

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

Village of Posen,)	
)	
Employer)	
)	
and)	Case No. S-DR-11-005
)	
Illinois Fraternal Order of Police)	
Labor Council,)	
)	
Labor Organization)	

DECLARATORY RULING

On May 25, 2011, the Employer, Village of Posen, and the Labor Organization, Illinois Fraternal Order of Police Labor Council, jointly 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 collective bargaining proposal by the Labor Organization was a mandatory or merely permissive subject of bargaining within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010). Both the Labor Organization and the Employer subsequently filed briefs in support of their positions.¹ For the reasons that follow, I find the Labor Organization's proposal to be a mandatory subject of bargaining.

¹ The Labor Organization's brief was accompanied by an affidavit of service indicating it was filed by depositing it in the U.S. mail on June 3, 2011. That brief was received by the Board on June 7, 2011. The Employer's brief is unaccompanied by any affidavit or certificate of filing or service, but was received by the Board on June 9, 2011.

I. Background

The Labor Organization represents a unit of peace officers employed by the Employer in the rank of sergeant and below. It and the Employer were parties to a collective bargaining agreement with an expiration date of April 30, 2009, and when that date neared, the Labor Organization filed a demand for compulsory interest arbitration. A neutral arbitrator was selected, and in the process of determining issues for resolution by the arbitrator, the parties agreed to seek a declaratory ruling concerning one of the Labor Organization's contract proposals, that concerning the consequences of a confirmed positive test result.²

The current contract contains this provision within the article on drug testing:

Section 11.10: Consequences of a Confirmed Positive Test Result.

If an employee's positive test result has been confirmed, the employee is subject to disciplinary action before the Board of Fire and Police Commissioners. Factors to be considered in determining the appropriate disciplinary response include the employee's work history, length of employment, current job performance, and the existence of past disciplinary actions.

The Labor Organization asserts that the reference to the Board of Fire and Police Commissioners was always in error, and for the new contract it proposed striking that reference as follows:

Section 11.10: Consequences of a Confirmed Positive Test Result.

If an employee's positive test result has been confirmed, the employee is subject to disciplinary action ~~before the Board of Fire and Police Commissioners~~. Factors to be considered in determining the appropriate disciplinary response include the employee's work history, length of employment, current job performance, and the existence of past disciplinary actions.

² The Petition originally asserted three issues for resolution, but the parties have come to agreement regarding two, and only one remains.

It asserts this revision will eliminate any potential conflict with another portion of the article on drug testing, or with the just cause provision. Specifically, the next section in the drug testing article provides:

Section 11.11: The Right to a Hearing.

The Union and/or the employee, with or without the Union, shall have a right to file a grievance concerning any testing permitted by this Agreement, contesting the basis for the order to submit to the tests, the right to test, the administration of the tests, the significance and accuracy of the tests, the consequences of the testing or results of any other alleged violation of the Article. Such grievances shall be commenced at Step 3 of the grievance procedure. It is agreed that the parties' legal rights are not restricted, diminished, or otherwise impaired in regard to such testing. Employees shall retain any such legal remedies as may exist and may pursue the same in their own discretion.

The just cause provision states:

Section 13.1: Relief from Duty.

No employee covered by the terms of this Agreement shall be suspended, relieved from duty or disciplined in any manner without just cause.

The Employer wishes to retain the current language. It concedes that the Board of Fire and Police Commissioners does not typically review matters of discipline, but asserts that the clause in its current form enables it to pursue enforcement of its drug policy through the Commission. Citing Section 10-2.1-17 of the Illinois Municipal Code, 625 ILCS 5/10-2.1-17 (2010), it further states that state law requires a hearing before a board or commission prior to discharge, and this must include discharge for failing a drug test. It concludes its brief by suggesting the topic proposed by the Labor Organization is a prohibited subject of bargaining, but the Petition itself asserts its position is that the topic is a permissive subject of bargaining.

II. Issue

The Petition requires me to determine whether the proposal to remove reference to the Board of Fire and Police Commissioners from the contractual provision concerning the

consequences of a confirmed drug test concerns a mandatory, or merely a permissive, subject of bargaining.

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:

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).

Section 8 of the Act requires that collective bargaining agreements contain grievance procedures:

The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. Any agreement containing a final and binding arbitration provision shall also contain a provision prohibiting strikes for the duration of the agreement. The grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois "Uniform Arbitration Act". The costs of such arbitration shall be borne equally by the employer and the employee organization.

5 ILCS 315/8 (2010).

The relevant portion of the Illinois Municipal Code upon which the Employer relies provides:

Removal or discharge; investigation of charges; retirement. Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement. Such bargaining shall be mandatory unless the parties mutually agree otherwise. Any such alternative agreement shall be permissive.

625 ILCS 5/10-2.1-17 (2010).

IV. Discussion and Analysis

The Petition requests a ruling on whether the proposal to remove reference to the Board of Fire and Police Commissioners from the contractual provision providing the consequences of a confirmed drug test concerns a mandatory, or merely permissive, subject of bargaining. 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 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). More precisely, the Central City analysis requires three stages, the last of which applies a balancing test. First, one must determine if the subject matter is one of wages, hours and terms and conditions of employment. If it is not, the subject is not mandatory. If it is, one proceeds to the second stage to determine if it is also a matter of inherent managerial authority. If not, the subject *is* mandatory. If it is, one must balance the benefits that bargaining will have on the decision-making process with the burdens that bargaining imposes on the employer's authority.

Both the Illinois Labor Relations Board and the Illinois Appellate Court have had opportunity to apply the Central City analysis to the topic of implementation of drug testing policies and procedures and have consistently found it to be a mandatory subject of bargaining. See e.g. County of Cook v. Licensed Practical Nurses Ass'n of Ill., 284 Ill. App. 3d 145, 154-55 (1st Dist. 1996) (making determination at the third, balancing stage); County of Cook, 15 PERI

¶3001 (IL LLRB 1998) (collecting cases and making determination at the second stage, finding precise topic did not concern a matter of inherent managerial authority).

According to the contract, the consequences of a positive drug test include the possibility of discipline as severe as termination. This matter clearly concerns wages, hours, and terms and conditions of employment, and passes the first stage of the Central City analysis.

The Employer does not articulate why the matter would also be a matter of inherent managerial authority except to assert that the Municipal Code requires a hearing before the Board of Fire and Police Commissioners and, by implication, it has a managerial obligation to comply with state statutes. But there are two readily apparent flaws to the Employer's position. First, it acknowledges that the Board of Fire and Police Commissioners does not currently review matters of discipline. Either it has not previously felt the need to comply with state law, or, more likely, state law does not mandate such review. Second, the Municipal Code itself provides that the parties may agree to review by means of arbitration: "The hearing shall be as hereinafter provided [in the Municipal Code], *unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement.*" 625 ILCS 5/10-2.1-17 (2010) (emphasis added). In short, contrary to the Employer's assertion, the Municipal Code does *not* mandate review by the Board of Fire and Police Commissioners. The Employer articulates no other reason why maintaining an option for review by the Board of Fire and Police Commissioners would be a matter of inherent managerial authority, and consequently I am compelled to find the topic to be a mandatory subject of bargaining at the second stage of the *Central City* analysis. Even if I were to find in the Employer's favor at the second stage, I would find that the benefits that bargaining would have on the decision-making process would

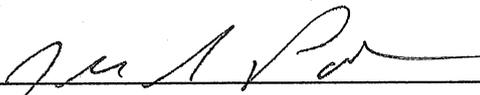
outweigh whatever burdens such bargaining might impose on the Employer's authority. I find the end result regarding the precise topic of whether to maintain an option of review by the Board of Fire and Police Commissioners to be consistent with the Board's prior decisions on the general topic of drug testing.

V. Conclusion

The Labor Organization's proposal to eliminate reference to the Board of Fire and Police Commissioners from the contractual language concerning the consequences of a confirmed drug test is a mandatory subject of bargaining.

Issued in Chicago, Illinois, this 8th 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**

Village of Posen,)
)
Employer)
)
and) Case No. S-DR-11-005
)
)
Illinois Fraternal Order of Police,)
Labor Council,)
Labor Organization)
)
)
)

AFFIDAVIT OF SERVICE

I, Elaine Tarver, on oath state that I have this 8th 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.

Gary Bailey
IFOP
5600 S. Wolf Road, Suite 1200
Western Springs, Illinois 62704-1304

Peter Murphy
Attorney at Law
11800 S. 75th Ave, Suite 101
Palos Heights, Illinois 60463



SUBSCRIBED and SWORN to
before me this **8th day**
of **July, 2011.**



NOTARY PUBLIC

