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Interest Arbitration

City of Markham, Illinois, A Municipal Corporation, Employer and State and Municipal Teamsters, Chauffeurs and Helpers, Local 726, Union	ISLRB No. S-MA-95-63 Arbitrator's File 94-162 Herbert M. Berman, Arbitrator May 12, 1995

Opinion and Award

Contents

page

I. Preliminary Statement 1
II. Background 1

A. The Board of Fire and Police Commissioners 1
B. Bargaining and Litigation History 3

1. Interest Arbitration 3
2. The Litigation 5

(a) The First Jackson Charges: City of Markham, S-CA-90-87 & S-CA-90-103 5
(b) The Tolbert Charges and the Second Jackson Charges: City of Markham, S-CA-94-9 6

III. The Final Offers 8

A. The Union's Amended Final Offer 9
B. The City's Final Offer 10

IV. Relevant Provisions of the 1991-94 Agreement 11
V. Statutory Criteria 16
VI. Summary of Arguments 17

A. The City 17
B. The Union 19

VII. Discussion and Findings 23

A. The City's Non-Delegable Authority in Matters of Discipline 23

1. The Critical Decisions 25

(a) City of Decatur v. Illinois State Labor Relations Board 25
(b) Parisi v. Jenkins & Village of Worth 26

2. Post-Decatur Cases 29
3. Conclusion 31

B. Arbitration of Disciplinary Suspension and Discharge 34

1. The Change in Language 34
2. Comparability 36
3. Equity and Fairness Compel Adoption of the Union's Proposal 37

Award 42

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Opinion and Award

I. Preliminary Statement

I must decide whether it is lawful and appropriate to allow Markham police officers the opportunity to submit disciplinary suspension and discharge grievances to arbitration under a just-cause standard. The Union says yes. The City says no.

II. Background

A. The Board of Fire and Police Commissioners

The City of Markham is not a home rule municipality. Section 1, Division 2.1 of the Illinois Municipal Code (Boards of Fire and Police Commissioners, 65 ILCS 5/10-2.1-1) provides that the mayor of a non-home rule municipality, "with the consent of the city council or the president of the village or incorporated town, with the consent of the board of trustees, shall appoint a board of fire and police commissioners...."

Section 17 of Division 2.1 (65 ILCS 5/10-2.1-17) provides:

> Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. If the chief of the fire department or the chief of the police department or both of them are appointed in the manner provided by ordinance, they may be removed or discharged by the appointing authority. In such case the appointing authority shall file with the corporate authorities the reasons for such removal or discharge, which removal or discharge shall not become effective unless confirmed by a majority vote of the corporate authorities. The board of fire and police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time. In case an officer or member is found guilty, the board may discharge him, or may suspend him not exceeding 30 days without pay. The board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days. If the Board of Fire and Police Commissioners determines that the charges are not sustained, the officer or member shall be reimbursed for all wages withheld, if any. In the conduct of this hearing, each member of the board shall have power to administer oaths and affirmations, and the board shall have power to secure by its subpoena both the attendance and testimony of witnesses and production of books and papers relevant to the hearing.
>
> * * *
>
> The provisions of the Administrative Review Law, and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners hereunder. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.
>
> Nothing in this Section shall be construed to prevent the chief of the fire department or the chief of the police department from suspending without pay a member of his department for a period of not more than 5 calendar days, but he shall notify the

> board in writing of such suspension. Any policeman or fireman so suspended may appeal to the board of fire and police commissioners for a review of the suspension within 5 calendar days after such suspension, and upon such appeal, the board may sustain the action of the chief of the department, may reverse it with instructions that the man receive his pay for the period involved, or may suspend the officer for an additional period of not more than 30 days or discharge, depending upon the facts presented.

About 30 years ago, the citizens of Markham voted for a referendum establishing a board of fire and police commissioners to govern the employment relationship between the City of Markham and its police officers and fire fighters.[1]

B. Bargaining and Litigation History

1. Interest Arbitration

On July 25, 1988, the Illinois State Labor Relations Board certified the Union as the exclusive representative of the City's patrol officers and sergeants.[2] See *City of Markham,* 7 PERI ¶2021 (ISLRB 1991).

The parties entered into timely negotiations. Ultimately, however, they reached impasse over the Union's proposal to permit a suspended or discharged employee to file a grievance and to choose between a just-cause arbitration hearing and a discipline-for-cause Markham Police Board hearing. The parties agreed on the first two paragraphs of a

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[1]In the remainder of this opinion, I shall refer to Markham's Board of Fire and Police Commissioners as the "Markham Police Board."

[2]I shall hereinafter refer to the Illinois State Labor Relations Board as the "Labor Board" and the Illinois State Labor Relations Act as the "Labor Act."

"discipline" clause to be incorporated into their contract as Article VI. They disagreed only on the third paragraph.

The agreed-upon paragraphs of Article VI provided (Union Exhibit 1, at 4):[3]

> The parties agree that oral or written warnings shall be expunged from an officer's personnel and/or disciplinary file(s) one year after the warning is received by the officer so long as there has been no repetition of the offense within the one year period. Such expungement shall take place upon request by the employee given in writing to the Chief of Police.
>
> The parties further agree that the Police Chief shall the power and authority to impose such disciplinary actions as oral or written warnings and suspensions up to five days, and in addition shall have the power and authority to suspend for any period beyond five days or to discharge employees covered by this Agreement, so long as such action is taken for just cause.

Both parties proposed a third paragraph. The Union proposal read (UX 1, 5):

> An employee disciplined by the Chief shall have the option of appealing such disciplinary action either before the City of Markham Fire and Police Commission or through the grievance procedure set forth in Article VII of this Agreement. Such election must be made in writing within seven days of the imposition of the discipline. If the employee elects to appeal the discipline through the contractual grievance procedure, he shall voluntarily sign and present to the City an express waiver of his right to appeal the matter before the Fire and Police Commission at the time his grievance is filed.

The City proposal read (UX 1, 5):

> Nothing contained herein shall limit the statutory authority of the City of Markham Fire and Police Commission. The grievance procedure set forth in Article VII of this Agreement shall apply only to

[3]In the remainder of this exhibit I shall cite Union exhibits as "UX____," City exhibits as "CX____" and joint exhibits as "JX____."

> matters outside the scope of the Fire and Police Commission's statutory authority.

The parties sought interest arbitration. Under the chairmanship of arbitrator George Larney, the arbitration panel adopted the Union's proposal. See *City of Markham*, S-MA-89-39 (Larney 1989) (UX 1).

2. The Litigation

The City did not challenge the Larney award directly. In its administration of the labor contract, however, the City did not comply with the terms of the Larney award. On three occasions, the City declined to arbitrate suspension grievances; once the City refused to reinstate a discharged police officer returned to work by an arbitrator. These cases involved police officers James Jackson and Ralph Tolbert.

(a) The First Jackson Charges: *City of Markham*, S-CA-90-87 & S-CA-90-103

In January 1990, the City suspended Jackson one day for being late to court. In March 1990, the City suspended Jackson 30 days for disobeying orders. On both occasions, Jackson filed a grievance and waived his right to a hearing before the Markham Police Board. Contending that arbitrator Larney's award was inapplicable because it "relate[d] only to suspensions and discharges issued by the chief and that the City retain[ed] the option of issuing suspensions and/or discharges through the Commission,"[4] the City declined to process these grievances. It ignored the one-day suspension

[4]See *City of Markham, supra*, 7 PERI ¶2021 at X-93.

grievance. It conducted a hearing on the 30-day suspension before the Markham Police Board, which affirmed the suspension.

The Union filed unfair labor practice charges against the City and the Labor Board issued a complaint. A hearing was held before Hearing Officer John McClure in July 1990. Before McClure's decision came down, the City filed suit for injunction and declaratory judgment in the Circuit Court of Cook County. The City asked the court to restrain the Labor Board from proceeding and to declare that the interest arbitration panel chaired by arbitrator Larney had exceeded its authority by depriving the Markham Police Board of jurisdiction to determine whether a police officer had been disciplined properly. The court dismissed the City's complaint on January 30, 1991. The City did not appeal.

On March 20, 1991, the Labor Board found the City guilty, among other things, of refusing to bargain in good faith with the Union, in violation of Sections 10(a)(1), (2), (3) and (4) of the Illinois State Labor Relations Act. The City did not appeal.

(b) The Tolbert Charges and the Second Jackson Charges: *City of Markham*, S-CA-94-9

Another series of events involving Officers Jackson and Tolbert resulted in a new round of litigation.

On October 1, 1992, the City discharged Jackson. Jackson filed a grievance, waiving his right to a hearing before the Markham Police Board. The grievance was not resolved, and a hearing was held before arbitrator John Fletcher. On May 15,

1993 arbitrator Fletcher found that the City had discharged Jackson without just cause in violation of the collective bargaining agreement; he ordered the City to make Jackson whole and return him to duty (UX 4H).

The City did not comply with arbitrator Fletcher's award; on June 11, 1993, the City filed suit for a declaratory judgment in the Circuit Court of Cook County. The City alleged that arbitrator Fletcher had no jurisdiction and that the recent decision in *Parisi v. Jenkins & Village of Worth* barred arbitration of a discharge grievance.[5] The City asked the court to restrain enforcement of the Fletcher award. On October 13, 1993, Judge Everette Braden dismissed the City's complaint and imposed sanctions on the City (UX 16).

In 1989, the City fired officer Tolbert. In September 1992, Tolbert was reinstated by court order. For reasons not relevant to this discussion, the Illinois Local Governmental Law Enforcement Officers Training Board declined to certify Tolbert as fit for duty. On June 4, 1993, the Markham Police Board discharged Tolbert. He grieved. The City refused to recognize Tolbert's grievance or to process it through the grievance procedure.

The Union filed unfair labor practice charges alleging that the City had violated the Labor Act with respect to events surrounding the dismissals of officers Jackson and Tolbert. A complaint was filed and a hearing was held.

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[5] *Parisi v. Jenkins & Village of Worth*, 236 Ill.App.3d 42, 177 Ill. Dec. 496, 603 N.E.2d 566 (1st Dist. 1992).

On December 5, 1994, Administrative Law Judge William Waechter issued a decision (S-CA-94-9, UX 14). It contained the following conclusions of law:

1. The City of Markham violated Section 10(a)(4) and (1) of the Act by failing to comply with the May 15 arbitration award without seeking judicial review, in good faith, of the arbitration award pursuant to the Act's procedures.

2. The City of Markham violated Section 10(a)(2) and (1) of the Act by refusing to reinstate James Jackson as a police officer in accordance with the May 15 arbitration award.

3. The City of Markham violated Section 10(a)(1) of the Act by filing the unmeritorious Complaint for Declaratory Judgment against Local 726 for the purpose of attempting to delay Jackson's reinstatement as a police officer in accordance with the May 15 arbitration award.

4. The City of Markham violated Section 10(a)(4) and (1) by refusing to process the grievance of Ralph Tolbert in accordance with the procedures in the parties' collective bargaining agreement.

5. The allegations regarding Kenneth Louis Muldraw are dismissed in their entirety.

III. The Final Offers

The parties' most recent agreement expired April 30, 1994 (JX 1). In their negotiations for a new agreement, the parties reached agreement on everything except disciplinary suspension and discharge. Initially, the Union proposed that the contract language adopted by arbitrator Larney in 1989 remain in place. The City proposed that the Markham Police Board be given sole authority to resolve disputes over a discharge or suspension of five or more days and that the disciplinary test be "cause" rather than "just cause."

An interest arbitration hearing on this issue was held in Markham on January 12, 1995. The parties submitted final offers (JX 3A & 3B) at the hearing. The Union submitted an amended offer on January 23, 1995. The City did not revise its final offer.

A. The Union's Amended Final Offer

Article VI - Discipline

Section 6(a). Disciplinary Action. When the Employer believes just cause exists to institute disciplinary action, the Employer by its agents shall have the option to assess the following penalties depending upon the seriousness of the offense:

Oral reprimand
Written reprimand
Suspension
Discharge

The authority of the Police Chief to reprimand or suspend and the Board of Fire and Police Commissioners to suspend and or discharge shall be exercised in accordance with the authority granted by the Municipal Code, 65 ILCS 5/10-2.1-17.

(b) Grievances as to Disciplinary Action. Grievances may be filed with respect to any disciplinary action (other than an oral reprimand) taken against an employee when an employee believes the disciplinary action taken is not for just cause.

If the disciplinary action is a suspension ordered by the Police Chief, the grievance shall be filed in the first instance at Step 2 of the grievance procedure within 10 calendar days of the imposition of discipline, and shall thereafter be processed in accordance with Article VII of this Agreement. If the disciplinary action is ordered by the Board of Fire and Police Commissioners, the grievance may be appealed directly to arbitration within 10 calendar days after the issuance of the disciplinary decision.

Any appeal to arbitration of a disciplinary grievance shall be signed by the Union President or his designee and shall also contain a signed statement from the affected employee(s) waiving any and all rights they have to appeal the subject action to the Board of Fire and Police Commissioners (in the case of disciplinary action imposed by authority of the Fire Chief) or to seek judicial review pursuant to the Administrative Review Act (in the case of disciplinary action imposed

by order of the Board of Fire and Police Commissioners). Any disciplinary action grievance filed without the required signed waiver shall not be arbitrable and the arbitrator shall be without jurisdiction to consider or rule upon it. Any appeal for judicial review of an arbitrator's award shall be in accordance with provisions of the Uniform Arbitration Act, 710 ILCS 5/1.

(c) The parties agree that oral or written warnings shall be expunged from an officer's personnel and/or disciplinary file(s) one year after the warning is received by the officer so long as there has been no repetition of the offense within the one year period. Such expungement shall take place upon request by the employee given in writing to the Chief of Police.

B. The City's Final Offer

The City's final offer is contained in Joint Exhibit 3B (words added to the relevant portions of the 1991-93 Agreement are underlined; a line is drawn through deleted words):[6]

Article III
<u>Management Rights</u>

Unless specifically and expressly modified by this Agreement, the City retains all rights, powers and authority to manage and direct the affairs of the City in all of its various aspects and to manage and direct its employees, including but not limited to the following: to plan, direct, control and determine all the operations and services of the City; to supervise and direct the working forces; to schedule and assign work; to establish work and productivity standards and, from time to time, to change those standards; to assign mandatory overtime; to determine the methods, means, organization and number of personnel by which such operations and services are performed; to make, alter and enforce reasonable rules, ordinances, regulations, orders and policies; evaluate employees; to establish performance standards; <u>the sole and exclusive power</u> to discipline, suspend, and discharge ~~employees~~ <u>an employee</u> for ~~just~~ cause ~~(probationary employees without cause)~~; to change or eliminate existing methods, equipment or facilities; or to introduce new ones; and to take any and all actions as may be necessary to carry out the mission of the City and Police Department in the event of civil emergency as may be declared by the Mayor, Police

[6]Consistent with its position that Article VI as written did not provide for the arbitration of suspension and discharge grievances, the City did not propose to modify Article VI.

Chief, and/or City Council or their authorized designees. In the event of such emergency action, the provisions of this Agreement may be suspended, if necessary, provided that all provisions of this Agreement shall be immediately reinstated once a local disaster or emergency condition ceases to exist.

Article VII Grievance Procedure
Section 7.1 Definition

A grievance is defined as a dispute between the parties concerning the administration or interpretation ~~and/or application~~ of this agreement ~~or its provisions~~. It is expressly agreed that the jurisdiction of the Board of Fire and Police Commissioners to discipline or otherwise exercise its statutory powers shall not be considered a grievance.

IV. Relevant Provisions of the 1991-94 Agreement

The parties disagreed with respect to the text of the relevant terms of the 1991-94 Agreement. In 1989, as noted, arbitrator Larney adopted the grievance-arbitration and employee-discipline clauses proposed by the Union, and the parties incorporated these clauses into the 1989-91 Agreement. However, this language was not physically incorporated into the document purporting to memorialize the 1991-94 Agreement. The Union argues that this omission was inadvertent, and that the parties actually agreed at a later date that the omitted language was part of the Agreement (Un. Brief, 7). The City disagrees.

In 1989, arbitrator Larney was asked to choose between the following proposals, both relating to the third paragraph of Article VI (UX 1, 5):

City Proposal	Union Proposal
Nothing contained herein shall limit the statutory authority of the City of Markham Fire and Police Commission. The grievance procedure set forth in Article VII of this Agreement shall apply only to matters outside the scope of the Fire and Police Commission's statutory authority.	An employee disciplined by the Chief shall have the option of appealing such disciplinary action either before the City of Markham Fire and Police Commission or through the grievance procedure set forth in Article VII of this Agreement. Such election must be made in writing within seven days of the imposition of the discipline. If the employee elects to appeal the discipline through the contractual grievance procedure, he shall voluntarily sign and present to the City an express waiver of his right to appeal the matter before the Fire and Police Commission at the time his grievance is filed.

Arbitrator Larney adopted the Union's proposal (UX 1, at 18). For reasons not disclosed (or not known), however, this language was not incorporated *in haec verba* into the 1991-94 agreement. The actual text of Article VI of the 1991-94 agreement reads:

> The parties agree that oral or written warnings shall be expunged from an officers (sic) personnel and/or disciplinary file(s) one year after the warning is received by the officer as long as there has been no repetition of the offense within that one year period. Such expungement shall take place upon request by the employee given in writing to the Chief of Police.

In support of its contention that the contract language approved by arbitrator Larney was inadvertently omitted from the 1991-94 agreement, the Union submitted purported stipulations of the parties and admissions by the City's attorneys.

An excerpt from the February 25, 1993 transcript of the Fletcher arbitration hearing reads (UX 2):

> Ms. Moss (Counsel for the Union): I did have one other item I did want to mention which counsel and I discussed prior to this hearing. The collective bargaining agreement which is Joint Exhibit No. 1 contains the terms of the parties' agreement. However, when that agreement was entered into the terms of the arbitration award were kept separate from that agreement. So while you have the complete contract between the parties the terms of Arbitrator Larney's award which have been referred to and which brought us into this grievance procedure, which was that this individual, the Grievant, exercised his option through the grievance procedure is not contained in this document. It's been kept separate as the arbitration award.
>
> Mr. Hutchison (Counsel for the City): We will stipulate that that is, in fact, part of the contract; that the police officer may choose to file a grievance and arbitration procedure rather than before the Board of Fire and Police.

The Union also introduced copies of pleadings filed in *Teamsters Local 726 & City of Markham*, S-CA-94-9 (1994). The amended charge (UX 3A) alleged that Article VI of the parties' collective bargaining agreement provided:

> The parties further agree that the Police Chief shall have the power and authority to impose such disciplinary actions as oral or written warnings and suspensions up to five days, and in addition shall have the power and authority to suspend for any period beyond five days or to discharge employees covered by this Agreement, so long as such action is taken for just cause.
>
> An employee disciplined by the Chief shall have the option of appealing such disciplinary action either

> before the City of Markham Fire and Police Commission or through the grievance procedure set forth in Article VII of this Agreement. Such election must be made in writing within seven days of the imposition of the discipline. If the employee elects to appeal the discipline through the contractual grievance procedure, he shall voluntarily sign and present to the City an express waiver of his right to appeal the matter before the Fire and Police Commission at the time his grievance is filed.

The City answered as follows (UX 3B):

> Respondent admits that such portion of the alleged collective bargaining agreement as cited by Charging Party is contained...in that agreement. However, Respondent denies that the cited portion of the collective bargaining agreement is a valid part of the agreement based upon the history of the Agreement and the decision of the Appellate court of Illinois in the case of Parisi v. Jenkins, et al., (1992), 236 Ill.App. 3d 42, 603 N.E. 2d 566. That decision held, in effect, that a non-home rule community cannot enter into an agreement whereby a grievant may by-pass the local Board of Fire and Police Commissioners on matters of discipline as provided for by statute.

The City objected to admission of the parol evidence offered by the Union for several reasons: (1) the excerpt from the transcript was an "incomplete record" of the hearing (Tr. 32); (2) statements contained in the transcript were irrelevant because they related to "a contract...no longer in existence" (Tr. 32-3); and (3) the 1991-94 agreement, which contained a zipper clause acknowledging that the written text of the agreement was "complete and entire," precluded consideration of parol evidence designed to modify the agreement (Tr. 35; City Brief, 11-12). I took the City's objection to admission of this evidence under consideration (Tr. 36).

I overrule the City's objections to admission and consideration of this evidence. First, the objection of incompleteness was cured by the post-hearing submission of the entire transcript; the excerpt in question was contained in the transcript. Second, at the time of the arbitration hearing, the 1991-94 Agreement was in effect. See *City of Markham,* AAA 51 300 0710 92 S (Fletcher 1993) (UX 4). Third, parol evidence of a mutual mistake "contrary to what the parties intended" when they prepared their agreement is both admissible and probative.[7]

I reject the argument that "[e]ven assuming...that the City's attorneys made 'admissions' in arguments or pleadings in other proceedings, these 'admissions' would necessarily be limited to the proceedings in which they were supposedly made" (City Brief, 13). To the contrary, a "party's pleading in one case when offered against the party in another" case is a probative admission.[8]

Admissions are routinely offered and accepted into evidence:

> The admissions exception occupies an important place in the scheme of hearsay exceptions. It is frequently invoked, and often serves to justify the admission of evidence which is crucial or devas-

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[7]Marvin Hill, Jr. & Anthony V. Sinicropi, *Evidence in Arbitration,* 2d ed. (Washington, D.C.: BNA Books, 1987), at 344, citing the Report of the Chicago Area Tripartite Committee in *Problems of Proof in Arbitration,* PROCEEDINGS OF THE 19TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Washington, D.C.: BNA Books, 1967).

[8]Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* (St. Paul: West Publishing Co., 1982), 387. Exceptions to this rule involve changed or withdrawn pleadings, inconsistent or hypothetical pleadings, guilty pleas to traffic offenses and other pleadings not similar to the pleadings and statements offered in this case.

> tating. This is because it allows a party to introduce into evidence almost any nonprivileged statement made by an opposing party.[9]

The City's admissions are dispositive. They established that critical contract terms were mistakenly left out of the 1991-94 labor contract. As written, this document was incomplete and inaccurate. The proffered admissions corrected the parties' error and accurately reflected their intent. It is also significant that arbitrator Fletcher's award rested on the presumption, which the City did not challenge, that the 1991-94 labor contract required arbitration of a disciplinary discharge under a just-cause standard. Indeed, arbitrator Fletcher, referring to the Larney Award, pointed out that the grievant "elected not to proceed before the Board [of Fire and Police Commissioners], pursuant to the terms of Article VI, Discipline of the Agreement, as 'amended' by the terms of an Interest Arbitration Award in accordance with Section 14 of the Illinois Public Labor Relations Act" (UX 4, at 2-3).

Finally, by bringing suit in 1992 to invalidate the discipline and arbitration language it now claims was never part of the contract, the City tacitly admitted that this language was in actuality part of the 1991-94 contract.

V. Statutory Criteria

Section 14(g) of the Labor Act provides:

> As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in

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[9]Lempert & Saltzburg, *Ibid.*, at 383.

subsection (h). The findings, opinions and order as to all other issues shall be based upon the factors prescribed in subsection (h).

Section 14(h) of the Labor Act sets out the following "applicable factors":

(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.

(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.

VI. Summary of Arguments

A. The City

The City argues that it has "no duty to bargain over the Union's proposal for optional bypass of the Board of Fire and

Police Commissioners" (City Brief, 2). The City maintains that Section 7 of the Act "specifically excludes from the scope of the duty to bargain those matters 'excluded by Section 4 of this Act'...and also limits the duty to 'any matter...with respect to wages, hours and other conditions of employment, <u>not specifically provided for in any other law or not specifically in violation of the provisions of any law</u>" [underlining in original] (City Brief, 2). Division 2.1 of the Municipal Code (65 ILCS 5/10-2.1) requires a City with a population between 5,000 and 250,000 to "appoint a Board of Fire and Police Commissioners" which "shall make rules" for "appointments and removals" that "apply...to the conduct of hearings on charges brought against a member of the police or fire department." The Code goes on to provide, the City states, that "except as hereinafter provided, no officer or member of the...police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense....The Board of Fire and Police Commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof...." (City Brief, 3).

Under the Municipal Code, the City argues, "the courts have consistently held that municipalities have no power to abrogate the mandatory duties of their boards of fire and police commissioners" (City Brief, 3). See, for example, *Le Desma v. Village of Burr Ridge Fire & Police Commission*, 60

Ill.App.3d 768, 377 N.E.2d 319, 322 (2d Dist. 1978); *Weisenritter v. Board of Fire and Police Commissioners,* 67 Ill.App.3d 799, 385 N.E.2d 336 (1st Dist. 1979); *Paulik v. Village of Caseyville,* 100 Ill.App.3d 573, 427 N.E.2d 213 (5th Dist. 1981); *Diamond v. Board of Fire and Police Commissioners,* 115 Ill.App.3d 437, 450 N.E.2d 879 (1st Dist. 1983); *Parisi v. Jenkins,* 236 Ill.App.3d 42, 603 N.E.2d 566 (1st Dist. 1992). The City distinguished cases cited by the Union, noting that courts have allowed only home-rule communities to bargain over a proposal to submit disciplinary grievances to arbitration (City Brief, 8). Markham is not a home-rule community.

The City also argues that the evidence "does not establish a compelling need for the imposition of a provision that would allow the evasion of the exclusive statutory jurisdiction of the Board of Fire and Police Commissioners" (City Brief, 13). The Union proposal is mischievous, the City suggests, because it "is contrary to all parties' interests in certainty and finality when a disciplinary issue is raised" and creates "a serious risk that various officers who are charged with misconduct arising out of the same incident might elect different disciplinary forums and receive inconsistent dispositions" (City Brief, 14-15).

B. The Union

Citing my award in *City of Springfield v. IAFF Local No. 37,* S-MA-18 (Berman 1987), the Union argues that the City has the burden of justifying the "change in previously existing

contractual language or benefits" (Un. Brief, 4). "[P]rocedures and standards for discipline" are "conditions of employment" under Section 7 of the Act; thus, the City's position that the Arbitrator is deprived of jurisdiction is without foundation (Un. Brief, 9). Issues "relating to employee discipline" are "mandatory subjects of bargaining" (Un. Brief, 9). See *City of Decatur v. AFSCME, Local 268,* 122 Ill.2d 353, (1988); *Local No. 193 v. City of Springfield,* 211 Ill.App.3d 166 (4th Dist. 1991). Therefore, the Union argues, the "City has lawful authority to enter into an agreement that continues a provision allowing employees to grieve disciplinary disputes through arbitration based on just cause" (Un. Brief, 10).

The Union takes exception to the City's interpretation of *Parisi v. Jenkins*. In particular, the Union rejects the argument that Section 7 of the Act, which qualifies the duty to bargain by excluding matters "specifically provided for in any other law," makes it unlawful for the City to agree to "grievance arbitration of disciplinary disputes" (Un. Brief, 11). If, the Union maintains, it is lawful to arbitrate disciplinary grievances, the arbitration of disciplinary grievances is a mandatory subject of bargaining; the two issues are "essentially identical" (Un. Brief, 11, n. 1).

The Union goes on to argue that its "proposal 'supplements' a provision in another law in accordance with Section 7 of the Act" (Un. Brief, 12). As the "Police Board

would retain its statutory authority to impose discipline," subject to "appeal to arbitration," the Union proposal would supplement, not supplant, "the role of the Police Board" (Un. Brief, 12). See, for example, *Will County Board v. AFSCME, Council 31* (Nathan 1988) (UX 8).

The Union cited *State and Municipal Teamsters, Local 726 v. Markham,* Case No. S-CA-94-9 (ISLRB 12/5/94) (UX 14), for the proposition that the Illinois Supreme "'Court's reference to the employer's home rule status in *City of Decatur* was stated only as a collateral factor and was not the determinative consideration...'" (Un. Brief, 16). Thus, the Union maintains, "*City of Decatur* controls a city's obligation to bargain over arbitration of discipline issues for both home-rule and non-home rule municipalities" (Un. Brief, 16). See also *Village of Franklin Park v. Illinois State Labor Relations Board,* 203 Ill.Dec. 18, 638 N.E.2d 1144 (1st Dist. 1994) (UX 7); *Forest Preserve District of Cook County v. Illinois Local Labor Relations Board,* 190 Ill.App.3d 283, 290-91 (1st Dist. 1989). The Union's proposal does not contradict the "non-discretionary statutory mandate" of a non-home rule city "to establish a Police Board...authorized to conduct hearings and determine suspensions and discharges of police officers" (Un. Brief, 18). Rather, the Union suggests, its proposal, which is consistent with the "policy objectives" of the Act "strongly favor[ing] collective bargaining and arbitration of disputes," "supplements the statutory provisions" (Un. Brief, 18-19).

The Union argues that the City has misconstrued *Parisi* (Un. Brief, 19). In *Parisi,* the court declined to enforce a labor contract requiring dismissal of a police officer who did not return to duty after one year on disability leave. The court held that the contract "'entirely preclude[d] the Board's determination of this issue' and did not provide the terminated officer 'an opportunity to be heard in his own defense,' as the statute requires" (Un. Brief, 19). However, *Parisi* did not discuss the issue of whether a non-home rule city lacks authority to bargain over the arbitration of disciplinary issues. Further, *Parisi* relied on *Weisenritter v. Board of Fire and Police Commissioners,* a pre-Labor Act case involving a home rule city (Un. Brief, 20). *Parisi* also relied on *County of Cook v. Illinois Local Labor Relations Board,* 204 Ill.App.3d 370 (1st Dist. 1990), which was reversed by the Illinois Supreme Court, 145 Ill.2d 475, 482 (1991), on the basis of *City of Decatur* (Un. Brief, 20-1). The Union also argues that the labor contract in *Parisi* defined cause for discharge and foreclosed an arbitration hearing, an approach having "nothing in common with the Union's proposal in the instant case" (Un. Brief, 21).

The Union argues that "the 'just cause' standard is a basic element of industrial due process and should be retained in the contract" (Un. Brief, 23). In support of this argument, the Union stated, citing ISLRB decisions and an arbitration award, that "the City of Markham has a history of abusing the disciplinary process" (Un. Brief, 25). In

addition, the Union insists that the "Police Board is not a neutral body" but "part of the City and hence an arm of the employer" (Un. Brief, 27-8). Finally, the Union contends, the "'just cause' standard embodies necessary additional elements of due process," such as uniformity, not provided by "statutory 'cause' under the Illinois Municipal Code" (Un. Brief, 29). The statutory standard "is not interchangeable with contractual 'just cause'" and "arbitrators are better able to evaluate disciplinary matters requiring contract interpretation" (Un. Brief, 31). In addition, the Union maintains, "arbitration of police board disciplinary actions would not constitute a 'second bite of the apple'" as contended by the City (Un. Brief, 32). See, for example, *Board of Regents (Northern Illinois University)*, 7 PERI ¶1113 (IELRB 1991); *Ryherd v. General Cable Co.*, 124 Ill.2d 418 (1988).

Finally, the Union insists, since *Decatur* the trend in home-rule and non-home rule municipalities "has been toward bargaining grievance arbitration of discipline" (Un. Brief, 22-3). See, for example, Union exhibits 17-48.

VII. Discussion and Findings

A. The City's Non-Delegable Authority in Matters of Discipline

The parties have asked me to decide whether the Union's proposal is lawful. Section 14(g)(1) of the Labor Act also requires consideration of the "lawful authority of the employer." Accordingly, I must decide whether the City has

"lawful authority" to permit the arbitration of grievances filed by suspended or discharged police officers.

There are two critical cases: *City of Decatur v. AFSCME, Local 268*, 122 Ill.2d 353, 119 Ill.Dec. 360, 522 N.E.2d 1219 (1988) and *Parisi v. Jenkins*, 236 Ill.App.3d 42, 177 Ill.Dec. 496, 603 N.E.2d 566 (1st Dist. 1992). Other important cases are: *Local 193, IBEW v. City of Springfield*, 211 Ill.App.3d 166 (4th Dist. 1991); *Village of Franklin Park v. Illinois State Labor Relations Board*, 203 Ill.Dec. 18, 638 N.E.2d 1144 (1st Dist. 1994); *Forest Preserve District v. Illinois Local Labor Relations Board*, 190 Ill.App.3d 283 (1st Dist. 1989); *Weisenritter v. Board of Police & Fire Commissioners of the City of Burbank*, 67 Ill.App.3d 799, 24 Ill.Dec. 424, 385 N.E.2d 336 (1st Dist. 1978); *Bindell v. City of Harvey*, 212 Ill.App.3d 1042, 156 Ill.Dec. 1037, 571 N.E.2d 1017 (1st Dist. 1991); and *Teamsters Local 726 & City of Markham*, S-CA-94-9 (ISLRB ALJ Waechter, 1994) (UX 14). In connection with this issue, I have also considered the following interest arbitration awards: *Village of Schaumburg*, S-MA-93-185 (Fleischli 1994) (CX 3); *Will County Board & Sheriff of Will County* (Nathan 1988) (UX 8); *City of Springfield*, S-MA-89-74 (Benn 1990) (UX 10); *Village of Arlington Heights*, S-MA-88-89 (Briggs 1990) (UX 11); *Village of Skokie* (Gundermann 1993) (UX 12); and *Village of Elk Grove Village*, S-MA-93-231 (Nathan 1994) (UX 13).

1. The Critical Decisions

(a) *City of Decatur v.* Illinois State Labor Relations Board

In *City of Decatur,* the Illinois Supreme Court held that Section 7 of the Labor Act required the city to bargain over the union's proposal to submit disciplinary grievances to arbitration, despite the city's adoption of a civil service commission.

Decatur is a home-rule municipality. By referendum, voters adopted a civil service commission. By law, no civil service employee, including police officers, could be "removed, discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense." The Commission had a duty to investigate charges, and provide a hearing to any employee suspended for more than five days or suspended within six months of a previous suspension.

The collective bargaining agreement defined a grievance as "any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning, or interpretation of this Agreement or arising out of other circumstances or conditions of employment" (122 Ill. 2d at 363). The Union proposal would remove "disciplinary matters involving terminations, suspensions of five days or more, and multiple suspensions within a six-month period from the jurisdiction of the municipal civil service commission and would instead commit all disciplinary questions to final and binding arbitration" (122 Ill.2d at 363).

Suggesting that it did not believe that "the legislature intended to make the broad duties imposed by the [Labor] Act hostage to the myriad of State statutes and local ordinances pertaining to matters of public employment" and noting that the "civil service system provided for in...the Municipal Code is an optional scheme and not one imposed by the State on any municipal body" (122 Ill.2d at 364, 365), the court held "that the State Board was correct in ordering the city to bargain over the union's proposal" (122 Ill.2d at 366):

> [T]he Union's proposal...pertain[s] to a matter not specifically provided for or in violation of another law and...supplement[s], implement[s], or relate[s] to the provisions of the civil service scheme adopted by the city. We do not believe that the legislature would have intended that the civil service system it made available, *as an optional matter* [my italics], to municipalities in the Municipal Code would eliminate the duty to bargain over the union's proposal here (122 Ill.2d at 367).

City of Decatur was applied by the Court of Appeals for the First District in *Franklin Park v. Illinois State Labor Relations Board, supra, Forest Preserve District of Cook County v. Illinois State Labor Relations Board, supra,* and by Labor Board Administrative Law Judge Waechter in *City of Markham, supra,* S-CA-94-9.

(b) *Parisi v. Jenkins & Village of Worth*

From May 1968 until he injured his knee at work in September 1985, Officer Joseph Parisi was a full-time police officer for the Village of Worth. While on leave and in physical therapy for his knee, he injured his back. In September 1986 he applied to the Village Pension Board for a line-of-duty disability pension. The Pension Board granted

Parisi a non-disability payment equal to 50 percent of his salary but denied his petition for a line-of-duty disability pension.

At Parisi's request, the Pension Board terminated his disability pension and found him fit to return to duty in June 1989. During Parisi's absence from work, the Village of Worth and the union entered into a labor contract containing a clause under which employment was terminated when an employee was "unable to return to full unrestricted duties within 365 days of a non-work related injury." Citing this clause, the Village declined to reinstate Parisi. In January 1990, Parisi sued for reinstatement to active duty. While suit was pending, Police Chief Harry Jenkins filed charges against Parisi with the Police Board and requested that Parisi be discharged.

The Police Board denied Jenkins' request and ordered Parisi to be reinstated to active duty. On review, the Circuit Court of Cook County sustained the Police Board's decision, finding that "Section 2 of Article XI of the labor agreement and section 10-2.1-24 of the Illinois Municipal Code constituted cause for termination. The trial court expressly found the labor agreement valid and binding." See *Parisi v. Jenkins*, 177 Ill.Dec. at 499.

Parisi appealed and the appellate court reversed. Finding *Weinsenritter v. Board of Fire and Police*

Commissioners "dispositive,"[10] the court held at 177 Ill.Dec. 502 that "adoption of the employment termination provision in the labor agreement constituted an *ultra vires* act by the Village":

> [T]he Police Board's statutory power to determine cause for dismissal and terminate an employee cannot be abrogated by a collective bargaining agreement. The labor agreement's presumption that an officer's 365-day disability leave necessarily constitutes "good cause" for termination entirely precludes the Board's determination of this issue.

The court held that dismissal for the "single factor" of a "year-long, injury-related absence" with no "opportunity to be heard" was "clearly inconsistent" with Section 10-2.1-17 of the Municipal Code. Further, the court insisted, the "termination provision" of the labor contract was not "a proper subject for bargaining under the Illinois Public Labor Relations Act" because "a provision which summarily defines cause for discharge is not a 'condition of employment' under the meaning of the statute." 177 Ill.Dec. at 503. In addition, the court held, since Section 10-2.1-17 of the Municipal Code "grants the Police Board authority to determine cause for an employee's termination," the "labor agreement's provision, by defining cause for termination, constitutes a matter specifically provided for in, and directly in conflict with Section 10-2.1-17....[S]uch conflict between the labor agreement and the Police Board's statutory authority to determine good cause for termination exempted the bar-

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[10]*Weinsenritter v. Board of Fire and Police Commissioners*, 67 Ill.App.3d 799, 24 Ill.Dec. 424, 385 N.E.2d 336 (1st Dist. 1978).

gaining unit from the duty to bargain imposed by Section 7 of the Labor Relations Act." 177 Ill.Dec. at 503.

Interestingly, although the court reached back to *Weisenritter*, a pre-Labor Relations Act case, it ignored *Decatur v. ISLRB*. It was as though *Decatur*, a watershed Supreme Court decision, had not been written.

2. Post-*Decatur* Cases

Several post-*Decatur* cases are relevant to resolution of the current issue. In *Village of Franklin Park v. ISLRB*, the first appellate district affirmed the Labor Board's decision that the village had unlawfully refused to bargain over union proposals concerning the promotion of rank-and-file police officers to the rank of lieutenant. The Municipal Code governed these promotions. Respecting the "accommodation provision of Section 7 of the Act," however, the court reconciled the Municipal Code to the Labor Act. The court quoted *Decatur:*

> [W]e do not believe that the legislature intended to make the broad duties imposed by the Act hostage to the myriad of State statutes and local ordinances pertaining to matters of public employment. * * * To construe the accommodation provision of Section 7 narrowly would, we believe, frustrate the declared policy of the State.

Administrative Law Judge Waechter's decision in *City of Markham* is subject to review and thus not controlling, but his reasoning is instructive. Judge Waechter wrote that the "City's reliance on *Parisi* completely overlooks *City of Decatur....*" (UX 14, at 11-12):

> In *City of Decatur*, the Illinois Supreme Court held that municipalities are required to bargain with

> their employees' exclusive representative concerning a union's proposal to have discipline issues resolved through the contractual grievance procedure, culminating in binding arbitration, regardless of the fact that the employer's civil service commission had jurisdiction over disciplinary matters. In contrast, *Parisi* held that a collective bargaining agreement requiring the termination of any police officer who is unable to return to active duty within one year after commencing disability leave was not enforceable because the employer, a non-home rule municipality, did not have the power to negotiate and agree to a provision abrogating its Board of Fire and Police Commissioners' authority. Indeed, in addressing the employer's authority to negotiate and agree to the provision requiring the termination of the officers on disability leave, the appellate court simply concluded that the particular agreement did not involve a "condition of employment" within the meaning of the Act because the clause "summarily" defined cause for discharge. *Parisi v. Jenkins*, 236 Ill.App.3d 42. More importantly, the *Parisi* court never held, let alone even discussed, that non-home rule municipalities lacked the authority to negotiate and agree to arbitrate discipline issues. Based on the following considerations, I find that the Illinois Supreme Court's decision in *City of Decatur* is controlling in this case, and *Parisi* did not permit the City to ignore the court's clear holding under *City of Decatur.*

Judge Waechter considered it immaterial that the City of Decatur was a home-rule municipality but that the Village of Worth in the *Parisi* case was not a home-rule municipality (UX 14, at 12, n. 13):

> The fact that the employer in *City of Decatur* was a home rule municipality was irrelevant to the court's holding. Even though, in *City of Decatur,* the court specifically noted that the employer's status as a home rule municipality allowed it to alter or amend any of its civil service system's terms, the employer's home rule status was not conclusive to the holding. Indeed the court's reference to the employer's home rule status in *City of Decatur* was stated only as a collateral factor and was not the determinative consideration to its holding in *City of Decatur.* I believe that if the court intended to base its holding on the fact that the employer was a home rule municipality, it would

have clearly said so. This conclusion is supported by the court's own synopsis of its holding which made no reference to the employer's home rule status, stating that it did

> ...not believe that the legislature would have intended that the civil service system it made available, as an optional matter, to municipalities...would eliminate the duty to bargain over the union's proposal [concerning arbitration of discipline issues].

Judge Waechter suggested (UX 14, at 12-13)—

> The statute which allowed the City to adopt its Board of Fire and Police Commissioners, the civil service system at issue in this case, is no different than the civil service system at issue in *City of Decatur,* since both civil service laws involve "an optional scheme" which was not imposed on either municipality. Accordingly, because the City's civil service system involved an optional scheme and because of the express public policy preferring arbitration as a method for resolving disputes during the term of the parties' contract, the City had the authority to enter into a contract with Local 726 that included grievance and arbitration procedures involving discipline issues.

3. Conclusion

In *Parisi,* the court made two significant findings: (1) the "Police Board's statutory power to determine cause for dismissal and terminate an employee cannot be abrogated by a collective bargaining agreement" (177 Ill.Dec. at 502); and (2) a contract "provision which summarily defines cause for dismissal is not a 'condition of employment' under the meaning of the statute" (177 Ill.Dec. at 503). For reasons suggested by Judge Waechter, neither finding compels rejection of the Union's amended proposal.

First, "cause" as defined by the Municipal Code is different from "just cause" as commonly employed in labor

arbitration. In *Fantozzi v. Fire and Police Commission,* 27 Ill.2d 357, 360 (1963), the court defined "cause" as—

> [S]ome substantial shortcoming which renders continuance in...office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his no longer occupying the place.

Just cause "cannot be reduced to a simple rule or formula,"[11] but it generally requires advance notice of the consequences of certain acts, application of reasonable rules or orders, an adequate pre-disciplinary investigation, proof of guilt at the time of discipline, uniform or equal treatment of employees and a reasonable and appropriate penalty. These concepts may indeed be foreign to "cause" as defined by the Municipal Code. Even though "cause" may in fact be subsumed by "just cause," there may be statutory "cause," but not "just cause," for dismissal. Under the Union's proposal, the Markham Police Board would retain the right to determine statutory cause. If arbitration is elected by the grievant, just cause or its absence would be determined through arbitration.

Second, Section 7 of the Labor Act provides in part that "any other law" pertaining to "conditions of employment" will neither limit the duty to "bargain collectively" nor preclude parties from agreeing to clauses in a labor contract "which either supplement, implement, or relate to the effect of such

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[11]Adolph M. Koven & Susan L. Smith, *Just Cause: The Seven Tests,* 2nd edition revised by Donald F. Farwell (Washington, D.C.: BNA Books, 1992), 2.

provisions in other laws." In *Parisi*, the plaintiff was dismissed under a contract requiring the termination of an employee unable to return to "full unrestricted duties within 365 days of a non-work related injury." In the court's judgment this "summarily define[d] cause for dismissal" was not a "'condition of employment' under the meaning of the statute." As the 365-day clause was not a "condition of employment," the clause did not supplement the Municipal Code; it abrogated the Municipal Code. In agreeing to this clause, the Village of Worth exceeded its authority. The 365-day clause was not a condition of employment because it was "summary" or arbitrary. It "summarily define[d]" cause for termination without offering the terminated employee the opportunity to be heard by the police board charged with the responsibility of determining "cause."

The just-cause provision in question is not arbitrary or summary. It does not narrowly and arbitrarily define cause for dismissal; it does not deprive an employee of the opportunity to appear before the Markham Police Board on charges of dismissal for cause. To the contrary, it permits an employee suspended or discharged by the City to appear before the Board on charges of "cause" and to appear before an arbitrator on charges of "just cause." There can be no summary or arbitrary cause for long-term suspension or dismissal. Due process is respected. A hearing—either before the Board or before an arbitrator—is provided.

Parisi is distinguishable in another respect. *Parisi* did not hold that the labor contract unduly limited the employer's statutory rights. Rather, the contract unduly limited the terminated employee's statutory right to a hearing before the police board on broadly defined charges of cause for dismissal. In *Parisi,* the labor contract defined employee rights too narrowly, not too broadly. The just-cause language proposed here does not limit employee rights. The proposed language builds on employee rights, adding rights on top of those legally guaranteed.

B. Arbitration of Disciplinary Suspension and Discharge

1. The Change in Language

I reiterate that "[w]ithout economic or operational justification, it is inappropriate [for an arbitrator] to take away employees' benefits." *City of Springfield,* S-MA-18 (Berman 1987), at 38. I concur with arbitrator Harvey Nathan's elaboration of this point In *Will County, supra,* at page 50:

> 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 [the] 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.

Both parties seek to change the discharge-and-discipline clause adopted by arbitrator Larney in 1989 and carried over into the 1991-94 labor contract. The City seeks to substitute "cause" for "just cause" as the basis for discipline and to eliminate the opportunity for arbitral review of discipline. Under the Union's amended proposal, "just cause" remains the disciplinary test, and any disciplinary penalty more severe than oral reprimand may be challenged though grievance and arbitration.

Although both parties seek to modify the grievance-and-arbitration and discipline-and-discharge provisions of the Agreement, the City would eliminate discharge-and-suspension arbitration and it proposes a radical restructuring of the basis for discipline—from discipline based on just cause to discipline based on statutory cause. The City is trying to restore the *status quo ante*—to eliminate arbitration of disciplinary grievances and restore the pre-Larney-award authority of the City and the Markham Police Board to determine whether a disciplinary suspension or discharge was based on "cause." The City's proposal thus amounts to a "marked change in the product of previous negotiations" (*Will County, supra,* at 50).

The Union's amended proposal suggests a less drastic change. It does not antedate the first labor contract. It would in fact give the Markham Police Board more authority than it enjoyed under the two previous labor contracts. The Union proposal is a compromise, apparently designed to meet

the argument that *Parisi* precluded abrogation of "the Police Board's statutory power to determine cause for dismissal." *Parisi v. Jenkins,* 177 Ill.Dec. at 502. In short, while both parties have some burden of justification, the City carries the heavier burden. Its proposal seeks a more radical change in the labor contract and in the basic relationship between employer and employees.

2. Comparability

While no study of discipline and grievance and arbitration clauses in police officer and firefighter collective bargaining agreements in purportedly comparable jurisdictions was produced, the Union introduced 31 current or recently expired labor contracts involving police or fire departments in Illinois (UX 17-48) that contained some form of grievance and arbitration for employee discipline. Most allowed discharged or suspended employees to appeal either to a civil service commission or an arbitrator.[12] Some permitted an employee to bypass the civil service commission and to appeal directly to arbitration.[13] Like the Union's proposal in this

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[12]See City of Blue Island (Police Department) & Teamsters Local 726 (UX 17); City of Oak Forest (Police Department) & Teamsters Local 726 (UX 18); Village of Arlington Heights & IAFF, Local 3105 (UX 19); Village of Bensenville & IAFF, Local 2968 (UX 21); Carol Stream Fire Protection District & IAFF, Local 3192 (UX 24); Village of Lombard & IAFF, Local 3009 (UX 29); Village of Park Forest & IAFF, Local 3065 (UX 32); Board of Trustees of Tri-State Fire Protection District & IAFF, Local 3165 (discharge only) (UX 33); The County of Will & AFSCME, Local 2961 (UX 35); City of Alton & IAFF, Local 1255 (UX 36); City of Bloomington & IAFF, Local 388 (UX 37); City of Charleston & IAFF, Local 3200 (UX 39); City of Dekalb & IAFF, Local 1236 (UX 40); City of Decatur & IAFF, Local 505 (UX 41); City of East Moline & IAFF, Local 929 (UX 42); City of Granite City (Police Department) & AFSCME, Local 1347 (UX 44); and City of Springfield & IAFF, Local 37 (UX 46).

[13]See City of Aurora & IAFF, Local 99 (UX 20); City of Calumet City & Firefighters Association (UX 23); City of Chicago & IAFF, Local 2 (UX

case, several permitted a disciplined employee to appeal the decision of a civil service commission to arbitration.[14] Among the non-home rule communities permitting some form of discipline-arbitration were Bensenville (UX 21), Bloomingdale (UX 22), Forest Park (UX 28), Charleston (UX 39) and East Moline (UX 42).

The evidence on comparability is not decisive. It did not show the number of municipalities and unions that have agreed to arbitrate employee discipline. Nor did the evidence establish whether any of the cited municipalities are statistically and demographically comparable to the Village of Markham. It is enough to say that the Union has identified a "trend."

3. Equity and Fairness Compel Adoption of the Union's Proposal

I agree with arbitrator Steven Briggs that "fundamental equity and fairness considerations" compel that "controlling weight" be given "to the 'other factors' statutory criterion." *Village of Arlington Heights,* S-MA-88-89 (Briggs 1990) (UX 11), at 101. Thus, as arbitrator Briggs wrote, at 101-02:

> The obligation of employers to use the "just cause" standard in disciplinary matters, and the corresponding right of employees to have employer disci-

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25); City of Evanston & IAFF, Local 742 (UX 27); Village of Northbrook & IAFF, Local 1894 (UX 30); and State of Illinois & AFSCME (UX 48).

[14]See Bloomingdale Fire Protection District No. 1 & IAFF, Local 3272 (UX 22); Village of Oak Park & IAFF, Local 2012 (UX 31); Village of Villa Park & IAFF, Local 2392 (UX 34); City of Carbondale & IAFF, Local 1961 (UX 38); and City of Effingham & IAFF, Local 3084 (UX 43).

> plinary decisions reviewed by a trained third-party neutral have been widely embraced by union and management negotiators alike. Indeed, even the Illinois Public Labor Relations Act at Section 8 recognizes the desirability of the arbitration process for resolving disputes over the administration of collective bargaining agreements. The Union...was simply seeking for members of the bargaining unit a contractually guaranteed right to fair treatment. That objective is not unreasonable nor is out of line with the vast majority of collective bargaining agreements negotiated in both the public and private sectors.

At page 17 of his opinion (UX 1), arbitrator Larney quoted professor Charles Morris' well-known work, *The Developing Labor Law,* for the proposition that "there can be little doubt that in American labor law the arbitration process is the primary mechanism for resolution of disputes arising under collective bargaining agreements. As the Supreme Court has explained, the grievance-arbitration system is the very heart of the system of industrial self-government." I agree. It "is difficult to conceive of a concept more fundamental to a collective bargaining relationship than that of just cause." *Village of Skokie* (Gundermann 1993) (UX 12).

The Markham Police Board must be presumed competent to decide whether a dismissal or suspension is based on "cause," but "just cause" has traditionally and routinely been applied by independent arbitrators selected by the parties themselves. As the court noted in *City of Decatur,* 122 Ill.2d at 366, "the legislature has expressed a...preference for arbitration...."

One question remains. May a "system of industrial self-government" derived from a consensual, private-sector model reasonably be superimposed upon a statutory system of discipline and dismissal? The fit seems awkward. As discussed, statutory "cause" is not the same as arbitral "just cause." Under the Union's amended proposal, the Markham Police Board's decision to suspend or discipline an employee for "cause" may be appealed to arbitration. If appealed, unless the Board has considered the extra-statutory standard of "just cause," its decision on "cause" might turn out to be of little moment. Markham Police Board proceedings could either be reduced to the fourth step of the grievance procedure or the arbitrator could be constrained to rubber stamp the Board's decision on statutory cause.

The inevitable question thus presents itself: May an employee discharged by the Board for cause be reinstated by an arbitrator whose decision rests on the absence of just cause? *City of Decatur* appears to answer this question in the affirmative: "[A] municipality that has adopted the [civil service] system may unilaterally alter or amend one of its terms" (122 Ill.2d at 365). Accordingly, "the city could, if it chose to, eliminate those features of the civil service system at issue here" (122 Ill.2d at 366). In Illinois, if impasse is reached in bargaining with respect to protective service units, interest arbitration is a substitute for bargaining, and an arbitrator has the same authority as the parties themselves to "eliminate...features of the civil

service system." Under *Decatur,* therefore, it would seem appropriate for either the parties or an arbitrator to establish a grievance and arbitration and disciplinary procedure that "alters, amends" or "eliminates" certain "features of the civil service system."

In any event, the procedure proposed by the Union does not wholly displace the statutory procedure. As arbitrator Nathan pointed out in *Will County Board,* at 61:

> [T]he 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. All employees will continue to have the minimal protections of the Act if they so choose or they may [elect] to complain through the grievance procedure. Clearly, the Union proposal supplements the Merit Commission. It does not nullify it.

Here, as in *Will County,* no employee is compelled to choose arbitration over a public board hearing under the Municipal Code.

In *City of Decatur,* the Illinois Supreme Court declined "[t]o construe the accommodation provision of section 7 narrowly" in such a way as to "frustrate the declared policy of the State" (122 Ill.2d at 364). Not wishing "to make the broad duties imposed by the [Labor] Act hostage to the myriad of State statutes and local ordinances pertaining to matters of public employment" (122 Ill.2d at 364), the court held

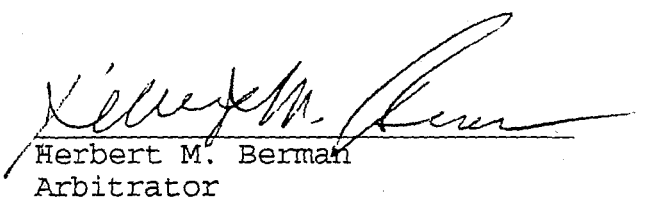
that it did "not believe that the legislature would have intended that the civil service system it made available, as an optional matter, to municipalities in the Municipal Code would eliminate the duty to bargain over the union's proposal here" (122 Ill.2d at 367). Similarly, while the scheme proposed by the Union may run into practical hitches, it is compatible with *Decatur*. It is workable if administered in good faith. Consistent with the accommodation requirements of Section 7 of the Labor Act, the Union's amended proposal would create a condition of employment not precluded by law.

In conventional interest arbitration, an arbitrator is not required to choose between final offers. Without compelling reason, however, it seems unwise to dream up contract language not proposed by either party. Even if an arbitrator is not wholly enthusiastic about either proposal, it would seem better in most circumstances to adopt the best proposal than to impose contract language that may not be acceptable to anyone. The Union's proposal may be imperfect; but for the reasons suggested, it is better—more reasonable and equitable—than the City's proposal. I shall adopt it.

Award

In their "Ground Rues and Stipulations" (JX 4), the parties waived the three-member arbitration panel prescribed by Section 14 of the Labor Act and authorized me to make a final determination.

As the Union's amended final offer appears to contain a typographical error, I adopt this offer with the following correction: The word "police" shall be substituted for the word "fire" in the seventh line of the second paragraph of Section 6(b) of the Union's amended final offer.



Herbert M. Berman
Arbitrator

May 12, 1995