

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

Midlothian Professional Fire Fighters)	
Association, Local 3148, International)	
Association of Fire Fighters,)	
)	
Charging Party)	
)	Case No. S-CA-10-287
and)	
)	
Village of Midlothian,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On May 17, 2010, the Midlothian Professional Fire Fighters Association, Local 3148, International Association of Fire Fighters, (Charging Party or Union) filed a charge with the Illinois Labor Relations Board’s State Panel (Board) alleging that the Village of Midlothian (Respondent or Village) engaged in unfair labor practices within the meaning of sections 10(a)(4) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2010), as amended (Act). The charge was investigated in accordance with Section 11 of the Act and on July 27, 2010, the Board’s Executive Director issued a Complaint for Hearing. On August 4, 2010, the Village filed its Answer. On September 2, 2010, the Union filed a Motion For Leave to File a First Amended Complaint Instantly. On September 18, 2010, Administrative Law Judge John Clifford granted the Union’s motion. The First Amended Complaint for Hearing (Amended Complaint) was deemed filed on September 20, 2010. On October 25, 2010, the Village filed its Answer to the Amended Complaint. On November 8, 2010, Administrative Law Judge Clifford ordered the parties to file cross motions for summary judgment. The parties filed their motions for summary judgment on November 22, 2010, their responses on November 30, 2010, and their replies on December 2, 2010. On December 17, 2010, the Union moved for sanctions. In July 2012, the Board administratively transferred the case to the undersigned. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following:

I. **PRELIMINARY FINDINGS**¹

1. At all times material, the Village has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Village has been a unit of local government subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a) of the Act.
3. At all times material, the Village has been a unit of local government subject to the Act pursuant to Section 20(b) thereof.
4. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
5. At all times material, the Union has been the exclusive representative of a bargaining unit comprised of the Village's full-time firefighters below the rank of deputy chief (unit).
6. At all times material, the Union and the Village have been parties to a collective bargaining agreement (agreement) governing the unit, effective from May 1, 2003, through October 31, 2009.
7. Article IV, Section 4.1 of the agreement governing the unit grants the Village the right to "discipline, suspend and discharge employees for just cause."
8. Article XVI of the agreement states that:

All parties recognize that the Board of Fire and Police Commissioners of the Village of Midlothian have certain statutory authority over employees covered by this Agreement, including but not limited to the right to make, alter and enforce rules and regulations and to hire, promote and discipline employees. Nothing in this Agreement is intended in any way to replace or diminish the authority of the Board of Fire and Police Commissioners.

9. On or about July 2009, the parties commenced bargaining for a successor collective bargaining agreement (successor agreement). During negotiations, the Union proposed that the grievance procedure include the right to grieve disciplinary actions involving a suspension of greater than five days or discharge to a final and binding arbitration (proposal).

¹ Unless otherwise noted, these facts are admissions taken from the Village's answer to the Amended Complaint.

10. At all times between July 2009 and February 2010, the Village rejected the proposal and on February 3, 2010, the parties reached a successor agreement which included a provision that the parties would place on hold any further negotiations with respect to the proposal until after the results of the upcoming municipal referendum on whether the Village would become a home rule municipality.
11. The agreement also granted the Village the right to “discipline, suspend and discharge employees for just cause.”²
12. As a result of the February 2010 municipal referendum, the Village became a home rule municipality.
13. In March 2010, the Union requested that the Village continue with their negotiations concerning the proposal. The Village agreed to meet with the Union even though the Village continued to maintain that the Union had no right to have discipline processed through the grievance procedure.
14. On April 21, 2010, the Village submitted a counterproposal to the Union which provided that only the Village’s decisions to discharge an employee would be subject to the grievance procedure.
15. The Union rejected the Village’s counterproposal and insisted that the Village agree to final and binding arbitration for both suspensions and discharges.
16. The Village, to the point of impasse, has maintained that the discipline and/or discharge of a unit employee should not be subject to the parties’ grievance procedure.
17. On May 3, 2010, the Union informed the Village that if the Village continued, after May 5, 2010, to maintain its position that only discharges proceed to arbitration, that the Union would file an unfair labor practice charge alleging that the Village was failing to bargain in good faith.
18. On May 12, 2010, the Village adopted an ordinance which vested its Village’s Board of Fire and Police Commissioners with the authority to issue discipline. The ordinance provided the following, in relevant part:³
2-7-15 Removal or Discharge; Investigation of Charges; Retirement

² This language is taken from the parties’ successor agreement.

³ The language of the ordinance was not set forth in the complaint.

- (A) Except as hereinafter provided, no officer or member of the fire or police department of the Village appointed pursuant to this Chapter shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense.
- (B) The hearing shall be as hereinafter provided.
- (D) With regard to any member of the fire department or police department appointed pursuant to this Chapter (not including the chief of the fire department, the chief of the police department or the deputy chief of the fire department), the Board of Fire and Police Commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time upon mutual agreement of the parties, but in no event beyond 120 days from the filing of the charges or appeal pursuant to Subsection 2-7-15(J)(1).
- (E) In case any officer or member is found guilty, the Board may discharge him, or may suspend him not exceeding 30 days without pay. The Board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days. (emphasis added)

19. On May 17, 2010, the Union filed its unfair labor practice charge with the Board alleging that the Village violated sections 10(a)(4) and (1) of the Act by insisting that the Union waive its right to arbitrate suspensions and/or discharges and thereby bargained to impasse on a permissive subject of bargaining.
20. On September 20, 2010, the Union amended the Complaint to include an allegation that the Village violated sections 10(a)(4) and (1) of the Act when it adopted an ordinance which vested its Board of Fire and Police Commissioners with the authority to issue discipline allegedly as part of its effort to force the Union to waive its statutory right under Section 8 of the Act to submit all issues involving firefighter discipline to the grievance and arbitration procedures contained in the parties' collective bargaining agreement.⁴

II. ISSUES AND CONTENTIONS

The two main issues in this case are whether the Village violated sections 10(a)(4) and (1) of the Act when it (i) bargained to impasse on its proposal that the discipline and/or discharge of a unit employee should not be subject to the parties' grievance and arbitration procedure and

⁴ Paragraphs 19 and 20 are procedural facts not drawn from the Answer.

when it (ii) adopted an ordinance on May 12, 2010 which vests in the Village's Board of Fire and Police Commissioners the authority to issue discipline, allegedly to force the Union to waive its statutory right under Section 8 of the Act to submit all issues involving firefighter discipline to the grievance and arbitration procedures contained in the parties' collective bargaining agreement.

The Union argues that the Village violated sections 10(a)(4) and (1) of the Act by bargaining to impasse on a permissive subject of bargaining because the Village insisted on a proposal that the Union waive its statutory right to arbitration of disciplinary disputes. Further, the Union argues that the Village violated sections 10(a)(4) and (1) of the Act by passing an ordinance mandating that appeals of disciplinary matters be heard solely by the Commission because the Village passed the ordinance in an effort to force the Union to waive its statutory right to arbitration under section 8 of the Act. The Union adds that the Village also violated section 15(c) of the Act by passing such an ordinance because the Village impermissibly exercised powers related to labor relations which are reserved to the State. Finally, the Union moved for sanctions.

The Village, as a preliminary matter, argues that the Board does not have jurisdiction to hear this case because the Board is not authorized to rule on the constitutionality of a home rule municipality's actions, a function that only the courts may perform.

Next, the Village argues that it did not violate the Act by bargaining to impasse on its proposal because that proposal addressed the use of alternative or supplemental forms of due process to resolve disputes over discipline and therefore concerned a mandatory subject of bargaining under the Fire and Police Commission Act and the Board's case law.

In the alternative, the Village asserts that its proposal did not require the Union to waive a statutory right because the Union is not statutorily entitled to arbitrate disciplinary disputes. In support, the Village contends that the language of the Act does not expressly require that a contract's arbitration clause apply to disputes arising from the application of the contract's disciplinary provisions and that the Act instead only requires that the contract contain an arbitration clause. Further, the Village argues that even if the Act does confer a specific right to arbitrate disciplinary disputes, it is superseded by the Fire and Police Commission Act which merely permits but does not mandate that parties resolve disciplinary disputes through arbitration. Finally, the Village argues that the Board's decision in Village of Wheeling which

rejects these arguments is both distinguishable and wrongly decided.⁵ Village of Wheeling (“Wheeling”), 17 PERI ¶ 2018 (IL LRB-SP 2001).

Next, the Village argues that it did not violate sections 10(a)(4) and (1) of the Act by adopting the ordinance which vests its Board of Fire and Police Commissioners with the authority to issue discipline because the Fire and Police Commission Act does not deny a home rule municipality the right to enact such laws. Finally, the Village argues that it was permitted to enact the ordinance because the ordinance did not change the status quo and merely codified the existing practice between the parties.

III. DISCUSSION AND ANALYSIS

1. Board’s Jurisdiction

The Board has jurisdiction to hear both counts of this case because they concern collective bargaining matters and because the Village is a unit of local government.

The Act provides that its purpose is “to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements.” 5 ILCS 315/2 (2010). To achieve that objective, section 5(a-5) of the Act provides that “the State Panel shall have jurisdiction over collective bargaining matters...between employee organizations and units of local government.”⁶ 5 ILCS 315/5(a-5) (2010).

The issues in this case pertain to “collective bargaining matters” over which the State Panel has jurisdiction because the complaint alleges a violation of section 10(a)(4) which provides that “it shall be an unfair labor practice for an employer or its agents to “refuse to bargaining collectively in good faith with a labor organization which is the exclusive representative or public employees in an appropriate unit.” 5 ILCS 315/10(a)(4) (2010). Further,

⁵ The Village’s argument that the Board’s Wheeling case was wrongly decided will not be addressed here because that case is precedential and the ALJ may not deviate from binding case law. The Village may raise such arguments with the Board on exception.

⁶ Section 20(b) of the Act provides that the Act “shall not be applicable to units of local government employing less than 5 employees at the time the Petition for Certification or Representation is filed with the Board. This prohibition shall not apply to bargaining units in existence on the effective date of this Act and units of local government employing more than 5 employees where the total number of employees falls below 5 after the Board has certified a bargaining unit.” 5 ILCS 315/20(b) (2010).

the Village has admitted that it is a unit of local government and subject to the State Panel's jurisdiction within the meaning of the Act. Thus, the Board has jurisdiction to hear this case.

Contrary to the Village's contention, the Board need not engage in constitutional interpretation or determine the constitutionality of a home rule municipality's actions to resolve the instant dispute. Rather, the Board must only interpret its own statute and assess the facts of this case to determine whether the Village violated the Act when it bargained to impasse on its proposal that the discipline and/or discharge of a unit employee should not be subject to the parties' grievance procedure, and whether the Village acted in bad faith when adopting the ordinance at issue.

2. The Village's Proposal: Mandatory or Permissive Subject of Bargaining?

The Village violated sections 10(a)(4) and (1) of the Act when it maintained that the discipline and/or discharge of a unit employee should not be subject to the parties' grievance-arbitration procedures because the Village thereby insisted that the Union waive its statutory right to arbitrate suspensions and/or terminations and thus bargained to impasse on a permissive subject of bargaining.

As a preliminary matter, the Union has a statutory right to submit disputes over discipline to the contract's grievance and arbitration procedures because the parties agreed to a "just cause" provision which creates that right under Board precedent. Section 8 of the Act provides in relevant part that, "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." 5 ILCS 315/8 (2010). The Board has interpreted this language to mean that "where there exists a substantive article in a contract, section 8 grants a party the corresponding right to use arbitration to resolve disputes regarding that provision." Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001). Here, like the parties in Wheeling, the Union and the Village agreed to a "just cause" standard in the contract and, as a result, "section 8 of the Act creates a corresponding right to arbitrate disputes over the application of that disciplinary standard." Id.

Contrary to the Village's contentions, Wheeling is not distinguishable from this case even though the Respondent in Wheeling did not contest the Board's jurisdiction and did not adopt an

ordinance which vests a Fire and Police Commission with the authority to hear disciplinary disputes and issue discipline. First, as noted above, the Board does have jurisdiction over this matter, and accordingly, the Village of Wheeling's failure to raise the jurisdictional issue has no bearing on the application of the Wheeling Board's holding here.

Second, the ordinance has no impact on the employees' statutory right to submit disciplinary disputes to grievance arbitration or on the employer's bargaining obligations and thus does not distinguish Wheeling. First, the ordinance cannot divest employees of a statutory right conferred by the Act. Indeed, the Act which grants employees the right to use arbitration procedures to resolve disciplinary disputes supersedes any conflicting law which arguably prohibits employees from doing so. See 5 ILCS 315/15(a) (2010) ("in case of any conflict between the provisions of this Act and any other law ... relating to wages, hours and conditions of employment and employment relations, the provisions of this ... shall prevail and control."). Further, since the Union may only relinquish its right voluntarily and through agreement, the Village may not unilaterally extinguish that right by enacting an ordinance. Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001) ("While a party may agree to waive this right, it cannot be required to relinquish a right guaranteed by statute.") Finally, the ordinance does not permit the Village to maintain, to impasse, that the Union waive its right to arbitrate suspensions and discharges because it cannot allow what the Act and the Board's case law prohibit.⁷

Also contrary to the Village's contention, employees retain their statutory right to use a grievance-arbitration process to resolve disciplinary disputes, even though the Fire and Police Commission Act (FPCA) provides that parties are not required to agree to such alternative dispute resolution procedures, because the Act supersedes the FPCA to the extent that they conflict.⁸ The Act unambiguously provides that:

⁷ Notably, the ordinance does not affect the Village's obligation to bargain generally over the establishment or modification of substantive disciplinary procedures either since the mere existence of a statute addressing the resolution of disciplinary disputes, without more, does not remove that subject from the scope of bargaining particularly given the purpose of the Act, the voluntary manner in which the law was adopted, and the legislature's express preference for arbitration as a method of resolving such disputes. See City of Decatur v. Ill. State Labor Rel. Bd., ("Decatur"), 122 Ill. 2d 353, 357 (1988).

⁸ The FPCA provides that, a "hearing [on disciplinary charges] 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 on upon impartial arbitration as a terms of a collective bargaining agreement...*any such alternative agreement shall be permissive.*" (emphasis added) 65 ILCS 5/10-1-18 (2010).

“in case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by this amendatory Act of the 96th General Assembly), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control.” 5 ILCS 315/15(a) (2010).⁹

Here, the Act mandates broadly and without limitation that parties’ contracts include an arbitration clause which “provide[s] for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise.” 5 ILCS 315/8 (2010). The Board’s own interpretation of this section, which is granted deference by the courts, provides that this right to arbitrate extends to all disputes arising from disagreements over substantive provisions in the collective bargaining agreement. Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001); See Bd. of Trustees of Comm. College Dist. No. 502 v. Ill. Educ. Labor Rel. Bd., 241 Ill App. 3d 914, 916 (4th Dist. 1993) (“as a general rule, courts will accord deference to the interpretation placed on a statute by the agency charged with its administration and enforcement.”). In contrast, the FPCA does not by default require parties to arbitrate disciplinary disputes and instead merely permits parties to agree to alternate dispute resolution procedures. Thus, employees retain their statutory right to use a grievance-arbitration process to resolve disciplinary disputes because the Act supersedes the FPCA to the extent that its mandate conflicts with the FPCA’s permissive language.

Next, the Village’s proposal concerned a permissive subject of bargaining because it required the Union to waive its statutory right to arbitrate suspensions and/or terminations. It is well-settled that a proposal seeking the waiver of a statutory right is a permissive subject of bargaining. Id. (citing, Cnty. of Cook (Cook Cnty. Hosp.), 15 PERI ¶ 3009 (IL LLRB 1999); Bd. of Trustees of the Univ. of Ill., 8 PERI ¶ 1014 (IL ELRB 1991), aff’d, 244 Ill. App. 3d 945, 612 N.E.2d 1365 (4th Dist. 1993); Toledo Typographical Union No. 63 v. Nat’l Labor Rel. Bd., 907 F.2d 1220 (D.C. Cir. 1990); Bd. of Regents of the Regency Univ. System (Northern Ill. Univ.), 7 PERI ¶ 1113 (IL ELRB 1991); Mt. Diablo Unified School Dist., 14 PERC ¶ 21192 (CA PERB

⁹ In light of this clear provision, it is unnecessary to address the Village’s statutory construction arguments which suggest that the language of the FPCA should supersede that of the Act because the FPCA’s language is more specific.

1990); Chula Vista City School Dist., 14 PERC ¶ 21162 (CA PERB 1990); Am. Fed. of State, Cnty. and Mun. Empl., Local 1363, 8 FPER ¶ 13278 (FL PERC 1982), aff'd, 9 FPER ¶ 14172 (1983); Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 7 FPER ¶ 12300 (FL PERC 1981), aff'd, 425 So. 2d 133 (Fla. 1st DCA 1983), aff'd in relevant part 475 So. 2d. 1221 (Fla. 1985); Columbus Printing Pressmen & Assistants' Union No. 252, 219 NLRB 268 (1975).

Here, the Village proposed that the discipline and/or discharge of a unit employee should not be subject to the parties' grievance and arbitration procedures and that those disputes should instead be heard by the Fire and Police Commission. If the Union accepted this proposal, it would waive its statutory right to arbitrate disputes over the application of the contract's just cause disciplinary standard. Thus, the Village's proposal concerned a permissive subject of bargaining.

Contrary to the Village's contention, its proposal concerns a permissive subject of bargaining, even though the Village advanced it to affect employees' terms and conditions of employment by eliminating their right to arbitrate disciplinary disputes, because the proposal itself sought a waiver of the Union's statutory right. Notably, it is not the respondent's ultimate objective but rather the content of the respondent's proposal and the manner in which the respondent achieves its end that determines whether a proposal concerns a mandatory or a permissive subject of bargaining. To illustrate, when an employer refuses to bargain with a union over the arbitrability of disciplinary disputes, the employer's conduct is characterized as a failure to bargain over a mandatory subject of bargaining because grievance resolution procedures affect terms and conditions of employment. See Decatur, 122 Ill. 2d at 357. In contrast, when an employer unlawfully insists that a union accept its proposals concerning the arbitrability of certain disputes, effectively refusing to execute the agreement unless the union waives its statutory right to arbitration, the employer's conduct is characterized as a failure to bargain over a permissive subject of bargaining because the Act guarantees employees the right to arbitration. Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001). Thus, in this case, the Village's proposal concerned a permissive subject of bargaining regardless of the Village's ultimate goals to affect employees' terms and conditions of employment because it required the Union to waive its statutory right.

For the same reason, it is immaterial that the FPCA provides that bargaining over alternative dispute resolution/due process procedures is a mandatory subject of bargaining because the Village's proposal at issue here seeks the Union's waiver of its statutory right and therefore addresses a permissive subject.¹⁰

Thus, Respondent violated sections 10(a)(4) and (1) of the Act when it maintained to the point of impasse that disputes over discipline and/or discharge of a unit employee should be heard by the Fire and Police Commission, and not subject to the parties' grievance-arbitration procedure, because an employer fails to bargain in good faith when it "holds the rest of the contract terms hostage to its attempt to force the union's acceptance of an alternative to grievance arbitration." Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001) (citing, Cnty. of Cook (Cook Cnty. Hospital), 15 PERI ¶ 3009 (IL LLRB 1999); Bd. of Trustees of the Univ. of Ill. v. Ill. Educ. Labor Rel. Bd., 244 Ill. App. 3d 945, 612 N.E.2d 1365, 9 PERI ¶ 4011 (4th Dist. 1993); Nat'l Labor Rel. Bd. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342; Latrobe Steel Co. v. Nat'l Labor Rel. Bd., 630 F.2d 171 (1980)).

Further, contrary to the Village's contention, the Village did not meet its bargaining obligation merely by agreeing to include an arbitration clause in the contract because it simultaneously and impermissibly sought to limit the scope of that clause by insisting to impasse that the Union waive its right to submit certain disciplinary disputes to the grievance-arbitration process.

Finally, under the unique and particular facts of this case, the Village must either accept the Union's proposal or agree to an unlimited and unqualified arbitration clause because the parties have reached agreement on all other contractual matters and the Village cannot compel the Union to waive its statutory right to arbitration. On the one hand, the duty to bargain collectively does not require a party to reach a particular agreement or make a particular concession. Decatur, 122 Ill. 2d at 367. On the other hand, an employer may not force a union to relinquish its statutory right by bargaining to impasse on its proposal that the union waive that

¹⁰ Sec. 10-2.1-17: "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.*" 65 ILCS 5/10-2-17 (2010) (emphasis added).

right. Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001). In practice, then, a union may use its statutory right as a bargaining chip to obtain concessions from the employer in other areas of contract negotiation; the employer may, in turn, both reject the union's offer and refuse to discuss it altogether. See Village of Hazel Crest, 26 PERI ¶ 146 (IL LRB-SP 2010) (employer has no obligation to bargaining over permissive subjects and may reject the other party's proposals); 5 ILCS 315/8 (2010). However, if the parties have already agreed on all other contractual matters, and the Union has not yet waived its statutory right to arbitrate particular issues, then the employer is ultimately required to accept the statutory mandate because the Union will not relinquish its right to arbitrate if it will receive nothing in return. Thus, in this case, the Village must accept the statutory mandate because the parties have agreed to all other terms and the Village cannot force the union to relinquish its statutory right. Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001); Decatur, 122 Ill. 2d at 367.

3. The Ordinance

The Village did not bargain in bad faith in violation of Section 10(a)(4) and (1) by adopting the ordinance which vests in its Fire and Police Commission the authority to discipline firefighters because it did not alter the status quo and because there is no indication that the Village's conduct in passing the law displays any other indicia of bad faith under the Board's case law.

The duty to bargain in good faith entails an obligation to participate actively in the deliberations so as to demonstrate a present intention to find a basis for an agreement. City of Springfield, 6 PERI ¶ 2051 (IL SLRB 1990); City of Burbank, 4 PERI ¶ 2048 (IL SLRB 1988). The duty implies both an open mind and a sincere desire and effort to reach an agreement and to find a common ground. City of Springfield, 6 PERI ¶ 2051 (IL SLRB 1990). In determining whether a party has fulfilled its duty to bargain in good faith, the Board looks to the totality of circumstances. Certain types of conduct are indicative of bad faith bargaining. These include delaying tactics, unreasonable bargaining demands, unilateral changes involving mandatory bargaining subjects, attempts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of tentative agreements or regressive bargaining, and the arbitrary scheduling of bargaining meetings. Woodford and the Woodford Cnty. Sheriff, 8 PERI

¶ 2019 (IL SLRB 1990); Vill. of Bartlett, 10 PERI ¶ 2033 (IL SLRB 1994); City of Collinsville, 16 PERI ¶ 2026 (IL LRB-SP 2000); Vill. of Maywood, 10 PERI ¶ 2018 (IL LRB-SP ALJ 1994).

In this case, the Village did not make a unilateral change in a mandatory subject of bargaining because it did not alter the status quo and instead merely codified the parties' current practices concerning disciplinary procedures. To illustrate, the terms of the parties' expired collective bargaining agreement provided that the "Board of Fire and Police Commissioners [had] statutory authority over employees covered by [the] Agreement, including but not limited to the right to...discipline employees." Similarly, the ordinance vests the Village's Board of Fire and Police Commissioners with the authority to issue discipline to firefighters. Thus, even though the Village took unilateral action on an issue that touches on a mandatory subject of bargaining, the Village did not violate the Act because it did not change employees' terms and conditions of employment.¹¹

Further, the Village did not engage in regressive bargaining by adopting the ordinance because the ordinance was not a "proposal" made at the bargaining table and the Union never agreed to the Village's previously-offered terms. A respondent engages in regressive bargaining when it effects substantive changes in tentative agreements that are less favorable to the charging party than the earlier agreed-to terms. Granite City Comm. School Dist. No. 9, 19 PERI ¶ 175 (IELRB ALJ 2003). Driftwood Convalescent Hosp., 312 NLRB 247, 252 (1993). However, the withdrawal of previous proposals or tentative agreements does not in and of itself establish the absence of good faith. Mead Corp. v. NLRB, 697 F.2d 1013, 1022 (11th Cir. 1983). Rather an employer engages in bad faith bargaining only when it withdraws its proposals without good cause, after the union has either agreed to them or after the union's agreement appears imminent. Id. The key issue in evaluating the propriety of regressive bargaining is whether it is designed to "frustrate the bargaining process." Chicago Local No., 458-3M v. NLRB, 206 F.3d 22 (DC Cir. 2000) (citing Fairhaven Properties, Inc., 314 N.L.R.B. 763, 771, 1994 WL 446846 (1994); Transit Serv., 312 N.L.R.B. at 483; Toyota of San Francisco, 280 N.L.R.B. 784, 801, 1986 WL 54048 (1986); Pacific Grinding Wheel Co., 220 N.L.R.B. 1389, 1390, 1975 WL 6114 (1975)). If the parties were not close to agreement when the regressive proposal was made, it

¹¹ Contrary to the Union's contention, the status quo analysis is an appropriate one here because the Village's ordinance concerns substantive disciplinary procedures and thus addresses a mandatory subject of bargaining.

cannot be found to have frustrated bargaining. Irving Ready-Mix, Inc., 357 NLRB No. 105 (2011).

Here, as the Union correctly notes, the ordinance is less favorable to the Union than the Village's proposal, presented earlier. The May 12 ordinance essentially provides that no disciplinary disputes¹² over suspensions and terminations will proceed through the grievance arbitration process; in contrast, the April 21 proposal provided that some disciplinary disputes, those concerning terminations, would be arbitrable. Nevertheless, the Village's ordinance is not a bargaining proposal and therefore cannot support a finding that the Village engaged in bad faith regressive bargaining. More importantly, even if the Board determined that the Village's ordinance is reasonably viewed as a bargaining proposal, the elements for bad faith still are not met because the Union steadfastly rejected the Village's more favorable offer and demonstrated that the parties were not close to agreement when the Village made its "regressive proposal." See Irving Ready-Mix, Inc., 357 NLRB No. 105 (2011).

Next, there is no indication that the Village has used the ordinance to justify an express refusal to bargain substantive disciplinary procedures, as the Union implies. See Decatur, 122 Ill. 2d 353 (1988). Indeed, there is no evidence in the record, or allegation in the complaint, that the Village refused to bargain at all. Rather, the Union asks the Board to infer that such refusal was imminent because the Village asserted an affirmative defense that it was "not required to agree to the amendment of the current bargaining agreement language related to discipline due to its Fire and Police Commission Ordinance." However, since the Village has not yet categorically refused to bargain with the Union over substantive disciplinary proceedings, the Board cannot grant relief for a harm that has not occurred.

Further, the Union's assertion that the Village exceeded its authorities as a home rule power by adopting the ordinance and exercising functions reserved to the state under section

¹² The ordinance may be fairly read as vesting the Village's Fire and Police Commission with exclusive jurisdiction over disciplinary disputes arising from the application of the contract's just cause standard since it provides both that "the Board of Fire and Police Commissioners shall conduct a fair and impartial hearing of the [disciplinary] charges" against a firefighter and that the "Board may discharge [the firefighter] or may suspend him" when he is found guilty.

15(c) of the Act¹³ is insufficient to demonstrate a violation of sections 10(a)(4) and (1), even if proven correct, absent a showing that such overreaching constitutes per se bad faith.

Finally, contrary to the Union's contention, there is no indication that the Village "adopted [the] ordinance as part of its effort to force the Union to waive its statutory right under Section 8 to submit all issues involving firefighter discipline to...grievance arbitration procedures" because the ordinance does not alter the Village's bargaining obligations. Indeed, the ordinance neither allows the Village to refuse to bargain over substantive disciplinary procedures nor does it allow the Village to bargain to impasse on a permissive subject.¹⁴

In this case, the Village is required to bargain substantive disciplinary procedures because the ordinance must be read to either conflict with the Act or to permit the parties to bargain clauses which supplement or relate to the ordinance. Substantive disciplinary proceedings affect employees' terms and conditions of employment and therefore constitute a mandatory subject of bargaining. See Decatur, 122 Ill. 2d at 361-62. Section 7 of the Act provides that parties must bargain over "any matter with respect to wages, hours and other conditions of employment" as long as those matters are "not specifically provided for in any other law." 5 ILCS 315/7 (2010). Despite this limitation, parties are still required to bargain collectively over "clauses which either supplement, implement, or relate to the effect of such provisions." Id. Nevertheless, if such a law relates to wages, hours and conditions of employment and employment relations and also conflicts with the provisions of the Act, then the "Act or any collective bargaining agreement negotiated thereunder shall prevail and control."¹⁵ 5 ILCS 315/15(a) (2010).

Here, the Village must bargain the establishment or modification of substantive disciplinary procedures, specifically, the arbitrability of disciplinary disputes, regardless of how the ordinance is construed. If the ordinance is read to eliminate employees' statutory right to arbitrate disciplinary disputes, then it conflicts with, and is superseded by, the Act which

¹³ Section 15(c) of the Act provides, in relevant part, that "the provisions of this Act are the exclusive exercise by the State of powers and functions which might otherwise be exercised by home rule units." 5 ILCS 315/15(c) (2010).

¹⁴ The quoted language is drawn from the Union's First Amended Complaint.

¹⁵ The full text of the Act is as follows: "in case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by this amendatory Act of the 96th General Assembly), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control." 5 ILCS 315/15(a) (2010).

expressly confers such a right. Alternatively, if the ordinance does not seek to eliminate that right, then it does not specifically provide for matters the Union seeks to bargain and the Village must still bargain over contractual clauses which relate to or supplement the ordinance. See Decatur, 122 Ill. 2d at 366-67 (given the purpose of the Act, the fact that the civil service law at issue was an optional scheme, not one imposed by the State on any municipal body, and the legislature's express preference for arbitration as a method of resolving disputes, the municipal code which granted the civil service commission exclusive jurisdiction over certain disciplinary disputes did not limit bargaining over the arbitrability of grievances); City of Collinsville, 16 PERI ¶ 2026 (IL LRB-SP 2000)(an employer's authority to bargain over a subject matter is only preempted by a municipality's law if the matter is specifically covered by the law and if the subject matter conflicts with law's provisions).

Second, the ordinance does not permit the Village to maintain, to impasse, that the Union waive its right to arbitrate suspensions and discharges because it cannot permit what the Act and the Board's case law prohibit. See Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001); 5 ILCS 315/15(a) (2010).

Thus, the Village did not bargain in bad faith when it adopted the ordinance.

4. Sanctions.

The Charging Party's motion for sanctions is denied because the Village did not make untrue factual assertions without reasonable cause nor did the Village engage in frivolous litigation.

Section 11 (c) of the Act provides that the Board has discretion to include an appropriate sanction in its order if a party has made allegations or denials without reasonable cause and found to be untrue, or has engaged in frivolous litigation for the purposes of delay or needless increase in the cost of litigation. The test for determining whether a party has made factual assertions which were untrue and made without reasonable cause is an objective one of reasonableness under the circumstances. Chicago Transit Auth., 16 PERI ¶ 3021 (IL LLRB 1999); Chicago Transit Auth., 15 PERI ¶ 3018 (IL LLRB 1999); Cnty. of Rock Island, 14 PERI ¶ 2029 (IL SLRB 1998), aff'd, 315 Ill. App. 3d 459, 734 N.E.2d 33, 16 PERI ¶ 4008 (2000). The test for determining whether a party has engaged in frivolous litigation is whether the party's defenses to the charge were not made in good faith or did not represent a "debatable" position.

Chicago Transit Auth., 16 PERI ¶ 3021 (IL LLRB 1999); Cnty. of Cook, 15 PERI ¶ 3001 (IL LLRB 1998); Cnty. of Cook and Sheriff of Cook Cnty., 12 PERI ¶ 3008 (IL LLRB 1996); City of Markham, 11 PERI ¶ 2019 (IL SLRB 1995).

The Union argues that the Village made allegations and denials without reasonable cause and found to be untrue because it denied straightforward statements of current Board law that (1) “a bargaining proposal seeking a waiver of a statutory right is a permissive subject of bargaining” and (2) that “section 8 of the Act grants the Charging Party to right to use arbitration to resolve a dispute regarding the application of a contractual ‘just cause’ standard for discipline.” The Union likewise argues that these denials and Village’s supporting arguments on brief also demonstrate that the Village engaged in frivolous litigation because the Village’s positions are contrary to established Board case law and are therefore not debatable.

The Village did not make untrue factual assertions without reasonable cause because its statements, alleged to be untrue by the Union, were legal and not factual in nature.¹⁶ The Board’s case law suggests that any untrue allegations or denials sufficient to support the imposition of sanctions must address issues of fact rather than issues of law. See Chicago Transit Auth., 19 PERI ¶ 12 (IL LRB-LP 2003) (addressing allegedly untrue “factual assertions” when ruling on a motion for sanctions), see also Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), but see Wood Dale Fire Protection Dist. v. Ill. Labor Rel. Bd., 395 Ill. App. 3d 523, 535-36 (2nd Dist. 2009) (Court analyzed Respondent’s assertion that its failure to file a timely answer did not constitute an admission of the legal conclusions in the complaint under the frivolous litigation prong of section 11(c)). Indeed, the fact that Section 11(c) already provides a separate avenue by which the Board may examine a party’s legal assertions further suggests that the Act’s drafters intended that “allegations or denials” made without reasonable cause include factual allegations and denials, but not legal ones. Thus, the Village’s allegedly untrue assertions which concern the Board’s case law are more properly analyzed under the Board’s test for frivolous litigation.

The Village did not engage in frivolous litigation by asserting that a bargaining proposal seeking a waiver of a statutory right is a permissive subject of bargaining or by distinguishing the Board’s holding in the Village of Wheeling. In determining whether a Respondent has engaged

¹⁶ Notably, the parties have agreed to all the material facts because this is a case decided on a motion for summary judgment.

in frivolous litigation, the courts view a Respondent's legal arguments in the context of all its submissions. Wood Dale Fire Protection Dist., 395 Ill. App. 3d at 535-36. Indeed, the Illinois Appellate Court has held sanctions to be inappropriate even if Respondent has taken a legal position that is incorrect in the face of non-debatable black letter law as long as the Respondent's remaining arguments and submissions to the Board are supportable. Id.

For example, in Wood Dale Fire Protection Dist., the Court reversed the Board's award of sanctions against a defaulting Respondent that argued that its failure to file a timely answer did not constitute an admission of the legal conclusions set forth in the Board complaint. Id. The Court rejected the Board's reasoning that Respondent's intentional disregard or failure to adequately research the Board's case law on default warranted the imposition of sanctions since the Court determined that the Respondent's argument on that issue constituted only a small part of the Respondent's total submissions. Id.

Applying these tenets here, it is inappropriate to sanction Respondent for its denial that a "bargaining proposal seeking a waiver of a statutory right is a permissive subject of bargaining," even though the Board has consistently held that it is,¹⁷ because the Village's denial made up only a small portion of its submissions to the Board. Indeed, the Village never explicitly argued on brief that waiver of a statutory right is not a permissive subject of bargaining. Rather, Respondent instead sought to characterize its own bargaining proposals as pertaining to a mandatory subject. Further, the Village's remaining arguments, while ultimately unsuccessful, were supported by citation to authority and were therefore not frivolous.

Similarly, neither the Village's denial of the rights conferred by Section 8 of the Act nor the Village's accompanying arguments related to the Board's holding in Wheeling can support an award of sanctions because the Village did not seek to delay proceedings or needlessly

¹⁷ See Mt. Vernon Educ. Ass'n v. Ill. Educ. Labor Rel. Bd., 278 Ill. App. 3d 814, 820 (4th Dist. 1996); Bd. of Trustees of Univ. of Ill. v. Ill. Educ. Labor Rel. Bd., 244 Ill. App. 3d 945, 949 (4th Dist. 1993); Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001) (citing, Cnty. of Cook (Cook Cnty. Hosp.), 15 PERI ¶ 3009 (IL LRB 1999); Bd. of Trustees of the Univ. of Ill., 8 PERI ¶ 1014 (IL ELRB 1991), aff'd, 244 Ill. App. 3d 945, 612 N.E.2d 1365 (4th Dist. 1993); Bd. of Regents of the Regency Univ. System (Northern Ill. Univ.), 7 PERI ¶ 1113 (IL ELRB 1991); Toledo Typographical Union No. 63 v. Nat'l Labor Rel. Bd., 907 F.2d 1220 (D.C. Cir. 1990); Mt. Diablo Unified School Dist., 14 PERC ¶ 21192 (CA PERB 1990); Chula Vista City School Dist., 14 PERC ¶ 21162 (CA PERB 1990); Am. Fed. of State, Cnty. and Mun. Empl. Local 1363, 8 FPER ¶ 13278 (FL PERC 1982), aff'd, 9 FPER ¶ 14172 (1983); Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 7 FPER ¶ 12300 (FL PERC 1981), aff'd, 425 So. 2d 133 (Fla. 1st DCA 1983), aff'd in relevant part 475 So. 2d. 1221 (Fla. 1985); Columbus Printing Pressmen & Assistants' Union No. 252, 219 NLRB 268 (1975).

increase the cost of litigation and instead presented debatable positions and good-faith arguments to modify or reverse existing case law. First, the Village's denial that the Act confers a right to arbitrate disputes regarding the application of a contractual 'just cause' standard for discipline is a debatable position because the language of the Act does not explicitly reference the just cause standard or expressly provide that all contractual matters are subject to arbitration. Second, the Village's efforts to distinguish Wheeling or argue that it was wrongly decided are likewise debatable before the Board because the Appellate Court has never ruled on these particular issues and the Board is, accordingly, free to reverse its own prior holdings. But see Chicago Transit Auth., 19 PERI ¶ 12 (IL LRB-LP 2003)(sanctions awarded where the Respondent failed to distinguish or even discuss the Board's finding in a previous case between the same parties in which the Board directly addressed the crux of Respondent's argument in the new case); see also, Pryor v. United Equitable Ins. Co., 2011 IL App (1st) 110544 ¶ 14 (1st Dist. 2011) (applying Ill. S.Ct. R. 137, holding that positions which constitute good-faith arguments for the extension, modification, or reversal of existing law are not frivolous).

For these reasons, sanctions are denied.

IV. CONCLUSIONS OF LAW

The Village violated sections 10(a)(4) and (1) of the Act when it bargained to impasse on its proposal that the discipline and/or discharge of a unit employee should not be subject to the parties' grievance and arbitration procedure.

The Village did not violate sections 10(a)(4) and (1) of the Act when it adopted an ordinance which vested its Board of Fire and Police Commissioners with the authority to issue discipline.

V. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondent, its officers and agents, shall:

1. Cease and desist from:

- (a) Failing and refusing to bargain collectively in good faith with the Charging Party, Midlothian Professional Fire Fighters Association, Local 3148, International Association of Fire Fighters, as the exclusive representative of a bargaining unit composed of the Respondent's full-time firefighters below the rank of deputy chief, by insisting to impasse

upon its proposal to exclude disputes relating to discharges and/or suspensions from the contractual grievance arbitration procedure.

- (b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- (a) On request, bargain collectively in good faith with the Midlothian Professional Fire Fighters Association, Local 3148, International Association of Fire Fighters, as the exclusive representative of full-time firefighters below the rank of deputy chief, to negotiate a contractual clause providing for the arbitration of disputes relating to the just cause standard.
- (b) Post, at all places where notices to employees are normally posted, copies of the notice attached hereto and marked "Addendum." Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.
- (c) Notify the Board in writing, within 20 days from the date of this Decision, of the steps Respondent has taken to comply herewith.

VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the

exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 3rd day of August, 2012

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

NOTICE TO EMPLOYEES

FROM THE ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board, State Panel, has found that the Village of Midlothian has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from failing and refusing to bargain collectively in good faith with the Charging Party, Midlothian Professional Fire Fighters Association, Local 3148, International Association of Fire Fighters, as the exclusive representative of a bargaining unit composed of the Village's full-time firefighters below the rank of deputy chief, by insisting to impose upon our proposal to exclude disputes relating to discharges and/or suspensions from the contractual grievance arbitration procedure.

WE WILL cease and desist from in any like or related manner, interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL on request, bargain collectively in good faith with the Midlothian Professional Fire Fighters Association, Local 3148, International Association of Fire Fighters, as the exclusive representative of full-time firefighters below the rank of deputy chief, to negotiate a contractual clause providing for the arbitration of disputes relating to the contractual just cause standard.

DATE _____

Village of Midlothian
(Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor

Springfield, Illinois 62702

(217) 785-3155

160 North LaSalle Street, Suite S-400

Chicago, Illinois 60601-3103

(312) 793-6400

**THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED.**

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

Midlothian Professional Fire Fighters)	
Association, Local 1348, International)	
Association of Fire Fighters,)	
)	
Charging Party)	
)	
And)	Case No. S-CA-10-287
)	
Village of Midlothian,)	
)	
Respondent)	

AFFIDAVIT OF SERVICE

I, Anna Hamburg-Gal, on oath state that I have this 3rd day of AUGUST, 2012, served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** 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 West Randolph Street, Chicago, Illinois, addressed as indicated and with postage for regular mail.

Ms. Susan W. Glover
Robbins, Schwartz, Nicholas, Lifton
& Taylor, Ltd.
24 West Cass Street
5th Floor
Joliet, Illinois 60432

Ms. Lisa B. Moss
Carmell Charone Widmer Moss
& Barr, Ltd.
1 East Wacker Drive
Suite 3300
Chicago, Illinois 60601



Anna Hamburg-Gal
Attorney