

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

Glenview Professional Firefighters,	)	
Local 41286, International Association	)	
of Fire Fighters,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-11-201
	)	
Village of Glenview,	)	
	)	
Respondent	)	

**ORDER**

On August 21, 2014 Administrative Law Judge Heather R. Sidwell, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its November 18, 2014 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

**THEREFORE**, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

**Issued in Chicago, Illinois, this 18th day of November, 2014.**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

  
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**Jerald S. Post**  
**General Counsel**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
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Glenview Professional Firefighters,	)	
Local 4186, International Association	)	
of Fire Fighters,	)	
	)	
Charging Party	)	
	)	Case No. S-CA-11-201
and	)	
	)	
Village of Glenview,	)	
	)	
Respondent	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On March 30, 2011, the Glenview Professional Firefighters, Local 4186, International Association of Fire Fighters (Charging Party, Union) filed a charge with the State Panel of the Illinois Labor Relations Board (Board) pursuant to Section 11 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240, alleging that the Village of Glenview (Respondent, Village) violated Sections 10(a)(4) and 10(a)(1) of the Act. The charges were investigated in accordance with Section 11 of the Act and on November 1, 2011, the Board’s Executive Director issued a Complaint for Hearing.

Administrative Law Judge Elaine Tarver issued a recommended decision and order on January 12, 2012, granting the Respondent’s motion to defer the amended charge to binding grievance arbitration.<sup>1</sup> On December 3, 2012, arbitrator Lamont E. Stallworth issued an award finding that the Village’s complained-of conduct was authorized under the management rights clause of the parties’ collective bargaining agreement. On December 14, 2012, the Charging Party filed a timely motion to re-open. I issued a recommended decision and order (RDO) re-opening this matter on May 20, 2013, on the grounds that the arbitration award did not resolve the issues underlying the charge.

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<sup>1</sup> As issued, the Complaint for Hearing alleged a violation of Sections 10(a)(4) and 10(a)(1) of the Act on the basis of a unilateral change in apparatus manning levels. ALJ Tarver granted the Charging Party’s December 9, 2011, motion to amend the Complaint for Hearing. As amended, the Complaint for Hearing alleges a violation based on the Respondent’s unilateral change to minimum shift staffing levels.

A hearing was held before the undersigned on July 11 and 12, 2013, in the Board's Chicago office. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. After full consideration of the parties' stipulations, evidence, arguments, and upon the entire record of this case, I recommend the following.

I. **PRELIMINARY FINDINGS**

The parties stipulate, and I find:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act;
2. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a-5) of the Act;
3. At all times material, the Respondent has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act;
4. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act; and
5. At all times material, the Charging Party has been the exclusive representative of a bargaining unit comprised of all persons employed by the Respondent in the following titles or ranks: Firefighter, Firefighter/Paramedic, Fire Lieutenant, and Fire Captain.

II. **ISSUES AND CONTENTIONS**

This unfair labor practice charge is based on the Village's decision to remove an ambulance from service during non-peak hours if overtime would be required to keep the ambulance in service. By implementing this change, the Respondent reduced shift staffing levels during shifts in which one ambulance was not in service. In doing so, the Charging Party alleges that the Respondent failed to fulfill its obligation under Section 14(l) of the Act to maintain the status quo with respect to wages, hours, and terms of conditions of employment during the pendency of interest arbitration proceedings. The Respondent argues that its conduct was permissible under the management rights clause of the parties' collective bargaining agreement.

The Respondent's motion to defer this matter to binding grievance arbitration having been granted, the parties' chosen arbitrator issued an award on December 3, 2012, finding that the Respondent's conduct was authorized by the management rights clause of the parties'

collective bargaining agreement. The Charging Party filed a timely motion to re-open, and on May 20, 2013, I issued a recommended decision and order granting this motion on the grounds that the arbitration award did not resolve the issue of whether the Respondent's exercise of its rights under the management rights clause is consistent with its obligation under the Act to maintain existing wages, hours, and other conditions of employment during the pendency of interest arbitration proceedings. In doing so, however, I adopted the arbitrator's interpretation of the management rights clause of the parties' agreement.

The Respondent concedes that it implemented the complained-of change during the pendency of interest arbitration, but argues that this matter should nonetheless be dismissed for two reasons: (1) the effect of the expiration of the collective bargaining agreement on the management rights clause is irrelevant where, as here, the decision to take the complained-of action was made and unambiguously announced prior to the expiration of the agreement, even where the decision was implemented after the expiration; and, alternatively (2) the Respondent's rights under the management rights clause were not affected by the expiration of the collective bargaining agreement or the pendency of interest arbitration.

### III. **FINDINGS OF FACT**<sup>2</sup>

#### Village History

Following the closure and re-development of the 1,100-acre Glenview Naval Air Base, the Village added approximately 42 full-time positions to its staff between 1999 and 2004.

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<sup>2</sup> Both parties presented evidence regarding the minimum manning provisions in other jurisdictions. The Union presented excerpts from contracts in 12 municipalities, including a cover page, table of contents, and applicable provisions for each one. However, at least one of these was labeled as a tentative agreement; another appears to have been drafted in the legislative style, causing me to be unsure whether the provisions therein represent a proposal, a tentative agreement, or a fully executed agreement; and only one includes a signature page indicating that the agreement was ever executed. Additional foundation is necessary to support any findings based on these documents. Moreover, these documents, along with the summary of provisions in comparable jurisdictions provided by the Village, suffer an additional defect: no testimony was presented as to any of these documents. Counsel for the Charging Party attempted to provide the Board with background regarding the contract provisions it provided. However, counsel was not under oath at the time. Additionally, I could not permit counsel to offer testimony because, having represented the Charging Party at the hearing in this matter, he was precluded from acting as a witness under Rule 3.7 of the Illinois Rules of Professional Conduct. As such, the only finding I can derive from these documents is that some jurisdictions appear to have contract provisions regarding minimum shift staffing and others do not. To try to extrapolate further insights or conclude that minimum shift staffing is amendable to bargaining without information on the collective bargaining process by which jurisdictions with minimum shift manning provisions arrived at their agreements would be speculative at best.

Village Manager Todd Hileman testified that the biggest issue he was faced with when he was hired in 2004 was the Village's financial sustainability following this period of significant growth. Beginning in 2005, Hileman and the Village Board began to identify efficiencies to control long-term personnel costs and balance the Village's budget. Through attrition and early retirement incentives, the Village reduced its number of full-time employees by 17 in 2008 and by another 27 in 2009; however, personnel costs increased from \$21.2 million in 2002 to \$32.6 million in 2009.

#### Structure and Function of the Glenview Fire Department

The Glenview Fire Department operates five fire stations within the Village. Each station operates a fire engine staffed with three firefighters. Stations 6, 7, and 8 also operate an ambulance staffed with two firefighters; stations 13 and 14 do not operate an ambulance.

The Department employs 74 bargaining unit members assigned to one of three 24-hour shifts. Prior to 2011, each shift was staffed with enough firefighters to man all five engines and the three ambulances, for a total of at least 21 bargaining unit members working each shift. A Battalion Chief is also assigned to each shift, for a total of at least 22 employees scheduled per shift.

Lieutenant John Geaslin testified that each station is responsible for approximately 14 square miles of response area. When the Department receives an ambulance call, both the closest engine and the closest ambulance respond. For stations 6, 7, and 8, the engine and ambulance assigned to that station typically respond together; for stations 13 and 14, the engine responds and is met by the closest available ambulance. Geaslin further testified that the Department's standard is that a patient should be en route to a hospital within ten minutes of the arrival of paramedics, and that having more than two firefighter/paramedics on the scene is the only way to reliably meet that goal. With five firefighter/paramedics at the scene, the bargaining unit employees are able to more quickly and efficiently carry in the cot, backboard, cervical collar, bag of pharmaceuticals, heart monitor, airway bags, and trauma bag; start treatment and stabilize the patient by setting up the heart monitor and any necessary IVs; call the hospital to inform doctors that a patient is en route; and begin transporting the patient.

In the event of a fire, the closest engine and ambulance are typically first on the scene. Though all engines and all but one ambulance respond to each fire, the first firefighters on the scene can begin responding to the fire while others are en route. Geaslin testified that the

National Fire Protection Association's (NFPA) standards provide that four people are necessary to begin the response to a fire by stretching a hose into the structure while someone outside locates the fire, ventilates the building, and searches for victims. If an engine arrives without an ambulance, only three firefighters are on the scene initially. Geaslin stated that the Department's practice is that these three firefighters would nonetheless respond to the fire while other vehicles were en route, despite the fact that this practice does not comply with NFPA standards.

#### Overtime Reduction Plan and Subsequent Bargaining

Sometime prior to 2009, the Respondent commissioned a study from the International City/County Management Association to analyze the Village's fire service. Geaslin testified that the Union members became aware of the study and subsequent report sometime around 2009, and received portions of the report through a request under the Freedom of Information Act, 5 ILCS 140. Geaslin further stated that the report recommended adding a fourth ambulance to the Department, and suggested that an ambulance could be taken out of service overnight to reduce the cost incurred by adding a fourth ambulance. The report itself was neither presented at hearing nor offered into evidence.

Prior to December 2010, the Department's standard operating procedures dictated that the standard staffing for a shift was 26 personnel and the minimum staffing for a shift was 22 personnel. If absences would cause staffing for a particular shift to drop below 22 personnel, the procedures dictated that employees not regularly assigned to that shift would be called in on an overtime basis as a "hire-back" in order to maintain staffing at 22 personnel.

In May or June of 2010, Fire Chief Wayne Globerger held a meeting with the Department's officers to discuss the Village's financial constraints. At this meeting, Globerger told the officers that an ambulance may be removed from service if the Department was unable to realize other savings.

On December 10, 2010, Globerger issued a memorandum with the subject "Overtime Reduction Plan." Citing the decrease in revenues the Village had experienced during the Great Recession, the memorandum detailed the need to control the cost of one of the Department's greatest expenditures—overtime. Globerger's memorandum recited that overtime costs for the Department had escalated for a variety of reasons, including multiple long-term absences and the increased use of sick leave. Finally, the memorandum detailed a plan, effective January 1, 2011, to take the ambulance assigned to station 7 out of service from 7:00 p.m. to 7:00 a.m. on nights

that overtime hire-backs would be necessary to maintain on-duty staffing at 22, saving the Village approximately \$300,000 in annual overtime. On December 30, 2010, Geaslin emailed Globberger and other command staff to suggest taking the less busy ambulance assigned to station 8 out of service.

The Village's fiscal year coincides with the calendar year. Hileman testified that the Village Board typically adopts its yearly budget in mid-November or early December of the preceding year. The 2011 budget adopted by the Village Board included \$300,000 in overtime savings from implementing the Department's overtime reduction plan. Hileman testified that this budget was adopted "a couple of days" before Globberger's memorandum was issued on December 10, 2011, but he could not recall the exact date.

On December 13, 2010, Globberger and Union Vice President Mike Carnes agreed to meet on December 22, 2010, to discuss alternative cost-saving measures. At this meeting, the Union's negotiating committee and executive board suggested they could find alternative measures to save \$300,000. The parties ended the meeting with an agreement to develop alternative suggestions to present to Hileman. On December 29, 2010, Globberger notified the Union that he would delay implementation of the overtime reduction plan until January 5, 2011, to allow the Union to review a new standard operating procedure related to the plan and to present alternative cost-saving measures per their discussions on December 22, 2010. On January 5, 2011, Globberger again notified the Union that Hileman had delayed implementation of the overtime reduction plan until January 11, 2011, to allow the Union more time to develop alternatives. Globberger also notified the Union that the ambulance at station 8, and not the one at station 7, would be taken out of service upon implementation of the plan.

On January 11, 2011, the parties met a second time. At this meeting, the Union presented cost-saving ideas solicited from its members. Discussions at this meeting were off-the-record.<sup>3</sup> The Union presented the following cost-saving measures at this meeting: contributing firefighter labor to a planned remodel of station 8, saving an estimated \$25,000 to \$30,000; utilizing the

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<sup>3</sup> I denied the Respondent's Motion in Limine to exclude bargaining proposals made in off-the-record discussions, and instructed the parties to argue the weight that the discussions should be given in their briefs. Respondent persists in its contention that these discussions should be excluded. However, no privilege attaches to these proposals due to the mere fact that they were made during off-the-record discussions. The Respondent has cited no authority to the contrary. Moreover, the admission of testimony regarding these proposals violates no rule of evidence. Despite the Respondent's contention to the contrary, these proposals made during the course of collective bargaining negotiations were not offers to compromise within the meaning of Rule 408 of the Illinois Rules of Evidence.

Battalion Chief assigned to a shift until 4:00 p.m. so that any hire back necessary that day would only be on the shift after that time, saving approximately \$70,000 in estimated overtime costs; and soliciting the Foreign Fire Board for a \$100,000 grant. The Village's position with respect to these alternatives was that it could not determine how long the Village's budget would be limited by the Great Recession, and it thus could not consider savings that were not recurring and quantifiable. More specifically, the Village believed that the use of firefighter labor on the remodel of station 8 did not constitute real savings as no money had yet been allocated to the project. The Village also expressed concerns about the use of a grant from the Foreign Fire Board because such a grant could not be used to pay salaries and may be tied to other conditions for the Department.

The parties met again on January 18, 2011. At this meeting, the Union offered to forego a 2% raise the Village was offering during their negotiations for a successor agreement, agreeing to no raise for each of the next two years. The Union calculated that this would save the Village \$320,000 over those two years based on the Department's \$7.94 million payroll. However, the Union insisted that its members would not approve the concession on raises if, as the Village insisted, proposed language contractualizing minimum shift staffing at 22 was made to sunset on December 12, 2012. Hileman informed the Union that their proposals did not equal the \$300,000 quantifiable annual savings estimated under the overtime reduction plan. The parties agreed to meet again.

On January 21, 2011, the Village implemented the overtime reduction plan.

Between February 15, 2011, and March 16, 2011, the parties continued to meet. During this time, the Union raised proposals relating to sick leave, disability, workers' compensation, and leave under the Family Medical Leave Act (FMLA). These suggestions were designed to respond directly to Globberger's December 10, 2010, memorandum, which cited long term absences and sick leave as two factors driving up the cost of overtime for the Department. Under the Union's proposal on sick leave reduction, certain patterns of sick leave usage would trigger higher scrutiny. After one of these patterns was found to exist, an employee would be required to prove that his or her use of sick leave was legitimate, and that employee's pay would be withheld until the required proof was presented. The Union also proposed permitting short-notice duty trades, in which employees of equal rank trade shifts. At the time, firefighters were required to trade duty days at least three days in advance; the Union felt that permitting short

notice trades could obviate the need for other types of leave, such as sick leave, under certain circumstances. The Village believed that the specifics of the sick leave proposal were too difficult to understand, and that the savings from these two proposals were not quantifiable. At the hearing in this matter, Eamon O’Dowd, a bargaining unit member serving as president of the Union at the time of hearing, could not state how often employees take sick leave when duty trade would be an option under this proposal, but argued that the Employer could have determined this information from reviewing personnel records. The Union’s other offers included tying minimum staffing to a benchmark level of sick leave reduction, review of disability at six months to determine whether an injured firefighter might be expected to return to duty at twelve months, and an expedited process to determine whether an injury is job-related. The Union also proposed working certain assignments, such as public education and special or holiday details at their “7G” rate. The Department’s 7G rate is a negotiated rate at which personnel perform services that would otherwise be paid at an overtime rate.

On March 16, 2011, the Village formally rejected the Union’s proposals on minimum staffing, sick leave, and disability. On March 30, 2011, the Union filed the instant charge.

Following the implementation of the overtime reduction plan, the Union collected data on Department calls and response times and attempted to analyze the effect of removing an ambulance from service overnight. The Union collected data for the 15-month period of February 2011 through April 2012.<sup>4</sup> According to the Union’s data, the Department received

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<sup>4</sup> This data included each call received during that time period to which the ambulance at station 8 would have responded had it not been out of service, the arrival time of the closest engine, and the arrival time of the closest ambulance. The Union then calculated the difference between the two arrivals to derive what it called the “arrival time delta,” or the difference between the arrival time of the two vehicles. Next, the Union then added the arrival time delta for each call in a given month and divided by the number of calls to derive the average ambulance delay for each month. Finally, the Union added the average ambulance delay for all 15 months it tracked and divided by 15 to arrive at an average delay of 2.49 minutes during the period for which it collected data. I am unable to rely on the accuracy of the Union’s calculations, however. The Union provided the raw data for April 2012 to demonstrate the manner in which it arrived at its results. This data shows that the Union included in its calculations at least one outlier—a delay of 14 minutes that is more than two standard deviations from the mean delay for that month. Moreover, the Village’s raw data for April 2012 indicates that this 14-minute delay was attributable to the fact that a request for an ambulance was made only after the engine that arrived first made patient contact. With this outlier excluded, the average delay drops to 1.59 minutes per call. Though I am able to correct the calculation of average delay for the month of April 2012, the Union did not provide the raw data used to calculate the average delay prior to April 2012, so I am unable to verify that those calculations do not improperly include outliers or other data that is not statistically relevant. As such, I make no factual findings regarding the delay in ambulance arrival while ambulance 8 was out of service. Additionally, I make no factual findings regarding the Union’s vulnerability study on the number of times the Village

between 22 and 54 calls each month to which the ambulance at station 8 would have responded had it not been out of service during the period for which the Union collected data. When the Union divided these totals for each month by the number of days in that month that the ambulance was out of service, it determined that the Department received an average of .97 to 2 calls per night during the months tracked to which the ambulance at station 8 would have responded had it been in service. Therefore, I find that the ambulances at stations 6 and 7 and mutual aid ambulances from other municipalities handled an average of .97 to 2 additional calls each night while ambulance 8 was out of service.

As to the effect on the bargaining unit members, Geaslin observed that ambulance drivers who were affected by more calls during their shifts were more fatigued and less efficient, and he described their demeanor as “crabby.”<sup>5</sup>

#### Collective Bargaining Agreement and Arbitration Award

The parties were subject to a collective bargaining agreement covering the bargaining unit represented by the Charging Party. This agreement contained a management rights clause which read as follows:

Except as specifically limited by the express provisions of this Agreement, the Village retains all traditional rights to manage and direct the affairs of the Village 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 Village; to supervise and direct the working forces; to establish the qualifications for employment and to employ employees; to schedule and assign work; to establish work and productivity standards, and from time to time, to change those standards; to administer overtime; to determine the methods, means, organization and number of personnel; to make, alter and enforce reasonable rules, regulations, orders and policies; to evaluate employees; to discipline, suspend and discharge employees for just cause (probationary employees without cause); to change or eliminate existing methods, equipment or facilities; to maintain an effective internal control program to determine the overall budget, and to carry out the mission of the Village; provided, however,

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was “vulnerable”—i.e. when all ambulances were responding to calls and thus unavailable. The Union’s study included only ambulance unavailability between the hours of 7:00 p.m. to 7:00 a.m, and does not differentiate between nights that the ambulance at station 8 was in service or out of service. Though Geaslin testified that the study shows the implementation of the overtime reduction plan caused more vulnerability, I am unable to reach that conclusion without such comparative data.

<sup>5</sup> At the hearing in this matter, I excluded a study on the effects of sleep deprivation in firefighters over the objection of the Union. I explained that the competency of the study as evidence was in issue where the Charging Party provided no expert testimony as foundation for the study and where the Village was denied the opportunity to cross-examine an expert witness as to the methodology and results of the study.

that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

By its terms, the agreement remained in full force and effect from its execution until December 31, 2010, and thereafter automatically renewed from year to year unless one party notified the other in writing at least 90 days prior to the anniversary date of the agreement of its desire to modify the agreement. On or about August 10, 2010, then-Union President Brian Gaughan notified Village Manager Todd Hileman in writing of the Charging Party's desire to modify the agreement. On or about November 12, 2010, the parties began negotiations for a successor agreement. In November 2010 the Charging Party filed a request for mediation in connection with these negotiations.

On March 30, 2011, the Charging Party filed the instant charge. Following ALJ Tarver's deferral of this matter to grievance arbitration, an arbitration award was issued in the Respondent's favor. This award found that the management rights clause of the parties' collective bargaining agreement gave the Respondent the right to determine the standards of service it would provide and the number of personnel used to provide those services. Therefore, according to the arbitrator, the complained-of conduct was within the Respondent's rights under the agreement that expired December 31, 2010. In my May 20, 2013, RDO, I adopted the arbitrator's interpretation of the parties' agreement.

#### **IV. DISCUSSION AND ANALYSIS**

Under Section 10(a)(4) of the Act, prior to reaching impasse in negotiations, an employer is prohibited from making unilateral changes in the terms and conditions of employment of the employees subject to the negotiations. Village of Crest Hill, 4 PERI ¶ 2030 (ISLRB 1988) and City of Peoria, 3 PERI ¶ 2025 (ISLRB 1987). This case arises in the context of Section 14 of the Act; Section 14 details specific procedures, beginning with a request for mediation and culminating in an interest arbitration award, for resolving an impasse in negotiations for bargaining units comprised of security employees, peace officers, firefighters, and paramedics. 5 ILCS 315/14 (2012). While the proceedings detailed in Section 14 are pending, both parties are obligated to maintain the existing wages, hours, and other conditions of employment of the employees subject to the negotiations. 5 ILCS 315/14(1) (2012). The Charging Party alleges that Respondent failed to fulfill this obligation, and thus violated Sections 10(a)(4) and 10(a)(1) of

the Act, when it implemented its overtime reduction plan, thus reducing minimum shift staffing while interest arbitration proceedings between the parties were pending.

In my RDO of May 20, 2013,<sup>6</sup> I declined to defer to the award finding that the Respondent had the contractual right to implement its overtime reduction plan. In doing so, however, I determined that the award was not repugnant to the Act, and thus adopted the arbitrator's interpretation of the parties' collective bargaining agreement. As stated in my May 20, 2013, RDO, an arbitrator's interpretation of contractual provisions becomes a binding part of the parties' agreement. County of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011) (citing The Motor Convoy, Inc., 303 NLRB 135 (1991)). This is because parties who have agreed to have their disputes settled by an arbitrator have contracted to accept the arbitrator's construction of the terms of their agreement. American Federation of State, County and Municipal Employees, AFL-CIO v. Dep't of Central Management Services, 173 Ill. 2d 299, 305 (Ill. 1996). Moreover, the Board is bound by the Arbitrator's construction. See Department of Central Management Services v. American Federation of State, County and Municipal Employees, 222 Ill. App. 3d 678 (1st Dist. 1991). Unlike the courts and the Illinois Educational Labor Relations Board, this Board has no jurisdiction to vacate or otherwise disregard the award, even if it were to determine the award did not derive its essence from the contract. Id. Therefore, had this charge not included the allegation that the Respondent failed to fulfill its obligation to maintain existing wages, hours, and other conditions of employment under Section 14(l), I would have recommended that the Board defer to the arbitration award and dismiss the instant charge. Instead, in my May 20, 2013, RDO I recommended that the Board re-open this matter to determine an issue that the arbitrator declined to address: what effect, if any, does the obligation to maintain the status quo under Section 14(l) have on the Respondent's authority to exercise its contractual right to implement the overtime reduction plan during interest arbitration proceedings?

#### Expiration of the Collective Bargaining Agreement

The Respondent's first defense is that its obligations under 14(l) do not affect its authority to exercise its contractual right to implement the overtime reduction plan where the decision to implement the plan was made and the changes unambiguously announced prior to the expiration of the parties' collective bargaining agreement. However, assuming, without

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<sup>6</sup> See Appendix A.

deciding, that the decision was made and unambiguously announced prior to the expiration of the parties' agreement, the Village's defense is insufficient as a matter of law.

Section 14(l) requires both parties to maintain the status quo during the pendency of proceedings before the arbitration panel. 5 ILCS 315/14(l) (2012). The Act clarifies that proceedings before the panel are deemed pending upon the initiation of arbitration procedures. Id. These procedures are initiated by the filing of a letter requesting mediation. 5 ILCS 315/14(j). Thus, while the Board's decisions regarding Section 14, which I will discuss extensively, make reference to expired collective bargaining agreements, there is no statutory basis for such a distinction. Moreover, the Board has never expressly determined that the obligations imposed by Section 14(l) arise only upon the expiration of a collective bargaining agreement, nor have its decisions construing Section 14(l) rested on an agreement's status as effective or expired. Therefore, I find that the parties' obligations to maintain the status quo arise upon the initiation of interest arbitration proceedings, with the filing of a letter requesting mediation. In this case, the Union initiated interest arbitration proceedings with a request for mediation in November 2010, and the Village's decision to implement the overtime reduction plan was made and the changes unambiguously announced, at the earliest, in December 2010, when the Village's 2011 budget was adopted and Globerger's memorandum regarding the plan was issued. It is clear that the Village's obligation to maintain the status quo had already arisen at that time.

#### Section 14(l)'s Obligation to Maintain the Status Quo

It is undisputed that the Respondent implemented its overtime reduction while arbitration proceedings were pending under Section 14 and without the consent of the Charging Party. The issue for the Board to resolve is whether, in doing so, the Village failed to maintain existing wages, hours, and other conditions of employment for employees in the bargaining unit represented by the Union. The Village asserts that it did not change existing wages, hours, and other conditions of employment because the status quo with respect to the overtime reduction plan was the Village's contractual right to remove an ambulance from service, thus reducing minimum shift staffing. However, the Union contends that, because minimum shift staffing is a mandatory subject of bargaining, the Village's right to unilaterally alter minimum shift staffing operates as a waiver of the Union's right to bargain over the topic and is thus a permissive subject. Further, the Union asserts that the status quo is comprised only of mandatory subjects of

bargaining. The Union thus concludes that the status quo in this case was the Department's longstanding practice of having a minimum of 22 employees on each shift. The Board must therefore determine what terms constituted the existing wages, hours, and other conditions of employment for the employees at issue.

The earliest cases construing the scope of Section 14(l) are non-precedential ALJ decisions. In County of DeKalb and Sheriff of DeKalb County, 3 PERI 2054 (ISLRB ALJ 1987), an ALJ considered the issue of whether the status quo that must be maintained under Section 14(l) is static or dynamic. In that case, the parties' collective bargaining agreement provided for annual step and longevity increases for employees in a bargaining unit of peace officers; the employer, however, argued that paying the increases while interest arbitration proceedings were pending would constitute a change in existing wages in violation of Section 14(l). County of DeKalb and Sheriff of DeKalb County, 3 PERI ¶ 2054 (ISLRB-ALJ 1987). The ALJ disagreed, finding that the annual step and longevity increases were an existing condition of employment paid regularly on an annual basis to all bargaining unit members employed on the date the increases were due and that failure to pay the increases thus constituted a change in existing conditions of employment in violation of Section 14(l). Id.

ALJs next considered what terms constitute the status quo during interest arbitration proceedings. In Village of Oak Park, 9 PERI ¶ 2019 (ISLRB ALJ 1993), an ALJ concluded that the status quo is comprised only of mandatory subjects of bargaining to the exclusion of permissive subjects, and thus is not merely comprised of the terms of the parties' most recent collective bargaining agreement. The ALJ stated that this construction of Section 14(l) was consistent with the interpretation of the phrase "wages, hours, and other terms and conditions of employment" in Section 7 of the Act as well as the decisions of other jurisdictions. Village of Oak Park, 9 PERI ¶ 2019 (ISLRB ALJ 1993). Thus, the ALJ concluded that an employer's changes to its act-up/work-in policies and time-off scheduling were implemented in derogation of its obligations under Section 14(l), and therefore in violation of Sections 10(a)(4) and 10(a)(1) of the Act, where the policies involved mandatory subjects of bargaining and the Respondent changed the existing practice while interest arbitration proceedings were pending. Id. Subsequently, an ALJ again determined that not all contractual terms or practices fall within the prohibition described in Section 14(l), but only those matters which are mandatory subjects of bargaining. Village of Maywood, 10 PERI ¶ 2045 (ISLRB ALJ 1994). In that case, the parties

had stipulated that minimum shift staffing is a mandatory subject of bargaining. Id. Despite the employer's contentions that it had bargained to impasse with the union and that the changes it implemented were necessitated by an economic emergency, the ALJ concluded that the employer had failed to fulfill its obligation under Section 14(l), and thus violated Sections 10(a)(4) and 10(a)(1), when it unilaterally implemented changes to minimum shift staffing. Id.

In 1999, an ALJ determined that an employer had breached its duty to maintain the status quo, and thus violated Sections 10(a)(4) and 10(a)(1) of the Act, when it implemented a new policy of processing disputes over discipline and discharge through its Merit Commission's appeal procedures rather than the parties' negotiated contract grievance procedures. County of Williamson and Sheriff of Williamson County, 15 PERI ¶ 2003 (ISLRB 1999). However, while the Board found that the Respondent had breached its duty to bargain in good faith under Section 10(a)(4) of the Act, the Board did not address the Respondent's duties under Section 14(l) and instead concluded that the conduct upon which the ALJ relied in finding a violation was encompassed within the violation of Section 10(a)(4). Id.

In City of Chicago (Department of Police), 15 PERI ¶ 3010 (ILLRB 1999), the Board upheld the Executive Director's dismissal of an unfair labor practice charge where an employer's alleged unilateral changes did not concern a mandatory subject of bargaining. The Executive Director recited that parties are not obligated to bargain over topics that are not mandatory subjects of bargaining. City of Chicago (Department of Police), 15 PERI ¶ 3010 (ILLRB 1999). In the absence of a duty to bargain, the Executive Director concluded that the employer had not derogated its duties under Section 14(l) or violated Section 10(a)(4). Id.

In a 2002 RDO, an ALJ cited the non-precedential decisions in Village of Oak Park and Village of Maywood, *supra*, in construing Section 14(l). City of Harvey, 18 PERI ¶ 2032 (IL LRB-SP 2002). The ALJ recommended that the Board find that an employer had breached its duty to maintain the status quo when it implemented a drug and alcohol testing policy while interest arbitration proceedings were pending. Id. However, while the Board upheld the ALJ's recommendation, the basis of this recommendation was the ALJ's determination that the union had not consented to the changes implemented by the employer, and not the construction of 14(l) employed in Village of Oak Park and Village of Maywood. Id.

Thereafter, an ALJ determined that an employer had derogated its duties under Section 14(l) when it entered into an agreement to subcontract bargaining unit work during the pendency

of interest arbitration. City of Chicago (Department of Police), 21 PERI ¶ 83 (IL LRB-LP 2005). As with the charge at hand, the employer in City of Chicago argued that its actions were permitted by the parties' collective bargaining agreement; however, the Board found that the contractual provision cited by the employer, coupled with a history of arbitration awards interpreting that provision,<sup>7</sup> did not convey an explicit waiver of the union's statutory right to bargain over the subcontracting of bargaining unit work. Id. Again, the Board affirmed the ALJ's determination that the employer had violated Sections 10(a)(4) and 10(a)(1) of the Act by implementing its agreement without reference to the Respondent's duties under Section 14(l).

Similarly, in Town of Cicero, 24 PERI ¶ 75 (IL LRB ALJ 2008), an ALJ's conclusion that an employer had violated its obligation under Section 14(l) by implementing changes to sick leave policy while interest arbitration proceedings were pending, despite the employer's contention that the changes were permitted under the parties' collective bargaining agreement, was contingent on the ALJ's determination that the employer's conduct was not permitted under the collective bargaining agreement.

Thus, as of the date the RDO in Town of Cicero was issued, precedential decisions regarding the scope of Section 14(l)'s prohibition on unilateral changes during the pendency of interest arbitration could be described as follows: (1) where a change does not relate to a mandatory subject of bargaining, there is no duty to bargain and thus no violation of either Section 10(a)(4) or 14(l);<sup>8</sup> and (2) where a change does relate to a mandatory subject of bargaining, a party derogates its duties under Section 14(l) and thus violates Sections 10(a)(4) and 10(a)(1) when it implements such a change during the pendency of interest arbitration proceedings and with neither the contractual right to do so nor the consent of the other party.<sup>9</sup>

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<sup>7</sup> Unlike the case at hand, the arbitration awards referenced by the Board in City of Chicago did not deal specifically with the conduct complained of in the unfair labor practice charge.

<sup>8</sup> City of Chicago (Department of Police), 15 PERI ¶ 3010 (ILLRB 1999).

<sup>9</sup> City of Harvey, 18 PERI ¶ 2032 (IL LRB-SP 2002) and City of Chicago (Department of Police), 21 PERI ¶ 83 (IL LRB-LP 2005).

1. The Respondent did not breach its duty to maintain the status quo when it implemented its overtime reduction plan because minimum shift staffing is not a mandatory subject of bargaining, therefore the Respondent had no duty to bargain over the implementation of its plan.

As detailed above, there is no violation of either Section 14(l) or Sections 10(a)(4) and 10(a)(1) where a party implements a change during the pendency of interest arbitration if the change does not relate to a mandatory subject of bargaining. Thus, if the changes promulgated by the Village do not relate to a mandatory subject of bargaining, there is no need to further construe Section 14 of the Act.

Section 14(i) of the Act provides that an interest arbitration award for a bargaining unit of peace officers shall not include manning. 5 ILCS 315/14(i) (2012). In a non-precedential decision issued under Rule 23, the Illinois Appellate Court, 1st District, found that a topic, such as manning for units of peace officers, that is excluded from arbitration under Section 14(i) cannot be a mandatory subject of bargaining. Village of Oak Lawn v. Illinois Labor Relations Board, State Panel, 2011 WL 4975528 ¶ 18. However, the court went on to conclude that the legislature's failure to enumerate minimum shift staffing in a similar list of topics excluded from arbitration for units of firefighters simply indicates that minimum shift staffing is not precluded as a mandatory topic, but does not itself identify manning as a mandatory subject of bargaining. Id at ¶ 19 and 20. Though non-precedential, I agree with the court's sound statutory construction.

The Charging Party asks me to consider the legislative history of subsequent bills to amend Section 14(i) in determining the legislature's intent to identify minimum shift staffing as a mandatory subject of bargaining for units of firefighters. In its post-hearing brief, the Union identifies H.B. 3044 of the 97th General Assembly, which, if passed, would have added minimum shift staffing to the list of topics excluded from arbitration for units of firefighters. From the failure of this bill to pass from the Cities and Villages Committee of the Illinois House of Representatives, the Union would like me to infer legislative approval of the court's decision in Village of Oak Lawn. However, following the deadline for the parties to file post-hearing briefs in this matter, H.B. 5485 was filed in the 98th General Assembly. H.B. 5485 provided that an interest arbitration award for a bargaining unit of firefighters shall be limited to wages, hours, and conditions of employment *including manning*. H.B. 5485 passed the Illinois House of

Representatives and was never assigned to committee in the Illinois Senate. The attempt to codify minimum shift staffing as a mandatory subject of bargaining may suggest the General Assembly's determination that, absent legislative action, minimum shift staffing is not otherwise a mandatory subject. As such, the legislative history with respect to proposed amendments to Section 14(i) is not instructive.

The Charging Party also proposes that the decisions of the Board and court in Village of Oak Lawn are determinative on the question of whether minimum shift staffing is a mandatory subject of bargaining under the application of the three-pronged test formulated by the Illinois Supreme Court in Central City Education Association, IEA/NEA v. Illinois Educational Labor Relations Board, 149 Ill. 2d 496 (1992). However, the court in Central City stated explicitly that the question of whether a topic is a mandatory subject of bargaining is very fact specific. Central City Education Association, IEA/NEA, 149 Ill. 2d at 523. The application of the Central City test in Village of Oak Lawn was based on a stipulated record; here, I have made detailed factual findings and thus believe that the adjudication of this charge is best served by applying those findings to the Central City test.

The Central City test first considers whether a topic concerns the wages, hours, and terms and conditions of employment of employees in the bargaining unit. Central City Education Association, IEA/NEA, 149 Ill. 2d at 523. If it does, the second prong of the Central City test asks whether the topic is also a matter of inherent managerial authority. Id. Finally, if the topic both concerns the wages, hours, and terms and conditions of employment of employees in the bargaining unit and is a matter of inherent managerial authority, the Board must consider whether the bargaining's benefits to the decision-making process outweigh the burdens placed on the employer's authority. Id.

In this case, minimum shift staffing is clearly a topic that concerns wages, hours, and terms and conditions of employment. The Village argues that this prong is not satisfied because the Union's stated concerns throughout the parties' negotiations related to the level of service provided to the community. However, I cannot ignore the very real consequences of the Village's decision to implement its overtime reduction plan. Given the projected savings of \$300,000 a year in overtime costs, divided amongst the 74 bargaining unit members employed by the Department, the implementation of the Village's overtime reduction plan would result in an average of over \$4,000 in lost overtime income a year for each member of the bargaining

unit. Furthermore, the decisions affects the terms and conditions of employment for bargaining unit members because they are potentially required to handle additional calls during each evening shift when they may otherwise be able to sleep. As discussed previously, the Department received an average of .97 to 2 calls each night that ambulance 8 was out of service to which ambulance 8 would have otherwise been otherwise; these calls were handled by either ambulance 6 or 7 or by mutual aid ambulances from other jurisdictions.

Regarding the second prong of the Central City test, I also find that the implementation of the Village's overtime reduction plan implicates a matter of inherent managerial authority. Section 4(a) of the Act provides that employers are not required to bargain over matters of inherent managerial authority including the employer's standards of service and its overall budget. 5 ILCS 315/4(a). The implementation of the Village's overtime reduction plan is clearly a matter of inherent managerial authority: as part of a long-term effort to determine the appropriate level of services to provide citizens following a period of growth and substantial efforts to limit long-term personnel costs, and partly in response to the fiscal crisis experienced during the Great Recession, the Village identified running three ambulances during non-peak hours as a service that was not justified by call volume, the elimination of which could save substantial overtime costs. The Village then adopted a total budget that included the savings estimated from the implementation of this plan.

Finally, I find that the benefits of bargaining to the decision-making process do not outweigh the burdens bargaining would place on the Village's inherent managerial rights. The Board has stated that the core of the Central City test is whether issues are amendable to bargaining. County of St. Clair and Sheriff of St. Clair County, 28 PERI ¶ 18 (IL LRB-SP 2011) (citing Village of Bensenville, 19 PERI ¶ 119 (IL LRB-SP 2003) (*aff'd*, unpublished order The County of St. Clair and Sheriff of St. Clair County v. Illinois Labor Relations Board, 2012 WL 3525457 (Ill. App. Ct. 5th Dist. 2012)). Generally, the Board holds that economic concerns are particularly amendable to bargaining. County of St. Clair and Sheriff of St. Clair County, 28 PERI ¶ 18 (IL LRB-SP 2011) (citing Village of Ford Heights, 26 PERI ¶ 145 (IL LRB-SP 2010); Village of Bensenville, 19 PERI ¶ 119 (IL LRB-SP 2003); City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1994); and State of Illinois (Department of Central Management Services.), 1 PERI ¶ 2016 (IL SLRB 1985)). Moreover, the negotiations between the parties between December 2010

and March 2011 demonstrate that the Union was able to address the issues cited as concerns by the Village and offer proposals presenting several alternatives to the overtime reduction plan.

However, the Respondent's arguments regarding the burdens bargaining will place on its inherent managerial authority are persuasive. Section 14 of the Act envisions interest arbitration proceedings lasting 143 days from the filing of a request for mediation: 15 days from the initial request to commence mediation, 15 days from the commencement of mediation to request arbitration, seven days to request a panel of arbitrators, ten days to receive a list of arbitrators, seven days to select a panel of arbitrators, 15 days to commence the arbitration hearing, 30 days to conclude the hearing, 14 days to remand for bargaining, and 30 days to issue a decision. 5 ILCS 315/14 (2012). Several of these provisions also permit the parties to waive these time periods, in which case interest arbitration would take even longer to complete. *Id.* Furthermore, by requiring the Village to submit decisions regarding minimum shift staffing to interest arbitration, the Village will lose its right to unilaterally implement its decisions on minimum shift staffing and potentially be required to implement provisions to which it would not have agreed in the event of an adverse arbitration award. By finding this burden is significant, I do not intend to suggest that the interest arbitration proceedings implemented by Section 14 are in all cases a significant burden on an employer's inherent managerial authority. However, where the authority of the Village's Board to weigh costs and determine the level of service to offer its citizens is so central to the Village Board's core function, and requiring it to bargain over the decision would cause a nearly five-month delay in any exercise of its authority and potentially strip the Village of this authority in some instances, I cannot find that this burden is outweighed by any potential benefits to the decision-making process that may come from bargaining between an entity concerned with the financial stability and services of the Village as a whole and an entity concerned only with that portion allocated to the Department.

Because I find that the implementation of the Village's overtime reduction plan both concerns wages, hours, and terms and conditions of employment and is a topic of inherent managerial authority, and I find that the benefits of bargaining do not outweigh the burdens placed on the Village's authority, I conclude that minimum shift staffing is not a mandatory subject of bargaining. Consequently, I recommend the Board find that the Respondent did not breach its duty to maintain the status quo when it implemented its overtime reduction plan because the Respondent had no duty to bargain over the implementation of its plan.

2. Alternatively, the Respondent fulfilled its obligation under Section 14(l) to maintain the status quo when it implemented its overtime reduction plan because the status quo with respect to minimum shift staffing was the Respondent's contractual right to remove an ambulance from service.

If the Board does not uphold my recommendation and find that the Respondent was under no duty to bargain over the implementation of its overtime reduction plan, I recommend in the alternative that the Board find that the Respondent fulfilled its obligation under Section 14(l) to maintain the status quo when it implemented its overtime reduction plan because the Respondent's contractual right to remove an ambulance from service was the status quo.

Prior to 2009, the Board's precedent did not address the scope of Section 14(l) in situations where a change relates to a mandatory subject of bargaining but the party implementing the change had the contractual right to do so. However, I believe the Board has since resolved that issue, rejecting the argument advanced by the Union in the instant case.

In Village of Oak Park, the parties were subject to two collective bargaining agreements: one covering employees in lieutenant positions, and one covering employees in the position of firefighter. Village of Oak Park, 25 PERI ¶ 169 (IL LRB-SP 2009). Each agreement had a term of January 1, 2003, through December 31, 2005. Id. These agreements included a longevity benefit providing that, at 20 years or more of service, a member of the bargaining unit would receive longevity pay in the amount of 15% added to his or her base salary based on certain calculations. Id. The agreement covering the lieutenants provided that the longevity benefit would revert back to language used in a prior agreement in the event that the 15% longevity benefit was deemed inconsistent with the applicable portion of the Illinois Pension Code, such that it would not be considered a pensionable salary increase. Id. Following an interest arbitration award of April 4, 2005, containing both the longevity benefit and, in the case of the agreement covering the lieutenants, the reversion language, the employer requested an opinion from the Chief Administrator of the Illinois Department of Financial and Professional Regulation, Division of Insurance, Public Pension Division, as to whether the longevity benefit was consistent with the Illinois Pension Code. Id. The Chief Administrator advised that treating the benefit as salary for pension purposes was not consistent with the Illinois Pension Code. Id. In early 2008, after the agreement covering the lieutenants had expired and while the parties were in negotiations for a successor agreement, the employer ceased paying the longevity benefit

as provided under the 2003- 2005 agreement and reverted to the language of the prior agreement. Id. In response to the union’s contention that the employer, by reverting to the language of the prior contract with respect to the longevity benefit, had failed to maintain the status quo as required by Section 14(l), the ALJ declined to make a determination regarding what terms constituted the status quo. Id. The Board, however, noted that the issue before it in determining whether the respondent had breached its obligations under Section 14(l) was “what is the status quo.” Id. The Board further stated that the express terms of the recently expired collective bargaining agreement are the primary indicator of the status quo as to wages, hour, and other conditions of employment; however, the past practice of the parties to the contract are relevant, especially as to matters not covered thereunder. Id. Finally, the Board noted that the ALJ’s recommendation relied on the express terms of the parties’ most recent contract, and that the employer had followed the express language of the agreement in reverting to the language of the prior agreement. Id. The Board concluded “[t]here is no support for the Union’s contention that the status quo is somehow divorced from the express terms of the recently expired collective bargaining agreement.” Id.

The Union argues that Village of Oak Park does not stand for the proposition that, when a contract term gives an employer the right to unilaterally change a mandatory subject of bargaining, thus waiving a union’s statutory rights, the term becomes part of the Section 14(l) status quo. In support of this argument, the Union notes that the contract at issue in Village of Oak Park had two provisions, both part of the status quo, and the employer in that case merely followed one instead of the other. However, in Village of Oak Park the Board explicitly determined that “[t]here [was] no support for the Union’s contention that the status quo is somehow divorced from the express terms of the recently expired collective bargaining agreement.” To further understand the Board’s conclusion, I reviewed the exceptions filed by the charging party in that case.<sup>10</sup> By doing so, I determined that the claim raised by the charging party and specifically rejected by the Board is the precise claim that the Union makes in the instant charge. Specifically, the charging party in Village of Oak Park stated “the Union excepts from the ALJ’s analysis and legal conclusion that an expired contract provision that allows the Employer to unilaterally eliminate the longevity benefit is not a permissive subject of bargaining and continues to serve as authority for unilateral action during the pendency of interest

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<sup>10</sup> See Appendix B.

arbitration[.]” (Appendix B, page 5). The charging party went on to argue that Section 14(l) does not carry forward contract terms that are permissive subjects of bargaining. (Appendix B, page 6).

Therefore, I conclude that the Board’s decision in Village of Oak Park stands for the proposition that, where a unilateral change relates to a mandatory subject of bargaining but the party implementing the change had a contractual right to do so, the status quo with respect to the topic of the unilateral change is the contractual right to implement the change. Because the Respondent in this case had the contractual right to take an ambulance out of service, it did not change existing wages, hours, and other conditions of employment during the pendency of interest arbitration in doing so. I thus recommend that the Board find the Respondent fulfilled its obligation under Section 14(l) to maintain the status quo when it implemented its overtime reduction plan.

**V. CONCLUSIONS OF LAW**

1. The Respondent did not breach its duty to maintain the status quo when it implemented its overtime reduction plan because the plan involved a permissive subject of bargaining over which the Respondent had no duty to bargain.
2. Alternatively, the Respondent fulfilled its obligation under Section 14(l) to maintain the status quo when it implemented its overtime reduction plan because the status quo with respect to wages, hours, and other conditions of employment for the employees in the bargaining unit at issue was the Respondent’s contractual right to implement its overtime reduction plan.

**VI. RECOMMENDED ORDER**

In light of the above findings and conclusions, I hereby recommend that the complaint be dismissed in its entirety.

**VII. EXCEPTIONS**

Pursuant to Section 1200.135 of the Board’s Rules, parties may file exceptions to the Administrative Law Judge’s Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge’s Recommendation.

Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 21<sup>st</sup> day of August, 2014,

A handwritten signature in black ink that reads "Heather R. Sidwell". The signature is written in a cursive style and is positioned above a horizontal line.

**Heather R. Sidwell**  
**Administrative Law Judge**  
**Illinois Labor Relations Board**

## Appendix A

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

Glenview Professional Firefighters,	)	
Local 4186, International Association	)	
of Fire Fighters,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-11-201
	)	
Village of Glenview,	)	
	)	
Respondent	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On March 30, 2011, the Glenview Professional Firefighters, Local 4186, International Association of Fire Fighters (Charging Party) filed a charge with the State Panel of the Illinois Labor Relations Board (Board) pursuant to Section 11 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240, alleging that the Village of Glenview (Respondent) violated Sections 10(a)(4) and 10(a)(1) of the Act. The charges were investigated in accordance with Section 11 of the Act and on November 1, 2011, the Board’s Executive Director issued a Complaint for Hearing.

Administrative Law Judge Elaine Tarver issued a recommended decision and order (RDO) on January 12, 2012, granting the Respondent’s motion to defer the matter as amended<sup>1</sup> to binding grievance arbitration. This RDO, which became binding on the parties following an April 12, 2012, order of the Board’s General Counsel, provided that the Charging Party could request this matter be re-opened within 15 days after the termination of grievance arbitration proceedings. On December 3, 2012, arbitrator Lamont E. Stallworth issued an award finding that the Respondent’s complained-of conduct was authorized by the management rights clause of the parties’ collective bargaining agreement. On December 14, 2012, the Charging Party filed a

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<sup>1</sup> As issued, the Complaint for Hearing alleged a violation of Sections 10(a)(4) and 10(a)(1) of the Act on the basis of a unilateral change in apparatus manning levels. ALJ Tarver granted the Charging Party’s December 9, 2011, motion to amend the Complaint for Hearing. As amended, the Complaint for Hearing alleges that the Respondent’s violation is based on a unilateral change to minimum shift staffing levels.

timely motion to re-open, alleging that the arbitrator's award was repugnant to the purposes and policies underlying the Act and that the arbitrator failed to resolve an issue that was crucial to the underlying charge.

Subsequently, this matter was administratively transferred to the undersigned. After full consideration of the parties' stipulations, evidence, and arguments, and upon the entire record of the case, I recommend the following.

I. **PRELIMINARY FINDINGS**

The parties stipulate, and I find:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act;
2. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a-5) of the Act;
3. At all times material, the Respondent has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act;
4. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act; and
5. At all times material, the Charging Party has been the exclusive representative of a bargaining unit comprised of all persons employed by the Respondent in the following titles or ranks: Firefighter, Firefighter/Paramedic, Fire Lieutenant, and Fire Captain.

II. **ISSUES AND CONTENTIONS**

The underlying unfair labor practice charge alleges that the Respondent failed to maintain the existing terms and conditions of employment during the pendency of interest arbitration proceedings when the Respondent unilaterally took one ambulance out of service during non-peak hours. The Charging Party argues that this conduct violated the Act because minimum shift staffing levels are a mandatory subject of bargaining, and the Respondent implemented this change during the pendency of interest arbitration proceedings and without the Charging Party's consent, in violation of Section 14(1) of the Act. The Respondent denies that minimum shift staffing levels are a mandatory subject of bargaining, and maintains that its right to implement this change was protected by the management rights clause of the parties' collective bargaining agreement. Arbitrator Stallworth agreed with the Respondent as to its authority under the management rights clause.

At issue is the Charging Party's motion to re-open this matter. The Charging Party alleges that the arbitration award is repugnant to the purposes and policies underlying the Act because the arbitrator refused to apply the Board's "clear and unequivocal" standard in determining that the Charging Party waived its right to bargain over minimum shift staffing levels. Additionally, the Charging Party argues that the arbitrator failed to resolve an issue crucial to the underlying charge: namely, whether the Respondent failed to maintain the existing terms and conditions of employment during the pendency of interest arbitration pursuant to Section 14(l) of the Act.

### III. FINDINGS OF FACT

The parties have stipulated to the following facts:

The parties were subject to a collective bargaining agreement covering the bargaining unit represented by the Charging Party. The agreement contained a management rights clause which read as follows:

Except as specifically limited by the express provisions of this Agreement, the Village retains all traditional rights to manage and direct the affairs of the Village 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 Village; to supervise and direct the working forces; to establish the qualifications for employment and to employ employees; to schedule and assign work; to establish work and productivity standards, and from time to time, to change those standards; to administer overtime; to determine the methods, means, organization and number of personnel; to make, alter and enforce reasonable rules, regulations, orders and policies; to evaluate employees; to discipline, suspend and discharge employees for just cause (probationary employees without cause); to change or eliminate existing methods, equipment or facilities; to maintain an effective internal control program to determine the overall budget, and to carry out the mission of the Village; provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

By its terms, the agreement remained in full force and effect from its execution until December 31, 2010, and thereafter automatically renewed from year to year unless one party notified the other in writing at least 90 days prior to the anniversary date of the agreement of its desire to modify the agreement. On or about August, 10, 2010, Union President Brian Gaughan notified Village Manager Todd Hileman in writing of the Charging Party's desire to modify the agreement. On or about November 12, 2010, the parties began negotiations for a successor agreement. In November 2010 the Charging Party filed a request for mediation in connection

with these negotiations, which constituted the commencement of interest arbitration proceedings within the meaning of Section 14(j) of the Act.

On December 10, 2010, Fire Chief Wayne Globerger issued a memorandum to fire department personnel detailing an overtime reduction plan. Pursuant to this plan, beginning January 1, 2011, one ambulance would be taken out of service during non-peak hours, from 7:00 p.m. to 7:00 a.m, if sufficient staff was not available to operate the ambulance without the use of overtime hours. The Respondent projected that this plan would reduce overtime costs by approximately \$300,000. The Charging Party objected to Globerger's plan, and the Respondent delayed implementing its overtime reduction plan while the parties discussed the measure. During their discussions, the Charging Party proposed cost saving alternatives that it believed would save approximately \$300,000. The Respondent, however, disputed that the projected savings from these alternatives were sufficient. Unable to reach agreement over alternative cost-saving measures, the Respondent implemented its overtime reduction plan on or about January 21, 2011.

On March 30, 2012, the Charging Party filed the instant charge, alleging that the Respondent's conduct violated Sections 10(a)(4) and 10(a)(1) of the Act. Following the deferral of this matter to grievance arbitration, an arbitration award was issued in the Respondent's favor. This award found that the management rights clause of the parties' collective bargaining agreement gave the Respondent the right to determine the standards of service it would provide and the number of personnel used to provide those services. Therefore, according to the arbitrator, the complained-of conduct was within the Respondent's rights under the agreement that expired December 31, 2010. The Charging Party now moves to re-open this matter, and the Respondent contends that deferral to the arbitrator's award is appropriate.

#### IV. DISCUSSION AND ANALYSIS

In support of its motion to re-open this matter, the Charging Party argues that deferral to the arbitration award is not appropriate in this case because: (1) the award is repugnant to the purposes and policies of the Act because the arbitrator refused to apply the Board's "clear and unequivocal" standard in determining that the Charging Party waived its statutory right to bargain over minimum shift staffing levels; and (2) the issues of the underlying unfair labor practice charge were not considered by the arbitrator because the arbitrator expressly declined to determine whether the Act permits the Respondent to exercise its rights under the management

rights clause after the expiration of the parties' collective bargaining agreement and during the pendency of interest arbitration proceedings.

Section 11(i) of the Act permits the Board to defer to a grievance arbitration award to resolve an unfair labor practice charge where the underlying charge involves the interpretation or application of a collective bargaining agreement. 5 ILCS 315/11(i) (2010). The Board has adopted the standard established by the National Labor Relations Board (NLRB) in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and will defer to an arbitration award where: (1) the unfair labor practice issues have been presented to and considered by the arbitrator; (2) the arbitration proceedings appear to have been fair and regular; (3) all parties to the arbitration agree to be bound by the award; and (4) the arbitration award is not clearly repugnant to the purposes and policies of the Act. Moehring v. Illinois Labor Relations Board, 2013 IL App (2d) 120342, ¶ 11 (2nd Dist. 2013) (citing City of Alton, 22 PERI ¶ 102 (IL LRB-SP 2006) and Chicago Transit Authority, 16 PERI ¶ 3010 (IL LLRB 1999)). The Charging Party does not contest that the second and third elements of the Spielberg standard have been satisfied. Instead, the Charging Party has moved to re-open this matter on the grounds that deferral is inappropriate under the first and fourth elements.

First, the Charging Party argues that the arbitration award is clearly repugnant to the purposes and policies underlying the Act because the arbitrator refused to apply the Board's "clear and unequivocal" standard in determining that the Charging Party waived its statutory right to bargain over minimum shift staffing levels. A party to a collective bargaining agreement may waive its right to bargain under the Act where contract language evinces a clear and unequivocal intent to relinquish such rights. American Federation of State, County and Municipal Employees v. State Labor Relations Board, 274 Ill. App. 3d 327, 334 (1st Dist. 1995).

In his December 3, 2012, award, the arbitrator concluded that the management rights clause of the parties' agreement reserves to Respondent the right to determine the standards of service it will provide and the number of personnel used to provide those services, including the right to unilaterally reduce the number of ambulances in service. However, in reaching this conclusion the arbitrator did not find that the Charging Party waived its statutory right to bargain over the topic. In fact, the arbitrator expressly refused to determine whether minimum shift staffing is a mandatory subject of bargaining, and thus could not have concluded that the Charging Party had a statutory right to bargain over the topic. Therefore, the arbitrator analyzed

the dispute not as a question of the Charging Party's waiver but as an issue of contract interpretation, expressly finding that the Board's "clear and unequivocal" standard concerning the waiver of a statutory right was inapplicable.

The test for determining repugnancy under Spielberg is not whether the Board would have reached the same conclusion as the arbitrator, but whether the arbitrator's award was palpably wrong as a matter of law, or contrary to a clear line of Board precedent. City of Chicago, 10 PERI ¶ 3010 Fn. 10 (IL LLRB 1993) (citing Inland Steel Co., 263 NLRB 1091 (1982)). The NLRB has clarified that an award is palpably wrong as a matter of law if the decision is not susceptible to an interpretation that is consistent with the National Labor Relations Act. Inland Steel Co., 263 NLRB 1091 (1982). Furthermore, the NLRB has considered this issue and determined that an arbitration award upholding an employer's argument that its actions were justified by a contractual management rights clause is not repugnant, "even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver." Southern California Edison Co., 310 NLRB 1229, 1231 (1993) (citing Motor Convoy, 303 NLRB 135 (1991)).

The arbitrator in this case carefully confined his award to the issue within his jurisdiction—the interpretation of the parties' agreement. As a result, the arbitrator deemed the "clear and unequivocal" standard the Board would apply when interpreting the collective bargaining agreement in light of the parties' statutory rights to be inapplicable. As a matter of contract interpretation, the Charging Party has not indicated how the award is inconsistent with the Act or Board precedent, other than alleging that the Board would have applied a different standard. This alone, even where the Board may have reached a different conclusion, is insufficient to render the award repugnant to the purposes and policies underlying the Act. Southern California Edison Co., 310 NLRB at 1231. Therefore, assuming without yet deciding that the Charging Party did have a statutory right to bargain over minimum shift staffing levels, I conclude that the arbitrator's refusal to apply the Board's "clear and unequivocal" standard does not render the award repugnant to the purposes and policies of the Act.

Second, the Charging Party argues that the issues underlying the unfair labor practice charge were not presented to and considered by the arbitrator because the arbitrator expressly declined to determine whether the Act permits the Respondent to exercise its rights under the management rights clause after the expiration of the parties' agreement and during the pendency

of interest arbitration proceedings. An arbitrator has adequately considered the issues of an underlying unfair labor practice where the contract issues are factually parallel to the unfair labor practice issues and the arbitrator was presented generally with facts relevant to resolving the unfair labor practice. Olin Corp., 268 NLRB 573, 574 (1984). In this case, the arbitrator determined that the Respondent's actions were consistent with its rights under the management rights clause of the parties' agreement. However, the resolution of the underlying unfair labor practice charge depends on whether the Respondent's actions were consistent with the parties' obligations under Section 14(l) of the Act to maintain existing wages, hours, and other conditions of employment during the pendency of interest arbitration proceedings. In order to make this determination, it is necessary to establish whether the relevant existing wages, hours, and other conditions of employment were comprised of existing shift staffing levels at the expiration of the parties' collective bargaining agreement or the Respondent's right under the management rights clause to make unilateral changes to those levels. Where the arbitrator expressly declined to resolve this question, I cannot conclude that the contract issues resolved by the award are factually parallel to the unfair labor practice issues. I therefore recommend granting the Charging Party's motion to re-open this matter, as further proceedings are necessary to determine the effect of the management rights clause on the parties' obligations under Section 14(l).

Though deferral to the arbitration award is not appropriate in this case, for future proceedings I will nonetheless adopt the arbitrator's interpretation of the management rights clause of the parties' agreement. An arbitrator's interpretation of contractual provisions becomes a binding part of the parties' agreement. County of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011) (citing The Motor Convoy, Inc., 303 NLRB 135 (1991)). This is because parties who have agreed to have their disputes settled by an arbitrator have contracted to accept the arbitrator's construction of the terms of their agreement. American Federation of State, County and Municipal Employees, AFL-CIO v. Dep't of Central Management Services, 173 Ill. 2d 299, 305 (Ill. 1996).

## **V. CONCLUSIONS OF LAW**

1. The arbitrator's refusal to apply the Board's "clear and unequivocal" standard when interpreting the management rights clause of the parties' agreement does not render the award repugnant to the purposes and policies of the Act.

2. Deferral to the arbitration award is not appropriate in this case because the award does not resolve the issues underlying the unfair labor practice charge.

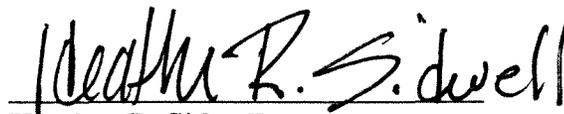
VI. **RECOMMENDED ORDER**

IT IS HEREBY ORDERED that the Charging Party's motion to re-open this matter be granted.

VII. **EXCEPTIONS**

Pursuant to Sections 1200.135 and 1220.65(d) of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 20<sup>th</sup> day of May, 2013,



**Heather R. Sidwell**  
**Administrative Law Judge**  
**Illinois Labor Relations Board**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

Glenview Professional Firefighters, )  
Local 41286, International Association )  
of Fire Fighters, )  
 )  
Charging Party )  
 )  
and )  
 )  
Village of Glenview, )  
 )  
Respondent )

Case No. S-CA-11-201

**AFFIDAVIT OF SERVICE**

I, Martin Kehoe, on oath state that I have this 20th day of May, 2013, served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

J. Dale Berry  
Mark Stein  
Cornfield & Feldman  
25 East Washington Street, Suite 1400  
Chicago, Illinois 60602

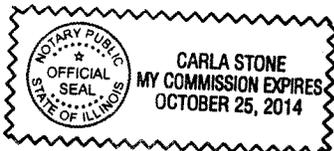
Benjamin Gehrt  
Clark Baird Smith  
6133 N River Road, Suite 1120  
Rosemont, IL 60018

*Martin Kehoe*  
\_\_\_\_\_

**SUBSCRIBED and SWORN to**  
before me this **20th day**  
of **May, 2013.**

*Carla Stone*  
\_\_\_\_\_

**NOTARY PUBLIC**



## Appendix B

STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL

RECEIVED

JUN 04 2009

Illinois Labor  
Relations Board

INTERNATIONAL ASSOCIATION OF FIRE )  
FIGHTERS, LOCAL 95, )  
 )  
Charging Party, )  
 )  
and ) CASE NO. S-CA-07-085  
 )  
VILLAGE OF OAK PARK, )  
 )  
Respondent. )

CHARGING PARTY'S EXCEPTIONS TO THE  
RECOMMENDED DECISION AND ORDER OF THE ALJ

The Charging Party, INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS, LOCAL 95, AFL-CIO ("Union"), hereby files the  
following Exceptions to the Administrative Law Judge's Recommended  
Decision and Order:<sup>1/</sup>

1. The Union excepts to the ALJ's finding of fact  
that "the parties submitted to interest arbitration their  
respective proposals as to the longevity, the buyback of sick leave  
and an alternate provision that preserves the terms of the parties  
original (previous) agreement concerning longevity and sick leave.

---

<sup>1/</sup> The Recommended Decision and Order ("RDO") of the  
Administrative Law Judge ("ALJ") is attached hereto as  
"Appendix 1" and shall be referred to as the "RDO".

In fact the dispute submitted to the interest arbitrator consisted of three distinct components. First was the substantive benefit itself: an increase of longevity payments payable annually in the amount of 15% in the month of the employee's anniversary year starting at after 20 years of service. The second concerned the amount of quid pro quo to be paid by members of the bargaining unit in the form of a reduction in their existing sick leave buyback payments for good attendance. The third component related to the process to be followed in the event of an adverse legal ruling as to whether the longevity payments could continue to be included in the calculation of salary for determining the amount of pension upon retirement.

2. The Union excepts from the ALJ's finding of fact and her legal conclusion that the Union's proposed procedure for mid-term negotiation in the event of an adverse third party ruling had no effect on the arbitrator's consideration as to the parties' dispute as to the amount of good attendance sick leave buyback reduction and the establishment of the increased longevity benefit. In fact, the arbitrator found merit in the "logic of the association on this issue, but further found that "this issue carries less weight from the issue on sick leave buyback. The buyback has an immediate financial impact. This other matter is totally speculative." (RDO, p. 8, Fn. 5, Attachment 1, p. 13)

3. The Union excepts from the ALJ's interpretation of the arbitrator as to the relationship between the amount of *quid pro quo* from sick leave buyback and the longevity benefit, to wit: "I view the arbitrator's ruling as disavowing any *quid pro quo* for the buyback for the one month longevity payment." (RDO, p. 8, FN. 5)

4. The Union excepts from the ALJ's speculation that "the Charging Party seems to concede that the division statement was correct as it nowhere argues that it was incorrect." (RDO, p. 10, fn. 7) The validity or invalidity of the second advisory opinion is not a material issue before the ALJ. The question before the ALJ was whether the Respondent's process in securing the opinion without notice to the Union based upon ex parte communications to the Department of Insurance violated its duty of good faith bargaining required under Sections 7 and 14(1) of the Act. Nevertheless, it is and remains the Union's position that the original opinion issued by the Department of Insurance is a valid application of the law.

5. The Union excepts from the ALJ's finding of fact and legal conclusion as to the existence of "evidence of enmity by the Respondent with respect to the bargaining unit's exercise of protected rights under the Act and her conclusion that the duty to engage in good faith bargaining under the Act and under the circumstances of this case did not include an obligation to

notify the Union of its efforts to secure a second opinion:

"I reject this contention because there is no evidence that the parties agreed either that the Respondent could not contact the Division of Insurance regarding pension calculations except in concert with the Charging Party or that the Respondent was required to give advance notice that it would do so unilaterally. I cannot and do not infer any such intent merely because that is what the parties did on one previous occasion when they jointly sought an opinion regarding pension calculations. \*\*\*

Footnote 8: The Charging Party nowhere contends that it is a necessary party with respect to communications or proceedings regarding pensions with the Division of Insurance or the pension board."  
(RDO, p. 11)

The ALJ's preoccupation with the absence of evidence of an agreement between the parties to provide notice wholly ignores the central thrust of the Charging Party's positions and the allegations of the Complaint that the Respondent's conduct violated its duty to bargain in good faith as required by Sections 7, 10(a)(1), (4) and 14(1) of the Act. As such, no express contractual agreement is required, especially when the conduct occurred after the contracts expired and during the pendency of interest arbitration.

6. The Union excepts from the ALJ's analysis and legal conclusion that an expired contract provision that allows the Employer to unilaterally eliminate the longevity benefit is not a permissive subject of bargaining and continues to serve as authority for unilateral action during the pendency of interest arbitration:

"I am not persuaded by the Charging Party's argument that because the reversion provision is permissible, I need not consider it. That provision accounts for the Respondent's defense that it was allowed to revert to the pre-2003 agreement. That being Respondent's defense in part, its interpretation seems inescapable and grievance arbitration would seem appropriate. I note that Respondent could otherwise justly say that if it could not revert as the agreement seemed to provide, it would then merely hold the whole provision as to the one month payment void under law." (RDO at p. 12)

The ALJ's analysis is flawed by her apparent inability to conceptualize the substantive longevity benefit as distinguishable from the parties' dispute as to the process to be followed in the event of an adverse ruling by a third party. They are readily distinguishable and a review of the arbitration award will disclose that the Arbitrator treated them as separate concepts (RDO Attachment 1, pp. 12-14). The fact that the Arbitrator's

award gave the Village's proposed process allowing unilateral change vitality during the contract term is not inconsistent with a construction of 14(1) that denies it continuing vitality after the contract has expired. Longevity is a form of wage and is clearly a mandatory subject of bargaining and therefore is continued under the terms of Section 14(1). To the contrary the contract language which is permissive does not continue beyond the contract term because 14(1) does not carry forward contract terms that are permissive subjects of bargaining. See City of Mattoon, 13 PERI ¶2004 (1997).

7. The Union excepts from the ALJ's characterization of Charging Party's position with respect to a "joint request":

"I regard the joint request to not hold the matter in abeyance as indicating that both parties want a springboard to their future, not a guide to the problem of the past. Therefore, I agree -- reluctantly and only because of the joint request -- not to defer to arbitration." (RDO p. 13)

The ALJ's comments misstate Charging Party's position in relation to the ALJ's "Interim Order Holding Case in Abeyance Pending Interest Arbitration" dated October 3, 2008. The Charging Party objected to the issuance of this Interim Order as improper and sought to have the ALJ move forward and schedule a hearing on the

allegations of the Complaint so that the proper status quo based upon consideration of Respondent's conduct in relation to the duty to bargain required by Sections 7, 10(a)(1), (4) and 14(1) of the Act could be determined. The Charging Party also excepts from these comments to the extent that they state that but for the "joint request" the Charging Party's complaint should have been deferred to grievance arbitration (RDO, p. 13).

8. The Charging Party excepts from the ALJ's legal conclusion that Respondent's conduct did not violate Section 10(a)(4) of the Act:

"The Charging Party argues that the Respondent violated Section 10(a)(4) by unilaterally seeking opinion of the Division of Insurance regarding longevity pay without notice to the Charging Party. I reject that argument, I am not persuaded by a preponderance of the evidence that because the parties jointly requested an opinion regarding the longevity pay on the first occasion when they sought a third party opinion, that conduct constituted an agreement as to what they would do in the future." (RDO, p. 13)

A finding putatively based on the "preponderance of evidence" when no hearing has been allowed to take place, is wholly without a foundation. Further, once again the ALJ fails to consider the Employer's conduct in relation to duties established under Sections

7, 10(a)(1), (4) and 14(1) of the Act.

9. The Union excepts from the ALJ's legal conclusion that:

"I'm sure that doing so was a colorable interpretation of the contract and does not amount to a repudiation of the agreement or, otherwise, an unfair labor practice under Section 10(a)(4). Thus, even [if] I accepted these contentions of the Charging Party as to contract violations, I do not consider them to amount to a repudiation of the agreement and therefore unfair labor practices." (RDO, p. 14)

The Charging Party has not contended that the conduct of the Respondent which is the basis of the Complaint constitute contract violations. On the contrary, it has consistently contended that they amount to actions which violate its duty to engage in good faith bargaining as required by Sections 7, 10(a)(1), (4) and 14(1) of the Act. Further, the Charging Party has not contended that Respondent's conduct were unfair labor practices based on the theory that they amounted to a repudiation of an agreement. On the contrary it has been Charging Party's consistent position that the predecessor contract expired by its own terms on December 31, 2005 and that its actions during the pendency of interest arbitration constituted violations of its statutory duties.

10. The Union excepts from the ALJ's legal

conclusions and analysis set forth on page 14 of the RDO including the statement "In this case it cannot be determined whether the Respondent unilaterally changed working conditions without interpreting the contract." The reference point for determining whether or not Respondent's conduct violated the Act are the duties established by Sections 7, 10(a)(1), (4) and 14(1) of the Act.

11. The Union excepts from the ALJ's analysis and legal conclusion that

"Thus, the precise issue of whether the Respondent violated Section 14(1) relates back to whether the Respondent breached the contract. The "existing wages" did not change if the contractual provision of reversion came into play. Inasmuch as the contractual breach cannot be determined without resort to interpretation of the contract, I reject the Charging Party's allegation that the Respondent violated Section 14(1) of the Act."  
(RDO, p. 15)

The ALJ's analysis wholly ignores the central thrust of the Charging Party's argument in support of its 14(1) violation, to wit: that because the reversion language permits a unilateral change that involves a process whereby Respondent is permitted to unilaterally change an existing condition of employment without notice or bargaining, it waives the Charging Party's bargaining rights and is therefore a permissive subject of bargaining. After

the expiration of the contract as a permissive subject of bargaining it has no legal force under Section 14(1) and therefore cannot "come into play" so as to justify Respondent's unilateral conduct. And since the longevity benefit is an "existing wage" under §14(1), it cannot be changed without the "consent of the Union".

12. The Union excepts from the ALJ's characterization of the Charging Party's position as seeking a "advisory" opinion:

"As I stated in my Interim Order, I see no reason I should render an advisory opinion so as to facilitate either party's arguments in the interest arbitration. However, if the Board should insist that I make a determination as to the status quo, I would hold that the parties intended the longevity calculation be consistent with the Pension Code. I reject the notion that the parties intended the longevity calculation agreed upon remain in effect regardless of whether it met the requirements of the Pension Code."  
(RDO, pp. 15-16)

The ALJ's conclusions ignore the fact that there is nothing in the January 2, 2008 advisory opinion that requires the elimination of the longevity benefit in order for longevity calculations to be consistent with the Pension Code. The ALJ's Order references the relevant advisory opinions from the Department of Insurance as

Attachments 3 and 5. These Attachments are discussed at RDO pages 6 and 8-9. Examination of these two opinion letters disclose that the difference is limited to the conclusion. The original letter concludes that the proposed language "does meet the structure requirement for longevity" and was therefore considered salary for pension purposes. The most recent opinion simply replicates example A taken from Respondent's November 7, 2007 letter and states that this example qualifies as "salary" for pension purposes. Neither letter provides any rationale or reasoning for their respective conclusions. Nevertheless in the absence of any rationale for the latest opinion letter's preference for the formula set forth in A as opposed to the formula originally approved in B, one fact is clear, under either A or B the 15% longevity is added to the employee's pensionable salary. In option A it is an additional \$75 over base salary; under B, the original calculation, it is \$6,900.

The Charging Party does not dispute that a primary purpose for the 15% longevity provision was to increase firefighters' pensionable salary. However, that is not the only purpose. Under its terms the 15% is paid annually beginning with completion of an employee's 20<sup>th</sup> year of service. The first employee affected by the Respondent's unilateral action was bargaining unit member Lt. Mark Wilson who received none of the 15% longevity after completing his 20<sup>th</sup> year of service. Another

purpose of the 15% longevity is that it adds an additional 15% of pay each year after completion of service prior to retirement. At the time he was affected by the Respondent's action, Mark Wilson had not filed an application for a pension and had no intention of doing so. Thus, Wilson lost this additional money even though it had no significance to calculation of pensionable salary.

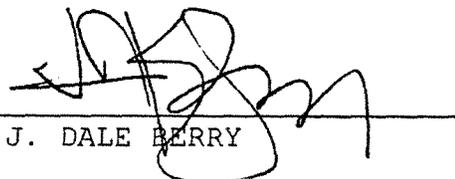
13. The Union excepts from the ALJ's conclusions of law in its entirety (RDO, Article 5, p. 16).

14. The Union excepts from the ALJ's recommended decision in its entirety (RDO, Article 6, p. 16).

The Union submits herewith its Brief in support of its Exceptions and requests the opportunity to present oral argument in support of its position.

Respectfully submitted,

CORNFIELD AND FELDMAN

BY: 

J. DALE BERRY

Attorneys for the Union

June 4, 2009

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STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL

INTERNATIONAL ASSOCIATION OF FIRE )  
FIGHTERS, LOCAL 95, )  
 )  
Charging Party, )  
 )  
and ) CASE NO. S-CA-07-085  
 )  
VILLAGE OF OAK PARK, )  
 )  
Respondent. )

CHARGING PARTY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS

STATEMENT OF THE CASE

The Charging Party, **INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 95**, has filed Exceptions to the Recommended Decision and Order (RDO) proposed by the Administrative Law Judge (ALJ) in this proceeding and submits this Brief in support of its Exceptions.

The ALJ's RDO recommended that the Charging Party's complaint be dismissed.

The ALJ's issuance of her RDO was the culmination of a long and circuitous process that was, if not bizarre, at least unique. The Union's original Charge was filed on October 30, 2006. The Charge alleged that the Village had acted to change the status quo as to the payment of 15% longevity benefit without the Union's

consent in violation of Section 14(1) of the Act. This longevity benefit had been established under the terms of the predecessor contract, the term of which was January 1, 2003 through December 1, 2005.

The Village responded by denying the charge, flatly stating that it had not acted to change the status quo as to the payment of longevity benefits for firefighters:

"The Union contends that on September 3, 2006, it learned that the Village unilaterally implemented a method for calculating longevity pay that is contrary to what is provided for in the Agreement. This contention is utterly false and completely without merit. The Village admits that in September 2006, pursuant to an opinion letter issued by the Insurance Board that stated longevity payments should be prorated on an annual basis, it advised the Pension Board to alter the way in which it calculated the longevity benefits of a *police officer* for pension purposes, but the Village did not change the manner in which it calculated longevity pay. However, this change had absolutely no impact on the method used to calculate the longevity benefits of firefighters and is therefore irrelevant to the instant charge. Moreover, the Union has provided no evidence that a firefighter has ever been denied the longevity benefits he is entitled to under the Agreement. There has thus been no change to the *status quo*. Employer's Response letter dated April 2, 2007, a copy of which is attached as Complainant's Exhibit 1." (Emphasis added)

Thereafter, the Union and the Village continued to meet and negotiate as to the terms of the successor contract. Impasse

was reached, the Union invoked interest arbitration and an arbitrator was selected. The parties then agreed to enter into mediation/arbitration negotiations under the auspices of the arbitrator. These proceedings were disrupted, however, when the Union was told in February 2008 by a member of its bargaining unit, Mark Wilson who had completed 20 years of service in January and who under the terms of the established longevity benefit was entitled to receive the additional 15% longevity increment, that the payment had not been made. Upon further inquiries put to the attorney representing the Village in the contract negotiations, it was confirmed that this event was not a mistake. The Union learned that the Village in November, 2007 had solicited an opinion letter from Scott Brandt, an official with the Department of Insurance, seeking a second opinion as to whether the payments made to employees pursuant to the 15% longevity benefit were "salary" for pension purposes. The parties had previously jointly submitted a request for an opinion to Mr. Brandt's predecessor, Thomas R. Jones, and had received an opinion dated June 25, 2004 stating that the proposed longevity language did qualify as a longevity payment and would be considered salary for pension purposes.

The second opinion letter was solicited without prior notice to the Union or its attorney, even though the parties were concurrently meeting in ongoing negotiations. The opinion letter was issued *ex parte* by Scott Brandt, Acting Chief Administrator of

the Public Pension Division. At no time prior to the issuance of the opinion did the Village or Mr. Brandt notify the Union or afford the Union an opportunity to respond to the assertions made in the Village attorney's letter dated November 7, 2007.

These additional facts were filed with the Board's investigative agent in support of an Amended Charge and the issuance of a complaint. The Village responded to the Union's Amended Charge by seeking to have the charge deferred to grievance arbitration under the terms of the expired predecessor contract. The Executive Director nonetheless acted on March 17, 2008 to issue a complaint for hearing.

Before the ALJ, the Village answered the complaint but no hearing was set because the Village renewed its effort to defer the dispute to resolution through grievance arbitration under the terms of the expired contract. The Union opposed this motion and the parties filed briefs in support of their respective positions. On October 3, 2008 the ALJ issued an "Interim Order Holding The Case In Abeyance Pending Interest Arbitration". The Order put the case in abeyance "until the earlier of the issuance of an interest arbitration award or June 30, 2009". The ALJ further provided that her Interim Order was "not appealable". The Union objected to this "Interim Order" to the Executive Director and during the course of a conference call between Union and Village counsel, it was agreed that the Interim Order would be withdrawn, the parties would submit

additional memoranda in support of their positions and that a final order would be issued. The Union submitted its memorandum dated December 2, 2008. The Village submitted its memorandum dated March 4, 2009.

Analysis of the ALJ's RDO will reveal that her ultimate conclusion is predicated upon her belief that the complaint should not be heard but should be deferred to grievance arbitration upon the Village's motion. This mindset is stated as follows:

"I regard the joint request to not hold the matter in abeyance as indicating that both parties want a springboard to their future, not a guide to the problem of the past. Therefore, I agree - reluctantly and only because of the joint request - not to defer to arbitration." (RDO, p. 13)

The ALJ's conclusion is not supported by an analysis of the Act and specifically the employer's duty to bargain under Sections 7, 10(a) (1), (4) and 14(1) of the Act. On the contrary, it appears that having been required to issue a determination as to the legal status quo, the ALJ abdicated her duty to construe the allegations of the complaint in light of the language of the Act, and instead donned an arbitrator's hat and sought to construe the terms of the expired contract as if the case had been deferred.

The effect of the RDO is extremely prejudicial to the Union's interest and inimical to the dispute resolution policies

of the Act particularly as they are embodied in Section 14(1) and more generally in Section 2. The ALJ has attempted to construe the Union's rights under the predecessor contract without benefit of a pending grievance or an evidentiary hearing. Secondly and most egregiously, the ALJ has issued an order dismissing the Union's complaint based on analysis that both misapprehends the Union's arguments in support of the complaint and fails to discuss in any way the Board precedents cited by the Union. In consequence, the status quo imposed upon the bargaining unit is one where the Village has been allowed to unilaterally eliminate the longevity payments to eligible Firefighters and Fire Lieutenants; it has been allowed to keep the substantial *quid pro quos* obtained from Union members in the form of sick leave buyback reductions made as part of the establishment of the longevity benefit; the Charging Party has been denied a hearing to offer evidentiary proof in support of the allegations of the complaint; and the Charging Party's ability to negotiate a successor contract has been prejudiced by the extensive delay resulting from the ALJ's initial attempt to hold in abeyance a decision on the merits of the charge.

#### STATEMENT OF THE ISSUES PRESENTED

The Charging Party submits that the basic issues to be decided may be stated as follows:

1. Whether the Respondent violated Sections 7, 10(a)(1), (4) and 14(1) of the Act by taking steps to collaterally attack employees' existing longevity benefits during the pendency of interest arbitration which steps includes the following:

a) Responding to the Union's original charge by filing a statement with the Board on March 28, 2007:

"The Union contends that on September 3, 2006 it learned that the Village unilaterally implemented a method for calculating longevity pay that is contrary to what is provided for in the agreement. This contention is utterly false and completely without merit. The Village admits that in September 2006 pursuant to an opinion letter issued by the Insurance Board that stated longevity payments should be prorated on an annual basis, it advised the Pension Board to alter the way in which it calculated the longevity benefits of a police officer for pension purposes, but the Village did not change the manner in which it calculated pension longevity pay. However, this change had absolutely no impact on the method used to calculate the longevity benefits for firefighters and is therefore irrelevant to the instant charge. Moreover, the Union has provided no evidence that a firefighter has ever been denied the longevity benefit he is entitled to under the agreement." (Emphasis added)

b) Engaging in ongoing negotiations with the Union while concurrently and surreptitiously soliciting and obtaining ex parte a second advisory opinion letter contradicting the original

opinion letter issued on June 25, 2004 by Thomas R. Jones, the then Chief Administrator of the Public Pension Division of the Department of Insurance pursuant to the joint request of the parties;

c) Thereafter, acting unilaterally and without prior notice to the Union, to eliminate effective January 1, 2008, all payments of the 15% longevity benefits due to eligible bargaining unit members?

2. Whether the "third party/reversion" language included as a term of the expired predecessor agreement is a permissive contract term which lapsed and is not perpetuated under 14(1)?

#### ARGUMENT

I. THE RESPONDENT'S SURREPTITIOUS ACTIONS INTENDED TO COLLATERALLY ATTACK EMPLOYEES' EXISTING LONGEVITY BENEFITS REPRESENT A "BACK DOOR" MOVE WHICH STRIKES AT THE HEART OF THE PARTIES' COLLECTIVE BARGAINING RELATIONSHIP AND CANNOT BE CONDONED UNDER ANY DEFINITION OF GOOD FAITH BARGAINING REQUIRED BY SECTIONS 7, 10(a)(1), (4) AND 14(1) OF THE ACT.

A. The Longevity Benefits Eliminated By The Village Are Not Gratuitous Add-Ons But Rather Represent Agreed upon Longevity Benefits For Which the Village Obtained A Substantial Quid Pro Quo In The Form Of A 67% Reduction In Preexisting Sick Leave Buyback Benefits.

1. The Longevity Benefit.

At the outset the Board should understand the nature of

the longevity benefit at issue and the bargaining history underlying it. The longevity benefit is established under Appendix C of the contract between the Union and the Village. This benefit was established under the terms of the contract effective January 1, 2003 through December 31, 2005. Under the predecessor contract the longevity benefit maxed out at \$105 a month for firefighters who completed 15 years of service. This benefit was enhanced by the longevity benefit which is now in dispute. This benefit provides that after employees achieve 20 years of service, a benefit of 15% would be added to base salary. Calculation of this 15% is as follows:

- (a) Employee's annual salary divided by 12 to obtain monthly base salary.
- (b) Employee's monthly base salary multiplied by 15% (monthly salary times 1.15).
- (c) Difference between monthly base and increased base 15% divided by 2 and added to biweekly wages paid during two consecutive pay periods."

The contract further provides that:

"Such longevity amounts shall be paid effective on the first day of the month in

which the employee's seniority/anniversary date occurs starting with the 20<sup>th</sup> year of seniority and in each successive year thereafter. For all other months of the year any employee who has achieved 20 years of service with the Village shall receive longevity pay in the amount of \$115 per month."

This language will be referred to as the "third party/reversion" language below.

The limitation of the 15% payment to a one month period was a limitation proposed by the Village and accepted by the Union after receiving the 2004 opinion letter from Thomas R. Jones.

## 2. The "Quid Pro Quo"

The second component that needs to be understood is the sick leave buyback *quid pro quo*. The Village demanded that the Union provide a "*quid pro quo*" for the longevity increase. The *quid pro quo* demanded by the Village was that the good attendance incentive buyback be reduced by two-thirds for all bargaining unit members.<sup>1/</sup>

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<sup>1/</sup> At the time of these negotiations the Charging Party represented a unit consisting of Firefighters and Fire Inspectors. A separate unit consisting of Fire Lieutenants was represented by a separate organization, the "Fire Command Officers Association" (FCOA). The Village and the FCOA had  
(continued...)

The Union rejected the Village's proposal. The parties ultimately agreed on a formula for reducing the amount of sick leave buyback based on the 67% factor. However, the Union was not willing to accept that this reduction would affect all bargaining unit employees from their date of hire. It was the Union's position that starting the reduction so early would mean that members of the firefighters would be paying more *quid pro quo* than would the Fire Lieutenants since years of service after promotion to Lieutenant are much less than a full firefighter career. Ultimately, the parties reached impasse as to this dispute and the matter was submitted for resolution to Arbitrator Frederic Dichter. See RDO Attachment 1, pp. 4-5, 8-10. The Union supported its position with exhibits demonstrating the differences in the length of service between Lieutenants and firefighters. The Arbitrator characterized the Union's argument as follows at 9:

"The Association argues that these figures demonstrate that what is being asked of this bargaining unit as a *quid pro quo* is greater than what the Lieutenants had to give up."

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<sup>1/</sup> (...continued)  
entered into an agreement providing for the payment of a 15% longevity with a *quid pro quo* reducing sick leave buyback payments by two-thirds for all bargaining unit members. Subsequently, upon the expiration of the Village agreement with the FCOA they were accreted to the Firefighter bargaining unit and are now represented by the Union. There is no successor contract to the FCOA 2003-05 contract and the FCOA is a defunct labor organization.

In the end the Arbitrator, while crediting the Union's argument that firefighters would be paying more in sick leave buyback money than the Lieutenants, adopted the Village's final offer based upon the agreement made with the FCOA on behalf of the Fire Lieutenants. He explained his conclusion as follows at 11:

"It is this Arbitrator's experience that the similarity of language is the method most often used for judging internal comparability. While it is true firefighters will here for the most part be reducing the sick leave buyback benefit for longer than lieutenants and that junior members in this unit will be giving up that benefit for longer than many senior personnel, that is always the nature of division between junior and senior employees." (Emphasis added)

The fact that the Village was requiring a very substantial *quid pro quo* concession from the Union for the establishment of the 15% longevity benefit was a factor that drove the parties to enter into a joint agreement to request an opinion from the Department of Insurance as to whether the 15% longevity calculated as proposed by the Village would qualify as salary under the pension code. Arbitrator Dichter explicitly commented upon this connection at 4:

"The parties had agreed that if the Department of Insurance accepted the longevity increase as part of the employee's

salary that the Association would agree to adjust the provision in the agreement involving sick leave as a quid pro quo for this increase."

The Union has examined the Arbitrator's ruling in detail because the parties' dispute as to the amount of sick leave buyback reduction was central to the arbitrator's award. Yet, on this record the ALJ makes the following finding of fact: "I view the Arbitrator's ruling as disavowing any quid pro quo for the buy back for the one-month longevity payment provision." (RDO, p. 8, fn. 5)

### 3. The "Third Party/Reversion" Language

A third component of the parties' respective proposals concerning the establishment of the longevity benefit concerned their dispute as to the procedure to be followed in the event a third party would issue a ruling different than that of the Department of Insurance concerning whether the 15% longevity benefit would qualify as pensionable salary when employees retired. The parties also submitted this component of their respective proposals to Arbitrator Dichter. The Village proposed the language to which it had obtained agreement from the FCOA and sought to apply it to the Firefighters. The Union rejected this proposal. The Arbitrator explicitly acknowledged this dispute:

"The parties do not agree as to what should happen if it is later determined by a third party that the 15% longevity increase cannot be considered wages for retirement purposes." (At 12)

4. The ALJ's Critical Error In Analysis.

It is important to recognize that the parties' dispute as to the "third party/reversion" language is analytically distinct from the other two components involved. This dispute concerns a process or procedure. It is not a dispute as to a substantive economic benefit such as the 15% longevity benefit itself or the amount of sick leave buyback money to be reduced as *quid pro quo*. Arbitrator Dichter treated it and discussed it as a distinct issue (Attachment 1, pp. 12-13). At the root of the ALJ's analytical error was her failure to recognize these distinctions. By dismissing the parties' dispute as to *quid pro quo* as irrelevant to the Arbitrator's ruling and conflating the substantive longevity benefit with the dispute as to the process to be followed in the event of an adverse ruling, she was unable to comprehend, much less adequately consider the allegations of the complaint in relation to the employer's duties under Sections 7, 10(a)(1), (4) and 14(1) of the Act. Once again the ALJ misread Arbitrator Dichter's ruling. As she understood it:

"With respect to what would happen if it would be later determined by a third party that the 15% increase cannot be considered wages for retirement purposes, the Arbitrator ruled that it would not affect his determination with respect to the buyback of sick leave." (RDO, p. 8, fn. 5)

The Arbitrator actually ruled that in the final analysis what he recognized to be the merits of the Union's proposal as to a mid-term negotiation process were not sufficiently weighty as to outweigh the merits, in his view, of preserving internal parity between the Firefighters and Lieutenants with respect to the *quid pro quo* formula established in the FCOA agreement. Further, because the three components of the parties' respective proposals were submitted to him as a single economic item, he correctly concluded that he had no authority under the Act to decide the issues separately (Attachment 1, pp. 12-13). He nevertheless saw and discussed the procedural dispute as analytically distinct. As he explained, "While the Arbitrator agrees to much of the logic of the Association on this issue, it is the Arbitrator's finding that a determination on this issue carries less weight than the issue on sick leave buyback." (At 13) Moreover, the primary reason he attributed to affording this procedural issue less weight was that he thought the likelihood of it coming into play was:

"...totally speculative. No entity has yet found a problem. To the contrary, the Department of Insurance has indicated that there is not one. There is no indication that this 'what if' proposal will ever come into play. As the saying goes, a bird in the hand is worth more than two in the bush. Here, we have a bird in the hand, a longevity increase and sick leave buyback, and that is clearly more significant than the speculation that the other issue might pose." (At 13)

As a result of the Arbitrator's award on the terms of the 2003-05 contract, the longevity benefit was established in the form of a package consisting of three components: a longevity benefit increase, an economic benefit to bargaining unit employees; at the price of a *quid pro quo* in the form of 67% sick leave buyback reduction for all Firefighters regardless of seniority as proposed by the Village -- an economic benefit to the Village; with a procedure for the dealing with the consequences of an adverse ruling as proposed by the Village's proposal. During the term of the agreement the condition precedent for the activation of the third party reversion component did not occur in that no third party issued an adverse ruling. In the event that an adverse ruling by a third party had been issued, the Union would have had to live with the reversion clause awarded by the Arbitrator and resorted to the grievance procedure to protect its interest. But, both the Firefighter contract and the contract covering the Lieutenants expired December 31, 2005. Further, the

labor organization representing the Lieutenants, the FCOA, is defunct. The Charge does not relate to actions taken by the Employer prior to December 31, 2005. It relates to a course of conduct initiated and undertaken after the expiration of the contract and during the pendency of interest arbitration. The ALJ's preoccupation with considering this conduct in relation to the expired contract terms and her failure to analyze the significance of this conduct in relation to the Employer's duty to bargain under Sections 7, 10(a)(1), (4) and 14(1) of the Act is at the crux of her flawed analysis. When the Respondent's conduct is measured against its statutory duty to bargain and the applicable precedent, the need to reverse the ALJ's order of dismissal is compelling.

II. THE STEPS TAKEN BY THE VILLAGE TO OBTAIN AN ADVERSE OPINION LETTER WITHOUT PRIOR NOTICE TO THE UNION AND EX PARTE, VIOLATED ITS DUTY TO BARGAIN WITH THE UNION AS REQUIRED BY THE ACT.

It is undisputed that the Village provided no notice of any of its actions up to and including its action to unilaterally eliminate the longevity benefits established under the 2003-2005 contract. It is a well-settled rule that prior to acting to change a benefit that is a mandatory subject of bargaining, the employer is minimally required to provide notice to the union representing employees affected by its action. County of Cook v.

Licensed Practical Nurses Association of Illinois Division 1, 285 Ill.App.3d 145 (1996); Georgetown-Ridge Farm Community Unit School District No. 4 Vermillion County v. IELRB, 239 Ill.App.3d 428, 450-51 (IA 4, 1992); SEIU v. State Educational Labor Relations Board, 153 Ill.App.3d 744, 755 (4<sup>th</sup> Dist., 1987). Indeed, failure to give notice "...constitutes a per se violation of the duty to bargain, without regard to consideration for good or bad faith." Georgetown-Ridge Farm Community Unit School District No. 4 Vermillion County v. IELRB, at 450. While under these authorities the Village's failure to give notice to the Union constitutes a per se violation of its duty to bargain, there is more involved here. There can be little question that the Village's actions were undertaken surreptitiously for the purpose of undermining the Union's bargaining position with respect to the successor agreement. Here, failure to give notice was not inadvertent or compelled by the necessity of operational exigencies. On the contrary, the steps taken were transparently an effort to achieve a fait accompli and gain an advantage over the Union in their ongoing negotiations and before the interest arbitrator. The Village's conduct is all the more injurious to the Union's bargaining interests protected under the Act when we consider these additional aggravating factors:

- 1) The parties had been in contact by telephone

on several occasions before and after November 7, 2007 and last met in a negotiation session on December 20, 2007.

2) At no time prior to the issuance of the opinion did the Village or Mr. Brandt notify the Union or afford the Union an opportunity to respond to the assertions made in Mr. Malahowski's letter dated November 7, 2007. This despite the fact that:

- The original opinion issued by Mr. Brandt's predecessor, Mr. Jones, was made pursuant to a joint request submitted by Mr. Creamer and Mr. Berry on behalf of the parties.

- The calculation included in the contract and approved by Mr. Jones was the calculation originally proposed by the Village.

- Mr. Brandt's opinion is advisory and is expressly disqualified by the following disclaimer:

"The Pension Division opinion is based on the assertions made in your email. If the assertions made in your email change or are not complete, the opinion given below may no longer be appropriate given the new set of facts."

A review of Mr. Malakowski's letter will disclose that these facts were not disclosed to Mr. Brandt. Nor did Mr. Malahowski disclose that the contract provision submitted at that time was the subject

of contract negotiations between the parties and an item in an interest arbitration dispute pending before Arbitrator Youngerman.

- Mr. Brandt's opinion contains no rationale explaining his reversal of the opinion of Mr. Jones, but the same method of calculation.

The fact that this conduct occurred during the pendency of interest arbitration makes it even more injurious to the bargaining process. The Act imposes a stronger value on maintaining the status quo during the pendency of interest arbitration. In ordinary negotiations prior notice and an opportunity to meaningfully bargain is sufficient. However, under Section 14 impasse procedures, more is required. Neither party may change the status quo during the pendency of interest arbitration "without the consent of the other..." This standard respects the strong policy underlying the §14 impasse procedures Act favoring maintenance of the status quo as to existing wages and benefits. To give force to this policy, any conduct affecting a modification of the status quo must be subjected to strict scrutiny. Interestingly, one of the first cases involving a violation of 14(1) involved the Village of Oak Park and the Union. In this case, the Village had acted unilaterally by entering into an agreement with the FCOA on behalf of the Lieutenants to eliminate existing practices for acting assignments and vacation selection procedures. The Union filed a ULP and after hearing,

a violation was found and the status quo ante ordered to be reinstated. In this case the Village sought to shield its actions by interposing the agreement entered into with the FCOA. The ALJ rejected this claim stating that the Firefighters Union's consent was required before these benefits could be changed:

"Section 14(1) provides that during the course of interest arbitration existing employment conditions 'shall not be changed by action of either party without the consent of the other....' This language establishes a condition precedent that the Respondent obtain the Charging Party's consent prior to changing the act-up policy. In effect, the burden was on the Respondent in this case to secure the Charging Party's consent to change the act-up policy...." Village of Oak Park, 9 PERI ¶2019.

III. THE ALJ'S RULING IMPOSES A FORFEITURE OF LONGEVITY BENEFITS IN CONTRAVENTION TO PRINCIPLES OF FUNDAMENTAL FAIRNESS AND DUE PROCESS EMBODIED IN SECTIONS 2 AND 14(1) OF THE ACT.

A. The Forfeiture Imposed Has Both Prospective and Retroactive Impact On Bargaining Unit Employees.

As we have seen, the longevity benefit established by agreement of the parties operates in two dimensions. Most immediately it provides for a 15% increase in base salary during the month of the employee's anniversary year annually. Typically firefighters don't retire in their 20<sup>th</sup> year. Maximum

pension benefits do not accrue until the 30<sup>th</sup> year of employment. The Union submitted evidence before the interest arbitrator showing that the average years of service prior to retirement for firefighters was 26.32 years of service. Thus, on average a bargaining unit member can look forward to receiving the 15% increase in base salary for at least six years before encountering any issue as to whether such amount qualifies as pensionable salary. To be sure the parties intended for the longevity benefit to be included as pensionable salary. Without this component of the benefit, the *quid pro quo* extracted by the Village from Union members would have been unacceptably disproportionate. However, this circumstance does not nullify the value of the annual payments to bargaining unit members prior to retirement. Further, as to the pensionable salary issue, the ALJ's order allows a forfeiture beyond even that described in the *ex parte* advisory opinion. The Brandt opinion did not state that none of the 15% increase was pensionable. On the contrary it applied the 15% pro rata which reduced the amount to be included in pensionable salary from 15% to 1.25%. This is a substantial reduction but it is still a significant economic value to bargaining unit members. But the Village then parlayed Brandt's opinion to eliminate the longevity benefit in its entirety.<sup>2/</sup>

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<sup>2/</sup> In the complaint ¶17 alleges that the Village changed the longevity computation to reduce it in conformity with the ex  
(continued...)

The ALJ arrogated to herself the jurisdiction to construe the parties' intent and the meaning of the third party/reversion language and did so without benefit of a hearing or an evidentiary record. The ALJ's opinion asserts her view that the dispute should be deferred to arbitration. However, faced with the parties' joint request not to hold the matter in abeyance, she "reluctantly" offered her opinion as to the status quo in effect during the pendency of interest arbitration. However, in doing so she abdicated her duty and jurisdiction to construe the status quo in light of the Act and stepped into the shoes of a grievance arbitrator and attempted to construe the terms of the expired contract. There is nothing in the the Board's deferral policy that invests the Board or its ALJ with jurisdiction or authority to construe the contract. If an unfair labor practice is deferred to arbitration, at least the charging party is afforded a full opportunity for a hearing before the agreed where it can support its interpretation of the contract with evidence and arguments. The briefs submitted to the ALJ were based upon Board precedent supporting the allegations of the complaint as violations of applicable provisions of the Act. A major pillar in the ALJ's opinion is her conclusion as to the

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2/ (...continued)  
parte advisory opinion. This is denied in the Village's answer and in fact the Village entirely eliminated the benefit.

parties' intentions as to the longevity benefit:

"...I would hold that the parties intended the longevity calculation to be consistent with the Pension Code. I reject the notion that the parties intended the longevity calculation agreed upon to remain in effect regardless of whether it met the requirements of the Pension Code. If that were so, then there would have been no need for the reversion clause in the Lieutenants' contract." (RDO, p. 15)

However, before a grievance arbitrator the Union would have been afforded a full opportunity to challenge the Employer's conduct as being inconsistent with the purpose of the agreement to establish the longevity benefit. Legitimate questions could be raised as to whether Scott Brandt was a proper "third party" with jurisdiction over such matters whose opinion would permit the Village to eliminate the longevity benefit. Does the phrase "in the event" contemplate the active and surreptitious method by which the Village solicited this opinion? The Union would argue that the language contemplated a passive role by the Village and that the initiative for an adverse opinion would be initiated by a party to the Pension Board hearing at retirement. There is a legitimate question as to whether the "inconsistency" expressed in the opinion is sufficient to justify the Village's acting to forfeit the longevity benefit in its entirety. The ALJ's ad hoc opinion ignored the significance of a forfeiture in contract

interpretation. Elkouri & Elkouri states the basic rule as follows at 482:

"It is a familiar maxim that the law abhors forfeiture. If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture." Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> Ed., 2003.

The record considered by the ALJ is devoid of evidence as to the parties' intent with the exception of the arbitration award itself. Reference to the arbitration award will readily disclose that forfeiture was not the Union's intent. The Union objected to the third party/reversion language and proposed language that would have preserved its right to bargain in the event of an adverse third party ruling (Attachment 1, pp. 5, 6).

The Union submits that since the language was awarded by the Arbitrator, it is the Arbitrator's understanding of the purpose of the language that should control. Again, reference to the award discloses that the Arbitrator most certainly did not expect or intend that the third party language would result in a forfeiture at the instigation of the Village after the expiration of the contract. In fact, as we have seen the key factor in his ruling to grant the Village's *quid pro quo* proposal is that he did not contemplate that the longevity benefit would be eliminated by

such event. He dismissed the possibility as "totally speculative". Id. at 13. Certainly the Village did not disclose to the Arbitrator any intent to actively seek to obtain an adverse opinion during the hearing. Sitting with the benefit of hindsight and presented with the instant facts, the interest arbitrator would have had to give greater weight to the Union's proposed language designed to preserve its bargaining rights. Whether this would have been a sufficient consideration to outweigh the arbitrator's concern for internal parity with the Lieutenants is not certain. However, it is certainly a circumstance that a grievance arbitrator could take into consideration in construing the parties' intent and in determining whether or not the third party opinion is sufficient to authorize the Village to impose a forfeiture.

The most serious error in the ALJ's analysis, however, is that she ignored the fact that the status quo she was attempting to construe was not during the term of the predecessor contract. It was after the expiration of the contract and during the pendency of interest arbitration. The basic question never addressed by the ALJ is whether under the terms of the Act and particularly 14(1), the terms of an expired contract put forward by the Village to shield the forfeiture of an economic benefit is to be afforded continued and controlling effect. As will be discussed next, the Union submits that such a construction is

hostile to the basic policies underlying Section 14(1).

- B. Respondent's Back Door Moves Designed To Take Away Existing Benefits Cannot Stand In The Light of Section 14 of the Act.

Section 14(1) is a crucial part of the architecture of the §14 impasse procedures. It serves as essentially the bridge from the predecessor contract to the successor contract. Under the Act interest arbitrators are invested with the authority to determine and resolve disputes for employees who are denied the right to strike. Section 2 sets forth this policy 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, equitable and effective procedure for the resolution of labor disputes subject to the approval procedures mandated by this Act. To that end, the provisions for such awards shall be liberally construed." (Emphasis added)

The importance of these policy considerations served as the basis for this Board's enforcement of the right of employees to invoke interest arbitration as to mid-term disputes. State of Illinois Department of CMS v. State of Illinois Labor Relations Board, 373 Ill.App.3d 242, 253-254 (4<sup>th</sup> Dist., 2007). The Appellate Court's decision affirming the Board's decision was

based upon a need to fulfill the mandate of Section 2 by affording security employees an alternate procedure that was equitable. In the absence of the right to strike, the Board and the Court concluded that without the right to mid-term interest arbitration security employees would "not be on equal footing with the employer if it were able to unilaterally implement changes in working conditions". Certainly mid-term interest arbitration is far more burdensome than a requirement that the employer afford notice to the Union when it is initiating action to change an existing condition of employment. There is no more basic principle of equity and fundamental due process than affording a party prior notice and an opportunity to be heard to the party against whom you are taking adverse action. In Footnote 8 the ALJ dismisses the Union's interest in prior notice with the statement "The Charging Party nowhere contends that it is a necessary party with respect to communications or proceedings regarding pensions with the Division of Insurance or the Pension Board." (RDO at 11) To the extent that the Department of Insurance has no rules requiring the parties soliciting opinions to notify the parties that may be adversely affected of their request, the ALJ is correct. However, that begs the question, the issues are: (1) whether such a procedure is permissible under the duties established under the Act and 14(1) in particular; and (2) whether the Village is to be permitted to take advantage of this

circumstance to change the existing benefits?

The Department of Insurance would defend its procedures by pointing out that due process is not necessary because its opinions are only "advisory" and are accompanied by the following disclaimer:

"The Pension Division opinion is based on the assertions made in your letter. If the assertions made in your letter change or are not complete, the opinion given below may no longer be appropriate given the new set of facts."

To the extent that an opinion is advisory and is not conclusive as to adverse interests, due process requirements are diminished. However, in this circumstance the opinion was used not merely to modify or diminish the existing longevity benefit but was the lynchpin for the Village's unilateral action to eliminate it entirely and to dramatically alter the shape of the bargaining table. The fact is that under fundamental principles of due process required in legal proceedings adversely affecting another party, moving parties are required not only to notify affected parties but to "join them as necessary parties". A "necessary party" has been defined as:

"...one whose presence in the suit is required for any of three reasons: (1) to protect an interest which the absentee has in

the subject matter of the controversy which would be materially affected by a judgment entered in his absence, or (2) to reach a decision which will protect the interests of those who are before the court, or (3) to enable the court to make a complete determination of the controversy." Threshak v. Yorkville National Bank, 273 Ill.App.3d 855, 859 (Ill. 3<sup>rd</sup> Dist. 1992).

See also Kurt v. Board of Education of Coal City Community Unit School District No. 1, 132 Ill.App.3d 393, 395 (3<sup>rd</sup> Dist. 1985).

There can be little question that the Union's interests meet these requirements. It is equally well-settled that due process requires the joinder of necessary parties. In Pettey v. First National Bank of Geneva, 225 Ill.App.3d 539 (2<sup>nd</sup> Dist. 1992), the Court held at 547-48:

"It is well-settled that under fundamental principles of due process a court is without jurisdiction to enter an order or judgment which affects the right or interest of someone not before the court. [citations] Pursuant to this requirement all persons not must be made parties to the suit who are legally or beneficially interested in the subject matter of the litigation so that the court may dispose of the entire controversy."

The rule was stated even more definitively in Glickauf v. Moss, 23 Ill.App.3d 679 (5<sup>th</sup> Dist. 1974). The court relying on Illinois Supreme Court precedent opined as follows at 683-684:

"The 'requirement of joinder' of necessary parties thus appears absolute and inflexible. It applies to trial courts as well as to appellate courts. [citations] As shown, it is the duty of the trial court and reviewing court to enforce this principle of law sua sponte as soon as it is brought to their attention. It has been repeatedly held that it is error for a court to proceed to hearing and disposition on the merits of a cause without jurisdiction of necessary parties. This rule has been described as a 'fundamental doctrine'. [citations omitted] The Supreme court has put the matter in the strongest terms with the statement that 'it has long been the rule that an order entered without jurisdiction of indispensable parties is null and void.' People ex rel. Meyer v. Kerner, 35 Ill.2d 33 at 38. (Emphasis added)

Fundamental due process in civil actions require the joinder of necessary parties, in potentially adverse proceedings, the policies underlying the Act and in particular Sections 14(1) and 2 can require no less during the pendency of interest arbitration proceedings.

C. The ALJ's Recommended Decision Transgresses Other Important Equitable Principles.

1. The doctrine of Promissory Estoppel bars the Village's unilateral action to take back Firefighters' established longevity benefit.

In Kulins et al. V. Malco A Microdot Company, Inc., 121 Ill.App.3d 520 (1<sup>st</sup> Dist. 1984), the Court considered action by a

company that denied employees severance pay accrued to them for prior service according to a company policy. The Court relied upon the doctrine of promissory estoppel in supporting its decision to enforce the payment to employees of severance pay accrued under the policy, holding at 598:

"To allow Malco to retract its promise on the eve of termination, after years of reliance by plaintiffs would run counter to the fundamental principles of equity and justice, and raise a serious question as to Malco's compliance with the implied covenant of good faith, central to every contract."

The Court decided that promissory estoppel was applicable to plaintiffs' claim because they had provided service to the company under the severance policy and had a reasonable expectation that after doing so they would be paid severance pay. The Court explained the doctrine as follows at 527:

"Promissory estoppel, an equitable device invoked to prevent a person from being injured by a change in position made in reasonable reliance on another's conduct, is comprised of the following elements: (1) a promise (2) which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (3) which induces such action or forbearance, and (4) which must be enforced in order to avoid injustice."

- The Promise

Here, the Village agreed to establish a longevity benefit for employees completing 20 years of service and annually thereafter. The amount of the increase was 15% payable in the month of the anniversary date of service. The promise also included a promise that the longevity increase would be included in calculating their annual salary upon retirement. The promise to include the 15% in employee salary in calculating the pension was reinforced by the Village agreeing to jointly submit a request for an advisory opinion from the Department of Insurance.

- Induced Action of Substantial Character

The issuance of the 2004 opinion induced the Union to accept a two-thirds reduction in the existing sick leave buyback formula for some bargaining unit members as a *quid pro quo* for the Village's promise. It further induced the Union to submit the parties' dispute as to the scope of employees required to pay the *quid pro quo* as well as the parties' dispute as to the "third party/reversion" language to an interest arbitrator for resolution. Finally, the opinion induced the interest arbitrator to award the Village's proposed *quid pro quo* and the Village's proposed "third party/reversion" language.

- Induced Action/Forbearance

The 2004 opinion induced agreement to the Village's *quid pro quo* and continued work performance during the term of the 2003-05 contract. Moreover, upon the expiration of the contract and during negotiations as to a successor contract when first challenged as to efforts to collaterally attack the longevity benefit under the Union's original charge filed on October 30, 2006, the Village filed a response with the Board denying any change in the status quo. This statement induced forbearance as to further investigation of the charge on the part of both the Union and the Executive Director.

- Enforcement of Promise

Justice and equity, as embodied in Sections 2 and 14(1) of the Act, require that the Village's promise be enforced at least to the extent that it be estopped from engaging in surreptitious conduct designed to undercut the original promise and interposing as a shield for such conduct the *ex parte* 2008 opinion in this ULP proceeding.

2. The dismissal of the Charging Party's complaint produces a change in the status quo that unjustly enriches the Village.

A major dispute between the parties regarding the establishment of the longevity benefit was the amount of the *quid pro quo* to be taken from bargaining unit employees. The arbitrator awarded the amount that the Village sought. In accordance with the award, the Village has had the benefit of reducing sick leave buyback payments to all bargaining unit members regardless of their seniority by two-thirds. In consequence, bargaining unit members who constitute the large majority of the bargaining unit who have less than 20 years of seniority have accepted this condition of employment and have invested in the longevity benefit as a prospective reward, but have received no economic benefit in return. In the Arbitrator's view this disparate impact was appropriate because it was a product of a seniority based benefit. However, the predicate of the Arbitrator's analysis was that the benefit would be there when they reached the 20 year milestone. The Arbitrator's finding as to the intent of the provision is clear in his discussion of his reasons for rejecting the Union's proposal for mid-term bargaining:

"While it is true that, if and only if the longevity increase does not do what was

intended, employees would have given up something for no gain for some period of time...." Attachment 1, at 13; emphasis added.

The Union is prepared to offer evidence that over the period when the longevity benefit was in effect, which includes the two year contract term plus the two years that it was maintained in effect during negotiations and the pendency of interest arbitration (i.e., January 1, 2003 through December 31, 2008), the benefits received by members of the bargaining unit were substantially less than the value of the good attendance sick leave buyback reductions subtracted by the Village.

3. The status quo awarded by the ALJ will reward the Village who presents itself with unclean hands.

It is a basic maxim of equity that a party seeking relief in an equity proceeding will be denied requested relief if it has engaged in conduct that transgresses "equitable standards of conduct":

Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression

but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance." Precision Instrument Mfg. Co. et al. V. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945).

This is not a suit in equity and the Employer is not seeking injunctive relief. The §14 process is a process established to protect the "...public health and safety of the citizens of Illinois". Within this process the Village has sought to shield its unilateral elimination of the established longevity benefit during the pendency of interest arbitration by securing relief in the form of dismissal of the complaint issued by the Executive Director. Further, the ALJ's order of dismissal is grounded in the ALJ's view that the complaint should be deferred to grievance arbitration. Under the Board's deferral rule, however, dismissal may be withheld under circumstances where the respondent has demonstrated "enmity" with respect to employees' exercise of protected rights under the Act (RDO p. 11).

These considerations are of a piece with conduct that would be considered in equity proceedings in determining whether to apply the "unclean hands" doctrine. The ALJ did not consider the Respondent's surreptitious maneuvering to secure the second opinion as improper because she concluded such conduct could be limited only by evidence of an express agreement not to act unilaterally or without notice to the Union (RDO p. 11). The ALJ

opinion sets the bar for good faith bargaining in the mud. It cannot be countenanced under §14(1) particularly in the light of the policy mandate set by §2. Courts have articulated standards of good faith which include the following:

"He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court." (At 244)

\* \* \*

The equitable powers of this court can never be exerted in behalf of oen [sic] who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." Keystone Driller Co. v. General Excavator Co. v. Osgood Co., 290 U.S. 240, 245 (1933).

In colloquial terms, Respondent's maneuvers to reverse the original 2004 opinion were a calculated attempt to "Back Door" the Union. Prior notice and a forthright presentation of a proposal to change existing conditions are at the core of good faith bargaining. Then, with its ill-gotten new opinion in hand, it unilaterally eliminated the longevity benefit and cancelling a scheduled bargaining session, smugly presented the Union with a "fait accompli".

The fact that the Village sprang this second opinion on the Union while they were engaged in hearings before the interest arbitrator only served to maximize the prejudicial impact on the Union's bargaining position and has forced a massive delay in the proceedings. This delay was only exacerbated by the ALJ's issuance of her ill-advised "Interim Order". This conduct by the Village is nothing if it is not deceitful.

The Board should also recognize that Respondent's conduct here is of a piece with prior conduct violative of the Act. As we have seen, in 1992 the Village acted to unilaterally change acting assignments and vacation selection procedures beneficial to firefighters during the pendency of interest arbitration. The Union's unfair labor practice was sustained by the ALJ. No exceptions were taken and the remedy issued against the Village encompasses the Respondent's conduct at issue here. Village of Oak Park, supra, "Order" at XI-05. The Village was also guilty of another unfair labor practice charging that the fire chief had retaliated against the Union's grievance chairman by denying him secondary employment opportunities. IAFF LOCAL 95 and Village of Oak Park, 18 PERI ¶2016, S-CA-98-045 (2002). There have been several other instances where the Village has acted to the prejudice of the Union's statutory and contractual rights. Indeed, these circumstances were directly considered by the Arbitrator Dichter in his decision sustaining the Union's

position in awarding the Union's offer in the vacation selection dispute which preceded the parties' dispute as to the *quid pro quo* for the longevity benefit. After considering the evidence of the Employer's history of such conduct, Arbitrator Dichter concluded that it established a "pattern of abuse". He explained that but for such abuse he might have reached a different result, at 14:

"Absent the history, the Union would have to wait for abuse to occur before it could gain recourse through the arbitration process. This Arbitrator, however, cannot ignore the history that has already established a pattern of abuse. Time and again changes have been made by the Department that were detrimental to the rights of the members of this bargaining unit. An Unfair Labor Practice was sustained on the basis of this disparate treatment and discriminatory acts. Under those circumstances, the employees in this unit do not have to wait for there to be an abuse of the vacation system before it can accomplish change."

A copy of this prior award is attached to this Brief as "Exhibit "1".

The Village's action which is the subject of the pending complaint is a recidivist act consistent with this prior pattern of abuse. It is one more reason, among several, why this Board should not construe Section 14(1) as condoning such conduct.

IV. THE "THIRD PARTY/REVERSION" LANGUAGE RELIED UPON BY THE VILLAGE IN DEFENSE OF ITS CONDUCT LAPSED WITH THE EXPIRATION OF THE PREDECESSOR CONTRACT ON DECEMBER 31, 2005 BECAUSE IT IS PERMISSIVE LANGUAGE.

The "third party/reversion" language appeared in two different contracts. One contract was the FCOA contract with the Village that covered Fire Lieutenants. The second contract is the contract between the Village and Local 95 representing Firefighters and Fire Inspectors. The Amended Charge involved action implemented by the Village as to Fire Lieutenant Mark Wilson on January 1, 2008. The Amended Complaint was issued based upon the Village's action in relation to Lt. Mark Wilson. During the pendency of this dispute, the Village has extended this action to other Firefighters and Lieutenants who have achieved 20 or more years of service. At this juncture, Fire Lieutenants are part of the bargaining unit represented by Local 95. The FCOA contract expired December 31, 2005 and there is no prospect that it will be renewed since FCOA is now defunct and no longer represents any employees.

A. Language That Constitutes A "Permissive" Subject of Bargaining Is Not Carried Forward During the Pendency of Arbitration by Section 14(1).

As we have seen, one of the first cases involving an unfair labor practice relating to changes in existing conditions

of employment during the pendency of interest arbitration involved conduct by the Village of Oak Park against Oak Park Firefighters. Oak Park Firefighters Association and Village of Oak Park, supra. In discussing the scope of Section 14(1) the ALJ stated the following at X-98:

"Not all contractual terms or past practices fall within the scope of Section 14(1) however but only those matters which are 'wages, hours and other conditions of employment.' Such matters encompass only mandatory subjects of bargaining to the exclusion of permissive subjects of bargaining." (Emphasis added)

In this case the changes initiated by the Village involve practices that were mandatory subjects of bargaining (elimination of firefighters' opportunity to act as Lieutenants for acting pay and restriction of firefighters' opportunity to trade vacation selections into open slots). In consequence, the Village's actions were found to violate its duty to bargain under Sections 14(1) as well as 10(a)(1) and (4) of the Act.

Cases involving application of 14(1) to permissive subjects of bargaining have been less frequent and in the main have reflected efforts initiated by employers to deny arbitral jurisdiction over subjects which the employer contends involve matters of "inherent management authority". One such case which applied the rule barring the continuation of a permissive subject

of bargaining under 14(1) was City of Mattoon, 13 PERI ¶2004 (1997). In this case the employer sought to bar a police bargaining unit from submitting a shift manning provision to interest arbitration after the contract had expired. The shift manning provision which the union sought to perpetuate had been previously agreed to by the parties that the union contended should not lapse. However, the Board rejected this contention stating at 3:

"[T]he fact that the parties included a minimum manning provision in their previous collective bargaining agreement does not make that otherwise permissive subject of bargaining a mandatory subject of bargaining."

Another case frequently relied upon by employers in limiting the scope to 14(1) is Village of Lombard, 15 PERI ¶2007 (1999). In this case the union sought to perpetuate language which allowed paramedic firefighters to drop their certification in a dispute submitted to interest arbitration under Section 14 of the Act. Once again the parties had previously agreed to the language allowing a certain number of paramedics to drop their paramedic licensure. The village contended that the right to determine the number of firefighter/paramedics was an inherent managerial prerogative and therefore the paramedic drop language was permissive. Again the village's position was sustained and the

language was not continued in effect by Section 14(1) and lapsed. Permissive subjects of bargaining are a double edged sword however. It has been invoked to protect employers' efforts to protect their inherent managerial rights. It has also been invoked to protect employees from being required to waive statutory rights. As the Board has explained:

"The parties have respective rights and obligations endowed upon them by statute, and a proposal which does not concern terms and conditions of employment, but, rather, seeks to limit a party's basic statutory rights, is an attempt to alter the collective bargaining process established by the legislature. [internal citations omitted]" Wheeling Firefighters Assn. and Village of Wheeling, 17 PERI ¶2018 (ILRB 2001), at n. 13.

More recently the issue was considered in Village of Elk Grove, 21 PERI ¶87 (2005). This case involved an employer proposal which proposed to modify the statutory language governing firefighter promotions under the Fire Department Promotion Act. The union objected to this proposal and sought a declaratory ruling that the employer's proposed modifications were permissive subjects of bargaining. The Board's General Counsel issued an opinion stating the following at 8:

"However to the extent that the employer's proposal contains language providing for something less than what is provided for in

the FDPA regarding the subjects, it is not mandatorily negotiable. It is well settled that a proposal seeking the waiver of a statutory right is a permissive subject of bargaining. Village of Wheeling, 17 PERI ¶2018 (IL LRB SP 2001); County of Cook (Cook County Hospital), 15 PERI ¶3009 (IL LRRB 1999); Board of Trustees of the University of Illinois, 8 PERI ¶1014 (IL ELRB 1991), aff'd, 244 Ill. App.3d 945, 612 N.E.2d 1365 (1993); Board of Regents of the Regency Universities System (Northern Illinois University), 7 PERI ¶1113 (IL ELRB 1991). There is no question that the FDPA establishes 'minimum' standards governing promotions in fire departments, and no question that the Union is entitled to those by right. While the Employer can propose language guaranteeing less than what is provided for in the FDPA, that language is not mandatorily negotiable."

B. The Third Party Language Relied Upon By The ALJ And The Employer Is Permissive Language Because It Requires the Union To Waive Its Statutory Right To Prior Notice And Opportunity To Bargain Prior To A Change In A Mandatory Subject of Bargaining.

It has been the Union's position throughout this proceeding that the third party language, whatever its efficacy during the term of the predecessor contract, lapsed when this contract expired on December 31, 2005. It lapsed because it is language that unequivocally waives the Union's statutory right to bargain as to proposed changes in a mandatory subject of bargaining: longevity benefits and changes in payments for good attendance incentives. The Board will recall that when the Union filed its original charge alleging an attempt to change the

longevity benefit the Village defended by denying any change. In fact, upon investigation no change occurred. This wage benefit was continued for two years following the expiration of the contract. It was not until January 1, 2008 that the Village acted to unilaterally eliminate the benefit. Certainly a party to a collective bargaining agreement can agree to a permissive subject of bargaining and for the term of the agreement the term is enforceable. However, when the contract expires the vitality of the permissive agreement expires with it. This is so whether it involves the employer's waiver of an inherent management rights such as occurred in City of Mattoon and Village of Lombard or whether it involves a union's waiver of a statutory right such as its Section 7 right to bargain or promotional rights like those involved in Village of Elk Grove Village. To apply a different rule here is to apply a double standard.

The policies against enforcing waivers apply even during the term of the agreement where even contract language that is currently effective will not be enforced unless it evinces an "unequivocal intent to relinquish such rights". AFSCME v. Illinois Labor Relations Board, 190 Ill.App.3d 259, 269 (1st Dist. 1989). However, the intent to waive cannot be implied but instead must be found on "evidence...clear and unmistakable". Village of Oak Park v. Illinois State Labor Relations Board, 168 Ill.App.3d 7, 20 (1<sup>st</sup> Dist. 1998). In this contract although the language

awarded by Arbitrator Dichter is the same language included in the FCOA contract, it states that the "Village and Association agree to reinstate the language in the previous agreement that expired on December 31, 2002 concerning longevity and sick sale back". The record is clear that Local 95 never agreed to such language. This language was awarded by Arbitrator Dichter over the Union's objection. Further, as we have seen Arbitrator Dichter issued the award because he believed the prospect of an adverse ruling was "speculative". The Union accepted the Arbitrator's ruling and lived with it for the contract term. If the Village had initiated the action that it took on January 1, 2008 during the contract term, the Union would have been bound to the language and sought recourse under the grievance procedure.

The Employer may contend that because the third party language was part of Arbitrator Dichter's interest arbitration, this circumstance transforms it into a "mandatory subject of bargaining". This is nonsense. An interest arbitrator has no authority to determine what is or is not a permissive or mandatory subject of bargaining. This is a determination that is vested with the Board under the Act. The Act does give the parties the authority to submit disputes relating to permissive subjects of bargaining to the jurisdiction of the arbitrator. Section 14(p). Such agreements may be made for tactical reasons or to avoid delay or litigation costs. In this particular instance the Union agreed

to submit the dispute as to the process to be followed in the event of an adverse ruling for determination to the interest arbitrator. It was the Union's hope that the clause in the Village's proposed procedure would be viewed as of sufficient magnitude and weight by the arbitrator that it would tip the balance in favor of the Union's proposal on the *quid pro quo* dispute. As it turned out, while the Arbitrator considered the Union's process more meritorious he did not consider this issue to be of sufficient immediate concern to persuade him to award a different *quid pro quo* than that which the Village and the FCOA had agreed to. In consequence the Union was required to live with the Village's procedure for the contract term. However, the parties' agreement to include permissive subjects of bargaining in a contract are not made in perpetuity. Permissive subjects of bargaining lapse at the expiration of the contract, mandatory subjects of bargaining persist in accordance with the requirements of Section 14(1). City of Mattoon, supra.

Another fundamental error in analysis made by the ALJ was her apparent view that if the third party/reversion language was treated as a permissive subject of bargaining that lapsed, the economic components of the agreement reflected in the longevity benefit and the sick leave buyback *quid pro quo* would also have to be characterized as "permissive". The Village's third party/reversion language was not part of the *quid pro quo* relied

upon by the Arbitrator in awarding the longevity benefit or the amount of sick leave buyback. As we have seen, the parties were agreed as to the establishment of the 15% longevity benefit. The parties' dispute centered upon the amount of the *quid pro quo*. The Arbitrator awarded the Village's proposal in spite of expressing his agreement "...to much of the logic of the Association on this issue..." At the hearing the Arbitrator was constrained not to segregate the issues by virtue of the parties' stipulation as to the issue presented to him. However, once the award is issued each component of the dispute -- longevity increase, sick leave buyback reduction and third party/reversion language -- became part of the contract. As such, in the negotiations as to the successor contract either party was free to renegotiate each component in accordance with their respective duties to bargain under the Act. The Act imposes no duty on the Union to agree to renew a term that is otherwise a permissive subject of bargaining.

Before the ALJ the Respondent contended that the Union had waived its statutory rights as to the continuation of the third party language by accepting its inclusion into the 2003-05 contract. As a matter of fact this is not true as to the Union. The language was awarded over the Union's objection. However, it is true that the FCOA accepted the language as part of the Village/FCOA agreement. FCOA's agreement, however, cannot be

imputed to the Union and such agreement has no continuing vitality since FCOA/Village agreement will not be renewed. Lt. Mark Wilson and other Lieutenants who may have become eligible to receive the longevity benefit are entitled to such benefit not because of any continuing contractual obligation between FCOA and the Village, but because the longevity benefit is an established practice and must be continued under Section 14(1). Oak Park Firefighters Association and Village of Oak Park, supra, at X-98. The form that this benefit will take for both Fire Lieutenants and Firefighters will be as expressed under the terms of the successor contract based on the parties' agreement or the interest arbitrator's award. The Oak Park Fire Lieutenants' situation is directly analogous to that of the Waukegan fire lieutenants. Waukegan Firefighters IAFF Local 473 and City of Waukegan, 22 PERI ¶100, S-CA-06-071, August 6, 2006. In this case the fire lieutenants had been certified and included as part of a historical firefighter unit. Prior to such certification fire lieutenants had enjoyed a benefit based upon the village policy and practice of receiving health insurance fully paid by the city. After their certification and during the pendency of interest arbitration to set the terms and conditions of employment for the combined unit, the city acted to unilaterally deduct the contributions for health insurance required for firefighters under their predecessor contract. The union's ULP was sustained and the city was ordered to reinstate the status quo

ante. No contract waiver could be implied:

"Section 14 of the Act positively prohibits employers of firefighters from making unilateral changes of this kind during the mediation/interest arbitration of such 'disputes', and such disputes must be mediated. Moreover, to assert that a union has waived any right to bargain, the employer must first show it provided notice of the intended change sufficiently in advance of implementation so as to allow the union a reasonable opportunity to bargain and that the parties reached impasse."

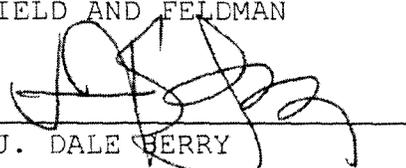
Even where the claim of waiver relates to a mandatory subject of bargaining, contract provisions arguably constituting a waiver of employees' right to bargain are narrowly and strictly construed under §14(1). See Illinois FOP Lodge 7 and City of Chicago, 21 PERI ¶83, 341-3 (ILRB Local Panel, 2005).

CONCLUSION

For the reasons stated above, the Union requests that the Board reverse the ALJ's Recommended Decision, reinstate the status quo as to the longevity benefit and sick leave buyback payments prior to the Village's unilateral action.

Respectfully submitted,

CORNFIELD AND FELDMAN

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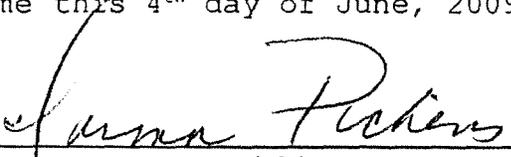
AFFIDAVIT OF SERVICE

SHARON A. FARMER, being first duly sworn upon oath, deposes and states that she served the foregoing CHARGING PARTY'S EXCEPTIONS TO THE RECOMMENDED DECISION AND ORDER OF THE ALJ and CHARGING PARTY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS by mailing a true and accurate copy of same to the following, with proper postage prepaid, on the 4<sup>th</sup> day of June, 2009:

Terrence T. Creamer, Esq.  
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SHARON A. FARMER

Subscribed and sworn to before  
me this 4<sup>th</sup> day of June, 2009.

  
Notary Public

