

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

7/11/11

City of Madison,)	
)	
Employer)	
)	
and)	Case No. S-DR-10-008
)	
Policemen's Benevolent Labor)	
Committee, PBPA Unit #110,)	
)	
Labor Organization)	

**ORDER IN DECLARATORY RULING PETITION DEFERRING
RESOLUTION OF FACTUAL DISPUTE TO INTEREST ARBITRATION**

On February 10, 2010, Employer, the City of Madison, unilaterally filed with the General Counsel of the Illinois Labor Relations Board pursuant to Section 1200.143 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1240, a Petition for Declaratory Ruling requesting a determination as to whether a "minimum manning" provision concerned a mandatory subject of bargaining within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), and, if it instead concerned merely a permissive subject of bargaining, whether the Employer could lawfully refuse to bargain over its continued inclusion in the parties' collective bargaining agreement. The Employer filed a timely brief. The Labor Organization, Policemen's Benevolent Labor Committee, PBPA Unit #110, did not, but instead submitted a letter, requesting that the Petition be dismissed. For the reasons that follow, I defer this matter to the interest arbitration panel for resolution of a factual issue.

I. Background

The Labor Organization represents a unit of officers of the Employer's police department below the rank of chief and assistant chief. Over the years, the parties have entered a series of collective bargaining agreements, and they are currently in the process of negotiating a successor agreement. The current contract includes an "Appendix F," which provides the following:

The minimum manning per shift shall be two full-time sworn patrol officers and the minimum bargaining unit staff shall be:

- 1 LIEUTENANT
- 4 SERGEANTS
- 5 PATROLMEN
(INCLUDES PROBATIONARY PATROLMEN)

With regard to minimum bargaining staff levels, the Employer shall make the necessary promotions to comply with these levels as soon as reasonably practicable following the ratification of this Agreement, THEREAFTER, any surplus over the minimum amount for a given rank shall operate to credit the Employer for staff positions in the rank immediately below.

Full time sworn patrol officers" [sic] are defined as bargaining unit members who are assigned to the patrol division. When patrol division personnel are not available due to unforeseen circumstance, other department personnel can be used.

Nothing in this Agreement shall prevent the Employer from laying off employees in the event the City experiences a fiscal emergency. It is the intent of the City not to effect layoffs of police unless and until all other viable options are effected first.

A fiscal emergency is when the City's revenues coming in and anticipated to come in as based on past experience is less than the bills on hand. The Union may conduct an independent audit to verify the City's fiscal emergency, the Union may grieve the disputed fiscal emergency under Article IV of the contract.

During the current negotiations, the Labor Organization proposed amending Appendix F to require a sergeant on each shift. The introductory sentence would then read (with the proposed addition in bold text):

The minimum manning per shift shall be two full-time sworn patrol officers **and one sergeant** and the minimum bargaining unit staff shall be:

* * *

In a letter dated February 4, 2010, the Employer advised the Labor Organization that it viewed the contract's specifications of "minimum manning" and "minimum bargaining staff" as involving permissive topics of bargaining pursuant to Section 14(i) of the Act, and that it could lawfully repudiate and refuse to bargain over either the proposed addition to Appendix F, or the continued inclusion of Appendix F in its present form. Enclosed with this letter was a copy of the Petition subsequently filed on February 10, 2010, and in the letter, Employer asked the Labor Organization to join in its filing. The letter indicated that a failure to respond would be interpreted by the Employer as a refusal to join in filing the Petition, and when the Employer filed the Petition, it asserted that, since it had not received any word from the Labor Organization, it was submitting the Petition unilaterally.¹

¹ Section 1200.143(b) allows for the filing of unilateral petitions for declaratory judgments, but only for protective service employee bargaining units like that present here, and only where the filing party "has requested the other party to join it in filing a declaratory ruling petition and the other party has refused the request." 80 Ill. Admin. Code §1200.143(b). The Employer did not strictly comply with this requirement. It assumed that the Labor Organization refused to join, and, while the assumption ultimately may have been correct, it was based on false premises. Its February 4 letter to the Labor Organization stated: "if I do not hear from you by 5:00 p.m. on Monday, February 15th ... I will understand your silence to be a refusal to join in the Petition, and will file the Petition unilaterally with the ILRB pursuant to the ILRB's Rules, Sec. 1200.143(b)(1)." It filed the Petition five days before that deadline. The Employer subsequently submitted a letter to the Board indicating that it had intended to impose a February 8 deadline on the Labor Organization. It stated it "would have no objection to the Board's holding the Petition in abeyance until that date, to allow [the Labor Organization] additional time to decide whether [it] will join in the Petition or decline to do so." Obviously that is not the process intended in Section 1200.143(b), but the Labor Organization has not requested dismissal of the Petition on that basis. My decision to consider the Petition should not be construed as establishing a general policy of such leniency.

The Labor Organization submitted a letter, requesting that the Petition be dismissed because the name of the Labor Organization was originally incorrect,² and also because the bargaining unit was an historical bargaining unit recognized by the Employer prior to the effective date of Illinois Public Labor Relations Act and the parties had, prior to the Act's effective date, bargained over, and reached agreement concerning, the subject addressed in Appendix F.

The Employer filed a brief as well as a response to the Labor Organization's request for dismissal. It asserts that a review of the City's archives has caused its good-faith belief that the parties' first written contract was effective May 1, 1986. It acknowledged that this contract contained the minimum manning provisions of Appendix F, but notes that this agreement's effective date was *after* the Act's effective date.

II. Issues

The Petition and related filings raise four questions:

- 1) Does Section 14(i) of the Act make minimum manning provisions like Appendix F and the proposed amendment to Appendix F non-mandatory subjects of bargaining?
- 2) Regardless of the general answer to that question, does the parties' prior bargaining and agreement over those topics before the Act became effective make them mandatory?
- 3) Did these parties, in fact, bargain over those topics prior to the Act's effective date? and
- 4) Is it appropriate to issue a declaratory ruling where there is a factual dispute as to whether they had?

² The Petition originally erroneously named the "Madison Police Command Officers Association Policemen's Benevolent Labor Committee" as the labor organization, but it also listed (and was served on) the correct labor organization representative. The error was administratively corrected upon the Employer's request submitted February 16, 2010. Though the Labor Organization requests dismissal of the Petition for the initial naming error, I decline to do so.

III. Relevant Statutory Provisions

The duty to bargain is set out in Section 7 of the Illinois Public Labor Relations Act, relevant portions of which provide:

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

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

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act" unless agreed by the parties.

5 ILCS 315/7 (2010).

Section 4 shields certain areas from the duty to bargain. Generally, it provides:

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

5 ILCS 315/4 (2010).

In addition to the provision generally applicable to bargaining obligations, Section 4 also includes the following language relevant to the second question presented here:

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

5 ILCS 315/4 (2010).

Section 17 of the Act preserves the right to strike for most employees, but not for security employees, fire fighters, paramedics, and, relevant here, peace officers. 5 ILCS 315/17 (2010). Section 2 requires an alternate means of dispute resolution for those precluded from striking, 5 ILCS 315/2 (2010), and Section 14 provides the procedures for such alternative dispute resolution: binding arbitration, 5 ILCS 315/14 (2010). Specifically relevant to the first question, Subsection 14(i) provides lists of subjects on which arbitrators are precluded from issuing awards, including the following with respect to peace officers like those here in issue:

In the case of peace officers, the arbitration decision shall be limited to wages, hours, and conditions of employment (which may include residency requirements in municipalities with a population under 1,000,000, but those residency requirements shall not allow residency outside of Illinois) and **shall not include the following:** i) residency requirements in municipalities with a population of at least 1,000,000; ii) the type of equipment, other than uniforms, issued or used; **iii) manning; iv) the total number of employees employed by the department;** v) mutual aid and assistance agreements to other units of government; and vi) the criterion pursuant to which force, including deadly force, can be used; provided, nothing herein shall preclude an arbitration decision regarding equipment or manning levels if such decision is based on a finding that the equipment or manning considerations in a specific work assignment involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties. Limitation of the terms of the arbitration decision pursuant to this subsection shall not be construed to limit the factors upon which the decision may be based, as set forth in subsection (h).

5 ILCS 315/14(i) (2010) (emphasis supplied).

Finally, relevant to the final question, the Board regulation that provides the process for issuing declaratory rulings includes the following provision:

Declaratory rulings shall not be issued concerning factual issues that are in dispute. In the case of a unilateral petition for declaratory ruling in which the General Counsel has determined that material issues of fact are in dispute, the General Counsel may either dismiss the petition without prejudice to the requesting party's right to file an unfair labor practice charge, or, where the General Counsel determines that a fact-finding of the disputed factual issues will facilitate a determination of the issues that are the subject of the petition, the issuance of the declaratory ruling may be deferred and the disputed issues of fact referred to the Interest Arbitration Panel for determination.

80 Ill. Admin. Code §1200.143(b)(2).

IV. Discussion and Analysis

The Petition requests a ruling on whether the topics covered in Appendix F are permissive or mandatory. Permissive subjects of bargaining are those subjects that, though not mandatory, are nevertheless proper bargaining subjects in that they do not conflict with applicable law. ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 1251 (John E. Higgins, Jr., ed., 5th ed. 2006). In contrast, Section 7 *mandates* parties to bargain over subjects concerning wages, hours, and other conditions of employment. However, some such subjects also touch on matters of inherent managerial authority pursuant to Section 4, and when that is the case the Illinois Supreme Court has established a balancing test generally used to determine whether a particular subject is a mandatory subject of bargaining. Central City Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Relations Bd., 149 Ill. 2d 496 (1992).

Distinct from this Central City analysis, it is also clear from Section 2 of the Act that parties should not be allowed to insist upon bargaining to impasse on a topic for which the Act's

impasse resolution procedure provides no means of resolution,³ and consequently the restrictions over what an arbitrator might award found in Section 14(i) of the Act often provide guidance as to what is, and what is not, a mandatory subject of bargaining. City of Mattoon, 13 PERI ¶2004 (IL SLRB G.C. 1997). The Employer relies on this means of addressing the issue, and focuses on the meaning of Section 14(i). In contrast, the Labor Organization focuses on a provision within Section 4 which, if applicable, would relieve the tension between Sections 7 and 4 and more directly answer the question of whether Appendix F is a mandatory subject of bargaining.

There is much merit to Employer's position in that Section 14(i) unequivocally prohibits an arbitrator from including an award concerning "manning" for peace officers and, because it also precludes an award concerning "total number of employees employed by the department," it clearly is using the term "manning" in a more specific sense that includes the "minimum manning per shift" and may include the "minimum bargaining unit staff" topics at issue within Appendix F. Section 14(i) provides an exception for safety concerns relating to manning,⁴ but no party has raised such concerns here, and consequently I would, under most circumstances, follow the reasoning in City of Mattoon, 13 PERI ¶2004, and declare the manning topics covered by Appendix F to be permissive and not mandatory subject of bargaining.

City of Mattoon points out that the mere fact that the parties have previously bargained over the topic of manning does not convert a permissive subject of bargaining into a mandatory subject of bargaining, but my assertion of how I would rule under most circumstances is

³ Section 2 of the Act includes the following: "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 approval procedures mandated by this Act."

⁴ After setting out a list of prohibited subjects of arbitration awards, Section 14(i) includes this caveat: "provided, nothing herein shall preclude an arbitration decision regarding equipment or manning levels if such decision is based on a finding that the equipment or manning considerations in a specific work assignment involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties."

qualified because of the parties' *pre-Act* negotiating history and the language in Section 4 relied on by the Labor Organization. Finding manning to be a non-mandatory topic of bargaining pursuant to Section 14(i) requires application of an inference derived from the general policy articulated in Section 2 that employees prohibited from striking should have a right to resolve disputes through other means. While subjects prohibited from inclusion in an arbitration award are typically found to be non-mandatory subjects of bargaining, nothing in the Act explicitly states this in so many words, and if other provisions of the Act conflict, I may be required to reach a different conclusion.

The Labor Organization's position is more directly grounded in statutory language. Section 7 makes it mandatory to bargain on subjects concerning wages, hours, and other conditions of employment (which would include the manning topics in Appendix F) with the exception that subjects that are also matters of inherent managerial authority within the meaning of Section 4, and also fail the balancing test set out at the third step of the Central City analysis, are nevertheless non-mandatory. But if the Labor Organization is correct that the parties had bargained over, and entered into agreements concerning, the very topics covered by Appendix F prior to the Act's effective date, there is no tension between Sections 7 and 4. Section 7 would make the topic mandatory because it concerns wages, hours or other conditions of employment, and Section 4 would make it mandatory because it states: "employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act."

Because finding a subject non-mandatory based on Section 14(i)'s restrictions on arbitration awards requires use of an inference based on legislative policy, while in contrast

finding a subject mandatory based on the provision within Section 4 regarding matters previously negotiated derives from the direct application of unequivocal statutory language, I would be compelled to find a topic a mandatory subject of bargaining where both apply. General Motors Corp. v. Pappas, ___ Ill. 2d ___, 2011 WL 1886595, *8 (May 19, 2011) (where the meaning of a statute is plain on its face, no resort to other tools of statutory construction is necessary); Blum v. Koster, 235 Ill. 2d 21, 29 (2009) (“When the statutory language is clear and unambiguous, we must apply it as written, without resort to extrinsic aids of statutory construction.”).

Consequently, I cannot issue a declaratory ruling in this matter without first determining whether the parties had, in fact, negotiated and reached agreement on the topics covered by Appendix F prior to the effective date of the Illinois Public Labor Relations Act on July 1, 1984. The Labor Organization asserts the parties had; the Employer asserts it has a “good faith belief” they had not.⁵ There clearly is a factual dispute which needs to be resolved before the terms of the Act can be applied.

The declaratory ruling process was not designed for factual disputes; indeed, the regulation providing for declaratory rulings states that declaratory rulings “shall not be issued concerning factual issues that are in dispute.” 80 Ill. Admin. Code §1200.143(a)(2); see Vill. of Univ. Park, 18 PERI ¶2043 (IL LRB-SP G.C. 2002). For that reason, I must defer this matter to the interest arbitration panel to resolve the underlying factual issue. If the parties had, prior to July 1, 1984, “bargained for and agreed to in a collective bargaining agreement” the topics covered by Appendix F and the proposed amendment to Appendix F, those topics are clearly

⁵ Based on its review of its archives, the Employer asserts the parties’ first written contract (which contained minimum manning contractual commitments) was effective May 1, 1986, nearly two years after the Act became effective. I note the effective date of this collective bargaining agreement was also after the date the peace officers first became subject to the Act, but only by five months. Public Act 84-1104 (eff. Jan. 1, 1986).

mandatory subjects of bargaining pursuant to Section 4; if they had not, the topics are permissive for the same reasons articulated in City of Mattoon, 13 PERI ¶2004 (IL SLRB G.C. 1997).

V. Conclusion

Because a factual issue precludes a declaratory ruling at this time, I defer this matter to the interest arbitration panel to resolve whether the parties had, prior to July 1, 1984, “bargained for and agreed to in a collective bargaining agreement” the topics covered by Appendix F and within the proposed amendment to Appendix F.

Issued in Chicago, Illinois, this 11th day of July, 2011.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD**



**Jerald S. Post
General Counsel**

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
GENERAL COUNSEL**

City of Madison,)

Employer)

and)

Case No. S-DR-10-008)

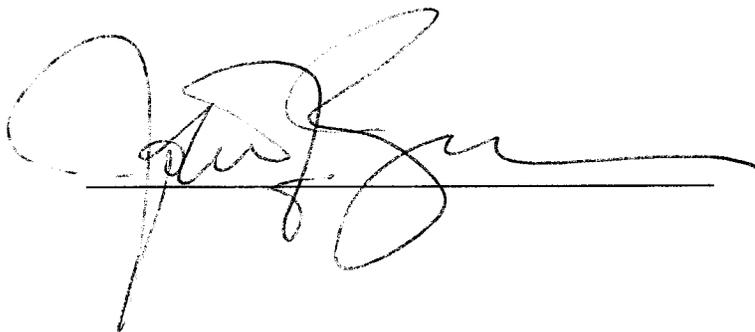
Policemen's Benevolent Labor,)
Committee, PBPA Unit #110,)
Labor Organization)

AFFIDAVIT OF SERVICE

I, John F. Brosnan, on oath state that I have this 11th day of July, 2011 served the attached **DECLARATORY RULING 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.

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SUBSCRIBED and SWORN to
before me this **11th day**
of **July, 2011.**



NOTARY PUBLIC

