Oak Lawn, the balancing test enunciated by the Supreme Court in Central Cities for determining whether a matter is a mandatory subject of bargaining is not applicable in those cases where the legislature has stated that the subject matter cannot be the subject of an interest arbitration decision. And, the court stated that because matters involving “manning” are statutorily prohibited from being the subject of an interest arbitration decision necessarily such matters cannot be a mandatory bargaining subject.

Yet, while 315/14(i) of the Act states that any arbitration decision “shall be limited to wages, hours and conditions of employment” and such decision shall not include “manning”, it then states,

provided, nothing herein shall preclude an arbitration decision regarding equipment or manning levels if such decision is based on a finding that the equipment or manning considerations in a specific work assignment involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties. * * *

The Appellate Court in Oak Lawn stated it agreed with the Illinois Labor Relations Board’s Administrative Law Judge’s conclusion that because the 315/14(i) language dealing with peace officers precludes matters involving “manning” from being the subject of an interest arbitration decision the matter necessarily, therefore, could not be

deemed to be a mandatory subject of bargaining. However, that conclusion appears to disregard both the subsequent qualifying language of 315/14(i) wherein it states that the prohibition is not applicable in cases if

“a specific work assignment(s) involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties.”

and 315/4 providing that

To preserve the rights of employers and exclusive representatives which have established collective bargaining relationships or negotiated collective bargaining agreements prior to the effective date of this Act, employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act, except as provided in Section 7.5.

The undersigned is persuaded that a reasonable inference to be drawn from the inclusion of those provisions is that the legislature did not intent that all matters involving “manning” should be deemed non-mandatory or permissive subjects of bargaining thereby relieving a public sector employer of a duty to bargain and prohibiting the submission of bargaining impasses on such matters to interest arbitration. Rather, a reasonable construction of 315/14(i) and 315/4 is that the legislative intended to prohibit interest arbitration of disputes involving manning”, unless it can be shown that the “work assignment”, in this case the 7 p.m. - 3 a.m. shift, “involve(s) a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties” or that the manning language was contained in agreements negotiated by the parties prior to passage of the Act.

The Union, however, argues notwithstanding the language of 315/14(i) of the Act, because the City agreed to include the language of Article XI, Section 11.1 in the parties 2010-2012 collective bargaining agreement, subsequent of passage of the Act, that matter should now be deemed to be a mandatory subject of bargaining and any bargaining impasse on the matter able to be submitted for an interest arbitration decision. It asserts that because the City agreed to include the language in the parties’ 2010-212 contract as a *quid pro quo* to induce the Union to agree to a wage freeze for the term of the contract

that the presumptively permissive subject of bargaining now be considered a mandatory subject of bargaining. And, that the City cannot now get out of its agreement by merely raising its objection that the language pertains to a matter of manning, is therefore a non-mandatory subject of bargaining, and it has no duty to bargain with the Union over the matter and is certainly not obligated to agree with the Union's submission of the matter for an interest arbitration decision.

While Hill testified that she considered the staffing of the 7 p.m. – 3 a.m. shift to be a safety issue from the City's perspective there was no evidence adduced that during those negotiations it was established that the City considered not having the 2 officers assigned to that shift presented a "serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties." Were that to have been the case, the safety considerations giving rise to inclusion of the language in the contract would have satisfied the statutory prerequisite permitting that language, even though it pertained to "manning", to be the subject of an interest arbitration decision. But, the record evidence does not prove that to have been the case. Notwithstanding that conclusion, the Union, nonetheless, believes and would have the undersigned treat the language as a mandatory subject of bargaining because equitable considerations should not permit the City to escape the consequences of a bargain reached between the parties acting in good faith.

However, in the undersigned's opinion, if this were what the legislature intended it could have so provided. In fact, a reasonable inference can be drawn that it chose not to do so as evidenced by its inclusion of the proviso included in 315/4 of the Act. That language explicitly provides for the circumstance where parties negotiated to agreement on language dealing with matters, for example "manning", prior to passage of the Act, which the Act now excludes from inclusion within the meaning of "wages, hours or conditions of employment" of peace officers.

To preserve the rights of employers and exclusive representatives which have established collective bargaining relationships or negotiated collective bargaining agreements prior to the effective date of this Act, employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act, except as provided in Section 7.5.

Had the legislature intended to also preserve the rights of employers and exclusive representatives by requiring them to continue to bargain about excluded matters once they have bargained to agreement on such matters subsequent to passage of the Act it could have so provided, but didn't. Consequently, I am not persuaded that merely because the parties reached agreement on the matter of "manning" on the 7 p.m. – 3 a.m. shift, which the Act excludes from being considered within the meaning of "wages, hours or conditions of employment", and which cannot be the subject of an interest arbitration decision, that the City is, therefore, prohibited from claiming the matter is a non-mandatory subject of bargaining about which the Union is unable to submit for an interest arbitration decision. Thus, I believe the legislature did not intend that after passage of the Act if parties bargain to agreement on manning language governing the assignment of peace officers that the subject is transformed from an otherwise permissive/non-mandatory subject of bargaining into a mandatory subject of bargaining.

The remaining issue is whether having only one officer assigned to the 7 p.m. – 3 a.m. shift involve(s) "a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties." If it does, then the undersigned can evaluate the merits of the final offers and render a decision. The City argues that the Union adduced no evidence establishing that having only one officer assigned to the City's 7 p.m. – 3 a.m. shift involves such risk(s). The undersigned agrees the record evidence in this case does not support a conclusion that the assignment does involve such risks that are not already inherent in the "normal performance of police duties". The risks associated with, for example, availability or non-availability of back-up, or working at night and/or at bar closing time late at night when patrons are more likely to be inebriated posing risks to an apprehending officers, in the undersigned's opinion, are risks that are inherent in police duties. Thus, the Union has not established that its final offer requiring the City to assign two police officers to its 7 p.m. – 3 a.m. work shift satisfies the statutory criteria permitting the undersigned to render an arbitration decision on the merits of its final offer.

For all of the above reasons the undersigned concludes that he is statutorily precluded from issuing an arbitration decision regarding the merits of the Union's final

offer which proposes to continue in the parties 2012-2016 collective bargaining agreement the language of Article XI, Section 11.1, as modified, in the parties' 2010-2012 contract.

Dated this 3rd day of May, 2014.

Thomas L. Yaeger

Arbitrator