

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

International Association of Firefighters,)	
Local 439,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-12-125
)	
City of Elgin,)	
)	
Respondent)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

On October 29, 2012, Executive Director Melissa Mlynski issued a deferral to arbitration, a partial dismissal, and a complaint for hearing. These documents disposed of six allegations set forth in a charge filed by the International Association of Firefighters, Local 439, (Charging Party or Union) against the City of Elgin (Respondent or City) on March 1, 2012, as amended on April 4, 2012.¹ The allegations asserted that the Respondent engaged in unfair labor practices in violation of Sections 10(a)(4), (2), and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010).

In relevant part, the Executive Director dismissed the allegation that the Respondent violated Sections 10(a)(4) and (1) of the Act when it unlawfully insisted to impasse on its proposal to maintain existing language in an “entire agreement” clause which waived the parties’ right to bargain the effects of matters covered by the Agreement.² On November 8, 2012, the

¹ These orders disposed of one, two, and three counts, respectively.

² The Executive Director also dismissed the allegation that Respondent violated Section 10(a)(1) of the Act when it solicited requests for proposals (RFPs) from private vendors for ambulance work on the basis

Charging Party filed exceptions to this portion of the Executive Director's partial dismissal pursuant to Section 1200.135(a) of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240 (Board's Rules). On November 19, 2012, the Respondent filed a response.

As previously noted, the Executive Director also issued a complaint on three counts. First, the complaint alleged that the Respondent retaliated against firefighter Alexander Gomez for filing grievances, in violation of Sections 10(a)(2) and (1). Second, it alleged that Respondent unilaterally changed employees' terms and conditions of employment in violation of Sections 10(a)(4) and (1) when it modified eligibility criteria for the Acting Captain Program. Third, it alleged that Respondent refused to bargain in good faith in violation of Sections 10(a)(4) and (1) when it repudiated a Variance Agreement that required Respondent to restore preexisting minimum manning levels upon the agreement's expiration.

The Board assigned the case to ALJ Michelle Owen. On November 12, 2012, the Respondent filed its answer to the Complaint, and on November 26, 2012, the Respondent filed a Motion to Defer all counts of the complaint to the parties' grievance arbitration process. On January 22, 2013, the ALJ issued a Recommended Decision and Order (RDO) granting Respondent's motion in part and denying it in part. The ALJ deferred the retaliation claim consistent with the National Labor Relations Board's decision in Dubo Manufacturing Corp., 142 NLRB 431 (1963),³ but declined to defer the alleged Section 10(a)(4) and (1) violations

that it is not an unlawful threat to solicit RFPs for bargaining unit work. She deferred the allegation that the Respondent violated Sections 10(a)(4) and (1) of the Act by unilaterally changing employees' terms and conditions of employment by issuing a series of operational directives. Neither party excepted to these rulings so they are not discussed below.

³ The Board will defer a case under Dubo where (1) the parties have already voluntarily submitted their dispute to their agreed-upon grievance arbitration procedure, (2) that procedure culminates in final and binding arbitration, and (3) there exists a reasonable chance that the arbitration process will resolve the dispute.

under the NLRB's precedent in Collyer Insulated Wire, 192 NLRB 837 (1971),⁴ on the basis that contract interpretation did not lie at the center of the dispute. On February 21, 2013, the Respondent excepted to the ALJ's RDO, pursuant to Section 1200.135(b) of the Board's Rules, asserting that the ALJ erred when she denied the Respondent's motion to defer all allegations. On March 11, 2013, the Charging Party filed a response.

To avoid confusion between the two appeals filed with the same case number, we set forth our decision on both appeals in one document.

1. Board Decision on the ALJ's Recommended Decision and Order

The exceptions to the ALJ's RDO raise two issues. The first is whether the ALJ erred when she denied the Respondent's motion to defer the allegation that Respondent violated Sections 10(a)(4) and (1) of the Act by repudiating the parties' Variance Agreement when it reduced minimum shift manning. The second is whether the ALJ erred when she denied the Respondent's motion to defer the allegation that Respondent violated Sections 10(a)(4) and (1) of the Act by unilaterally changing eligibility requirements for the Acting Captain Program.

The Respondent's exceptions assert that the ALJ erred because she should have deferred the allegations to the parties' grievance arbitration process under Collyer since contract interpretation is at the center of both disputes. We agree with the Respondent only in part. For the reasons set forth below, we reverse the ALJ's denial of Respondent's Motion to Defer the repudiation claim, but we affirm the ALJ's denial of Respondent's Motion to Defer the unilateral change claim.

⁴ Collyer applies where no grievance has yet been filed. Under Collyer, the Board will find deferral appropriate where (1) a question of contract interpretation lies at the center of the dispute, (2) the dispute arises within an established collective bargaining relationship where there is no evidence of enmity by the respondent, and (3) the respondent asserts a willingness to waive any and all procedural barriers to the filing of a grievance.

Deferral is discretionary. City of Bolingbrook, 20 PERI ¶ 139 (IL LRB-SP 2004). The Board's authority to defer unfair labor practice charges stems from Section 11(i) of the Act, which provides that “[i]f an unfair labor practice charge involves the interpretation or application of a collective bargaining agreement and said agreement contains a grievance procedure with binding arbitration as its terminal step, the Board *may* defer the resolution of such dispute to the grievance and arbitration procedure contained in said agreement.” (emphasis added).

In this case, the Union has not yet filed a grievance over the conduct at issue in the complaint. Accordingly, we must undertake a Collyer analysis to determine whether we should defer the instant allegations. Under Collyer, deferral is appropriate where (1) a question of contract interpretation is at the center of the dispute; (2) the dispute arises within an established collective bargaining relationship where there is no evidence of enmity by the Respondent towards the employees' exercise of protected rights; and (3) the Respondent has credibly asserted its willingness to arbitrate the dispute. The Board also considers whether arbitration will proceed expeditiously, and whether arbitration will be able to resolve all of the issues presented by the case. Cnty. of Cook, 6 PERI ¶ 3019 (IL LLRB 1990). Only the first prong of the test is at issue with respect to both allegations.

a. Repudiation Claim

The relevant facts are these. The Charging Party and Respondent were parties to a collective bargaining agreement with effective dates of January 1, 2007 through December 31, 2011. The contract provides that it remains in force after its expiration while the parties bargain for a new contract. It contains a management rights clause which allows the Respondent to set standards of service and to determine the operations conducted by the department. It also allows

the Respondent to change its methods, equipment, or facilities, as long as such action does not conflict with other provisions in the agreement.⁵

On February 10, 2010, the parties signed a Variance Agreement which stated that the Respondent would reduce minimum shift manning from 36 to 34. It further provided that when the Variance Agreement expired on December 31, 2010, the parties would return to the status quo ante which existed prior to their agreement to the variance, as if the agreement had never occurred. The agreement clarified that the status quo ante with respect to minimum shift manning was 36 firefighters per shift. As such, the agreement provided that the Respondent would return its minimum shift manning to 36 upon the agreement's expiration. Finally, the parties agreed that, after the Variance Agreement expired, they would each maintain all the contractual rights they enjoyed prior to entering into the Variance Agreement.⁶ In August 2010,

⁵ With emphasis added, the clause reads:

The City shall retain the sole right and authority to operate and direct the affairs of the City and the Fire Department in all its various aspects, including, but not limited to, all rights and authority exercised by the City prior to the execution of the Agreement, Except as modified in this Agreement. *Among the rights retained are the City's right to make and implement decisions to determine its mission and set standards of service offered to the public; to direct the working forces; to assign overtime, to plan, direct, control and determine the operations or services to be conducted in or at the Fire Department or by employees of the City; to assign and transfer employees within the Fire Department; to hire, promote or demote, or to lay off employees due to lack of work or for other legitimate reasons; to suspend, discipline, or discharge for just cause[,] to make modify and enforce reasonable rules, regulations, policies and orders concerning any aspect of the operations of the department, including rules, regulations, policies and orders that affect the conditions under which employees covered by this Agreement work; to change methods, equipment, or facilities; provided, however, that the exercise of any of the above rights shall not conflict with any of the specific provisions of this Agreement.* Any matters within the jurisdiction of the Elgin Board of Fire and Police Commissioners shall not be affected by the terms of this paragraph nor shall this paragraph be deemed to limit the authority of jurisdiction of the Board in any way.

⁶ The Variance Agreement reads:

The City will be making certain operation changes to enable it to reduce minimum shift manning from thirty-six (36) to thirty-four (34) including the Battalion Chief.

...

The term of this Variance Agreement shall commence as of the date set forth below the signature lines [February 10, 2010] hereof and shall terminate on December 31, 2010,

the parties extended the Variance Agreement for a year so that it would expire on December 31, 2011.

On January 1, 2012, the Respondent increased its minimum shift manning to 36 pursuant to the agreement. On January 29, 2012, the Respondent removed an ambulance from active service and thereby reduced minimum shift manning back to 34.

We find merit to the Respondent's argument that the ALJ should have deferred the repudiation count of the complaint to arbitration because contract interpretation is at the heart of the dispute and, as such, deferral conserves the parties' resources and furthers administrative efficiency.

As a preliminary matter, we note that repudiation cases are unusual because they require an ALJ to initially determine whether a Respondent breached the contract, a function usually performed by an arbitrator. Nevertheless, the mere fact that an ALJ must make such a determination does not render contract interpretation at the heart of every repudiation case. Rather, the determinative factor is whether the contractual provision at issue is open to more than one reasonable interpretation. If the contractual provision at issue is clear and unambiguous, then the ALJ determines whether the breach was so substantial and without rational justification that it demonstrates a repudiation of the contract and a violation of the respondent's duty to bargain in good faith. If the provision is ambiguous, then contract interpretation becomes the

whereupon this Variance Agreement shall terminate and be null and void as if it never occurred and of no further force and effect. The parties agree that at the conclusion of this Variance Agreement on December 31, 2010, the Parties shall have any and all rights they had which existed immediately prior to the entry into this Variance agreement and as if this Variance Agreement never occurred. Without limiting the foregoing, the return to status quo ante upon the expiration of this Variance Agreement with respect to minimum shift manning shall mean minimum shift manning returning to thirty-six (36) including the Battalion Chief and the operations changes to reduce such minimum shift manning determined by the City in paragraph 3 of this Variance Agreement shall cease.

center of the dispute because the ALJ cannot make that threshold determination without interpreting the contract.⁷ See City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d 389, 395 (2d Dist. 2003)(repudiation requires outright refusal to abide by a contractual term or disregard for the collective bargaining process) (citing City of Collinsville, 16 PERI ¶ 155 (IL SLRB 2000), *aff'd* City of Collinsville v. Ill. State Labor Rel. Bd., 329 Ill. App. 3d 409 (5th Dist. 2002)); City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007) (repudiation requires a substantial breach and a contractual argument by the employer that is without rational justification or reasonable interpretation of that contract); See Chicago Transit Auth., 15 PERI ¶ 3018 (IL LLRB 1999).

Here, contract interpretation is at the center of this dispute because an ALJ could not determine whether the Respondent's conduct constituted a breach of the contract without interpreting the Variance Agreement, which is open to more than one reasonable reading. For example, an arbitrator could determine that the Variance Agreement required the Respondent to maintain manning at 36 after the agreement's expiration because it expressly states that "the return to status quo ante upon the expiration of this Variance Agreement with respect to minimum shift manning shall mean minimum shift manning returning to thirty-six (36)." Under that reading, an arbitrator would determine that the Respondent violated the contract, even though it had initially increased manning to 36, because it reduced manning to 34 a month later.

Alternatively, an arbitrator could determine that the Variance Agreement required the Respondent to increase manning to 36 after its expiration, but that it reserved Respondent's right to reduce that number later, under other contractual authority, because it provided that parties maintained the rights they enjoyed "prior to the entry into [the variance], as if [the variance] had

⁷ ALJs dismiss the charge in such cases because there can be no repudiation (i.e. bad faith) if the contract is open to more than one reasonable interpretation. See City of Kewanee, 23 PERI ¶ 110 (IL LRB-SP 2007).

never occurred.” Under that reading, an arbitrator would then interpret the broad management rights clause to ascertain whether it gave the Respondent the right to unilaterally reduce minimum shift manning, ancillary to removing an ambulance from service. Thus, contract interpretation is at the center of this dispute because the Variance Agreement is susceptible to at least two reasonable readings and Respondent’s interpretation is neither incredible nor patently erroneous. Ritz-Carlton Water Tower Partnership, 358 NLRB No. 22 (2012) (Board should defer a case to the parties’ grievance arbitration procedure when the employer’s conduct “is not designed to undermine the union and is not patently erroneous but rather is based on a substantial claim of contractual privilege”; charge alleged repudiation) (citing Jos. Schlitz Brewing Co., 175 NLRB 141, 142 (1969)).

Notably, the Charging Party’s own arguments undermine its assertion that deferral is inappropriate because it relies on contract interpretation, specifically a construction of the management rights clause in light of the Variance Agreement. Here, the Charging Party asserts that the broad management rights clause does not need interpretation because the Variance Agreement contains more specific language which required the Respondent to restore minimum shift manning to 36 upon the agreement’s expiration. Yet that argument merely articulates a basic tenet of contract interpretation and invites the Board to undertake such an analysis; we decline to do so. See Am. Fed. of State Cnty. and Mun. Employ. v. State Labor Rel. Bd., 274 Ill. App. 3d 327, 337 (1st Dist. 1995) (“in construing a contract, courts must give effect to the more specific clause and, in so doing, should qualify or reject the more general clause as the specific clause makes necessary”).

Similarly, the Charging Party defeats its argument that Respondent fabricated the need for interpretation because the Charging Party presents its own interpretation of the contract to

support its contention. Indeed, the Charging Party asserts that the Variance Agreement requires no interpretation while it simultaneously uses a selective quote from the Variance to limit the breadth of the management rights clause and disregards additional language which directs the parties treat their post-Variance contractual rights as if the Variance Agreement had “never occurred.”⁸ Thus, the Charging Party’s own arguments which interpret the contract undermine its assertion that the Variance Agreement requires no interpretation.

Further, we find deferral of this allegation appropriate because it will conserve resources by resolving the entire dispute without a need for a hearing before the Board. To illustrate, if the arbitrator accepted the Charging Party’s interpretation of the contract, the Charging Party would receive its remedy. Alternatively, if the arbitrator accepted the Respondent’s interpretation of the contract, the Board would dismiss the repudiation claim finding no initial breach of contract. Thus, while ALJs have decided repudiation cases where contractual language was ambiguous,⁹ where a party has moved for deferral as in this case, such a determination would waste time and resources since an arbitrator could provide the Charging Party with a remedy and find a breach of contract even if the ALJ found there was no repudiation in light of ambiguous contract language. See PACE Northwestern Division, 10 PERI ¶ 2023 (IL SLRB 1994) (the deferral policy “helps to avoid the costs, in terms of both time and money, of conducting an unfair labor practice hearing which the parties’ own grievance and arbitration process may ultimately render unnecessary”).

Contrary to the Charging Party’s contention, County of Cook is not distinguishable because in this case, as in County of Cook, the contract contains sufficient ambiguity to warrant deferral. In County of Cook, the ambiguity arose from two contractual clauses which gave

⁸ Specifically, the Charging Party asserts that the Variance Agreement limits the management rights clause “by establishing thirty-six firefighters as the status quo.”

⁹ See City of Kewanee, 23 PERI ¶ 110 (IL LRB-SP 2007).

Respondent a credible right to unilaterally create a furlough/shut-down day program. Cnty. of Cook, 28 PERI ¶ 66 (IL LRB-LP 2011). Here, the ambiguity arises from the Variance Agreement itself which does not clearly require the Respondent to maintain manning at 36 indefinitely and instead carefully preserves the Respondent’s right to credibly argue that it could reduce manning, incidental to exercising its broad management rights, by stating that the parties must treat the expired Variance Agreement as if it had “never occurred.”

Likewise, the similarities between the management rights clause in County of Rock Island and the management rights clause in this case are immaterial to the outcome of the motion to defer because the Board in County of Rock Island did not reverse the Executive Director’s deferral based on contract language and instead reversed because arbitration would have failed to resolve the entire dispute—a problem not presented here. Cnty. of Rock Island, 25 PERI ¶ 3 (ILRB SP 2009). Specifically, in County of Rock Island, the Board denied deferral because arbitration would not resolve the remaining statutory allegation that the Employer failed to bargain over the effects of the alleged unilateral changes in staffing levels. Id. In this case, by contrast and as noted above, an arbitrator could resolve the entire dispute because the only issue concerns repudiation. Id.

Accordingly, we find that this allegation should be deferred to the parties’ grievance arbitration process.

b. Unilateral Change Claim

We find that the ALJ properly declined to defer the count concerning Respondent’s alleged unilateral changes to the Acting Captain Program’s eligibility requirements because contract interpretation is not at the heart of this dispute. Rather, this dispute concerns primarily

statutory issues and Respondent's waiver defense does not alter this finding. Notably, deferral in this instance would not conserve resources because it would not obviate the need for a hearing.

First, statutory issues are at the heart of this dispute, not contractual ones. Here, the ALJ need not even look at the contract until she initially determines whether the Respondent unilaterally changed employees' terms and conditions of employment when it allegedly altered the Acting Captain Program's eligibility requirements and whether the decision to make such changes constitutes a mandatory subject of bargaining under the Act.

Second, Respondent's waiver defense does not transform this otherwise statutory claim into a primarily contractual one which requires an arbitrator's consideration because ALJs have the expertise and authority to interpret the contract to resolve issues of waiver. NLRB v. C & C Plywood Corp., 385 U.S. 421, 428 (1967) (finding that the NLRB has the authority to construe a labor agreement to determine whether the charging party contractually waived the right to object to the respondent's conduct). Indeed, respondents routinely raise the contractual waiver defense in cases before the Board, and ALJs routinely interpret the contract to determine the validity of those arguments. Accordingly, it is unnecessary to involve an arbitrator where ALJs and the Board have sufficient expertise to determine whether a charging party waived its right to bargain over a respondent's alleged unilateral change.

Third, contract interpretation is not at the center of this dispute because an arbitrator's interpretation of the management rights clause would not necessarily obviate the need for a hearing. To illustrate, if the arbitrator determined that the Respondent's conduct violated the contract, the Charging Party might still decide to proceed with the charge to obtain additional relief which the arbitrator could not, or did not, provide. See Cnty. of Lake, 28 PERI ¶ 67 (ILLRB-SP 2011) (charging party sought a hearing on a complaint which alleged that the

respondent violated the Act by transferring bargaining unit work out of the unit when it reorganized its operations, even though an arbitrator had already determined that reorganization violated the contract and had ordered some measure of relief); See Cnty. of Rock Island, 25 PERI ¶ 3 (ILRB SP 2009) (noting that the arbitrator would not be able to determine issues concerning respondent's effects bargaining obligations, even if the arbitrator determined that the contract did not prohibit the underlying change); Cf. Cnty. of Cook, 28 PERI ¶ 66 (IL LRB-LP 2011) (Board deferred under Collyer, holding that the contract presented a "very real question" of whether the charging party waived the right to bargain over the change).

Alternatively, if the arbitrator found that Respondent's conduct did not violate the contract, the Charging Party would proceed before the Board for a determination as to whether the Respondent's conduct violated the Act. Notably, the arbitrator's findings would not mandate the conclusion that the Charging Party clearly and unmistakably waived the right to bargain the alleged change. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, 13-27 (7th ed. 2012) ("where an arbitrator finds that management is not contractually bound as to matter, either by the parties' written collective agreement or by virtue of any binding past practice, management is restricted from acting on the matter only if there is a statutory duty to bargain it."). Thus, contract interpretation is not at the heart of this dispute because the Charging Party would come before the Board for relief if it lost before the arbitrator and the arbitrator's determination would not bind the Board. Cnty. of Rock Island, 25 PERI ¶ 3 (ILRB SP 2009); Cf. Cnty. of Cook, 28 PERI ¶ 66 (IL LRB-LP 2011) (finding deferral appropriate where the Respondent presented a "credible claim" that it had a right to take the unilateral action at issue in the complaint based on two related, and specifically-worded, contractual clauses).

Contrary to the Respondent's contention, the Board would not create inconsistent results by affirming the ALJ's decision, even though the Executive Director deferred a similar alleged violation of Section 10(a)(4), because the Executive Director's analysis was sparse and vague such that it permits a different conclusion here. Indeed, the Executive Director's reasoning consists of a single sentence which notes that "[t]he agreement contains language that addresses the issue referenced in the charge." Yet, such non-specific reasoning permits the assumption that the Executive Director deferred based on contract language other than the management rights clause, particularly because her facts noted that certain individual operational directives at issue arguably conflicted with existing contract language. Here, by contrast, the parties' agreement is silent as to the Acting Captain Program and the only provision which would have allowed the Respondent's unilateral action is the management rights clause.¹⁰ Thus, deferral here would not create inconsistent results.

Further contrary to Respondent's contention, this case is unlike PACE Northwest Division, in which the Board deferred a Section 10(a)(2) charge under Dubo, because deferral is not necessary to "avoid a conflict in the credibility and factual determinations of the arbitrator with those of the Board" since there is no pending grievance. PACE Northwest Division, 10 PERI ¶ 2023 (IL SLRB 1994).

For these reasons, we affirm the ALJ's denial of Respondent's Motion to Defer the allegation that Respondent made unilateral changes to the Acting Captain Program's eligibility requirements.

¹⁰ Contrary to the Respondent's contention, the fact the Executive Director deferred that allegation even though the contract did not address many of the operational directives at issue does not similarly warrant deferral here because the contract specifically addresses some of them, whereas the contract is entirely silent with respect to the Acting Captain Program.

2. Board Decision on Executive Director's Dismissal

The Executive Director's dismissal will stand as a non-precedential, but binding ruling because the Board could not reach a majority decision on whether to affirm or vacate it. Chairman Hartnett and Member Besson would have affirmed the Executive Director's dismissal on the basis that the underlying allegations were moot. Members Brennwald and Washington would have reversed the Executive Director's dismissal on the basis that the allegations presented issues of fact or law for hearing. Member Coli was unable to attend the Board's meeting. In the absence of a majority vote on the appeal of the dismissal, we do not address the substance of the appeal and leave the dismissal to stand as a non-precedential decision, binding only on the parties.

In summary: (1) we reverse the ALJ and defer to the parties' grievance arbitration process the allegation that the Respondent violated the parties' Variance Agreement concerning minimum shift manning; (2) we affirm the ALJ's decision not to defer the allegation that Respondent made unilateral changes to the Acting Captain Program's eligibility requirements; and (3) we do not reach a decision concerning the Executive Director's dismissal of the allegation that Respondent violated Sections 10(a)(4) and (1) of the Act by insisting to impasse on its proposal to maintain existing language in an "entire agreement" clause, making the Executive Director's action the final and binding agency determination on this issue, albeit one that is non-precedential.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

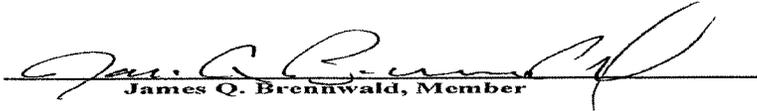
BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



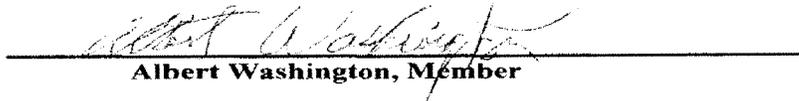
John Hartnett, Chairman



Paul S. Besson, Member



James Q. Brennwald, Member



Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on April 16, 2013, written decision issued in Chicago, Illinois on May 20, 2013.

10/29/12

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

International Association of Firefighters,)	
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)	
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)	
and)	Case No. S-CA-12-125
)	
City of Elgin,)	
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Respondent)	

EXECUTIVE DIRECTOR'S DEFERRAL TO ARBITRATION

On March 1, 2012, and as amended on April 4, 2012, the International Association of Firefighters, Local 439 (Charging Party or Union) filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), in Case No. S-CA-12-125, alleging that the City of Elgin (Respondent or Employer), engaged in unfair labor practices in violation of Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), *as amended*. After an investigation conducted in accordance with Section 11 of the Act, I determined that a portion of the charge should be deferred until the parties have exhausted the contractual grievance process.

I. INVESTIGATORY FACTS

The Charging Party represents a historical bargaining unit composed of the Respondent's Fire Department employees. The most recent collective bargaining agreement (Agreement) for the unit has a term of January 1, 2007, through December 31, 2010. The Agreement contains a grievance procedure including arbitration of disputes concerning the application or interpretation of its terms. Article 3 of the Agreement grants the City's right to "make, modify and enforce reasonable rules...." Likewise, Article 26 provides that the Union shall receive 5 days notice of changes to personnel rules or procedures.

The relevant portion of the instant charge involves the issuance of a series of operational directives by the Fire Chief on February 8, 2012. The directives are documents of considerable length and detail, and encompass a large number of topics. The Union alleges that the Chief originally

transmitted the directives on January 27, 2012, which led to a Union grievance alleging that the directives conflict with existing contract language. As such, the Union grievance on this issue, filed on February 2, 2012, predates the formal issuance of the directives.

The Respondent does not dispute the Union's assertions concerning the issuance of the directives, though it takes issue with the characterization of the degree of changes involved. The Employer also claims a longstanding history of prior rules changes implemented without objection by the Union. Finally, it notes that the Chief's February memorandum implementing the directives included text that provided where the directives conflict with the contract, the contract shall prevail.

II. POSITIONS OF THE PARTIES

The Union claims that the Respondent's directives conflict with a number of provisions of the Agreement, and as such, they involve unlawful unilateral changes to the Agreement's terms. The Respondent asserts that modifications of existing policies are within its discretion as provided in the Agreement. In the alternative, it asserts that it is willing to arbitrate the grievance referenced above, and requests that the Board defer further processing of the charge.

III. DISCUSSION AND ANALYSIS

In City of Mt. Vernon, 4 PERI ¶2006 (IL SLRB 1988), the then-State Board adopted a policy of deferring charges involving the application or interpretation of collective bargaining agreements. In that case, the Board listed the primary deferral doctrines employed by the National Labor Relations Board (NLRB). Each of these policies is known by the lead case in the area, namely, Spielberg Manufacturing Co., 112 NLRB 1080 (1955); Dubo Manufacturing Corp., 142 NLRB 431 (1963); and Collyer Insulated Wire, 192 NLRB 837 (1971). Spielberg concerns deferral to an existing arbitration award. Dubo applies in cases where the union has voluntarily initiated a grievance. Collyer concerns cases where the union has not initiated a contract grievance. The Local Panel has also adopted these deferral doctrines. See, e.g., City of Chicago, 10 PERI ¶3001 (IL LLRB 1993).

This charge is comparable to a Dubo deferral situation. The Union has initiated a grievance on the change in directives in question, and the parties have processed the grievance through the Agreement's procedure. The Agreement contains language that addresses the issue referenced in the charge. Under these circumstances, I find that it is appropriate to defer this charge to the Agreement's grievance procedure.

IV. ORDER

Accordingly, further processing of the charge will be deferred until the parties have completed the process in the above-referenced grievance. Within 15 days after the termination of the contractual procedure, the Charging Party may request that the Board reopen the case for the purpose of resolving any substantial issues left unresolved by the grievance procedure or proceed with the charge on the basis that the award is contrary to the policies underlying the Act. The Board will review any request to reopen the charge in conformance with the NLRB's Spielberg doctrine. If the Charging Party fails to make such a request within the time specified, the Board may dismiss this charge upon request of the Respondent or on its own motion.

This order may be appealed to the Board any time within 10 days of service hereof. The appeal must be made in writing, contain the case caption and number, and must be addressed to the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago Illinois, 60601-3103. The appeal must contain detailed reasons in support thereof, and be served upon all other parties at the same time that it is served upon the Board. A statement asserting that all other parties have been served must accompany an appeal, or the Board will not consider it. If the Board does not receive an appeal within the specified time, this order shall become final and binding upon the parties to this matter.

Issued in Chicago, Illinois, this 29th day of October, 2012.

**ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**



Melissa Mlynski, Executive Director

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

International Association of Firefighters,)	
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and)	Case No. S-CA-12-125
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**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER
DEFERRING IN PART TO ARBITRATION**

On March 1, 2012, and as amended on April 4, 2012, International Association of Firefighters, Local 439 (Charging Party), filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), alleging that the City of Elgin (Respondent) violated Sections 10(a)(4), (2), and (1) of the Act. On October 29, 2012, the Board issued a three-count complaint for hearing in the above-captioned matter. On November 12, 2012, the Respondent filed its answer to the complaint, and on November 26, 2012, the Respondent filed a motion to defer to arbitration. On December 17, 2012, the Charging Party filed its response in opposition to the Respondent’s motion to defer.

For the reasons that follow, I recommend that the Board defer Count II of the complaint to arbitration, and decline to defer Counts I and III of the complaint to arbitration.

I. INVESTIGATORY FACTS

The Charging Party is the exclusive representative of a historical bargaining unit (Unit) composed of the Respondent's fire department employees, currently composed of employees in the ranks of firefighter, lieutenant, and captain. At all times material, the Charging Party and the

Respondent (parties) have been parties to a collective bargaining agreement (CBA) setting out terms and conditions of employment for the Unit. The CBA contains a grievance-arbitration process culminating in final and binding arbitration.

A. Count I

On February 10, 2010, the parties became signatories to a variance agreement which modified the parties' CBA. The variance agreement noted that the "Parties agree that in accordance with Elgin Fire Department Policy No. 1031.01, minimum shift manning is currently thirty-six (36) including the Battalion Chief." The variance agreement also included a provision that allowed the Respondent to reduce "minimum shift manning from thirty-six (36) to thirty-four (34) including the Battalion Chief." The variance agreement further stated that after the expiration of the variance agreement:

[T]he Parties shall return to the status quo ante which existed immediately prior to the entry into this Variance Agreement it being agreed and understood that the parties shall have any and all rights they had which existed immediately prior to the entry into this Variance Agreement notwithstanding any of the provisions of this Variance Agreement and as if this Variance Agreement never occurred. Without limiting the foregoing, the return to status quo ante upon the expiration of this Variance Agreement with respect to minimum shift manning shall mean minimum shift manning returning to thirty-six including the Battalion Chief.

On or about December 31, 2011, the variance agreement expired. The Charging Party alleges that since then, the Respondent has failed and refused to restore the minimum manning level to thirty-six employees. In so doing, the Charging Party alleges that the Respondent repudiated the terms of the variance agreement, in violation of Sections 10(a)(4) and (1).

The Respondent maintains that Count I concerns the Respondent's decision to eliminate a single ambulance from one of its fire stations, which in turn resulted in a reduction of daily staffing levels by two employees. The Respondent contends that this allegation was erroneously designated "minimum manning," when in fact it deals with "standards of service." The

Respondent contends that it is contractually entitled under Article 3 (Management Rights) of the CBA to eliminate the ambulance, and by extension, reduce daily staffing levels by two. The management rights clause recognizes the Respondent's right to: "set standards of service offered to the public; . . . to plan, direct, control and determine the operations or services to be conducted in or at the Fire Department or by employees of the City; . . . to change methods, equipment, or facilities." In addition, the Respondent maintains that the parties' CBA does not contain a "minimum manning" provision. Next, the Respondent maintains that to the extent the Charging Party claims that the variance agreement also must be interpreted, which the Respondent does not concede, the meaning of the language of the variance agreement also becomes relevant. The Respondent maintains that based on the language addressing the parties' rights after the expiration of the variance agreement (both parties "shall have any and all rights they had which existed immediately prior to the entry into this Variance Agreement and as if this Variance Agreement never occurred"), the management rights clause must then become the focus of Count I.

B. Count II

At all times material, the Respondent has employed Alexander Gomez in the title of firefighter, and included him in the Unit. At all times material, the Respondent has also employed Fire Chief John Fahy, an agent of the Respondent. In or about November 2011, the Respondent began to investigate allegations of sick leave abuse by Gomez. In or about November 2011, the Respondent removed Gomez from the overtime assignment list, the "Acting Officer Program" assignment list, and a stipend mechanic assignment until further notice (Disciplinary Sanctions). The Charging Party alleges that on or about November 10, 2011, Fahy met with Gomez and served him with formal notice of disciplinary charges related to the alleged

misuse of sick time. The Charging Party alleges that at the meeting, Fahy told Gomez he would reduce or rescind the Disciplinary Sanctions if Gomez elected not to file a grievance. Gomez declined to agree to any waiver of a grievance concerning his discipline. The Respondent denies that this meeting was held and the statement made. The Charging Party alleges that on or about December 14, 2011, the Respondent formally imposed Disciplinary Sanctions on Gomez. The Respondent denies this occurred. The next day, the Charging Party, as requested by Gomez, filed a grievance on behalf of Gomez regarding the Disciplinary Sanctions.

On or about January 27, 2012, the Respondent met with Gomez and issued him a 20-day suspension. The Respondent admits that this meeting occurred. The Charging Party alleges, and the Respondent denies, that at this meeting Fahy told Gomez that he would rescind the Disciplinary Sanctions if Gomez elected not to grieve the suspension. Gomez declined to agree to any waiver of a grievance. On or about February 2, 2012, the Charging Party filed a grievance, as requested by Gomez, concerning the suspension.

The complaint for hearing alleges that from on or about December 14, 2011, and continuing thereafter, the Respondent has failed and refused to rescind the Disciplinary Sanctions in order to retaliate against Gomez for filing the two grievances. In addition, the complaint alleges that the Respondent has violated Section 10(a)(1) by stating to Gomez that the Disciplinary Sanctions would be rescinded if he elected not to file grievances. Finally, the complaint alleges that the Respondent imposed the Disciplinary Sanctions, issued the suspension, and failed and refused to rescind the Disciplinary Sanctions in order to discriminate against Gomez and discourage membership in or support for the Charging Party in violation of Sections 10(a)(2) and (1).

The Respondent maintains that it had legitimate reasons for taking the actions alleged in Count II, and would have taken the actions regardless of any alleged protected, concerted activity. The parties have consolidated the two grievances filed on behalf of Gomez and an arbitration hearing has been scheduled for January 28, 2013.

C. Count III

On or about February 8, 2012, the Respondent issued to all lieutenants a memorandum, which implemented changes to its promotional process referred to as the Acting Captain Program, including but not limited to changes to Unit employees' eligibility to serve as an Acting Captain. The Charging Party alleges that the Respondent took this action unilaterally, without providing the Charging Party notice or the opportunity to bargain in violation of Sections 10(a)(4) and (1). The Respondent maintains that an interpretation of Article 3 (Management Rights) and Article 26 (General Conduct) is critical for determining whether Count II of the complaint has any merit. The former stating that the Respondent maintains the right to "make, modify and enforce reasonable rules, regulations, policies and orders that affect the conditions under which employees covered by this Agreement work." The latter stating:

Prior to [the] effective date of any written changes made in the written personnel rules and regulations of the City of Elgin or the written rules and regulations excluding standard operating procedures and codes of the Elgin Fire Department, the Association will receive a five (5) day notice.

The Respondent alleges that because the requirements of Article 26 were satisfied, the Respondent had no bargaining obligation over the decision to modify the existing Acting Captain Program. The Respondent also maintains that it had a past practice of periodically modifying rules and regulations without challenge from the Charging Party.

II. ISSUE AND CONTENTION

The issue is whether to grant the Respondent's motion to defer the processing of the complaint to the parties' contractual grievance and arbitration procedures. The Respondent contends that the complaint should be deferred to arbitration. In regard to Count I, the Respondent maintains deferral is appropriate because the interpretation of the management rights clause and the variance agreement are at the center of the dispute. In regard to Count II, the Respondent asserts that deferral to the grievance procedure is appropriate because the parties have voluntarily submitted the dispute to the grievance-arbitration process, which culminates in a final and binding arbitration award, and there exists a reasonable chance that arbitration will resolve the dispute. In regard to Count III, the Respondent contends deferral is appropriate because the interpretation of the management rights clause, the general conduct clause, and the parties' past practice is at the center of the dispute.

The Charging Party contends that deferral to arbitration is not appropriate. In regard to Counts I and III, the Charging Party asserts that the allegations are statutory and do not require the Board to interpret or apply the terms of the parties' CBA; there is evidence of employer animosity toward the Charging Party and the Unit; and the matter is not well suited to, and cannot be efficiently resolved by arbitration. In regard to Count II, the Charging Party maintains that arbitration of Gomez's grievances will not sufficiently remedy the alleged violations of Sections 10(a)(2) and (1), and the mere fact that the Board has deferred matters involving retaliation and discrimination in the past does not warrant deferral of the instant matter.¹

¹ The Charging Party had also argued that deferral of Count II is not appropriate because of the Respondent's enmity toward the Charging Party. However, evidence of enmity by an employer is not a factor in determining whether to defer to arbitration an unfair labor practice charge that involves a pending arbitration.

IV. DISCUSSION AND ANALYSIS

Pursuant to Section 11(i) of the Act, if an unfair labor practice charge involves the interpretation or application of a collective bargaining agreement and the agreement contains a grievance procedure with binding arbitration as its last step, the Board may defer the resolution of the dispute to the grievance and arbitration procedure contained in the agreement. The Board has adopted a discretionary policy limiting the circumstances under which the Board will determine the merits of an unfair labor practice charge which also may be a contract violation. State of Illinois, Department of Central Management Services (Department of Human Services), 19 PERI ¶114 (IL LRB-SP 2003). The Board had adopted three different standards for determining whether a case should be deferred: (1) “Collyer deferral,” which concerns pre-arbitration deferral; (2) “Dubo deferral” which concerns deferral to a pending arbitration; and (3) “Spielberg deferral,” which concerns post-arbitration deferral. Id.; City of Mt. Vernon, 4 PERI ¶2006 (IL SLRB 1988); Collyer Insulated Wire, 192 NLRB 837 (1971); Dubo Manufacturing Corporation, 142 NLRB 431 (1963); Spielberg Manufacturing Company, 112 NLRB 1080 (1955).

The Act’s policy of deferral recognizes the fact that the collective bargaining relationship between parties is best nurtured by encouraging them to resolve their disputes, whenever possible, through their voluntary and agreed upon grievance and arbitration procedure. Pace Northwest Division, 10 PERI ¶2023 (IL SLRB 1994). The policy of deferral also helps to avoid costs, in terms of both time and money, of conducting an unfair labor practice hearing which the parties’ own grievance and arbitration process may ultimately render unnecessary. North Shore Sanitary District, 9 PERI ¶2014 (IL SLRB 1993).

A. Collyer Deferral: Count I and III

The Collyer standard applies to Counts I and III of the complaint. Under Collyer, deferral to grievance arbitration is appropriate, even where no grievance has been filed, when the following three conditions are present: (1) a question of contract interpretation lies at the center of the dispute; (2) the dispute arises within an established collective bargaining relationship where there is no evidence of enmity by the respondent; and (3) the respondent asserts a willingness to waive any and all procedural barriers to the filing of a grievance. Collyer, 192 NLRB 837; State of Illinois (Department of Central Management Services), 9 PERI ¶2032 (IL SLRB 1993).

Deferral to the grievance arbitration process is not appropriate for Counts I and III. Although the Respondent has expressed its willingness to arbitrate the disputes and waive any time limits with respect to filing grievances on the issues, a question of contract interpretation is not at the center of the disputes. Thus, the required factors for deferral have not been satisfied as to Counts I and III.

In regard to Count I, the Respondent contends that the issue is contractual in nature, and the issue is whether the CBA's management rights clause gave the Respondent the right to eliminate an ambulance, and in turn reduce staffing level. I find however that deferral is inappropriate because the issue at hand is one of statutory application: whether the Respondent's change in minimum manning repudiates the variance agreement and constitutes a failure to bargain over a mandatory subject of bargaining in violation of Sections 10(a)(4) and (1). The Charging Party correctly notes that the broad language in the management rights clause does not rise to the level of express language required to properly defer the matter to arbitration. The Charging Party cites to County of Rock Island, 25 PERI ¶3 (IL SLRB 2009), where the Board

declined to defer to arbitration, rejecting the employer's argument that staffing was purely a management right under the parties' collective bargaining agreement. The management rights clause at issue in County of Rock Island stated, "[the agreement] among other things, provides the Sheriff with authority to, allocate and assign the workforce, and establish work schedules and assignments." Here, the language at issue is equally broad. The management rights clause gives the Respondent the right to "set standards of service offered to the public; . . . to plan, direct, control and determine the operations or services to be conducted in or at the Fire Department or by employees of the City; . . . to change methods, equipment, or facilities." Contractual language will serve as a waiver of a party's bargaining rights only where is a "clear and unequivocal intent by a party to relinquish its right to bargain over the subject matter at issue." City of Westchester, 16 PERI ¶2034 (IL SLRB 2000). Here, the Respondent has not met its burden of establishing that the Charging Party's waiver of the right to bargain over minimum manning was clear, unequivocal and unmistakable. While the management rights clause grants the Respondent the right to "change methods, equipment, or facilities", it does not allude to the Respondent's right to make changes in the number of personnel by which operations are conducted. See Village of Skokie, 29 PERI ¶55 (IL LRB-SP ALJ 2012).

In addition, there is no need for an arbitrator to interpret the parties' obligations under the variance agreement because the agreement explicitly states that "the return to status quo ante upon the expiration of this Variance Agreement with respect to minimum shift manning shall mean minimum shift manning returning to thirty-six." Thus, an issue of contract interpretation is not at the center of the dispute.

The Respondent also argues that an arbitrator will be in the best position to weigh evidence of past practices and "any other relevant provisions of the parties' collective bargaining

agreement that are brought to the arbitrator's attention." However, the Respondent offers no evidence of relevant past practices, nor does it cite to any other provision of the parties' CBA besides the management rights clause.

Moreover, deferral to arbitration is not appropriate because there is no contractual provision which discusses minimum manning. The contract is silent on the issue of minimum manning and thus, there is no contract provision "upon which the instant case turns." See Cook County Recorder of Deeds, 22 PERI ¶99 (IL SLRB G.C. 2006) (General Counsel declined to defer to arbitration because there was no contractual provision to apply and interpret, and thus no provision "upon which the instant case turns.") Thus, deferral to arbitration of Count I is not appropriate.

In regard to Count III, the Charging Party is alleging that the Respondent implemented changes to its Acting Captain Program in violation of Sections 10(a)(4) and (1). The Respondent contends that it was entitled to make changes to the Acting Captain Program due to the management rights clause and the parties' past practice. It also asserts that it had no duty to bargain with the Charging Party because it complied with the general conduct provision of the CBA by giving five-days' written notice to the Charging Party prior to effecting changes in the program. Here, the issue in Count I does not center on contract interpretation. Again, the management rights clause at issue does not rise to the level of express language required to properly defer the matter to arbitration. See County of Rock Island, 25 PERI ¶3.

Moreover, the general conduct clause does not require interpretation by an arbitrator. Rather, that provision merely states that the Charging Party must receive notice prior to any changes in the Respondent's personnel rules and regulations.

The Respondent also argues that deferral to arbitration is appropriate due to the Respondent's past practice of modifying rules and regulations without challenge from the Charging Party. However, the Respondent provides no specific examples or support for this assertion. In addition, as the Charging Party notes, a union's past acquiescence in an employer's previous unilateral change does not, without more, constitute a waiver of its right to bargain over such changes for all time. Pembroke, 8 PERI ¶1055 (IL ELRB 1992); Owens-Corning Fiberglass, 282 NLRB 609 (1987).

Finally, the Respondent is unable to point to any provision in the contract which discusses the Acting Captain Program, or any provision which gives the Respondent the right to make changes to the Acting Captain Program. Thus, there are no contractual provisions "upon which the instant case turns." See Cook County Recorder of Deeds, 22 PERI ¶99. Thus, deferral to arbitration of Count III is not appropriate.

B. Dubo Deferral: Count II

Dubo deferral applies to Count II. Under Dubo, the Board will defer to arbitration if (1) the parties have already voluntarily submitted their dispute to the grievance arbitration process; (2) the process culminates in final and binding arbitration; and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. PACE Northwest Division, 10 PERI ¶2023; Dubo, 142 NLRB 431.

Deferral to the grievance and arbitration procedure is appropriate for Count II. The issues relevant to Gomez's discipline involve the application of the parties' collective bargaining agreement, specifically the provisions relating to sick leave and discipline for just cause. It is undisputed that Gomez has already filed two grievances challenging his suspension and his removal from the overtime list, the Acting Officer program assignment list, and a stipend

mechanic assignment. Gomez's discipline has been voluntarily submitted to arbitration, pursuant to the parties' agreed upon grievance and arbitration procedure, and the result of that arbitration is final and binding. The parties have consolidated the two grievances and an arbitration hearing has been scheduled for January 28, 2013. In determining whether Gomez's discipline was for just cause under the terms of the parties' collective bargaining agreement, there is a reasonable chance that the arbitration process will resolve the dispute of credibility and of facts relating to the reasons for Gomez's discipline, which may have a bearing on the resolution of the unfair labor practice charge and whether the Respondent's discipline of Gomez violated the Act, making further proceedings on the unfair labor practice charge unnecessary. See Pace Northwest Division, 10 PERI ¶2023; City of Peoria, 14 PERI ¶2024 (IL SLRB 1998). In order to avoid a conflict in the credibility and factual determinations of the arbitrator with those of the Board in an unfair labor practice hearing, deferral of Count II is warranted. See Pace Northwest Division, 10 PERI ¶2023.

V. CONCLUSIONS OF LAW

The Respondent's motion to defer to arbitration is denied for Counts I and III of the complaint. The Respondent's motion to defer to arbitration is granted for Count II of the complaint.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Respondent's motion to defer to arbitration is denied for Counts I and III of the complaint, and granted for Count II of the complaint. The processing of Count II of the complaint for hearing in Case No. S-CA-12-125 will be held in abeyance until the parties have fully completed the parties' pending grievance and arbitration processes. Within 30 days after the ultimate termination of the parties' contractual grievance and arbitration

procedures, a party may notify the Board of this termination and request that the Board review the award to determine whether to defer to the arbitrator's disposition. A party's request should contain a copy of the relevant award along with a detailed statement of the facts and circumstances bearing on whether the arbitral proceedings were fair and regular and whether the award is consistent with the purposes and policies of the complaint for hearing, upon request of another party or on the Board's own motion. It is also ordered that the parties to this case inform the Board of any significant delay in the arbitration process or of any resolution of the grievances prior to issuance of an arbitrator's award.

In reviewing an arbitrator's award, the Board will apply the standards consistent with those enunciated in Spielberg Manufacturing Company, 112 NLRB 1080, and related cases; e.g., that the arbitration proceeding was fair and regular, that the parties acknowledge they are bound, and that the result is not fundamentally at odds with or repugnant to the Act. The Board will determine whether the arbitrator's factual findings and contractual interpretations allow the Board to resolve any remaining statutory issues. If the arbitrator's factual findings and interpretations of the contract allow the Board to resolve the remaining statutory issues, the Board will defer to the award, but resolve the statutory issues de novo. If not, the Board will issue a notice of hearing so that a record may be established that will enable the resolution of the remaining statutory issues.

VII. EXCEPTIONS

Pursuant 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 at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. 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 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 on this 22nd day of January, 2013.

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

**Michelle N. Owen
Administrative Law Judge**