

RECEIVED

SEP 14 1988

STATE OF ILLINOIS
ILLINOIS STATE LABOR RELATIONS BOARD

II. State Labor Relations Bd.

In the Matter of the Interest Arbitration)
)
 between)
)
 WILL COUNTY BOARD and SHERIFF OF WILL)
 COUNTY,)
 Employer,)
)
 and)
)
 AMERICAN FEDERATION OF STATE, COUNTY AND)
 MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO,)
 on behalf of AFSCME LOCAL 2961,)
 Union.)

Before
 HARVEY A. NATHAN
 Chairman
 JOHN. P. KARUBAS,
 Will County Administrator
 HENRY SCHEFF
 AFSCME Staff
 Representative

Hearing Opened: December 14, 1987
Hearing Sessions: February 11, 1988
 February 16, 1988
Briefs Submitted: May 27, 1988
For the Employer: Edward F. Masters,
 State's Attorney of Will County,
 By: Scott Nemanich,
 Chief, Civil Division,
 Jeffrey C. Baldacci,
 Assistant State's Attorney
For the Union: Cornfield and Feldman,
 By: J. Dale Berry,
 Attorney

A R B I T R A T I O N A W A R D

I. Introduction

This is an interest arbitration case held pursuant to Chapter 14 of the Illinois Public Labor Relations Act (Ill. Rev. Stat. 1985, ch. 48, para. 1614) and Section 1230.30 et. seq. of the Rules and Regulations of the Illinois State Labor Relations Board. The parties to this proceeding are the Will County Board and the Sheriff of Will County, as joint employers (hereinafter "Employer") of a unit of Deputy Sheriffs below the rank of Sergeant,⁽¹⁾ and Local 2961, of Council 31 of the American Federation of State, County and Municipal Employees, AFL-CIO, (hereinafter "Union"). The parties have had a bargaining relationship for some years prior to the Labor Relations Act/ (hereinafter the "IPELRA").⁽²⁾ The last negotiated agreement expired on November 30, 1986 (hereinafter "old agreement"), but was kept in force and effect pending negotiation of a new agreement. Most of the terms of the new agreement have now been settled.

1. The bargaining unit has been variously identified as the Will County Sheriff's Police Merit Commission Deputies, the Will County Deputy Sheriff's under the jurisdiction of the Will County Merit Commission, and the Will County Sheriff's Department Merit Deputies under the jurisdiction of the Will County Sheriff's Police Department Merit Commission. For the purposes of this case, it suffices to refer to the unit as the Deputy Sheriffs.

2. Bargaining agreements from 1981 were admitted into evidence.

Bargaining for a new agreement began in 1986 and reached an impasse (for the purposes of Section 14 of IPELRA) in late 1987. In November, 1987, the parties selected the members of this Board of Arbitration. The Chairman received notice of his appointment on December 3, 1987, and the hearing was opened on December 14, 1987, within the 15 day period provided by IPELRA. At the opening session the parties identified unresolved items in the areas of salary, term of agreement, discipline and discharge, employee security and grievance procedure. These subject areas were encompassed in Articles 4, 5, 6, 19 and 20 of the old agreement. Between the first and second hearing sessions the parties resolved all issues concerning Article 19, Salaries, and Article 20, Term of Agreement. Evidence was taken during hearing sessions held on February 11 and 16, 1988. Thereafter there was an extended period prior to the submission of briefs as the parties attempted to resolve their differences outside of the arbitration process. During this period the Union further modified its proposal. Briefs were submitted on May 27, 1988. The parties waived the 30 day period for conclusion of this proceeding as provided for in Section 14(d) of IPELRA. On July 25, 1988, the Arbitration Board chairman wrote to the parties seeking a clarification of the proposals, particularly the amended proposal made by the Union during the extended recess. Responses were received on July 30th and August 4th.

II. The Issues

The issues open for determination by this Board of Arbitration do not concern any economic items. They involve matters of employment security, including discipline and discharge, and the grievance procedure. As will be illustrated below, the essence of the parties' impasse involves the Employer's proposals for the deletion of several items from the old agreement relating to employment security, discipline and discharge, and a major modification of the grievance procedure language, all of which had been encompassed in Articles 4, 5 and 6 of the old agreement. The parties have agreed to include some of the sections of the old agreement in the new agreement, and consolidate the areas of disagreement to Articles 5 and 6. In order to illustrate the parties' positions and to memorialize the now agreed to Article 4, the following provides the language of the parties' proposals.

ARTICLE IV EMPLOYEE SECURITY

Employer Proposal

Union Proposal

Old Agreement

Section 4.1 Medical Suspension

- a. The Employer shall have the right to suspend, with pay, any Employee who is believed to be mentally and/or physically unfit for duty.
- b. Such suspension shall require that Employee to obtain mental and/or physical examination(s), by appropriate physician(s), selected and/or approved by the Employer.
- c. The Employer shall pay for such required examination(s).
- d. The results of said examination(s) shall be divulged only to the Employer, the Union President or, if unavailable, the Union Vice-President, and the Employee, and shall determine if and when the Employee shall be able to return to duty.
- e. Should the Employee(s) desire "second" or other medical opinions, the Employee(s) shall pay the associated costs, which are not paid by the County group insurance program.
- f. Following the receipt of the initial medical opinion, confirming a medical problem, the subsequent time an Employee spends, in this status, shall be charged to Disability or Workers' Compensation Leave, as appropriate.

Agreed

Section 4.8 - Medical Suspension

The Employer shall have the right to suspend with pay, any employee who is believed to be mentally or physically unfit for duty. Said suspension shall be for the purpose of that employee to obtain a mental and/or physical exam by physician, mutually agreed upon by both the Union and Employer. Results of said exam shall be presented to both the Union (president and/or vice president only) and Employer prior to employee's return to duty. Failure to comply with this section shall be cause for disciplinary action against the employee by the Employer.

Employer Proposal

Union Proposal

Old Agreement

Section 4.2. File Inspection

The Employer's personnel files, relating to any Employee, shall be available by prior appointment, for inspection and copy by the affected Employee, during regular business hours.

Agreed

Section 5.2 - File Inspection

The Employer's and Merit Commission personnel files and disciplinary history files relating any Deputy shall be open and available for inspection by the affected Deputy during regular business hours, and make available copies.

Section 4.3. Limitation on Use of File Material

It is agreed that any material and/or matter not available for inspection, such as is provided for in Section 4.2 above, shall not be used in any manner or any form adverse to the Employee's interest.

Agreed

Section 5.3 - Limitation on Use of File Material

It is agreed that any material and/or matter not available for inspection, such as provided in Section 5.2 above, shall not be used in any manner or any form adverse to the Deputy's interest.

(NOTE: THE EMPLOYER'S PROPOSAL REFERRED TO "SECTION 5.2 ABOVE ***." THIS WAS CLEARLY AN ERROR ARISING FROM A REFERENCE TO THE OLD AGREEMENT.)

Section 4.4 Free Speech

The right of an Employee to speak freely and to comment upon matters of public concern, when out of uniform, during their off-duty hours shall not be abridged, and shall not violate the Will County Merit Commission Rules and Regulations.

Agreed

Section 5.4 - Free Speech

The right of a Deputy to speak freely and to comment upon matters of public concern during their off-duty hours shall not be abridged, and not violate the Merit Commission rules and regulations.

Section 4.5 Free Suffrage

- a. Employees shall have the right to vote.
- b. Employees shall further have the right to support or refrain from supporting candidates for political office of their choice, when off-duty and out of uniform.

Agreed

Section 5.5 - Exercise of Suffrage

A Deputy shall have the right to vote and to support or refrain from supporting candidates for political office of their choice.

ARTICLE V EMPLOYEE DISCIPLINE

<u>Employer Proposal</u>	<u>Union Proposal</u>	<u>Old Agreement</u>
<u>Section 5.1 Statement of Principles</u>	<u>Section 5.1 - Definition</u>	(Section 4.1 of the old Agreement
a. The Employer acknowledges the Constitutional, statutory and judicial rights of its Employees, with regard to established safeguards, in the matter of due process and disciplinary actions.	The Employer agrees with the tenets of progressive and corrective discipline. Disciplinary action or measures shall include only the following:	is the same as the Union proposal.)
b. Disciplinary action may only be taken against an Employee, after a showing of cause for such action, by the person(s) authorized to do so.	a. Oral reprimand	
c. The statutory and judicial rights of Employees, related to due process appeals from any and all disciplinary action, imposed against them, are acknowledged.	b. Written reprimand	
d. The Employer, the Union and the Employees agree with the tenets of corrective and progressive discipline, that is:	c. Suspension (Notice to be given in writing)	
(1) In addition to being punitive, a primary purpose of disciplinary action should result in improved Employee performance, in the area for which the need for disciplinary action arose.	and	
(2) All disciplinary action taken should be appropriate to the nature of the offense.	d. Discharge (Notice to be given in writing)	
e. Disciplinary actions, imposed upon Employees, shall normally be accomplished in a manner that does not embarrass Employees before their peers or the public.	e. Discharge upon mutual agreement between employee and the Sheriff. Disciplinary action may be imposed upon an employee only for just cause.	
f. To be effective, any disciplinary action, which is deemed appropriate, should be taken in a timely manner.		

Employer Proposal

Union Proposal

Old Agreement

Section 5.2 Employee Rights

Section 5.2(a) - Employee Rights

(No corresponding provision.)

- a. The Illinois Uniform Peace Officers Disciplinary Act, as now or hereinafter legislatively enacted and/or interpreted by a Court of competent jurisdiction, is adopted by reference.
- b. The provisions of said Act shall apply to any and all inquiries, investigations and/or similar proceedings, which may be the basis of any disciplinary action against an Employee, other than that which involves an oral reprimand, since such actions do not constitute a matter of official, personnel record.

The Illinois Uniform Peace Officers Disciplinary Act (UPODA), as now or hereinafter enacted, is adopted by reference. The provisions of the UPODA shall apply to any and all inquiries, investigations and/or other similar proceedings, which may be the basis of any disciplinary action against an employee, other than that which involves an oral reprimand.

(The substance of what was Section 4.2 of the old Agreement is provided in the Employer's proposed Section 5.1 (e) and (f), above.)

Section 5.2(c)

If the Employer has reason to discipline an employee, it shall normally be done in a manner that will not embarrass the employee before other employees or the public and shall be done in a timely fashion.

(Section 4.2 of the old Agreement is the same as the Union's proposal.)

- c. In addition to the right to counsel, Employees, who so choose, may also be represented by the Union or its lawfully designated agent.

Section 5.2(d) - Right to Representation

Employees who so choose shall have the right to be represented by counsel or representation by the Union or its lawfully designated agent during the investigation and at all times during any interrogation or inquiry, if interrogated pursuant to an investigation of which he/she is the subject thereof, in which charges may be placed against him/her. The employee shall be afforded at least twenty-four (24) hours to obtain counsel or representation prior to interrogation.

Section 5.8

The Deputy shall have the right to be represented by counsel or other representation of his/her choice, during the investigation and at all times during any interrogation, if interrogated pursuant to an investigation of which he/she is the subject thereof, and in which charges may be placed against him/her. The Deputy shall be afforded at least twenty-four (24) hours to obtain counsel or representation prior to interrogation.

Employer Proposal

Union Proposal

Old Agreement

- d. An Employee shall be entitled to a presumption of innocence, until evidentiary probable cause to the contrary is indicated.

Section 5.2(b) - Presumption of Innocence

An employee shall be entitled to a presumption of innocence during any disciplinary investigation. The Department may conduct a disciplinary investigation regarding an employee's conduct when it receives complaints or has reason to believe an employee has failed to fulfill his responsibilities as an employee and just cause for disciplining exists. The disciplinary investigation shall be conducted according to the standards set out in this Article V.

(Section 5.6 of the old Agreement is almost identical to the Union proposal.)

- e. The subject matter of any inquiry or investigation shall be narrowly drawn, so as to be directly and specifically related to the issues, which are the subject of the inquiry or investigation.

Section 5.2(e) Scope of Inquiry

The subject matter inquired into during the investigation or interrogation shall be narrowly, specifically and directly related to the charges which are the subject of the investigation. No employee shall be required to disclose personal information not related to the investigation, such as personal property, assets, income, source of income, debts, domestic expenditures, or information relating to any member of his family or household unless the information is obtained by proper legal procedures, is probative of a conflict of interest with the employee's official duties or disclosure as required by law.

(Section 5.9 of the old Agreement is almost identical to the Union proposal.)

- f. No Employee shall be required to disclose personal information nor that pertaining to any family or household member, which is unrelated to the inquiry or investigation, unless such information is otherwise:

- (1) Obtained by proper legal procedures; and/or
- (2) Probative of a conflict of interest, with the Employee's official duties; and/or
- (3) Required to be disclosed by law.

Employer Proposal

(No corresponding provision.)

- g. If Employees are placed under arrest, or if probable cause exists to place them under arrest, at the time of the inquiry or investigation, or as a result thereof, such Employees shall be fully informed of their Constitutional rights and safeguards, prior to any initial or further interrogation.

Section 5.3 Investigatory Suspension from Duty

- a. Pursuant to official investigatory proceedings, the Will County Sheriff is authorized to suspend an Employee from duty, with or without pay, for a period not to exceed thirty (30) calendar days, after providing the Employee with written reasons for such suspension, and so informing the Will County Merit Commission.
- b. If the results of the investigation exonerate the Employee(s), they shall be fully reinstated, including the restoration of all pay and benefits withheld, if any.

Union Proposal

Section 5.2(f) - Polygraph

No employee shall be required to take a polygraph examination as a condition of retaining employment with the Employer, nor shall be subject to discipline for the refusal to take such.

Section 5.2(g) - Notice of Constitutional Rights

If employees are placed under arrest, or if probable cause exists to place them under arrest, at the time of the inquiry or investigation, or as a result thereof, such employees shall be fully informed of their constitutional rights and safeguards, prior to any initial or further interrogation.

Section 5.3 - Suspension Pending Discharge

The Employer may suspend an employee for up to ten (10) calendar days, pending the decision whether or not charges for discharge shall be filed against the employee. The Sheriff may also suspend an employee for up to ten (10) calendar days without taking any further action.

A suspension exceeding more than ten (10) days may be mutually agreed upon between the employee and the Sheriff.

Old Agreement

(Sections 4.7 and 5.14 of old Agreement are the same as the Union's proposal.)

Section 5.13

If the Deputy is placed under arrest, or if probable cause exists to place the Deputy under arrest at the time of the interrogation, the Deputy shall be fully informed of his Constitutional Rights prior to the commencement of the interrogation.

(Section 4.3 of the old Agreement is the same as the Union's proposal.)

Employer Proposal

Union Proposal

Old Agreement

Section 5.3 - (Continued)

- c. If the results of the investigation are believed to warrant either non-judicial or judicial disciplinary action, the Will County Sheriff shall proceed, in accordance with those findings, as appropriate:
- (1) Should non-judicial, disciplinary action result from the investigation, such proceedings shall be in accordance with this Article, with full consideration given to the Employee, for any and all time spent under investigatory suspension from duty.
 - (2) Should judicial charges result from the investigation, the Will County Merit Commission may suspend the Employee indefinitely, pending the conclusion of related judicial action. Subsequent action, by the Will County Merit Commission, shall be appropriate to and consistent with final judicial action, taken in these matters.

Employer Proposal

Union Proposal

Old Agreement

Section 5.4 Disciplinary Hearings

Section 5.4 - Pre-Disciplinary Meeting

(Section 4.4 of the old Agreement is the same as the Union's proposal.)

a. Type of Hearings:

Prior to notifying the employee of the contemplated measure of discipline to be imposed, the Employer shall meet with the employee involved and/or his/her Union representative and inform them of the reasons for such contemplated disciplinary action, including any names of witnesses and copies of pertinent documents. The employee and Union representatives shall be given the opportunity to rebut or clarify the reasons for such discipline.

- (1) **Predisciplinary Proceedings:** Pursuant to Constitutional and statutory due process and prior to placing an Employee on investigatory suspension from duty, imposing non-judicial disciplinary measures, or referring charges for Will County Merit Commission or judicial review, the Will County Sheriff or subordinate supervisors, who are authorized to take such action, shall meet with affected Employees and any legal or other representatives, designated by the Employees for a pre-disciplinary hearing, and inform them of the allegations and/or charges against the affected Employees, and of the intent to administer discipline in the matter.
- (2) **Disciplinary Proceedings:** Disciplinary hearings shall be conducted by the Will County Sheriff or by the designated subordinate supervisor, appropriate to and consistent with the nature of the allegations and/or charges.

Section 5.5 - Notification and Measure of Disciplinary Action

(Section 4.5 of the old Agreement is the same as the Union's proposal.)

- A. In the event disciplinary action is taken against an employee, other than the issuance of an oral warning, the Employer shall promptly furnish the employee and the Union, at the employee's request in writing, with a clear and concise statement of the reasons therefor. The measure of discipline and the statement of reasons may be modified, especially in cases involving suspension pending discharge, after the investigation of the total facts and circumstances. But once the measure of discipline is determined and imposed, the Employer shall not increase it for the particular act of misconduct which arose from the same facts and circumstances.

Employer Proposal

Union Proposal

Old Agreement

Section 5.4 - Continued

- b. Affected Employees shall be presented with a clear, complete and concise, written statement of any and all preliminary allegations and/or charges against them, as well as the names of accuser(s), witness(es) and copies of pertinent documents, and such information shall be provided to affected Employees, not later than when they are notified of the date, place and time of the disciplinary hearing.
- c. At any disciplinary hearing, affected Employees and/or their designated representatives shall be given the opportunity to clarify or correct the circumstances, related to the allegations and/or charges against them, and/or to present facts, in evidentiary rebuttal.
- d. The result of the disciplinary hearing shall become a matter of official, personnel record.
- e. The procedures, outlined in this Section, shall not apply to the administration of oral reprimands, since they shall not constitute matters of official, personnel record.

Section 5.5 - Continued

- B. An employee shall be entitled to the presence of a legal representative at an investigatory interview if he/she requests one and if the employee has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her. The legal representative present during the interview will be allowed to advise the employee and not participate in questioning.
- C. Nothing in this Section shall prevent the Employer from relieving employees from duty in accordance with its practice. The employee shall not lose any wages because of such release.

Employer Proposal

Union Proposal

Old Agreement

Section 5.5 Administration of Discipline

- a. Discipline, either imposed or recommended for imposition, shall be appropriate to and consistent with the findings of the disciplinary hearing.
- b. Disciplinary measures, imposed by supervisors, who are subordinate to the Will County Sheriff, may be subsequently modified, at any time, by the imposing supervisors or supervisors who are senior to them, except that such modification may be only to lessen the severity of disciplinary action taken.
- c. Once discipline is imposed, its severity may not be increased, for the same act of misconduct, arising from the same facts and circumstances, except on review, by statutory action authorized to be taken only by the Will County Merit Commission itself.
- d. Inherent in the authority to impose a given level of disciplinary action is the authority to:
 - (1) Impose any lesser or included disciplinary action; and
 - (2) Abate, in part or in whole, the disciplinary measure imposed.
- e. Affected Employees shall receive written notification of all disciplinary actions imposed against them, except for oral reprimands.
- f. All disciplinary measures, except oral reprimands, shall become matters of official, personnel record.

(Except to the extent that proposed Section 5.5(A) by the Union (above) addresses notice of discipline and modification of discipline, there is no Union proposal corresponding to the Employer's proposed Section 5.5.)

(See comment on Union proposal.)

Employer Proposal

(Except to the extent that proposed Sections 5.4(d) and 5.5 (f) by the Employer address an employee's personnel record, there is no Employer Proposal corresponding to the Union's proposed Section 5.6.)

Section 5.6 Disciplinary Appeals

- a. Pursuant to Constitutional and statutory due process, all Employees, affected by any disciplinary actions, retain the inherent right to appeal such actions.
- b. In order for any appeal to be processed, it must be valid and submitted in a timely manner:
 - (1) To be valid, an appeal must set forth, in writing, the reasons why the disciplinary action taken was erroneous.
 - (2) To be timely, an appeal initially must be filed, prior to the expiration of the disciplinary action taken or within thirty (30) days, whichever is less time.
- c. All appeals shall be submitted initially, to the supervisor who imposed the disciplinary measures, as a request for reconsideration of the disciplinary action taken.

Union Proposal

Section 5.6 - Removal of Discipline

Any written warning or discipline of three (3) days or less, imposed shall be removed from an employee's record if, from the date of the last warning or discipline, two years pass without the employee receiving any additional warning or discipline of three day suspension or less.

Section 5.7

The provisions of this Article are intended to supplement an employee's rights under the Sheriff's Merit System Act, Ill.Rev. Stat. Ch. 125, §151, et. seq. The rights secured to employees under this Article shall not be construed to negate or diminish an employee's rights under such Act.

An employee may elect to contest a disciplinary action other than an oral reprimand through the grievance procedure. In the event tht an employee elects to contest a suspension or discharge before the Will County Merit Commission, such employee shall waive any right to appeal any grievance filed to the arbitration step of the grievance procedure and the parties agree that such arbitration step shall not be applicable.

Old Agreement

(Section 4.5 of the old Agreement is the same as the Union's proposal.)

(There is no corresponding provision in the old Agreement. The Employer's proposal is part of its modification of the grievance procedure. (See Article VI.) The Union's proposal is a response to the Employer's proposed modification.)

Employer Proposal

Union Proposal

Old Agreement

Section 5.6 - Continued

- d. If affected Employees are dissatisfied with the results of their appeal, they may continue the review process, through each subsequent supervisory level, including the Will County Sheriff, in accordance with the related timeframes, established in Section 6.2b through Section 6.2d inclusive.
- e. If affected Employees remain dissatisfied, after exhausting the Departmental review process, they may appeal to the Will County Merit Commission, in accordance with the timeframes, established in Section 6.2e.
- f. If affected Employees are dissatisfied with the results of their appeal to the Will County Merit Commission, they may appropriately file the matter with the Will County Circuit Court and subsequently continue the process through judicial review.
- g. The disciplinary action originally imposed, shall not be stayed during the appeal process, unless specific authorization to do so is directed by competent authority.

ARTICLE VI GRIEVANCE PROCEDURE

Employer Proposal

Section 6.1 Definition

A grievance shall be considered a dispute between the Employer and the Union and/or any Employee(s), regarding the application, meaning or interpretation of this Agreement, or out of conditions concerning wages, hours, and other non-disciplinary conditions of employment, as set forth in this Agreement. Disciplinary appeals shall be conducted, as set forth in Article V.

Section 6.2 Process

a. Step 1. First Line Supervisor (Police Sergeant):

- (1) Employee(s) affected, with or without the Union representative, or the Union representative alone, on behalf of the affected Employee(s), shall present the grievance, orally and/or in writing, to their immediate Supervisor, within five (5) working days from the date of the occurrence, giving rise to the grievance. At that time, the persons shall meet for discussion, in an attempt to resolve the matter.
- (2) If the grievance is presented in writing, the Supervisor shall furnish a written response, within five (5) working days, after the conclusion of the discussion.

Union Proposal

A grievance shall be considered a dispute between the Employer and the Union and or any employee(s) regarding the application, meaning or interpretation of this Agreement, or out of conditions concerning wages, hours, and all conditions of employment.

Step 1:

The employee, together with the Union steward or the Union steward shall present the grievance orally and/or in writing to the immediate supervisor within seven (7) working days of the grievance date to attempt to adjust the matter.

Old Agreement

(The Union's proposed Article VI is identical in its entirety to Article VI of the old Agreement.)

Employer Proposal

Union Proposal

Old Agreement

b. Step 2. Intermediate Supervisor (Police Lieutenant):

Step 2:

- (1) In the event the grievance is not resolved at Step 1, the Union shall present it, in writing, with the Step 1 response and the Union reason(s) for non-acceptance, to their mid-level Supervisor, within five (5) working days from receipt of the Step 1 supervisory response, or the date such answer was due, whichever is earlier.
- (2) The Step 2 Supervisor shall meet for discussion with the affected Employee(s) and/or the Union representative after receipt of the grievance, in an attempt to resolve the matter, and shall furnish a written response, after the conclusion of the discussion, within a total of five (5) working days.

In the event the grievance is not resolved in Step 1, it shall be presented in writing by the Union to the Sheriff of Will County within seven (7) working days from receipt of the answer or the date such answer was due, whichever is earliest. Within five (5) working days after the grievance is presented to Step 2, the Sheriff or his or her designee shall discuss the grievance with the Union. The Sheriff or his or her designee shall respond to the grievance in writing to the Union within seven (7) calendar days.

c. Step 3. Senior Supervisor (Chief Deputy):

- (1) In the event that the grievance is not resolved at Step 2, the Union shall present it, in writing, with the Step 2 response and the Union reason(s) for non-acceptance, to their senior Supervisor, within ten (10) working days from receipt of the Step 2 supervisory response, or the date such answer was due, whichever is earlier.
- (2) The Step 3 Supervisor shall meet for discussion with the affected Employee(s) and/or the Union representative within five (5) working days, after receipt of the grievance, in an attempt to resolve the matter. The Supervisor shall furnish a written response, within five (5) working days, after the conclusion of the discussion.

Employer Proposal

Union Proposal

Old Agreement

d. Step 4. Will County Sheriff:

- (1) In the event that the grievance is not resolved at Step 3, the Union shall present it, in writing, with the Step 3 response and the Union reason(s) for non-acceptance, to the Will County Sheriff, within ten (10) working days from receipt of the Step 3 supervisory response, or the date such answer was due, whichever is earlier.
- (2) The Will County Sheriff shall meet for discussion with the affected Employee(s) and/or the Union representative, within five (5) working days, after receipt of the grievance, in an attempt to resolve matter. The Will County Sheriff shall furnish a written response, within five (5) working days, after the conclusion of the discussion.

e. Step 5. Will County Board Executive Committee:

- (1) If the grievance remains unresolved, after Step 4, it may be appealed by the Union and presented, in writing, with the Step 4 response and the Union reason(s) for non-acceptance, no later than the second regularly scheduled meeting of the Will County Board Executive Committee, following receipt of the Step 4 supervisory response, or the date such answer was due, whichever is earlier.
- (2) The Committee shall schedule a hearing of the grievance, not later than their second regularly scheduled meeting, following receipt of the grievance. However, if the Union, the Will County Sheriff or the Will County Board Executive Committee specifically requests an extension of the aforementioned time-frames, an extension, not to exceed an additional fifteen (15) calendar days, shall be granted.

Step 3:

If the grievance is still unresolved, it shall be appealed by the Union and presented in writing no later than the second regularly scheduled meeting of the Executive Committee of the Will County Board, following the date of receipt by the Union of the written response, which will schedule a hearing of the grievance at the next regularly scheduled meeting of that committee. However, if the Union, Sheriff of Will County, or the Executive Committee specifically requested an extension of time within the aforementioned time frame, an extension not to exceed an additional fifteen (15) days shall be granted.

Employer Proposal

(3) At the hearing, all parties to this Agreement shall be allowed to introduce and question persons familiar with the facts of the grievance. The Union and the Employee(s) may be represented by officers of the International Union or their legal representatives, if the International Union so desires. Continuances may be granted by the Committee, but in no case shall the grievance hearing be extended beyond thirty (30) calendar days, from the date set by the Committee for the initial hearing.

(4) The Committee shall provide a written response to the Union, within fifteen (15) calendar days, after the conclusion of the hearing.

f. Step 6. Final Resolution:

(1) If the grievance remains unresolved after Step 5 and both parties agree, the issue(s) may proceed to non-binding mediation, pursuant to Section 12 of the Illinois Public Employees Labor Relations Act (IPELRA).

(2) If both parties agree, fact-finding, pursuant to Section 13 of IPELRA, may be employed in lieu of, concurrent with or subsequent to non-binding mediation. The costs of fact-finding shall be paid equally by the Employer and the Union.

Union Proposal

At this meeting, all parties to the Agreement will be allowed to introduce and question persons familiar with the facts of the grievance. The Union and the employee may be represented by officers of the International Union or their legal representatives if the International so desires.

The Sheriff of Will County may call upon State's Attorney or any of his personnel for assistance. In no case, will the grievance meeting be extended beyond thirty (30) calendar days from the date that said Committee sets the initial hearing date. The Committee shall give written response to the Union within fourteen (14) calendar days of the meeting.

Step 4:

If the grievance is not settled at Step 3, the Union Grievance Committee may submit the grievance to final and binding arbitration by giving written notice to the County Board Chairman of intent to arbitrate within seven (7) calendar days from the decisions of the Executive Committee at Step 3.

A grievance not resolved in Step 3 shall be taken before an arbitrator for final settlement in accordance with the rules of the American Arbitration Association.

Old Agreement

Employer Proposal

- (3) If the grievance remains unresolved after Step 5 and
- (a) Both parties cannot agree to proceed to mediation and/or fact-finding; or
 - (b) One or both parties seek to proceed directly to final and binding arbitration of the dispute, concerning the administration and/or the interpretation of this Agreement;
- the grievance shall be resolved, pursuant to Section 8 of IPELRA.
- (4) Arbitration shall be conducted, in accordance with the Rules and Regulations of the Illinois State Labor Relations Board, by a single, neutral Arbitrator, selected from a list provided by said Board for such purpose, in the manner prescribed by said Rules and Regulations.

Union Proposal

The arbitrator will be selected in accordance with the rules of the American Arbitration Association from a list provided by either the United States Department of Labor Federal Mediation and Conciliation Service or the Illinois Department of Labor State Mediation and Conciliation Service.

The arbitrator, once selected, shall decide the merits of the grievance. It shall have no authority to add to, subtract from, or change any of the terms of the Agreement. The costs of the arbitration shall be shared equally by the Union and the Board. The decision of the arbitrator shall be final and binding on the parties and the arbitrator shall be requested to issue his decision within thirty (30) days. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, provided it pays for the record and makes copies available without charge to the other party and to the arbitrator.

Old Agreement

Employer Proposal

Union Proposal

Old Agreement

Section 6.3 Union Representation

- a. The Union shall have reasonable access to persons and information, necessary to prepare for and represent the Grievant(s), in matters arising, pursuant to this Article.
- b. Union access to individual Employee files shall be subject to the written authorization of the Employee(s) affected and/or concerned.

Section 6.4 Hearing Location

Grievance hearings or other related procedural meetings, involving the Grievants, representatives of the Employer and the Union, shall be held during work hours, on County premises, without loss of pay to Employees, providing that such activities take place in a manner which does not interfere with County operations.

Section 6.5 Timely Submission

- a. No grievance shall be entertained or processed, unless it is filed within the required time limits. However, the absence of an Employee shall be cause to extend the time limits for filing or processing, in accordance with Section 6.5d of this Article.
- b. If a grievance is not filed or appealed, within the time limits and manner previously set forth, the grievance shall be deemed moot.
- c. When an answer is not received to a grievance, within the required period of time, the grievance shall be deemed moved automatically to the next Step.

Section 6.2

Meeting of the grievance procedure involving representatives from the County and the Union shall be held during working hours, on County premises, and without loss of pay to Union representatives, grievant, and witnesses providing that these grievance discussions and investigation shall take place in a manner which does not interfere with County operations.

Section 6.3

No grievance shall be entertained or processed unless it is filed within the required time limits. If a grievance is not appealed within the time limits or appear as previously set forth, the grievance shall be deemed withdrawn. Time limits at any step may be extended by mutual agreement. When an answer is not received to a grievance within the required period of time, the grievance shall be considered automatically moved to the next step.

Employer Proposal

Union Proposal

Old Agreement

- d. All of the foregoing notwithstanding, time limits, at any Step, may be extended by mutual consent of the parties.
- e. For purposes of this Article, "working days" are defined as those days when either the affected Employee(s) and/or the applicable Supervisor are scheduled and present for duty.

III. Review of the Evidence

In the old Agreement there was a substantial overlap between Articles IV and V. For example, Section 4.1 refers to progressive discipline and contains the statement that "disciplinary action maybe imposed upon an employee only for just cause." However, Section 5.1 contains different language, although the "just cause" principle is retained.⁽³⁾ Both Sections 4.7 and 5.14 prohibit polygraph examinations. Further, Article IV, which includes provisions for the implementation of discipline seems to be closely allied with certain sections of Article V relating to investigations preceding discipline. It is not entirely clear why certain provisions were put in Article V and others in Article IV. (See Section 5.08 through 5.12 and 5.15 and compare with Section 4.4 and 4.5.) Even within the same article there is some confusion. Thus, for example, Section 4.3 provides for suspensions of up to 10 days pending a decision on discharge. Section 4.5(c) provides for "relieving employees from duty" in accordance with Employer's practice. It is unclear whether this is a supplement to Section 4.3 or refers to other types of suspensions. If the latter, how does this relate to Sections 4.1 and 5.1?

3. Section 5.1 reads, "No Deputy covered by this Agreement shall be suspended, relieved from duty or disciplined in any manner without just cause."

In this case, at least as to issues remaining to be decided by this arbitration panel, the Employer has taken the initiative of coordinating and combining what had been Articles IV and V. The Union has agreed to the extent that it has now joined with the Employer in limiting the scope of Article IV. The parties have agreed that this article shall be entitled "Employee Security" (formerly the title for Article V) and it shall consist of five provisions: Medical Suspension, File Inspection, Limitation on Use of File Material, Free Speech and Free Suffrage. (See chart setting forth exact language in prior portion of this decision.) In its amended proposal, the Union has removed contested sections which relate to discipline, i.e. actions taken prior to discipline, the implementation of discipline and actions to be taken after discipline, and placed them in Article V, which is the approach used by the Employer.

The Employer proposes numerous changes in the provisions for "Employee Discipline," now contained in Article V. The Employer's proposal maintains many of the old Agreement's procedural protections, such as discipline being given in a timely manner (5.1(f) of Employer's proposal) and discipline administered so as not to embarrass the employee (5.1(e)) and that employees have the right to counsel and/or the Union (5.2(e)). However, it alters the wording of other protections, some subtly and some rather starkly. For example, the old Agreement contained

a statement (in Section 5.6) that an employee "shall be entitled to a presumption of innocence during any disciplinary investigation." The Employer's proposed Section 5.2(d) provides that an employee "Shall be entitled to a presumption of innocence, until evidenciary probable cause to the contrary is indicated."

(emphasis added.) Whether the Employer is proposing that once it has determined probable cause the presumption shifts and the employee has to prove his innocence, or whether the Employer is seeking only to clarify that upon finding probable cause there is no "presumption" at all and discipline may be taken, subject to appeal, is unclear from the words used and the structure of the proposal. Another example is contained in the Employer's proposed Section 5.2(f) which is intended to replace the old 5.9, relating to the disclosure of personal information under certain circumstances. The old Agreement listed examples of the personal information referred to ("personal property, assets, income, source of income," etc.) The Employer's proposal deletes this list in its entirety. On a more apparent level, the Employer proposes such changes as increasing the time for a suspension pending investigation from 10 days to 30 days.⁽⁴⁾

4. Another sharp difference between the Employer's proposal and the Union's (which follows the old Agreement) is the deletion of what had been Section 4.6, the removal of certain disciplinary records from an employee's file after two years without similar discipline.

However, the sharpest difference between the Employer's proposal and that of the Union (which closely tracks former sections of the old Agreement ---- see the chart, above), pertains to appeals of disciplinary actions. Nothing in the old Articles IV or V made any special reference to appeals in lieu of the grievance procedure. The Employer takes the position that appeals were to the Will County Sheriff's Police Merit Commission (hereinafter the "Commission"). According to the Employer, the Agreement was silent on this procedure because it is adequately covered by the statute (Sheriff's Merit System Act, Ill. Rev. Stat. 1985, ch. 125, par. 151 et. seq., hereinafter the "statute" or the "Act"). Nothing in the old Agreement referred disciplinary appeals to the Commission because such appeals were mandated as a matter of law. The Employer, being aware of the Union's strong disagreement with this position, amplifies its construction of the old Agreement by including specific reference to the Commission in its proposed Article V. The Union takes the position that the definition of a grievance in Article VI of the old Agreement included all disputes under that contract. It therefore maintains this general approach that the grievance procedure may be used to appeal disciplinary actions taken by the Employer. (5)

5. As will be discussed below, the Union proposes a new provision giving an employee an option of using Commission procedures or the grievance procedure for appeal in disciplinary cases.

Thus, the differences between the Employer's proposed Article V and that of the Union range from the Employer's proposed clarification and tightening of language to the restriction of certain protections previously enjoyed and the elimination of other rights and benefits.

The Employer also proposes several structural changes in Article VI. They include a clear statement that the grievance procedure does not apply to discipline cases and an expansion of the procedure itself to include new steps and processes. The Union proposes to keep the procedure exactly as it is under the old Agreement. Although the parties devoted much of the hearing to an exploration and explanation of Article V, and little effort was made regarding the changes proposed for Article VI, we have reviewed all proposals with the same scrutiny.

Al Harris, Staff Representative for Council 31, testified that he has represented Local 2961 in collective bargaining since 1979. Harris testified that in 1969 the County first recognized the deputies as part of a larger bargaining unit with other County employees. In 1976 the deputies were separated from the rest of the unit and in 1979 they obtained their own collective bargaining agreement. In 1981 the present parties entered into a collective bargaining agreement, a copy of which was submitted into evidence. This 1981 agreement

described the bargaining unit as covering the deputies "under the jurisdiction" of the Commission "in matters concerning wages, disciplinary matters, *** and certain other employment problems to the extent permitted by law." (emphasis added.) Other than this introductory provision, the 1981 agreement contained no other provisions addressing discipline or discharge. It did contain a grievance procedure, the structure of which is very similar to that contained in the 1983 Agreement ("old Agreement"). Harris testified that in 1983 the parties sought to and did reach agreement on rights of deputies ("bill of rights") including discipline and discharge. Harris testified that the language agreed to in 1983, which became Articles IV and V, was the result of numerous hours of difficult negotiations. The parties pursued the issue of discipline with great care. The Employer was represented by an Assistant State's Attorney, by the Sheriff and by the Chairman of the County's Finance Committee. According to Harris, when discipline was discussed it was the Employer's position that discipline would be handled by the Commission. However, the language of the grievance procedure remained the same and it covered the newly negotiated Articles IV and V, Harris testified. According to Harris, the Union had taken the position that Commission procedures were inadequate.

Harris testified that there have been about 20 to 25 grievances under the 1983 Agreement involving discipline. Resolution of almost all of these grievances has been under Step One (with the immediate supervisor) or at Step Two (with the Sheriff). At least one grievance went to Step Three (County Board), Harris testified. It involved a five day suspension. It was considered by the County Board which denied the complaint on its merits. The Union decided to accept this decision and not to appeal the grievance to arbitration. On another occasion, in 1984, a deputy was discharged and a grievance was filed. At Step Two, the Sheriff offered to settle the grievance by converting the discharge to a 60 day suspension. The Union agreed but the employee did not. He decided to pursue an appeal with the Merit Commission. The grievance was withdrawn and the appeal was made independent of the Union. The Commission subsequently upheld the Sheriff's action and the discharge became final. According to documentation presented by Harris, at no time did the Employer claim that this grievance should be processed by the Commission. However, in two recent cases, one in late 1987 and the other in early 1988, the Employer has refused demands for arbitration on the basis that discipline is for the Commission, not arbitration. At least one of these cases is pending.

Harris testified that the County has agreed with AFSCME for grievance and arbitration procedures in disciplinary cases for other County employees. These employees, Harris testified, are not covered by a merit commission or civil services, although at one time one group, correctional officers, were. Harris also presented a series of collective bargaining agreements between other employers and unions, all of which contain unrestricted grievance/arbitration procedures. The agreement between the State of Illinois and AFSCME covers correctional employees, as well as numerous other classifications. The agreement between the City of Chicago and Local 2, Chicago Fire Fighters Union covers fire fighters, as does the agreement between the city of Granite City and Local 253, I.A.F.F. Almost all, if not all, of the employees described in these said agreements are covered by civil service or merit-type commissions, but the employers have also agreed to grievance/arbitration provisions in these agreements.⁽⁶⁾ Harris also testified that many school districts have all-inclusive arbitration provisions in their collective bargaining agreements even though tenured teachers are provided a due process hearing procedure in discharge cases by statute.

6. The two fire fighter agreements expressly provide that the implementation of a grievance procedure in the agreement operates as a waiver of civil service procedures.

Harris also testified as to the Employer's proposal for increasing the number of steps in the grievance procedure. According to Harris, this increase is unnecessary and the procedure proposed by the Employer appears to be similar to interest arbitration and not grievance arbitration.

Presenting the County's evidence was John R. Gallagher, Jr., Director of Personnel for the County. Gallagher has been in this position since January, 1986, and has served as the Employer's chief negotiator in the bargaining which led to this proceeding. Gallagher testified that the first time he became aware of the conflict between the grievance procedure and the Commission was in April, 1986. At that time a correctional officer, then under the Commission's jurisdiction although included in the unit represented by AFSCME Local 1028, filed a grievance arising out of a 5 day suspension. After Step 2, it was appealed to the County Board pursuant to Step 3. (The grievance procedure under the Local 1028 contract was similar to the old Agreement involved in this present case.) Gallagher advised the County Board that the case should be sent to the Commission. Gallagher's advice was supported by the State's Attorney's office.

Although the grievance was not pursued by Local 1028, the State's Attorney requested an advisory opinion from the Illinois Attorney General on three points: (1) Could the employee

be suspended for five days without formal charges before the Commission? (2) Did the Commission have to have rules for a 5 day suspension (appeals of less than 10 days are not covered)? (3) If not, did the County Board have to hear the grievance? The Attorney General's office declined to give an official opinion but the Chief of the Opinions Division did "comment informally" on the inquiry. The letter, which is several pages in length, makes several pertinent points in response. As to the first question, the writer concluded that under the Merit System Act no formal charges need be brought before the Commission for suspensions of up to 30 days in a 12 month period. As to the second question, the writer cited the case of Wagner v. Kramer, 108 Ill 2d 413 (1985) wherein the Court concluded that to survive constitutional attack, the Act had to be interpreted so as to provide a hearing in all cases of suspensions. (7)

7. The Commission's Rules and Regulations do not presently provide for appeals in cases of suspension of ten days or less. They also still contain provisions for correctional officers, although the record is clear that those employees have been "civilianized" and are not under the Commission's jurisdiction. Gallagher first acknowledged and then disagreed that under current Rules, the Commission could increase discipline imposed by the Sheriff. Although this would be unlikely, Gallagher testified, it may be preserved in the Employer's proposed Section 5.5.

The writer then, however, refused to address the third question. Although his letter makes clear that he interpreted the definition of a grievance as including disciplinary cases, he wrote as follows:

"Because the merit commission must provide a review mechanism, it is unnecessary to address the implications and effects of the collective bargaining agreement grievance procedure under the factual situation described above."

Gallagher testified that the above-quoted sentence together with the Employer's reading of the Merit System Act under which there could be court review of Commission actions, the Employer concluded that there was no role for grievance and arbitration procedures in disciplinary cases. (8)

Gallagher testified that the County Board adopted an ordinance establishing the Commission on September 14, 1965. The ordinance provides that all deputies appointed, promoted, disciplined and discharged be so under the Commission's auspices. The Commission originally consisted of three members but it was expanded to five in 1975. The members are nominated by the Sheriff and confirmed by the County Board.

8. In cross examination Gallagher explained that he interpreted this sentence to mean that whether the grievance procedure conflicted with the Commission's jurisdiction was a moot point because the Commission had to provide an appeal under the statute.

Gallagher was asked to describe the other differences (other than the separation of disciplinary from non-disciplinary complaints) in the Employer's proposal compared with the old Agreement. He testified that the only other difference of note was the section on personnel records (the deletion of Section 4.6 of the old Agreement).⁽⁹⁾ Gallagher then went on to explain some of the bargaining history on the areas where the parties are in agreement.⁽¹⁰⁾ He testified that after the old Agreement went into effect, the state legislature passed the Illinois Uniform Peace Officers Disciplinary Act. This provided for many of the

9. The testimony was as follows:

"Q. *** are there any differences in *** 4, 5 and 6 of the contract between the Management proposal and the Union proposal, or have you covered it?"

"A. Well, *** there are verbal differences. I don't believe, other than the exception that I made on the *** matter of personnel records. That *** the intent is any different."

10. On cross examination Gallagher explained management's position on the deletion of the old Section 4.6, relating to the purging of personnel records of minor discipline. He testified that the complete record more accurately reflects an employee's growth and development. ("If there's nothing in the record, you cannot materially tell whether one employee has progressed, regressed, or done nothing.") He also testified that if items were removed from a file he would be unable to comply with a subpoena for these records.

areas covered by the old Articles IV and V. The Employer wanted to delete these sections from the Agreement as redundant but the Union resisted. Eventually the parties adopted the statute by reference and

"extended the provisions of the statute to all disciplinary inquiries and investigations, not merely those required by statute, which was for suspensions of three days or more. We said, we will apply these procedures in any and all investigations and inquiries. And we ultimately agreed to include the balance of the language that had been in the contract." (11)

Gallagher also testified that he and the Sheriff made inquiries and were unable to identify any non-home rule county (such as Will County) which had a grievance procedure covering disciplinary cases. During negotiations, Gallagher testified, he asked the Union to identify another similarly situated county and they could not do so. Gallagher testified that the Employer takes the position that not having home rule powers, the Employer cannot modify the requirements of the Merit Commission Act. Because that is a state statute, the Employer cannot contract away rights provided by that statute. On the other hand, Gallagher acknowledged that the County could abolish the Commission but that it has chosen not to do so.

11. On cross examination, Gallagher testified: "That it was our intent not to take *** away the concerns or protections that the employees had that had been covered in the existing contract."

IV. Positions of the Parties

A. Union Arguments

The Union points out that the primary area of disagreement between the parties is the scope of the grievance procedure. Another area of distinct disagreement has to do with removal of minor discipline from personnel files. Although there are other areas of substantive disagreement, the Union refers to Gallagher's testimony that the Employer is not seeking to change any other existing rights and benefits. Accordingly, the Union has focused most of its argument on the grievance procedure, with only some attention paid to other provisions.

At the outset, the Union argues that this arbitration panel should consider the parties' relationship and the impact the Employer's proposals will have on it. It suggests that our judgment should not be limited to a quantitative measuring of the factors set forth in Section 14(h) of IPELRA, but should reflect a sense of fairness, sound policy, the purposes of Section 14 (with sensitivity to the no-strike provision) and that the burden is on the Employer to demonstrate why the old Agreement should be changed. As to this latter point, the Union argues that it is encumbant upon the Employer, as the party seeking to change provisions which had previously been negotiated, to demonstrate that the existing provisions are economically or operationally harmful to the Employer.

The Union argues that the Employer's proposals regarding Articles V and VI are not merely clarifications, but represent radical changes of the status quo. The evidence demonstrates that until recently the Employer did not challenge the application of the grievance procedure to disciplinary actions by the Sheriff. It was not until 1986, when Gallagher became personnel officer, that the County Board ever refused to consider the merits of a disciplinary grievance. Indeed, the Union argues, while the Commission's jurisdiction was discussed at the bargaining table in 1983, the language agreed to was all inclusive. The old Agreement did not exempt disciplinary grievances from the contractual procedure and it is basic to contract interpretation that parties are presumed to have intended the plain meaning of the language they used.

According to the Union, the Employer has presented only one reason why discipline should be excluded from the grievance procedure. As the Union sees it, the only argument made by the Employer is that the Sheriff's Merit System Act mandates the appeal procedure established by the Merit Commission. Other than this legal conclusion, highly questionable in the Union's view, the Employer has presented no evidence as to why the grievance procedure should be changed. According to the Union, the Employer supports its argument upon two narrow points:

(1) that because Will County is a non-home rule County, the Employer must abide by the Merit System Act in its entirety and

(2) that an opinion by the Attorney General's office confirmed this conclusion. The Union argues, however, that a recent decision by the Illinois Supreme Court involving a local civil service commission held that the bargaining requirements of IPELRA supercede the myriad of local ordinances affecting terms and conditions of public employment. As to the Attorney General's informal response, the Union simply notes that the A.G.'s office refused to pass upon the effect of the labor agreement on the Commission and did not state that the Commission's procedures pre-empt all other means of disciplinary review. The Union further argues that the purpose of the Merit System Act was to provide a minimal level of due process for deputies and was not intended to prevent parties from expanding that protection. Due process provided by labor arbitration, the Union contends, is not only preferred by the Courts but is mandated generally by IPELRA itself.

Addressing the other differences in the proposals, the Union asserts that the Employer's expansion of the grievance procedure is inefficient and counterproductive. Furthermore, it argues, the steps proposed are more appropriate to bargaining impasse cases, not grievance cases. The Union also argues that the Employer has presented no reason why Section 4.6 of the old Agreement (now 5.6 in the Union's proposal) should be deleted. There is no evidence that the present plan has not worked and the Employer's rationale that it will be unable to comply with

subpoenas if documents are removed is wrong. Subpoenas require the production of documents which exist, the Union argues, and not those which have properly been destroyed prior to the issuance of the subpoena. As to other sections of the Employer's proposed Article V, particularly Sections 5.3, 5.4, 5.5 and the deletion of the polygraph prohibition, the Union questions the Employer's need to change the language in the face of Gallagher's testimony that no substantive changes were intended. If no changes are intended, the Union argues, the best way to preserve stability in labor relations is to refrain from tampering with language which has not failed the parties.

B. Employer Arguments

In its brief the Employer argues the two points which it deems to be the most significant in this case. It devotes most of its brief to the jurisdiction of the grievance procedure and concludes with a short argument in support of its proposal to delete the provision for purging files of minor disciplinary actions after two years.

The Employer argues that the Merit System Act is an all inclusive statute on the subject of discipline. It pre-empts the entire area of disciplinary review and provides for a hearing procedure in all cases of suspension of more than thirty days. It also permits a sheriff to administer discipline of less than a 30 day suspension (within a 12 month period)

without formal charges before the Commission. It is clear from the provisions of the statute that the legislature intended that when a County adopts the commission system the statute leaves nothing to be negotiated.

The Employer argues that Will County made a political decision more than twenty years ago to adopt the Act. That is now the law in Will County. The issue in this bargaining impasse case is not the wisdom of that decision but the realities it presents. These realities are that the Employer is bound by the law and cannot contract away what the law mandates. During negotiations the Employer's representatives pointed this out to the Union. The Employer's agents could not have agreed to apply the grievance procedure to discipline because they never had the authority to do so. It was not for them to secure specific language which excluded discipline from the grievance procedure. This operated as a matter of law.

The Employer further argues that the duty to bargain under Section 7 of IPELRA is not unlimited. Rather, the Employer cannot bargain on a subject which is already covered by another law. Because discipline is covered by the Merit System Act, Section 7 is of no force and effect. Nor is this conclusion affected by the recent decision of the Illinois Supreme Court in City of Decatur v. AFSCME Local 268, Ill 2d , (Docket Nos. 64464 and 64483) (opinion filed 3/30/88). In that case the Court held that collective bargaining for a grievance procedure in

discipline cases supplemented a municipal civil service system and did not conflict with it. According to the Employer, however, there are three distinguishing features in the Decatur case which render it inapplicable to the present situation.

1. The statute in Decatur was a broad statute covering a wide range of employment related topics. The Merit System Act applicable in this case is a narrow act the principal purpose of which is to regulate the hiring and firing of deputy sheriffs. By definition, the grievance procedure cannot "supplement" this specialized statute.
2. The employees in the Decatur case included a wide range of miscellaneous municipal employees. In the present situation the only employees involved are sworn law enforcement officers. Law enforcement employees have always been treated separately and distinctly in Illinois law. There are special provisions for them throughout the Illinois Code. Indeed, this very proceeding arises because the bargaining statute for this unit has different procedures than that which applies to the employees in Decatur. The special nature of law enforcement work requires special disciplinary procedures and the Commission is set to administer these. Collective bargaining should not be permitted to tamper with a specialized legislative scheme.
3. Decatur is a home rule jurisdiction. Will County is not. Decatur could modify its civil service law to fit its collective bargaining realities. The Employer in this case does not have that discretion. It must follow the statute precisely as it is written.

The Employer also argues that there is no past practice demonstrating any support for the Union's interpretation of the old Agreement. No grievance was ever taken past the third step and in three cases (one of which was under similar language with another bargaining unit) the Employer specifically advised AFSCME that the Commission's jurisdiction in disciplinary cases was absolute. The Union has never legally challenged that position, although it belatedly argues in these proceedings that the last two grievances are still alive.

Turning to its proposal to delete the provision for "sterilizing" files of minor disciplinary records, the Employer argues that this is an important proposal. It asserts that in order to accurately assess deputies for promotion or other review it needs complete files. The only accurate files are complete files, it argues. To remove unfavorable information and retain only positive items distorts reality and prevents management from making accurate decisions. It creates dishonesty because the files are not a true reflection of a deputy's employment history. This type of unreality is antithetical to law enforcement. It also puts the Employer in an impossible position when defending deputies against charges of misconduct. It might have to acknowledge that it does not know what an employee's past record is, possible relating to the current charges, because it was required to remove documents from that employee's file. This conflicts with legal process and should not be retained.

V. Analysis and Conclusions

A. Statutory Criteria for Review of Proposals

Section 14(g) of IPELRA provides that the arbitration panel "shall make written findings of fact and promulgate a written opinion ***." On economic issues the panel can only consider the parties' last offer. No similar requirement appears for non-economic issues. As indicated above, all economic issues between the parties have been resolved. Employee discipline and the grievance procedure are non-economic issues.⁽¹²⁾ The panel, therefore, is not bound by the parties' last offers. We may accept or reject their proposals, reconsider the old Agreement or substitute our own judgment as to what is the most appropriate language for the sections of the Agreement which are before us. The only direction contained in the statute appears in the last sentence of Section 14(g): "The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in subsection (h)." But even here we must be mindful that Section 2 of IPELRA states that the provisions setting out the procedures for impasse arbitration "shall be liberally construed."⁽¹³⁾

12. While the statute does not provide guidance as to which fringe benefits are considered "economic," there can be no doubt that standards for discipline and the structure of grievance procedure, both of which address fundamentals of the employment relationship, are not economic issues.

13. In relevant part, Section 2 reads as follows: "*** It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act. To that end, the provisions for such awards shall be liberally construed."

This statement of policy is particularly relevant in the consideration of Section 14(h) because many of the factors cited in that provision are either not relevant to issues of contract language (as opposed to fringe benefits and other economic items) or, if applied literally or uniformly, could distort, confuse or damage the parties relationship.⁽¹⁴⁾ Thus, we construe Section 14(h), considered in light of Section 2, to mean that we can determine which factors are applicable and how much weight to give to each, based upon the realities and exigencies of the particular items in dispute.

Section 14(h) of IPELRA provides as follows:

*** the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- (1) The lawful authority of the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (A) In public employment in comparable communities.
 - (B) In private employment in comparable communities.

14. For example, where the parties have a long bargaining relationship during which by mutual agreement certain ways of doing things have evolved, and contract language exists reflecting these practices, that different employers and bargaining units otherwise comparable do not follow the same practices is of much less relevance than where no such bargaining history exists.

- (5) The average consumer prices for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
- (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

In applying these factors to the record before us and the issues to be decided, we make the following findings:

- (1) The County of Will and the Sheriff of Will County are the lawful employers ("Employer") of the employees involved herein, and have the authority to enter into the Agreement under consideration. As will be discussed more fully below, as to the issue of the Employer's lawful authority to agree to a grievance and arbitration procedure covering disciplinary appeals, a majority of this panel finds that the Employer has such authority based upon our reading of the City of Decatur case, supra.
- (2) There are no stipulations directly bearing upon the issues. There was, however, a substantial amount of uncontroverted evidence.

- (3) We find none of the proposals before us have any measurably greater impact on the Employer's ability to pay than their counterproposals. Ability to pay is not a meaningful factor in this case. The panel is unable to make a determination of the "interests and welfare of the public" affected by the issues herein. No evidence was adduced bearing upon this factor except to the extent that the panel believes that the language it has selected will better support positive labor relations than that which has been rejected, and to that extent the interests and welfare of the public are better served.
- (4) We find that employees in the private sector and public employees generally enjoy terms and conditions of employment more nearly the same as those proposed by the Union than by the Employer. We further find, however, that most employees "performing similar services," which we interpret to mean performing the services of sheriff's deputies have terms and conditions of employment more similar to that proposed by the Employer. However, for reasons set forth below, a majority of this panel finds this factor to be of minor significance.
- (5) We find that the cost of living is not an applicable factor in this case because the issues are not economic.
- (6) We find that the "overall compensation" received by these employees covering "direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits" are not applicable in this case because costs, ability to pay, and relative level of economic benefits are not relevant in determining appropriate standards for the implementation of discipline and for the grievance procedure. We find, however, that the issues before us do impact upon the present level of "continuity and stability of employment." Accordingly, we find consideration of this factor (Section 14(h)(6)) relevant. We find that the language selected by a majority of this panel best encourages and contributes to continuity and stability in employment. This will be discussed in more detail below.

- (7) We find that there have been no changes in any of the foregoing circumstances during the pendency of these proceedings except that the decision in the City of Decatur case has clarified the issue of "lawful authority."
- (8) We find that the bargaining history for this unit, including negotiations leading up to these proceedings are relevant. So, too, the terms and conditions of employment of other employees of Will County are a factor to be taken into consideration in resolving the present issues.

B. Arbitral Standards for Review of Proposals

Under the arbitration scheme of IPELRA, only economic issues require the arbitration panel to select the final offer of the parties. Non-economic issues are left to traditional arbitration where the neutral has the power to select or reject the parties' proposals or fashion one of his or her own. Because "parties typically are fearful of the imposition of contractual language by a neutral who may be unfamiliar with the intricacies of (their) relationship," IPELRA encourages the parties to resolve non-economic issues on their own.⁽¹⁵⁾ A failure to do so will result in the imposition of what the neutral "believes to be just and equitable language"⁽¹⁶⁾ which may or may not be palatable to the parties.

15. Laner and Manning, "Interest Arbitration: A New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees, 60 Chicago Kent L. Rev. 839, 852 (1984).

16. Ibid.

In assessing non-economic issues it is particularly important for the arbitration panel to consider themselves an extension of the bargaining process. Interest arbitration, as collective bargaining itself, is essentially a legislative not a judicial function.⁽¹⁷⁾ We must consider the parties' circumstances at the time of impasse, evaluate the evidence in light of the statutory criteria, and develop a resolution the parties themselves might have achieved had they assessed the factors in the same unadorned light as the arbitration panel.

If the process is to work, "it must not yield substantially different results than could be obtained by the parties through bargaining."⁽¹⁸⁾ Accordingly, interest arbitration is essentially a conservative process. While, obviously, value judgments are inherent, the neutral cannot impose upon the parties contractual procedures he or she knows the parties themselves would never agree to. Nor is it his function to embark upon new ground and create some innovative procedural or benefit scheme which is unrelated to parties' particular bargaining history. The arbitration award must be a natural extension of where the parties were at impasse. The award must flow from the peculiar

17. New York Shipping Assn., 36 LA 44, 45 (Stein 1960), quoted with approval, Niles Twnshp. H.S. Dist. 219, unpublished, (Berman 1986).

18. Arizona Public Service Co., 63 LA 1189, 1196 (H. Platt (Chmn.) 1974).

circumstances these particular parties have developed for themselves. To do anything less would inhibit collective bargaining. (19)

In the present case, the Employer seeks to make substantial changes in the language of the Agreement. While it is true that the Employer argues that the changes it seeks are merely a clarification of the old Agreement and give rise to a system no different than what the law allows, it remains nonetheless that old Agreement contains a substantially different system for the resolution of grievances. The well-accepted standard in interest arbitration when one party seeks to implement entirely new benefits or procedures (as opposed to merely increasing or decreasing existing benefits) or to markedly change the product of previous negotiations, is to place the onus on the party seeking the change.

19. In Twin City Rapid Transit Co., 7 LA 845, 848 (McCoy (Chmn) 1974), it was stated: "In submitting this case to arbitration, the parties have merely extended their negotiations -- they have left it to this board to determine what they should, by negotiation, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntarily agreed to?"

OCT 11 1988

-51-

II. State Labor Relations B

In Twin City Rapid Transit Co., supra, the Chairman stated:

"We believe that an unusual demand, that is, one that has not found substantial acceptance in other properties, casts upon the union the burden of showing that, because of its minor character or its inherent reasonableness, the negotiators should, as reasonable men, have voluntarily agreed to it. We would not deny such a demand merely because it had not found substantial acceptance, but it would take clear evidence to persuade us that the negotiators were unreasonable in rejecting it. We do not conceive it to be our function to impose on the parties contract terms merely because they embody our own individual economic or social theories. To repeat, our endeavor will be to decide the issues as, upon the evidence, we think reasonable negotiators, regardless of their social or economic theories might have decided them in the give and take process of bargaining."

In Tampa Transit Lines, 3 LA 194, 196 (Hepburn, 1946), the Chairman ruled:

"An arbitrator cannot often justify an award involving the imposition of entirely novel relationships or responsibilities. These must come as a result of collective bargaining or through legislation. In rare cases, I concede it would be appropriate for an arbitrator to make an award entirely unique in an industry and area, as where conditions shock one's sense of equity and decency."

In changing the benefit balance or in altering a previously negotiated labor relations scheme, the neutral must consider the factors which went into that previously agreed to contract. The parties may have traded dearly to secure the benefit now being challenged. It may have been part of a larger bargain or an integral portion of an overall settlement scheme. The

arbitrator must examine how the old system operated, whether there were administrative problems, whether inequities were created, or unforeseen dilemmas. In each instance, the burden is on the party seeking the change to demonstrate, at a minimum: (1) that the old system or procedure has not worked as anticipated when originally agreed to or (2) that the existing system or procedure has created operational hardships for the employer (or equitable or due process problems for the union) and (3) that the party seeking to maintain the status quo has resisted attempts at the bargaining table to address these problems. Without first examining these threshold questions, the arbitrator should not consider whether the proposal is justified based upon other statutory criteria. These threshold requirements are necessary in order to encourage collective bargaining. Parties cannot avoid the hard issues at the bargaining table in the hope that an arbitrator will obtain for them what they could never negotiate themselves.

In a manner of speaking, arbitration can never construct a better deal for the parties than they can obtain for themselves. It is not so much that arbitrators are so devoid of wisdom, but that what is right for particular parties in a particular relationship becomes such, or is self-defining, as a result of the collective bargaining process. There are no perfect collective bargaining agreements but the ones which the parties themselves carve out are going to be a lot closer to what is best for them than those imposed by an outsider.

Obviously, there are exceptions. Were it otherwise, particularly under IPELRA where strikes by peace officers are prohibited, all of the bargaining power would be with the party who says no. Certainly there are occasions when changes are justified and the party resisting change becomes obstinate or recalcitrant for no good equitable or operational reasons. In these situations interest arbitration is designed to remedy the impasse by providing a forum for the advocates of change. But it is the party seeking the change who must persuade the neutral that there is a need for its proposal which transcends the inherent need to protect the bargaining process.

C. Consideration of the Proposals

1. Legal Authority to Grieve Discipline

There appears to be three types of proposals in this case. The first are those changes in contract language generated by the Employer's position that it has no authority to enter into a grievance procedure which intrudes upon the jurisdiction of the Commission. These include those sections of the Employer's proposed Article V, particularly Sections 5.3, 5.4 and 5.5, or portions thereof, and Section 6.1, which establish an appeal process for discipline which is separate from the grievance procedure. Although the Employer argues that these sections merely clarify what was already implied in the old Agreement as a matter of law, and does not upset past practice, they nonetheless establish by contract the division for the processing of complaints which is in marked contrast with the prior agreement.

The second category are those substantive changes proposed by the Employer relating to particular and distinct sections of the Agreement. These include, for example, the deletion of the polygraph prohibition, the deletion of the file sanitizing provision, the increase in the number of days of suspension from 10 to 30, and the increase in the number of steps of the grievance procedure.

The final category are minor changes in language or substance which in some instances are more stylistic than qualitative. These would include the adoption of the Uniform Police Officers Disciplinary Act, the wording of the presumption of innocence provision, the scope of inquiry and disclosure of personal information, the right to counsel, and others.

In large measure, the principles cited above can be applied uniformly to all of the Employee's proposals. For purposes of analysis, they will all be subject to the same scrutiny and the same standards. However, because the Employer's basic premise behind the first category of proposals, i.e. a legal inability to do otherwise, transcends conventional arguments, it will be examined separately. All other sections will be examined in the order in which they appear in the proposed Agreement.

As detailed above, the Employer's argument on the bifurcation of appeals may be summarized as follows: The Merit System Act pre-empts the duty to bargain in IPELRA. Having opted for a Commission more than 20 years ago the Employer cannot negotiate

contrary to that law. It never had the authority to bargain for coverage of discipline under the grievance procedure, did not do so and to the extent that the language of the old Agreement implies otherwise, those implied rights are null and void because they are contrary to law. The Employer has consistently interpreted the old Agreement in this regard. No disciplinary case has ever gone to arbitration. The Decatur case is distinguishable and does not apply to law enforcement employees in a non-home rule county. Finally, no other non-home rule sheriff's deputies are covered by a grievance procedure for discipline.

Of course, the Employer cannot comply with the aforesaid requirement of showing a need for change because it does not believe it is seeking a change. It has never applied the grievance procedure to discipline cases, it argues, and its only justification for the new language is conformity with the law. By implication the Employer concedes that it cannot justify its proposal for exclusion of the grievance procedure based upon the criteria and standards discussed above. From the Employer's perspective, it does not have to reach that point. Indeed, it is unlikely that, but for the legal argument, the Employer's proposal could stand on its own given the requirement of Section 8 of IPELRA that every agreement "shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final

and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise." As we interpret Section 8 of IPELRA, unless there is some exclusion mandated by law, or the parties otherwise mutually agree, the Agreement must contain a grievance and arbitration procedure covering all disputes concerning its administration or interpretation. Section 8 provides no exceptions.⁽²⁰⁾ It is not necessary to argue the statutory criteria of Section 14(h) on the scope of a grievance procedure. Limitations on jurisdiction must arise as a result of other laws and not on the basis of Section 14(h) criteria.

We turn now to an examination of the Employer's legal argument. After long and careful consideration, a majority of this arbitration panel rejects the Employer's legal argument. We do so for the following reasons:

- 1) We do not think there is a conflict of law between IPELRA and the Merit Commission Act. While the City of Decatur case may not have settled this issue absolutely, the Employer has produced no better authority to the contrary.

20. Accordingly, except to the extent that comparability lends weight to the Employer's legal argument, its evidence that no other non-home rule county has a grievance procedure in discipline cases is irrelevant. The law requires a grievance/arbitration procedure for all contract disputes. Of course the terms of that procedure are a different matter. Procedural limitations are always negotiable. Substantive jurisdiction arises as a matter of law.

- 2) The informal opinion from the Attorney General's office does not support the Employer. While it is sufficiently ambiguous so that it cannot be said with any certainty that it supports the Union, a fair reading of the opinion indicates that the author simply avoided the issue entirely.

- 3) The Employer's argument regarding bargaining history is less than ingenuous. The old Agreement was negotiated with the participation of the State's Attorney. The Agreement contains an all inclusive definition of a grievance and the parties have processed disciplinary grievances under that procedure. Given the County Board's participation at Step 3 prior to 1986 when negotiations were still fresh in everyone's mind, it may be a matter of happenstance that no grievance was appealed to arbitration prior to the arrival of Mr. Gallagher in 1986.

In City of Decatur, the voters of the municipality decided on a civil service commission under the Illinois Municipal Code, Ill. Rev. Statute, ch 24, Paragraphs 10-1-1, et. seq. and, like the Merit System in the instant case, the Decatur Civil Service Commission had a complete disciplinary scheme. Also as in this case, the employer in Decatur took the position that there was nothing to bargain regarding a grievance procedure for discipline cases because the Civil Service Commission pre-empted the subject. The State Labor Board found a violation of IPELRA and ordered the municipality to bargain. The Appellate Court reversed. On review, the Illinois Supreme Court reversed and reinstated the Labor Board's bargaining order.

The public employer in City of Decatur relied upon the provision contained in Section 7 of IPELRA, defining the duty to bargain, which states that:

"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 employer argued that because the underlying principle of a civil service commission was the establishment of a merit system with due process for dismissal, it was a law which covered the subject of disciplinary grievances and a contractual procedure would conflict with it. The identical argument is made by the Employer in the present case. (21)

21. In Decatur the Supreme Court stated, "The city contends that the union's proposal for final and binding arbitration of disciplinary grievances would supplant certain of the statutory civil service provisions adopted by the city and therefore would constitute a matter that is "specifically provided for" in another law. The city concludes that it has no duty to bargain over the Union's proposal." Slip Opinion, pp. 3-4. In its brief, at page 5, the Employer herein argues, "It is the position of Will County and the Sheriff of Will County that there is no legal duty to bargain over discipline because this topic is specifically covered by the Merit Commission Act that has been adopted by Will County."

Although the Supreme Court agreed that some laws might foreclose bargaining over the subject matter specifically covered by that law, it stated that "the mere existence of a statute on a subject does not, without more, remove that subject from the scope of the bargaining duty." Slip Opinion, p. 8. (22) Whether or not the other statute forecloses collective bargaining requires an examination of that statute. In examining the civil service statute the Court first commented that it was optional, not one imposed by the State. Next it found that the municipality could alter some of the terms of its Code to suit its own purposes because it was a home rule city. The Court then commented that arbitration was the preferred method of dispute resolution adopted by the legislature. Considering these factors, the Court concluded that the union's proposal in Decatur was merely to supplement, implement or related to the civil service law and did not provide for its violation.

22. Apropos to this principle, the Court also stated, "We do not believe that the legislature intended to make the broad duties imposed by (IPELRA) hostage to the myriad of State statutes, and local ordinances pertaining to public employment." Slip Opinion, p. 7.

The Employer distinguishes itself from Decatur first on the basis that police officers are special and that the Merit Systems Act is a specific statute for special employees. We find the Employer's distinctions to be a classic case of losing the forest for the trees. The Act in question is very similar to the one under review in Decatur. It has the same underlying purpose and is administered in substantially similar ways. The special nature of law enforcement officers gives rise to a separate merit system but this is no different than a separate bargaining unit for these employees under IPELRA. Although their terms and conditions of employment are special enough to warrant their own unit, they are still public employees with the same basic due process needs. The Merit Systems Act provides a parallel system of due process as in the Decatur case. The special status of law enforcement officers is a distinction which is just not relevant to the issues under consideration. The Union here is not proposing that the grievance procedure be integrated with that of other employees. Nothing in its proposal would diminish the special and separate nature of these law enforcement employees.

The Employer puts great emphasis on the lack of home rule powers in its case. Again, while it is true that Will County cannot alter or amend the terms of the Act, the number of Commission members can change. Additionally, the County can repeal the statute at any time. Of greatest significance,

however, in line with the Supreme Court's analysis, is that the Union's proposal does not cause the violation of the Act. It provides a complaint procedure for employees who seek to utilize it. The purpose of the Act is to benefit sheriff's deputies. It provides employees with a merit system and minimal due process. It was not designed to protect counties and their sheriffs from alternate forms of employment litigation in the way that, for example, worker's compensation statutes were enacted to provide relief for both employers and employees. By adopting the Union's proposal the purpose of the Act is not being frustrated.⁽²³⁾ All employees will continue to have the minimal protections of the Act if they so choose or they may select to complain through the grievance procedure. Clearly, the Union proposal supplements the Merit Commission. It does not nullify it.⁽²⁴⁾

23. The Act does not require deputies to pursue appeals through the Commission. The requirements fall upon the Sheriff and the Commission in order to protect deputies from abuse.

24. What the Employer has done in this case is to take a statute designed to protect employees from arbitrary behavior by a public employer and use it as a shield to prevent the implementation of a higher standard of protection promised (pursuant to Section 8) by a later statute.

The Employer has provided this panel with no legal authority to support its position. It has attempted to explain away Decatur but it has presented no precedent interpreting Section 7 of IPELRA which better states the law than Decatur. Until such time that such precedent appears we are constrained to follow Decatur.

The advisory opinion by the Attorney General's office lends no assistance to the Employer's case. The issue presented to the Attorney General was considered primarily as one which asked whether a hearing was required for a five day suspension. Arguably, if it did not, the grievance procedure would have to be used to provide minimal due process which the U.S. Supreme Court now requires. The Attorney General's office opined that a hearing was required by the Act. Therefore no opinion was rendered on the applicability of the grievance procedure because the request to the Attorney General was phrased in terms of reaching this issue only if a hearing by the Commission was not required. Thus, the Attorney General's representative phrased the last question, "If the Merit Commission does not have to provide an appeal mechanism, must the Executive Committee hear the grievance pursuant to the collective bargaining agreement?" (emphasis added) Because an appeal mechanism was required, the Attorney General did not have to respond to the last question.

Finally, the Employer's actions indicate that after the old Agreement was initially accepted, there was no question about the applicability of the grievance procedure to discipline cases. To begin with, the language of the old Agreement states that a grievance is a dispute regarding "the application, meaning or interpretation of this Agreement, or out of conditions concerning wages, hours, and all conditions of employment." This language was carried over from the 1981 Agreement which has no substantive provisions concerning discipline. Therefore the application of the grievance procedure to discipline may not have been an issue because no specific term of the Agreement could be alleged to have been violated. However, the parties were certainly aware of the changes made in 1983 when Articles IV and V were added. While the Employer may have stated during negotiations that it would not apply the grievance procedure to discipline, many things are said during negotiations. Absent an ambiguity, what is said during negotiations becomes subsumed by the final agreement. It is not what is said that is of importance, it is what is signed. The Employer was represented by the State's Attorney. It had to have knowledge that the Agreement to which it was a party bound it to an all-inclusive grievance procedure.

After the Agreement went into effect there were at least two grievances processed through the procedure which demonstrated its acceptance by the Employer. In one, the County Board responded on the merits to a grievance protesting a five day

suspension. The Board did not raise jurisdiction as a defense. In the other, the Sheriff responded to a grievance challenging a discharge by offering to reduce it to a 60 day suspension. There is no evidence that the Sheriff was operating under Commission procedures. Indeed, it is unlikely that he had authority under Commission rules to convert a discharge to a 60 day suspension. He would have that flexibility under the grievance procedure. That neither of these grievances went to arbitration is beside the point. The issue is not arbitration but the applicability of the grievance procedure at all in cases of discipline. It is true that in two recent cases the Employer has refused to process disciplinary grievances. However, this is self-serving. These grievances arose well after bargaining began and the Employer announced its present bargaining position. It could hardly be expected that given its position on the legality of the grievance procedure, the Employer would agree to process these two grievances.

Under all of these circumstances, we find that there is no merit to the Employer's argument that it lacks authority to agree to the Union's proposal to maintain the present grievance uniformity. We also find no basis under the statutory guidelines of Section 14(h) of IPELRA to accept any of the Employer's proposals which seek to separate discipline cases from other areas of contract interpretation. More significantly, as we interpret Section 8 of IPELRA, absent mutual agreement there is

no legal basis to carve out jurisdictional exceptions to the grievance procedure. Accordingly, Sections 5.3(c), 5.4(a)(1), 5.5(c), 5.6 and 6.1 of the Employer's proposal are rejected.

The Union proposes a new Section 5.7 which in effect requires an employee to choose between an appeal through Merit Commission rules or a grievance under the Agreement. An employee is not required nor encouraged to follow one path or the other. However, the proposal provides that if the employee chooses to exercise his statutory rights under Commission rules, he waives his rights to have a grievance processed. The Employer has not responded to this proposal, apparently because it believed that to do so would compromise its position on the exclusivity of the Merit Commission. While your chairman has some misgivings about requiring employees to sacrifice one set of rights in order to exercise another, there is considerable benefit in avoiding a multiplicity of proceedings. While the two procedures do not mimic one another, and the standards for one differ from the other, there is considerable overlap. Furthermore, a collective bargaining agreement, unlike a merit system, is an agreement for the selected group representative, i.e. the Union. It is the Union's contract not that of a group of employees. The Union has its own interests and perspective. It must be allowed some flexibility in determining which grievances to pursue and which, for the greater good, to withdraw. The Union's view that grievances should not be pursued

where they might conflict with the Merit Commission is not unreasonable on its face. Accordingly, we accept the Union's proposed Section 5.7

2. Proposals to Change or Modify the Old Agreement

As indicated above, with one exception, the Employer offers no arguments in support of its proposals to change the language of Articles V and VI of the Agreement. The one exception is the deletion of the provision requiring the removal of minor discipline from a file after two years. Generally speaking, the proposals for which there are no arguments ought to be rejected on that basis alone. If a party offers no evidence and no arguments in support of its proposed changes there is no basis for the arbitrators to adopt those proposals. In this case the Union substantially seeks to retain only what had previously been agreed to at the bargaining table in 1983. It seeks no major changes in language or substance. A few sentences have been reworded and the title of "deputies" has been changed to "employees." A few sections have been dropped or consolidated in order to make the Agreement more coherent. None of this is really in dispute.

The arbitration panel has taken the following approach. Where the Employer's proposals appear to be no more than a change in wording they will not be accepted without some evidence in support of the re-wording. This panel should not tamper with agreed upon language without evidence that this language has

caused the parties problems. Where the proposals are substantive, we shall consider them a little more closely, examining the record for clues as to their appropriateness, even though the Employer has not briefed or argued for these changes. We do so notwithstanding Mr. Gallagher's clear and frank admission that no changes of substance were intended.

Section 5.1 as proposed by the Employer includes both language and substantive changes. It includes a statement supporting statutory and due process rights in addition to the present provision supporting progressive discipline. While it repeats the general statement for progressive discipline it deletes the steps included (oral reprimand, written reprimand, etc.) The Employer's proposed Section 5.1 is rejected because the statement on statutory rights is clearly intended as a reference to the Employer's rejected proposal to make the Merit Commission the exclusive avenue for disciplinary appeals. The removal of the steps of progressive discipline is a serious substantive change. While there are good arguments why an Employer should not be locked into giving discipline in a fixed pre-determined pattern, the Employer has offered no evidence that those reasons are applicable in its situation.

The Employer's proposed Section 5.2 is likewise rejected in favor of the Union's proposal. First, the Union's 5.2 continues the scheme of its 5.1. It is impractical to "cut and paste" selective sentences from one proposal and inject them in that

of the other party when the sections flow as a whole. In this case, parts of the Union's Section 5.2 already incorporate parts of the Employer's 5.1, and vice versa. Second, the Employer's 5.2(c) contains a diminution of the specifics relating to the right to counsel, such as 24 hours to obtain counsel. This was a bargained benefit in the old Agreement. There is no reason for its elimination. Third, the Employer's 5.2(b), limiting the presumption of innocence, is ambiguous. We are not certain whether the Employer is proposing a change in form or substance. If form, the new wording is enigmatical. If substance, there is no basis for it. Fourth, the same observations regarding the presumption of innocence are applicable to the Employer's proposed Sections 5.2(e) and (f). While they are substantially the same as the Union's 5.2(e), Employer's 5.2(f) unaccountably omits details present in the old Agreement. Fifth, Section 5.2(f) proposed by the Union brings together what had been Sections 4.7 and 5.14 (polygraph) of the old Agreement. The Employer has eliminated the polygraph provisions. It is true that the Uniform Peace Officers Disciplinary Act, adopted by the parties in their respective Sections 5.2(a), covers polygraphs. However, the protections of that statute do not generally apply to what are classified as "minor infractions" or "informal inquiries". Because the parties are agreed that these "bill of rights" should apply across the board in all disciplinary settings, citation of just the Disciplinary Act is insufficient.

The Union's proposed Section 5.2(g) is a carryover of what had been 5.13 in the old Agreement.

The Union's proposed Section 5.3 is the same as the old 4.3. While the Employer's 5.3 was rejected above because of its citation of the Commission, it should also be pointed out that it increases the right to suspend from 10 to 30 days. Such a marked change requires some demonstrated need. None was given.

The Employer's Section 5.4 modifies what had been Sections 4.4 and 4.5 (now 5.4 and 5.5 in the Union proposal). Section 5.4(a)(1) was addressed above. Section 5.4(a)(2) by the Employer establishes a new "hearing" procedure. This is a substantive change, probably designed with Commission rules in mind. It adds an unnecessary and otherwise unexplained level of procedure. For discipline to be most effective it should be administered efficiently and without undue delay. The Employer's proposal tends to frustrate that goal. The present provision for an investigatory interview appears to be sufficient (absent evidence to the contrary). Almost all of the remainder of Section 5.4 of the Employer's proposal represents a stylistic change of the wording of the Union's 5.5. The same comments are applicable to the Employer's 5.5, except for 5.5(c) which was disposed of above. The language appears to be an attempt to incorporate Commission rules into the Agreement. This is unnecessary and, in part, duplicates other language in Article V. The Employer's Section 5.6 has been ruled on above.

The Union proposes in its Section 5.6 to retain the provisions of what was Section 4.5 of the old Agreement. This is the provision for the removal of minor discipline from an employee's file if after two years no additional minor discipline has been issued. The Employer seeks to eliminate this provision from the Agreement. The Union makes two arguments in support of this proposal. First, it argues that the Employer has given no good reasons for its removal. Second, it argues that the provision has a salutary effect and encourages improved behavior. The Employer argues that the provision creates an inaccuracy and misleads newer supervisors as to an employee's true employment history. It argues that it cannot accurately respond to a subpoena *ducas tecum* when its records are incomplete.

Because it is the Employer who seeks the change, it has the burden to demonstrate that this provision has not worked and attempts at resolving the problems caused by this provision have failed. The Employer does make several good arguments. While its subpoena argument is a little off the mark, the underlying point that no one can produce accurate records when those records have been destroyed has substantial appeal. Why should an employer be unable to assess an entire record? Why should not a litigant suing the County not be able to discover a deputy's complete record? Clearly if this were a new provision being sought by the Union this panel would have substantial difficulty accepting the Union's arguments for these law enforcement employees.

But this is not a new provision. It was freely agreed to by the parties a few years ago. Merely that the Employer now has second thoughts is insufficient to persuade us to alter the Agreement. It is imperative that the presumption be in favor of continuity. If every negotiations were to start from scratch, labor relations would be in continuous turmoil. Parties must build and refine the contractual structure they have created. While no provision is sacrosanct, there must be good and substantial reasons why a provision which has caused no problems for anyone should be removed simply because the present administrators would rather not have it there. Accordingly, we adopt the Union's proposed Section 5.6.

The Employer seeks to substantially alter the structure of the grievance procedure. Section 6.1 of the Employer's proposal limiting the scope of the procedure has been rejected. However, the remainder of the Employer's proposal for Article VI is an attempt to lengthen the procedure by adding several steps. In effect, the Employer seeks to convert a 4 step procedure into one with 6½ steps. As with other proposed changes, the Employer offers nothing in support of this position. Indeed, there is no record that the grievance procedure has even been used (other than for the disciplinary cases discussed above), let alone that it has not worked.

The Employer wants to add a step at every command level and prior to arbitration it wants non-binding mediation or fact finding (the "half step"). Of the Employer's many proposals, we find this one to have the least merit. It is unrealistic and impractical in a unit of this size to have so many steps. Clearly nothing will be accomplished by adding so many layers to the procedure. The purpose of a grievance procedure is to secure quick and efficient resolution of employee complaints in order to keep the workplace operating without unnecessary conflict. Delayed resolution is counterproductive to good labor relations. On a more practical level, it is quite obvious that after the first step no grievance will be resolved without the Sheriff's approval. To include intermediate steps in this small department for lieutenants and chief deputies is so unrealistic as to imply bad faith. Indeed, in organizations with many thousands of employees at numerous dispersed locations, grievance procedures rarely have more than four steps. Finally, grievance mediation and fact finding is contrary to generally accepted standards of dispute resolution. It appears in specialized situations, by mutual agreement, where there are too many grievances to arbitrate. Grievance mediation can be a useful procedure for very large employers with a grievance backlog and a sophisticated bargaining relationship. It is not appropriate in this case. For the reasons set forth above, the Union's proposal for Article VI is accepted in its entirety.



D I S S E N T I N G O P I N I O N

WILL COUNTY BOARD

WILL COUNTY OFFICE BUILDING • 302 NORTH CHICAGO STREET • JOLIET, ILLINOIS 60432

30 August 1988

Mr. Harvey A. Nathan, Esq.
137 North Oak Park Avenue
Oak Park, IL 60301

SUBJECT: AFSCME Local 2961 Contract Impasse Arbitration

Dear Mr. Nathan:

In response to your draft findings and award, dated 22 August 1988, re subject above, the following remarks are provided:

Article IV. Employee Security: Concur with findings. This is consistent with the Employer's initial premise, that these sections were not in dispute.

Article V. Employee Discipline: Non-concur with both findings and award. The Employer disagrees with both the interpretation and, therefore, the application of related law, in this case. In brief, the logical extension of the stated findings makes the very existence of the Merit Commission subject to negotiations, as well as every statutory aspect of the Act, i.e. numbers of Commissioners, the manner of their selection, scope of their duties, their rules and regulations, etc. This destroys the statutory intent of Commission independence and makes it a creature of partisan negotiations.

Article VI. Grievance Procedure: Non-concur with both findings and award:

a. During the course of negotiations, tentative agreement was reached, with the Union, concerning the Employer's related proposal, except for the following:

(1) Section 6.1 Definition:

(a) The word "non-disciplinary", towards the end of the first sentence.

(b) The entire last (second) sentence, which had been inserted, in the draft for review, at the request of a Union negotiator (Thomas Carey).

(2) Section 6.2f(1)-(3) - Step 6. Final Resolution: The major and only issue here was whether or not the Union wanted to make formal provision for actions, intermediate between those of the Will County Board Executive Committee and binding arbitration. To this question, the Union did not reply, in negotiations, nor did they do so, until the on-set of these arbitration proceedings. The Employer has always been prepared to delete Sections 6.2f(1) and (2).

Mr. Harvey A. Nathan, Esq.
30 August 1988
Page 2

b. Once again, the other contents of Article VI had reached tentative agreement, between the parties, in some cases, only after considerable and lengthy discussion, in negotiations. Specifically, these matters included:

- (1) Utilization of the chain of command;
- (2) Alterations of the time limits, at each Step; and
- (3) Addressing the role of the Illinois State Labor Relations Board, in the arbitration process.

c. Between the time of impasse and the beginning of arbitration, the Union was asked to specifically identify those areas they considered to be in dispute. These requests were made before and during Federal mediation and prior to arbitration. The only matters identified, by the Union, were Article V and Section 6.1. It was only between the first and second sessions of arbitration (14 Dec 87 - 11 Feb 88) that the Union presented their positions and, in so doing, reopened all of Articles IV-VI.

d. The failure or refusal of the Union, to specifically identify matters, they believed to be in dispute, prior to both mediation and arbitration, as well as their entering matters on which tentative agreement had been reached, would appear to constitute both a failure to negotiate in good faith and a "reneg". Furthermore, the failure of the Arbitration Panel to address or question this situation is confounding, in view of the findings and award.

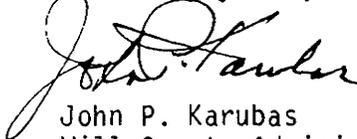
e. Finally, on a technical level, the Panel should not allow the Union's proposal for the manner of selecting an arbitrator (Report page 21), to stand:

- (1) The rules of the American Arbitration Association (AAA) are not necessarily those of either the US Federal Mediation and Conciliation Service, nor those of the State. If the arbitrator is selected from a Federal or State list it is generally that agency's rules, which govern, not those of the AAA.

- (2) It is now the Illinois State Labor Relations Board, not the "Illinois Department of Labor State Mediation and Conciliation Service", which provides selection lists.

Should you have any questions, please advise. In the meantime, extending to you our continued best wishes, I remain

Sincerely yours,



John P. Karubas
Will County Administrator

JPK:jt

cf Will County Board Chairman
Will County State's Attorney (3)
Will County Sheriff
Will County Personnel Director

A W A R D

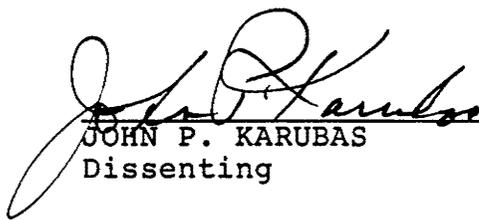
The Union's proposal for Article V
and Article VI are adopted and shall
become part of the parties' 1987-1989
Agreement.

Respectfully submitted,



HARVEY A. NATHAN
Chairman /

HENRY SCHEFF
Concurring in the result



JOHN P. KARUBAS
Dissenting

Oak Park, Illinois
August 17, 1988

