

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

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

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER
DEFERRING IN PART TO ARBITRATION**

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

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

I. INVESTIGATORY FACTS

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

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

A. Count I

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

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

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

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

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

B. Count II

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

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

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

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

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

C. Count III

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

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

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

II. ISSUE AND CONTENTION

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

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

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

IV. DISCUSSION AND ANALYSIS

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

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

A. Collyer Deferral: Count I and III

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

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

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

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

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

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

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

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

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

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

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

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

B. Dubo Deferral: Count II

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

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

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

V. CONCLUSIONS OF LAW

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

VI. RECOMMENDED ORDER

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

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

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

VII. EXCEPTIONS

Pursuant Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service

of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois on this 22nd day of January, 2013.

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

**Michelle N. Owen
Administrative Law Judge**