

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

Midlothian Professional Fire Fighters Association, Local 3148, IAFF,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-13-017
)	
Village of Midlothian,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On August 31, 2012, and as amended on September 19, 2012, Midlothian Professional Fire Fighters Association, Local 3148, IAFF (Union), filed unfair labor practice charges with the State Panel of the Illinois Labor Relations Board (Board), alleging that the Village of Midlothian (Village) engaged in various unfair labor practices in violation of Sections 10(a)(4), (2), and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act). On October 1, 2012, the Board issued a complaint for hearing in the above-captioned matter, and on October 17, 2012, the Village filed its answer to the complaint.¹ On December 7, 2012, the Village filed a motion for deferral to arbitration. On December 21, 2012, the Union filed its response in opposition to the Village’s motion to defer.

¹ The Village’s answer referenced a motion for deferral to arbitration, but did not include the motion and supporting arguments. According to the Board’s Rules, a party may file a motion to defer within 25 days after the issuance of the complaint for hearing. Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin Code, Parts 1200 through 1240. On November 13, 2012, I wrote to the parties stating that because more than 25 days had passed since the issuance of the complaint, a motion for deferral would now be untimely. The Village responded, stating that it believed that the motion for deferral it made before the Executive Director was still pending because no ruling was ever made on the motion. Thus, the Village believed that it did not need to file an additional motion to defer after the issuance of the complaint. On November 20, 2012, I granted the Village’s request for an extension to file the motion. The motion and the response were timely filed.

For the reasons that follow, I recommend that the Village's motion for deferral be denied.

I. INVESTIGATORY FACTS

The Union is the exclusive representative of a bargaining unit composed of the Village's full-time fire fighters below the rank of deputy chief (Unit). At all times material, the Village and the Union (parties) have been parties to a collective bargaining agreement (agreement) setting out terms and conditions of employment for the Unit. The agreement contains a grievance-arbitration process culminating in final and binding arbitration.

A. Duty Trade Requests

The Union alleges that prior to March 2012, the Village routinely approved and rarely denied requests by Unit members to exchange or trade shifts (duty trade). Article V, Section 5.7 (Employee Shift Substitution and Hours Reduction Day Trades) of the parties' agreement permits employees to exchange or trade work shifts. The provision states:

Employees shall have the right to voluntarily exchange work shifts, and shift reduction days (Kelly Days for Kelly Days), so long as the exchange: (1) is made in writing; (2) is signed by both the employee requesting and the employee agreeing to the exchange; (3) is made at least 62 hours prior to the exchange date; (4) will not occasion overtime for either employee or interfere with departmental plans or programs; (5) is approved by the Chief or his designee, which approval shall not unreasonably be withheld. A shift exchange of an hours reduction day (Section 5.1(A)) may only be made for a similar hours reduction day and a shift exchange of a Kelly Day (Section 5.1(B)) may be made for a similar Kelly Day.

Article IV, Section 4.1 (Management Rights) of the parties' agreement states in relevant part:

Except as specifically modified by other Articles of this Agreement, the Union recognizes the exclusive right of the Village to make and implement decisions with respect to the management of its operations in all respects. Such rights include but are not limited to the following: to plan, direct, control and determine all the operations and services of the Village; . . . to make, alter and enforce rules, regulations, policies and procedures.

On or about May 22, 2012, and August 15, 2012, the Union filed grievances alleging that duty trade requests were being unreasonably denied to Unit members in violation of the

management rights clause, the employee shift substitution and hours reduction day trades clause, and the sick leave clause. The two grievances have proceeded to arbitration. Arbitration panels have been received by the parties, but arbitrators have not yet been selected. The Union has not filed a grievance regarding the August 31, 2012 denial of one Unit member's duty trade request to attend paramedic training. However, this denial is included in the complaint for hearing as an allegation of retaliation by the Village.

The Union alleges that the Village unilaterally changed working conditions for Unit members without prior notice to or bargaining with the Union, in violation of Sections 10(a)(4) and (1), when it changed an employee benefit (duty trade) by reducing the benefit, making it more difficult to obtain approval, delaying the notification of approval, and by denying duty trade requests that had already been approved. In addition, the Union alleges that the Village denied duty trade requests to Unit members in order to discourage them from engaging in union and protected, concerted activity and in retaliation for their union and protected, concerted activity, in violation of Sections 10(a)(2) and (1).

B. August Memorandum and General Orders

On or about August 10, 2012, the fire chief issued a memo entitled morning responsibilities, cell phone usage, work out time, and punching out (August Memo). On or about August 24, 2012, the fire chief issued two general orders regarding Unit employees' departmental rules and policies: time and attendance policy, and communication and information systems (General Orders). The Union alleges that the August Memo and General Orders implemented and altered numerous policies regarding various terms and conditions of employment, without providing the Union with notice and an opportunity to bargain. The Union

filed two grievances over the August Memo, alleging violations of the rules and regulations clause, management rights clause, and the entire agreement clause.

The Union alleges that the Village unilaterally changed working conditions for Unit members without prior notice to or bargaining with the Union, in violation of Sections 10(a)(4) and (1), when it issued the August Memo and General Orders. In addition, the Union alleges that the Village issued the August Memo and General Orders in order to discourage Unit members from engaging in union and protected, concerted activity and in retaliation for their union and protected, concerted activity, in violation of Sections 10(a)(2) and (1).

II. ISSUE AND CONTENTION

The issue is whether to grant the Village's motion for deferral. The Village seeks to defer the Sections 10(a)(4), (2), and (1) allegations as they relate to 1) the denial of duty trade requests and 2) the August Memo and General Orders.² The Village maintains that an issue of contract interpretation is at the center of the disputes, there is no evidence of enmity by the Village, and the parties have voluntarily submitted the disputes to the grievance-arbitration process. In regard to the denial of duty trade requests, the Village argues that the management rights clause and the employee shift substitution and hours reduction day trades clause must be interpreted in order to resolve whether the Village reasonably denied the trade day requests, and whether the Village acted in accordance with its managerial rights. In regard to the August Memo and General Orders, the Village argues that the management rights clause must be interpreted in order to resolve whether the Village had the authority to issue the policies.

The Union argues that the motion for deferral should be denied because the allegations are statutory and do not require contract interpretation, the evidence clearly indicates enmity

² The complaint also includes Sections 10(a)(2) and (1) allegations relating to various Unit members' discipline. The Village's motion for deferral does not seek to defer the allegations related to discipline.

toward the Union, and the dispute cannot be effectively resolved by arbitration. The Union maintains that the issues only require statutory application: does the Village's "unreasonable" denial of duty trade requests and "unilateral" implementation of the August Memo and General Orders constitute unilateral changes in terms and conditions of employment in violation of Sections 10(a)(4) and (1) of the Act and retaliation in violation of Sections 10(a)(2) and (1). Finally, the Union argues that bifurcation of the issues is inefficient and impractical.³

III. 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 said agreement contains a grievance procedure with binding arbitration as its terminal step, the Board may defer the resolution of such dispute to the grievance and arbitration procedure contained in said 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. Village of Bolingbrook, 20 PERI ¶139 (IL LRB-SP 2004); State of Illinois, Department of Central Management Services (Department of Human Services), 19 PERI ¶114 (IL LRB-SP 2003); Chicago Transit Authority, 1 PERI ¶3004 (IL LLRB 1985). The Board has recognized three different standards for determining whether an unfair labor practice charge case may 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

³ The Union also argues that the motion for deferral should be denied because the Executive Director previously denied the Village's arguments through the issuance of the complaint for hearing. Section 1220.65(b) of the Board's Rules and Regulations allow for the filing of a motion for deferral both during the investigatory stage and after a complaint for hearing has issued. That section states that a party may file a motion for deferral: "1) at any time during the investigation prior to the issuance of a complaint for hearing, dismissal, or deferral order . . . 2) within 25 days after the issuance of a complaint for hearing." Therefore, the Village was within its right under the Board's Rules to file an additional motion for deferral after the complaint for hearing was issued.

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).

A. Denial of Duty Trade Requests

Since, the parties have proceeded to arbitration for some, but not all, of the duty trade request denials, both the Collyer and Dubo standards apply to the Sections 10(a)(4), (2), and (1) allegations. I find that deferral is inappropriate under both standards.

Under Collyer, deferral is appropriate, even where no grievance has been filed, when (1) a question of contract interpretation is 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). However, application of three-part test does not automatically end the inquiry. Other considerations are whether arbitration will proceed expeditiously and whether it will resolve all of the issues presented by the case. County of Cook, 6 PERI ¶3019 (IL LLRB 1990) (deferral was inappropriate where all of the unfair labor practice charges would not have been disposed of by arbitration, deferral would have created litigation in multiple forums, and it would have further delayed the resolution of issues which were almost two years old).

Under Collyer, although the Union has expressed its willingness to arbitrate the dispute and waive any time limits with respect to filing grievances on the issue, a question of contract interpretation is not at the center of the dispute, and the Union has presented evidence of enmity by the Village. The Village contends that the management rights clause and the employee shift

substitution and hours reduction day trades must be interpreted in order to determine whether the Village reasonably denied the duty trade requests and acted in accordance with its managerial rights. However, the central question is not whether the parties' agreement authorized the Village's conduct, but rather whether the Village denied the requests to discourage and retaliate against Unit members' protected, concerted activity, and "unilaterally" changed the duty trade request policy. These are statutory questions. An arbitrator's interpretation of the parties' agreement will not resolve these issues. Further, even assuming that the Village acted within its' rights under the parties' agreement, such authority does not cure the Sections 10(a)(2) and (1) allegations. The Village's motive for denying the request must still be examined. See Illinois Secretary of State, 19 PERI ¶35 (IL LRB-SP 2003). The issue therefore is not centered on an interpretation of the parties' agreement, and thus the first part of the Collyer test is not satisfied.

There is also evidence of enmity by the Village. This case does not involve "a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind." Collyer, 192 NLRB 837, 842, quoting Jos. Schlitz Brewing Co., 175 NLRB 141 (1969). The Union notes that the "ninety-two-paragraph Complaint" is replete with evidence of the Village's enmity toward the Union. The complaint does contain allegations of enmity toward the Unit employees' exercise of rights protected under the Act: denying duty trade requests in retaliation for Unit members' union and protected, concerted activity; and disciplining Unit members, including the union president and vice-president for their union and protected, concerted activity, including filing grievances on behalf of Unit members.⁴ In addition, in a recent case involving the same parties, the Board held that the Village had violated the Act. On January 28, 2013, in Case No.

⁴ Specifically, the complaint alleges that a Unit member engaged in protected, concerted activity by informing the local union president, who in turn informed the fire chief that the deputy chief had slept through emergency calls. The Union asserts that the Village then issued a written reprimand to the Unit member, filed a complaint seeking his suspension and/or discharge, and denied his duty trade requests in retaliation.

S-CA-10-287, the Board affirmed an administrative law judge's determination that the Village had violated Sections 10(a)(4) and (1) of the Act by insisting to impasse that the Union relinquish its right to have the meaning of the parties' just cause provision subject to grievance arbitration.⁵ There is sufficient evidence of enmity by the Village, and thus the second part of the Collyer test is not satisfied. Since, the duty trade dispute is not centered on contract interpretation and there is evidence of enmity by the Village, deferral is inappropriate under the Collyer standard.

Under *Dubo*, deferral to arbitration is appropriate if (1) the parties have voluntarily submitted their dispute to their agreed-upon grievance arbitration procedure, (2) that procedure culminates in final and binding arbitration, and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. *Dubo*, 142 NLRB 431; *Department of Human Services*, 19 PERI ¶ 114; *PACE Northwest Division*, 10 PERI ¶2023 (IL SLRB 1994).

In this case, although the parties have voluntarily submitted some of the grievances to arbitration and that procedure culminates in final and binding arbitration, the arbitration process will not resolve the dispute. As previously noted, arbitration would not resolve the statutory issues: whether the Village denied the requests to discourage and retaliate against Unit members' protected, concerted activity, and whether the Village "unilaterally" changed the duty trade request policy. Since there is not a reasonable chance that the arbitration process will resolve the dispute, deferral is inappropriate under *Dubo*.

B. August Memo and General Orders

Since the parties have proceeded to arbitration for the August Memo but not for the General Orders, both the Collyer and *Dubo* standards apply. I find that deferral is inappropriate under both standards.

⁵ See *Village of Midlothian*, 29 PERI ¶125 (IL LRB-SP 2013).

Under Collyer, the Village again asserts its willingness to arbitrate the dispute and waive any time limits. However, contract interpretation is not at the center of the dispute and there is evidence of enmity by the Village. The Village argues that contract interpretation is at the center of the dispute because the management rights clause must be interpreted in order to resolve whether the Village had the authority to issue the August Memo and General Orders. However, as the Union correctly notes, 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. See County of Rock Island, 25 PERI ¶3 (IL LRB-SP 2009). The management rights clause gives the Village the right to “plan, direct, control and determine all the operations and services of the Village; . . . to make, alter and enforce rules, regulations, policies and procedures.” Contractual language will serve as a waiver of a party’s bargaining rights only where 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 Union’s waiver of the right to bargain over policies regarding morning responsibilities, cell phone usage, workout time, punching out, and time and attendance is not clear, unequivocal and unmistakable. While the management rights clause grants the Village the right to make, alter and enforce rules, regulations, policies and procedures, it does not grant it the right to unilaterally change conditions of employment such as time and attendance.

Further, even if the issue of the August Memo and General Orders could be said to center on contract interpretation, as previously stated, there is evidence of enmity by the Village. Thus, deferral to arbitration is inappropriate under the Collyer standard.

Deferral is also inappropriate under the Dubo standard. There is not a reasonable chance that arbitration will resolve the dispute. The question of whether the management rights clause

gave the Village the authority to issue the policies does not answer the question of whether the policies were issued in retaliation for Unit members' union and protected, concerted activity.⁶ Thus, arbitration would not resolve the Sections 10(a)(2) and (1) allegations, making deferral inappropriate.

Finally, deferral in this case would increase litigation in multiple forums. The Village does not seek to defer all of the allegations in the complaint. Thus, the parties must still go to hearing before the Board on the Sections 10(a)(2) and (1) allegations relating to various Unit members' discipline, which were not included in the motion for deferral. Thus, deferral would not resolve all of the unfair labor practice charges in the complaint, making deferral inappropriate in this case. See County of Cook, 6 PERI ¶3019.

IV. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Village's motion for deferral is denied.

V. 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,

⁶ The complaint alleges, for example, that the August Memo and General Orders were issued in retaliation for the union president sending a letter to the mayor, which was critical of the fire chief's leadership and accused the Village of bad faith in resolving grievances.

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 8th day of March, 2013.

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Michelle N. Owen
Administrative Law Judge