

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

Tri-State Professional Firefighters Union,	)	
Local 3165, IAFF,	)	
	)	
Labor Organization	)	
	)	Case No. S-DR-14-001
and	)	
	)	
Tri-State Fire Protection District,	)	
	)	
Employer	)	

**DECLARATORY RULING**

On April 14, 2014, the Tri-State Professional Firefighters Union Local 3165, IAFF (Union) filed a unilateral Petition for Declaratory Ruling pursuant to Section 1200.143 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1240. The Union requests a determination as to whether the Tri-State Fire Protection District's (Employer's) proposals concerning the probationary period and promotions are mandatory subjects of bargaining within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012). Both parties filed timely briefs.

**I. Background**

The Union is the exclusive bargaining representative of a bargaining unit of the Employer's full-time sworn or commissioned Firefighters/Emergency Medical Technicians, Firefighters/Paramedics, Engineers, Lieutenants, and Battalion Chiefs. The most recent collective bargaining agreement for that unit expired on May 31, 2012. The parties began negotiations for a successor agreement in January 2012 and had a two-day interest arbitration hearing in April 2014. At hearing, the parties could not agree on whether the Employer's

proposals concerning the probationary period and promotions were mandatory or permissive subjects of bargaining. Upon request of the Union, the arbitrator held in abeyance the issues of the probationary period and promotions pending the outcome of the Petition for a Declaratory Ruling. The Employer's proposals are as follows:

**i. Section 5.1 Probationary Period.**

The probationary period for newly hired employees shall be twelve (12) months in duration. The District may extend the ending date of an employee's probationary period in accordance with the Illinois Fire Protection District Act [70 ILCS 705/16.13b]. During the probationary period, an employee is subject to discipline, including discharge, without cause and with no recourse to the grievance procedure.

**ii. Article XXIII – Promotions**

Promotions to the ranks of Lieutenant and Commander shall be conducted in accordance with Appendix G attached hereto and incorporated herein.

**1. APPENDIX G**

This memorandum of Agreement is made and entered into on the dates indicated below by and between the TRI-STATE FIREFIGHTER ASSOCIATION, LOCAL 3165 ("Union") and the TRI-STATE FIRE PROTECTION DISTRICT, DUPAGE COUNTY, ILLINOIS ("District").

**PROMOTIONS**

The following provisions shall apply to promotional examinations, to be administered by the Board of Fire Commissioners of the Tri-State Fire [P]rotection District, as agreed to and consistent with the Collective Bargaining Agreement between the parties. These examinations include the rank of Career Service Lieutenant and Commander.

**PREREQUISITIES –LIEUTENANT**

EFFECTIVE MARCH 01, 2004:

Illinois State Certified Provisional Officer I  
Illinois State Certified Fire Apparatus Engineer  
Illinois State Certified Hazardous Materials Operations  
Five (5) years in grade (including probation)

ADD EFFECTIVE MARCH 01, 2007:

Thirty (30) hours Formal Education (college)  
Completion of Incident Safety Officer Course

ADD EFFECTIVE MARCH 01, 2010:  
Associates in Science Degree  
Completion of a Technical Writing Course  
Seven (7) years in grade (including probation)

**PREREQUISITES – COMMANDER**

EFFECTIVE OCTOBER 01, 2004:  
Illinois Certified Provisional Officer II  
Illinois Certified Hazardous Materials Operations  
Thirty (30) hours Formal Education (college)  
Completion of Incident Safety Officer Course  
Five (5) years in grade

ADD EFFECTIVE OCTOBER 01, 2007:  
Illinois State Certified Hazardous Materials Command  
Associates in Science Degree  
Completion of a Technical Writing Course

ADD EFFECTIVE OCTOBER 01, 2010  
Associates degree plus 24 credit hours

**GRADING SCHEDULE**

All persons who submit themselves to examination will be subject to the complete battery and graded according to the following schedule.

Written Examination 70% or above (raw score)  
Assessment Center 70% or above (raw score)

The final Promotional Examination score shall be determined thusly:

Written Exam Score (raw) multiplied by	40%
Assessment Center Exam Score (raw) multiplied by	40%
District Merit/Efficiency (based on a 0-100 scale)	10%
State Certification and Education	5%
½ % per year of Time In Grade, including initial appointment to a maximum of five (5) points	5%
<b>MAXIMUM SCORE (NOT TO EXCEED 100%)</b>	<b>100%</b>

**OTHER PROVISIONS:**

- All prerequisites are to be completed 120 (sic) prior to the expiration of the existing list or the last promotion date if that promotion exhausts the eligibility list prior to the posted expiration date.

- Subjective elements of the examinations will be conducted and scored first with the written examination last.
- No test scores will be released until the entire testing process is complete.
- Notification of promotional examination will be in writing to the Union as well as by conspicuous posting at each station
- State Certification and Educational points will be awarded in accordance (sic) Appendix A, attached.

**APPENDIX A – STATE CERTIFICATION AND EDUCATION**

- A maximum of five (5) points will be allowed for any one promotional examination.
- Formal Education (college) points are not cumulative and are for the highest level achieved.

Lieutenant	2004	2007	2010
Haz-Mat Command	0.5	0.5	1.0
Incident Safety Officer			N/A
Technical Writing			N/A
Fire Officer II			2.0
Associates in Science			N/A
Associates plus 24 hours			1.0
Bachelors			2.0
Commander			
Haz-Mat Command	0.5	1.0	1.0
Technical Writing	0.5	N/A	N/A
Fire Officer III	2.0	2.0	2.0
Associates in Science	1.0	N/A	N/A
Associates plus 24 hours	N/A	1.0	N/A
Bachelors	2.0	2.0	1.0
Bachelors plus 18 hrs	N/A	N/A	2.0

**II. Relevant Statutory Provisions**

The duty to bargain is defined in Section 7 of the Act which provides in relevant part:

A public employer and the exclusive representative have the authority and duty to bargain collectively set forth in this Section.

For the purpose 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.

5 ILCS 315/7 (2012)

Section 16.13b of the Fire Protection District Act (District Act) provides in relevant part:

Unless the employer and a labor organization have agreed to a contract provision providing for final and binding arbitration of disputes concerning the existence of just cause for disciplinary action, no officer or member of the fire department of any protection district who has held that position for one year shall be removed or discharged except for just cause, upon written charges specifying the complainant and the basis for the charges, and after a hearing on those charges before the board of fire commissioners, affirming the officer or member and opportunity to be heard in his own defense.

Notwithstanding any other provision of this Section, a probationary employment period may be extended beyond one year for a firefighter who is required as a condition of employment to be a certified paramedic, during which time the sole reason that a firefighter may be discharged without a hearing is for failing to meet the requirements for paramedic certification.

70 ILCS 705/16.13b (2012)

Sections 10(d) and (e) of the Fire Department Promotion Act (Promotion Act) provide in relevant part:

(d) This Act is intended to serve as a minimum standard and shall be construed to authorize and not to limit ... [t]he right of an exclusive bargaining representative to require an employer to negotiate clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees to ranks, as defined in Section 5, covered by this Act....

(e) Local authorities and exclusive bargaining agents affected by this Act may agree to waive one or more of its provisions and bargaining on the contents of those provisions, provided that any such waivers shall be considered permissive subjects of bargaining.

50 ILCS 742/10(d) & (e) (2012)

### **III. Issues**

At issue is whether the Employer's proposals are mandatory or permissive subjects of bargaining. The Union maintains that the Employer's proposals are permissive because they seek the waiver of the rights guaranteed under the Fire Department Promotion Act (Promotion Act) and the Fire Protection District Act (District Act). The Union asserts that its agreement to the Employer's proposals requires it to waive its statutory rights because both statutes confer greater rights and protections than set forth in the Employer's proposals. The Employer argues that its proposals are mandatory subjects of bargaining because they address promotional criteria and the probationary period.

### **IV. Discussion and Analysis**

The Employer's proposals constitute permissive subjects of bargaining to the extent that they offer a narrower scope of rights than that conferred by the Promotion Act and the District Act.

Parties are required to bargain collectively regarding employees' wages, hours, and other conditions of employment—the "mandatory" subjects of bargaining. City of Decatur v. Am. Fed'n of State, Cnty. and Mun. Empl., Local 268, 122 Ill. 2d 353 (1988); Am. Fed'n of State, Cnty. and Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259 (1st Dist. 1989); Ill. Dep't of Military Affairs, 16 PERI ¶2014 (IL SLRB 2000); City of Mattoon, 13 PERI ¶2016 (IL SLRB 1997); City of Peoria, 3 PERI ¶2025 (IL SLRB 1987). Promotional criteria and procedures are mandatory subjects of bargaining. Village of Franklin Pk. v. Ill. State Labor Relations Bd., 265 Ill. App. 3d 997, 1003-04 (1st Dist. 1994), aff'g Vill. of Franklin Park, 8 PERI ¶2039 (IL SLRB 1992). Similarly, the conditions of a probationary period and its inclusion in the contract are mandatory subjects of bargaining. Oliver Corp., 162 NLRB 813,

815 (1967); see also Commonwealth of Pennsylvania State Police, 31 PPER ¶31021 (PLRB 1999) (employers must bargain over the procedures for retaining or dismissing probationary employees).

However, a proposal seeking the waiver of a statutory right is a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶125 (IL LRB-SP 2013); Vill. of Wheeling, 17 PERI ¶2018 (IL LRB SP 2001); Cnty. of Cook (Cook Cnty. Hosp.), 15 PERI ¶3009 (IL LLRB 1999); cf. Bd. of Trustees of the Univ. of Ill., 8 PERI ¶1014 (IL ELRB 1991), aff'd 244 Ill. App. 3d 945 (4th Dist. 1993) (applying concept under the Illinois Educational Labor Relations Act); Bd. of Regents of the Regency Universities System (Northern Ill. Univ.), 7 PERI ¶1113 (IL ELRB 1991) (same). A proposal may be permissive by virtue of its affect on statutory rights, even where it appears on its face to address an otherwise mandatory subject of bargaining. See Vill. of Midlothian, 29 PERI ¶125. Distinguishing between permissive and mandatory proposals under such circumstances requires more than merely reading the proposal in isolation, as the Employer contends. Instead, it requires a comparison of the proposal to the statutory right allegedly implicated by the proposal's acceptance.

Where a proposal offers the Union fewer rights than provided under statute, the proposal seeks a waiver of the Union's statutory rights and is therefore a permissive subject of bargaining. Vill. of Elk Grove Vill., 21 PERI ¶14 (IL LRB-SP GC 2005). A proposal may seek a waiver of a statutory right even where the waiver is not clear and unmistakable, and even where the proposal's language does not expressly reference waiver. Vill. of Elk Grove Vill., 21 PERI ¶14. In fact, a proposal that touches on a matter covered by statute may be construed to seek a waiver of related statutory rights not specifically mentioned, where the contract's silence would govern. Ehlers v. Jackson Cnty. Sheriff's Merit Comm'n, 183 Ill. 2d 83 (1998) (where contract allowed

for Weingarten right to union representation only during an “interrogation” and was otherwise silent as to when that right attached, it necessarily waived that right in all other circumstances); see also Vill. of Elk Grove Vill., 21 PERI ¶14 (finding proposal to be a permissive subject where it provided that the contract would take precedence over the FDPA and where the contract omitted rights granted by that statute).

**A. Probationary period proposal**

A literal interpretation of the language of the Employer’s proposal regarding the probationary period would require the waiver of a statutory right and consequently the proposal would be a permissive subject of bargaining. Whether that literal interpretation is the true meaning of the proposal is a matter I refer to the parties and the interest arbitration process.

The first sentence of the Employer’s probation proposal proposes a probationary period of 12 months for new hires, while Section 16.13b of the District Act provides the protection of removal or discharge only for just cause for those who have been employed for 12 months. The two provisions are entirely compatible, and this sentence of the proposal requires no waiver of a statutory right.

The second sentence of the proposal would allow the Employer to extend the probationary period, but only “in accordance with” Section 16.13b of the District Act. It clearly is no broader than the protections of Section 16.13b. Again, the two are compatible, and the second sentence requires no waiver of a statutory right.

The final sentence of the proposal allows for the discipline of probationary employees, even without cause, while Section 16.13b of the District Act provides no protections for probationary employees. On the surface, the two again seem compatible, at least with respect to the normal 12-month probationary period. However, the third sentence would seemingly allow

discipline without cause even for the extended probationary period permitted by the second sentence of the Employer's proposal and by Section 16.13(b) of the District Act, yet Section 16.13(b) goes on to provide that during the extended probationary period "the sole reason that a firefighter may be discharged without a hearing is for failing to meet the requirements for paramedic certification." To render the two compatible, I would have to read into the third sentence a similar restriction. That is what the Employer proposes:

The District's final offer contemplates that a bargaining unit employee's probationary period may be extended in full and complete compliance with Section 16.13b. It thus necessarily contemplates that, if an employee's probationary period is extended for the explicit reason set forth in Section 16.13b, then that employee may be discharged as set forth in Section 16.13b.

The Union suggests a more literal interpretation of the third sentence applies, and that the proposal means an employee subject to an extended probationary period is exposed to discipline, including discharge, without cause. To the extent the Union is correct regarding the meaning of the proposal, the proposal requires the Union to waive statutory rights and is a permissive subject of bargaining. I refer the issue of interpretation to the parties and the interest arbitration process.

### **B. Promotion proposal**

Promotional criteria and procedures are generally mandatory subjects of bargaining, Vill. of Franklin Pk. v. Ill. State Labor Relations Bd., 265 Ill. App. 3d 997, 1003-04 (1st Dist. 1994), aff'g Vill. of Franklin Pk., 8 PERI ¶2039 (IL SLRB 1992);<sup>1</sup> however, as previously noted, proposals seeking waiver of statutory rights are merely permissive subjects of bargaining. Vill. of Midlothian, 29 PERI ¶125 (IL LRB-SP 2013). Consequently, the Employer's promotion proposal concerns a mandatory subject of bargaining unless it requires the Union to waive statutory rights.

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<sup>1</sup> More specifically, promotional criteria and procedures like ranking order, time-in-rank requirements, and posting of exam scores are mandatory subjects of bargaining; test methods, such as who administers tests, are not. Vill. of Franklin Pk., 265 Ill. App. 3d at 1003-04.

The Promotion Act establishes *minimum* standards for promotion. That is expressly stated in Section 10(d), which further authorizes exclusive bargaining representatives to bargain over the conditions, criteria or procedures for promotion. 50 ILCS 742/10(d) (2012). Furthermore, Section 10(e) of the Promotion Act authorizes employers and exclusive bargaining agents to waive its provisions, and expressly provides that any such waiver shall be considered a permissive subject of bargaining. 50 ILCS 742/10(e) (2012).

The Union offers a number of examples of ways in which the Employer's proposal purportedly requires it to waive statutory rights. In many instances the Union simply points to a requirement of the Promotion Act, and notes that the Employer's proposal does not explicitly incorporate that same provision. For many of these examples, the Employer's proposal contains nothing inconsistent with the Promotion Act, and without some substantive inconsistency, I find that the Union's acceptance of the proposal would not require it to waive any statutory right.

Other of the Union's arguments present closer questions. For example, oddly placed as the final paragraph of the Promotion Act's definitions section is the following provision:

Each component of the promotional test shall be scored on a scale of 100 points. The component scores shall then be reduced by the weighting factor assigned to the component on the test and the scores of all components shall be added to produce a total score based on a scale of 100 points.

50 ILCS 742/5 (2012).<sup>2</sup> The Union states that the Employer's promotion proposal is inconsistent with this provision. In fact, the Employer's proposal clearly uses a 100-point aggregate scale by providing that a written examination score be multiplied by 40%, an assessment center exam score be similarly multiplied by 40%, district merit/efficiency (explicitly based on a 0-100 scale)

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<sup>2</sup> Not only is the term "promotional test" not defined in this section, but other sections of the Promotion Act entitled "promotion process," "promotion lists," "promotion examination components," "written examinations," "seniority points," "ascertained merit," and "subjective evaluation" make no reference to a 100-point scoring scale. 50 ILCS 742/15, 742/20, 742/25, 742/30, 742/35, 742/40, 742/45 & 742/50 (2012).

be multiplied by 10%, State certification and education points be added to constitute no more than 5%, and that applicants be awarded a ½ % per year of time in grade up to a maximum of 5%. A maximum weighted score for each of these components would result in an overall score of 100%. Moreover, two of the components of the score, the written examination and the assessment center exam score are expressed in terms of percentage which necessarily refers to a 100 point scale, and the district merit/efficiency component is expressly “based on a 0-100 scale.”

The remaining two components are not expressed in terms of a 100 point scales, but with mathematical precision can be transposed into such a scale. For example, the recitation of the various components for the aggregate score indicates that an employee will be given ½ % (on the aggregate scale) for each year of time in grade for a maximum score of 5%. This essentially means that, considered in isolation, the employee is given 10 points for each year of time in grade up to a maximum of 100 points with the score for that component then multiplied by 5% before being added to the aggregate score. In similar fashion, the state certification and education component, expressed in the Employer’s proposal as increments of 0.5, 1.0 or 2.0 points (percentage points on the aggregate scale) per particular benchmark, could as easily be expressed in isolation in terms of 10, 20 or 40 points per benchmark for a maximum of 100 points, then multiplied by 5% before being added to the aggregate scale.

While these aspects of the Employer’s proposal are not scrupulously consistent with the actual verbiage of one provision of the Promotion Act, I do not find that they are inconsistent with the Promotion Act such that acceptance of the Employer’s proposal would require the Union to waive a statutory right.

The Union states that Section 20(c) of the Promotion Act allows an individual to apply for a veteran's preference, adjusting the preliminary promotion list prior to determining the final promotional list. However, Section 20(c) does not itself create a right to a veteran's preference and consequently I cannot conclude that the lack of such a preference in the Employer's proposal is inconsistent the Promotion Act, nor that the Union's acceptance of the proposal would cause it to waive a statutory right.

Another of the Union's arguments raises a issue of interpretation which would require me to refer to the parties and the interest arbitration process for resolution in the same manner as I did the Employer's probationary proposal. Section 30 of the Promotion Act includes the following: "If the appointing authority establishes a minimum passing score, such score shall be announced prior to the date of the promotion process *and it must be an aggregate of all components of the testing process.*" 50 ILCS 742/30 (2012) (emphasis supplied). The Employer's proposal does not establish a minimum passing score based on an aggregate of all components, but immediately prior to its articulation of the weights attributed to each component sets out the following:

Written Examination 70% or above (raw score)  
Assessment Center 70% or above (raw score)

The Union interprets this as requiring an employee to meet a minimum score of 70 on the written examination component of the promotion test and similarly requiring the employee to meet a minimum score of 70 on the assessment center component. The Employer, whose brief was filed concurrent to the filing of the Union's brief and thus had no opportunity to respond to the Union's argument, offers no contrary interpretation. If the Union is right in its interpretation, the Employer's proposal is inconsistent with Section 30 of the Promotion Act and the Union's acceptance of the Employer's proposal would necessarily require it waive a statutory right. If I

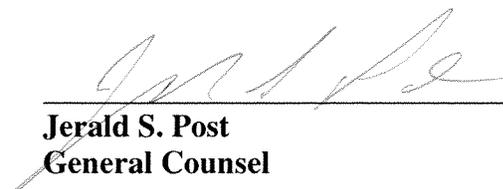
were not otherwise able to make a determination with respect to the potentially permissive nature of the Employer's proposal, I would refer the issue of the meaning of this portion of the Employer's proposal to the parties and the interest arbitration process.

The Union's final contention is based on the following provision in Section 15(c) of the Promotion Act: "scores for each component of the testing and evaluation procedures shall be disclosed to each candidate as soon as practicable after the component is completed." 50 ILCS 742/15(c) (2012). In contrast, the Employer's proposal provides: "No test scores will be released until the entire testing process is complete."<sup>3</sup> The two provisions are clearly inconsistent, and thus the Union's acceptance of the Employer's proposal would necessarily require it to waive at least one statutory right. I therefore conclude that the Employer's promotion proposal is a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶125 (IL LRB-SP 2013).

I conclude that the Employer's promotion proposal is a permissive subject of bargaining. Presence of an unresolved issue of interpretation precludes me from drawing a conclusion with respect to Employer's probationary period proposal, and I refer that issue of interpretation to the parties and to the interest arbitration process.

**Issued in Chicago, Illinois, this 23<sup>rd</sup> day of June, 2014.**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD**



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**Jerald S. Post  
General Counsel**

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<sup>3</sup>The proposal also provides that "[s]ubjective elements of the examinations will be conducted and scored first with the written examination last," so it clearly contemplates a multi-stage process.