

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

| | | |
|-----------------------------|---|----------------------|
| Wheaton Firefighters Union, |) | |
| Local 3706, IAFF, |) | |
| |) | |
| Charging Party |) | |
| |) | Case No. S-CA-14-067 |
| and |) | |
| |) | |
| City of Wheaton, |) | |
| |) | |
| Respondent |) | |

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On October 28, 2013, the Wheaton Firefighters Union Local 3706, IAFF (Union) filed a charge with the Illinois Labor Relations Board’s State Panel (Board) alleging that the City of Wheaton (City or Respondent) 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 (2012). The charge was investigated in accordance with Section 11 of the Act. On February 26, 2014, the Board’s Executive Director issued a Complaint for Hearing, which she amended on March 4, 2014 to correct a clerical error. The parties agreed to submit a Stipulated Record in lieu of a hearing, including Joint Exhibits, Union Exhibits, and Joint Stipulations. The parties filed briefs on July 11, 2014. The Union’s brief included a motion for sanctions against the Respondent for alleged frivolous litigation. On July 25, 2014, the Respondent filed a response to the motion. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. Stipulated Facts

1. At all times material, the City has been a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act (“Act”).
2. At all times material, the City has been subject to the jurisdiction of the State Panel of the Board, pursuant to Section 5(a-5) of the Act.
3. At all times material, the City has been 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 represented a bargaining unit comprised of all sworn, full-time firefighters, lieutenants, and captains/shift commanders employed by the City (the "Bargaining Unit").
6. The Union and City were parties to a collective bargaining agreement, effective from May 1, 2007 to April 30, 2012, which set forth the terms and conditions of employment for the Bargaining Unit. The collective bargaining agreement remained in effect until April 30, 2012 "and thereafter unless either party shall notify the other in writing 120 days (or by January 1st) prior to the anniversary date of [the] contract that it desires to modify and/or amend [the] Agreement."
7. On or about February 23, 2012, the Union and the City commenced negotiations for a successor contract.
8. After failed negotiations and mediation, the Union invoked interest arbitration. On June 14, 2013, Arbitrator John Fletcher was appointed to preside over the matter.
9. The parties submitted numerous outstanding issues to interest arbitration pursuant to Section 14 of the Act. Arbitrator John Fletcher presided over the interest arbitration hearing on October 15, 2013.
10. Prior to hearing, and in accordance with the parties' ground rules, the parties exchanged prehearing settlement offers.
11. Joint Exhibit 14 is a complete and accurate copy of the Union's Prehearing Offers Of Settlement For Interest Arbitration.
12. Joint Exhibit 15 is a complete and accurate copy of the City's Preliminary Final Offer.
13. During interest arbitration, the Union proposed modifications to Article 5, ¶ 9 [Management Rights clause, subcontracting provision] of the collective bargaining agreement. In response to this proposal, the City proposed to maintain the current contract language with respect to Article 5, ¶ 9 of the collective bargaining agreement.

14. During interest arbitration, the City proposed modifications to Article 33, Health Insurance, of the collective bargaining agreement. In response, the Union proposed different modifications to Article 33 of the collective bargaining agreement.
15. At the interest arbitration hearing, Arbitrator John Fletcher ordered the parties to exchange final offers by the conclusion of the hearing.
16. Joint Exhibit 16 is a complete and accurate copy of the final offer submitted by the City in response to the Arbitrator's order regarding the exchange of final offers.
17. In relevant part, the City's final offer includes the following two proposals:

Article 5 - Management Rights

Except as limited by the express provisions of this Agreement, the Employer has and will continue to retain the right to operate and manage its affairs in accordance with the authority granted to it under applicable law. Subject to such grant of authority, the rights assigned to the Employer include, but are not limited to, the following rights:

9. To contract out work, provided that such subcontracting does not result in layoffs of bargaining unit members, or reduced work assignments of current duties;

Article 33 - Hospitalization & Medical Coverage Program

- A. The City will provide medical insurance benefits to Employees and their eligible dependents on the same basis as is provided to non-bargaining unit City employees except that effective July 1, 2012, the employee contribution amount will be adjusted in accordance with the schedule listed below:

[schedule omitted]

- B. For each employee contribution change during the life of this Agreement, the annual employee contribution shall not increase by more than 15% in any one year. The City's cost shall be based on the monthly amount charged to the City for Single, Single +1, or Family Coverage by The City's provider. If actual Cost turns out to be different than the monthly charge, employees will not be required to make additional contributions and will not be entitled to any refunds. Employees have no right, title or interest in any reserves or assets of the health insurance plan. The amount will be paid through the pre-tax deduction available through the City Plan. The City reserves the right to change: any and all terms of such benefits

including, but not limited to: insurance carriers, self-insurance or risk pools, PPO networks, medical providers, covered benefits maximum limits, deductibles, and co-payments, so long as such changes apply equally to non-bargaining unit employees of the City.

18. At the interest arbitration hearing, counsel for the Union informed the arbitrator that he did not have jurisdiction to rule on the City's two above-referenced proposals because they addressed permissive subjects of bargaining. The Union further asked the arbitrator to retain jurisdiction over these issues until the Board resolved the instant unfair labor practice charge.¹
19. On February 20, 2014, Arbitrator Fletcher issued an Opinion and Award resolving all disputed issues except Article 33 and Article 5, ¶ 9. Arbitrator Fletcher retains jurisdiction to resolve those issues upon resolution of the instant Unfair Labor Practice Complaint.
20. The parties agreed to include the following language in their successor agreement:

Article 45 - Entire Agreement

This written Agreement constitutes the part[ies'] complete agreement, and concludes bargaining for its term as to any subject expressly covered by the terms of this Agreement, unless mutually agreed to by both parties. No amendment or modification of this Agreement shall be operative or effective unless reduced to writing and executed or signed by the representatives of the parties.

The parties' agreement to this provision shall not be construed as waiving any of their respective rights or obligations to negotiate as may be required by the IPLRA as to:

The impact of the exercise of the Employer's management rights as set forth herein on any terms and conditions of employment.

21. On April 15, 2011, a power point presentation, entitled Current Trends in Interest Arbitration and Collective Bargaining, was presented by Robert Smith and Benjamin Gehrt of Clark Baird Smith at the 2011 Illinois Association of Municipal Management Assistants Conference. Union Exhibit 1 is a true and accurate copy of

¹ This fact is drawn from the interest arbitration transcript. The parties did not expressly stipulate to it.

this power point presentation. While the City does not contest the authenticity of Union Exhibit 1, the City objects that Union Exhibit 1 is inadmissible and irrelevant.

II. Relevant Statutory Provisions

The Illinois Municipal Code Section 10-2.1-4 (Substitutes Act) provides the following in relevant part:

In any municipal fire department that employs full-time firefighters and is subject to a collective bargaining agreement, a person who has not qualified for regular appointment under the provisions of this Division 2.1 shall not be used as a temporary or permanent substitute for classified members of a municipality's fire department or for regular appointment as a classified member of a municipality's fire department unless mutually agreed to by the employee's certified bargaining agent. Such agreement shall be considered a permissive subject of bargaining.

65 ILCS 5/10-2.1-4 (2012).

III. Issues and Contentions

The issue is whether the Respondent violated Sections 10(a)(4) and (1) of the Act when it submitted its final offers on subcontracting and health care to the parties' interest arbitrator.

The Union argues that the Respondent violated the Act through this conduct by bargaining to impasse on permissive subjects of bargaining. First, the Union argues that the Respondent's subcontracting proposal is permissive because the Union's acceptance of that proposal would constitute a waiver of its statutory rights under the Substitutes Act. The Union explains that the proposal forces the Union's agreement to allow subcontracting of firefighter work, which the Substitutes Act would otherwise prohibit without such agreement. Similarly, the Union argues that the Respondent's health care proposal is permissive because it seeks the Union's waiver of its statutory right to bargain over mid-term changes to health insurance. The Union concludes that the Respondent's submission of these proposals to the interest arbitrator demonstrates that the Respondent held the contract hostage to its permissive proposals and thereby refused to bargain in good faith.

Finally, the Union moves for sanctions, arguing that the Respondent engaged in frivolous litigation because it had no good faith basis to deny that its subcontracting and health insurance proposals are permissive subjects of bargaining. In support, the Union points to case law

addressing similar health care proposals, opposing counsel's public acknowledgement of it, Respondent's offer to stipulate that its health care proposal is a permissive subject of bargaining, and an interpretation of the Substitutes Act issued by opposing counsel's former law firm.

The Respondent denies that it bargained to impasse on permissive subjects of bargaining by submitting its subcontracting and health care proposals to the interest arbitrator. First, the Respondent argues that its subcontracting proposal is a mandatory subject of bargaining because it does not seek a waiver of the Union's statutory rights under the Substitutes Act. The Respondent notes that its proposal does not contain clear and unmistakable language to that effect, and instead preserves the Union's rights under the Substitutes Act by limiting the Respondent's managerial authority to that granted under applicable law. Second, the Respondent argues that its proposal on health insurance is a mandatory subject of bargaining under NLRB case law and urges the adoption of federal precedent to resolve this issue of first impression. Further, the Respondent contends that it should be permitted to submit a proposal granting it discretion to change unit employees' health care benefits because it has no statutory obligation to offer employees health insurance at all. The Respondent concludes that its conduct does not violate the Act, even if its proposals are permissive, because its mere submission of permissive proposals to the interest arbitrator does not alone evidence a refusal to bargain in good faith.

Finally, the Respondent denies that it engaged in frivolous litigation and asserts that its position is not only debatable, but well supported and most likely meritorious. The Respondent particularly objects to the Union's use of attorneys' presentations and articles to establish a right to sanctions, and asserts that those documents are irrelevant. Further, the Respondent argues that its prehearing offer, to stipulate to the permissive nature of its health insurance proposal, is inadmissible. In the alternative, the Respondent asserts its offer evidences a desire to resolve matters short of a hearing, rather than an intent to engage in frivolous litigation.

IV. Discussion and Analysis

The City did not violate Sections 10(a)(4) and (1) of the Act because a respondent does not refuse to bargain in good faith merely by submitting permissive proposals to an interest arbitrator. In the event that the Board reverses this finding and at the request of the parties, the decision below also resolves whether the proposals at issue address mandatory or permissive subjects of bargaining.

A public employer violates Section 10(a)(4) of the Act by failing to bargain in good faith with a bargaining unit's exclusive representative over employees' wages, hours and other conditions of employment—the “mandatory” subjects of bargaining. City of Decatur v. Am. Fed'n of State, Cnty. and Mun. Empl., Local 268, 122 Ill. 2d 353 (1988); Am. Fed'n of State, Cnty. and Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 546 (1st Dist. 1989); Ill. Dep't of Military Affairs, 16 PERI ¶ 2014 (IL SLRB 2000); City of Mattoon, 13 PERI ¶ 2016 (IL SLRB 1997); City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987).

As a general matter, a public employer also breaches its duty to bargain in good faith if it insists to impasse on a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶ 125 (IL LRB-SP 2013); City of Mattoon, 13 PERI ¶ 2016; Cnty. of Kane and Kane Cnty. Sheriff, 4 PERI ¶ 2031 (IL SLRB 1988); Cnty. of Cook (Cook Cnty. Hosp.), 15 PERI ¶ 3009 (IL LRB 1999); Cnty. of Cook, 6 PERI ¶ 3003 (IL LRB 1989); Nat'l Labor Rel. Bd. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

In the interest arbitration context, however, the Board has not uniformly equated such “insistence to impasse” with bad faith. Compare Vill. of Hazel Crest, 26 PERI ¶ 146 (IL LRB-SP 2010); Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001); Vill. of Bensenville, 14 PERI ¶ 2042 (IL LRB-SP 1998). The Board's cases on this issue are collected below.

In Village of Bensenville (1998), the Board held that a respondent does not violate the duty to bargain in good faith simply by submitting its permissive proposal to the interest arbitrator. Vill. of Bensenville, 14 PERI ¶ 2042 (IL LRB-SP 1998). The Board reasoned that the language of the Act, the policies underlying interest arbitration, and the Charging Party's ability to strike the permissive proposal from the arbitrator's consideration warranted that outcome. Id. Accordingly, even though the Bensenville Respondent insisted to technical impasse on its permissive proposal, the Board declined to find such conduct a per se violation of the Act. Id. (objecting to the submission of mandatory subjects to interest arbitration is a per se violation of the Act, but submitting a permissive proposal to interest arbitration is not); see also Country Club Hills, 17 PERI ¶ 2043 (IL LRB-SP 2001) (accurately describing the Bensenville holding in these terms).

In Village of Wheeling (2001), the Board made a contrary ruling by effectively imposing a per se rule where the Bensenville Board expressly declined to do so. Vill. of Wheeling, 17 PERI ¶ 2018. In Wheeling, as in Bensenville, the Board acknowledged as undisputed that the

parties were at impasse, and observed that the Respondent submitted proposals on allegedly permissive subjects of bargaining to the interest arbitrator. Id. However, the Board made no further analysis of the Respondent’s bargaining conduct, as the Bensenville Board directed. Id. Rather, after citing the parties’ impasse, the Board unequivocally stated that the “sole” question bearing on the outcome of the case was whether the Respondent’s proposals addressed permissive or mandatory subjects of bargaining. Id. Upon finding the proposals addressed permissive subjects, the Wheeling Board effectively determined that the Respondent violated the Act simply by submitting them to the interest arbitrator.²

In Village of Hazel Crest (2010), the Board implicitly returned to the holding in Bensenville by affirming the rationale set forth in an Executive Director’s dismissal. Vill. of Hazel Crest, 26 PERI ¶ 146. There, as in the prior two cases, the Charging Party alleged that the Respondent unlawfully bargained to impasse on a permissive subject of bargaining by submitting its permissive proposals to the interest arbitrator. Id. Where the alleged violation was based on that submission alone, the Executive Director found it “unnecessary to detail any of the specific proposals or to outline the parties’ procession through the bargaining process.” Id. He simply dismissed the charge, reasoning that the Charging Party could (and did) “cure” the problem by striking the alleged permissive proposal from the arbitrator’s consideration.^{3,4} Id. By adopting the Executive Director’s analysis, the Board held that a respondent does not violate the Act by merely submitting its permissive proposal to the interest arbitrator. Id.

Applying the Board’s most recent precedent, this case must be dismissed. State of Ill., Dep’t of Cent. Mgmt., Serv. (Workers’ Comp. Com’n), 30 PERI ¶ 171 (IL LRB-SP 2014)(where cases resolve the same issues in opposing ways, the most recent one controls); Reynolds v. Danz, 172 Ill. App. 3d 907, 913 (3rd Dist. 1988). Here, the complaint alleges that the Respondent violated the duty to bargain in good faith by insisting to impasse on permissive subjects of bargaining. The sole basis for that assertion is the Respondent’s submission of its alleged permissive proposals to the interest arbitrator. Under Village of Hazel Crest, that conduct does

² The Wheeling Board did not distinguish or cite Village of Bensenville.

³ The Hazel Crest Board did not cite to either Wheeling or Bensenville.

⁴ In City of Elgin, the Board was presented with a similar issue to that raised in the cases cited above. However, it stands as non-precedential because there was no majority vote on the outcome. City of Elgin, 30 PERI ¶ 8 (IL LRB-SP 2013) (two members voted to uphold the dismissal on the grounds that the underlying issue was moot, two members voted to reverse the dismissal on the grounds that the charge raised an issue for hearing as to whether the City insisted to impasse on a permissive subject).

not alone violate the duty to bargain in good faith because the Charging Party can strike the permissive proposal from the arbitrator's consideration and, in this case, has done so. Vill. of Hazel Crest, 26 PERI ¶ 146.

Thus, the instant complaint is dismissed.

a. Health care proposal

The Respondent's health care proposal is a permissive subject of bargaining because it requires the Charging Party to waive its right to bargain over unforeseen changes to unit employees' health benefits.

The Board has consistently held that questions regarding employees' health insurance benefits are mandatory bargaining subjects. City of Kankakee (Kankakee Metropolitan Wastewater Utility), 9 PERI ¶ 2034 (IL SLRB 1993); City of Blue Island, 7 PERI ¶ 2038 (IL SLRB 1991); Cnty. of Jackson, 8 PERI ¶ 2008 (IL SLRB H.O. 1992).

However, a proposal seeking the waiver of a statutory right is a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶ 125; Vill. of Wheeling, 17 PERI ¶ 2018. Statutory rights provided to public employees by the Illinois Public Labor Relations Act include "the right ... to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment..." 5 ILCS 315/6; City of Rockford, 14 PERI ¶ 2030 (IL SLRB 1998). The duty to bargain extends to issues that arise during the term of a collective bargaining agreement. Mt. Vernon Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Rel. Bd., 278 Ill. App. 3d 814, 816 (4th Dist. 1996) (addressing IELRA which has no express reference to midterm bargaining); 5 ILCS 315/7 ("no party to a collective bargaining contract shall terminate or modify such contract unless the party desiring such termination or modification" satisfies the requirements of the Act.).

A union may waive the right to demand midterm bargaining, but the waiver of that right must be clear and unmistakable. Am. Fed'n of State, Cnty. & Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 269 (1st Dist. 1989). For example, a broad zipper clause waives parties' right to midterm bargaining because it addresses matters covered by the statutory right to midterm bargaining and contains the type of explicit language required to waive such statutory rights. Mt. Vernon Educ. Ass'n, IEA-NEA, 278 Ill. App. 3d at 817. To illustrate, the right to midterm bargaining applies only to those subjects that are neither fully bargained nor the subject

of a clause in a collective bargaining agreement, and any waiver of that right must be clear and unmistakable. Id. (“the right to midterm bargaining is not absolute”); Ill. Dep’t of Military Affairs, 16 PERI ¶ 2014 (ISLRB 2000)(same); Am. Fed’n of State, Cnty. & Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 269 (1st Dist. 1989)(addressing standard for finding waiver). Broad zipper clauses address such matters, in the explicit form required of an effective waiver, because they expressly waive bargaining over matters unforeseen or unknown by either party at the time of the contract’s execution. Mt. Vernon Educ. Ass’n, IEA-NEA v., 278 Ill. App. 3d at 817.

The Respondent’s health care proposal is a permissive subject of bargaining because it is analogous to a broad zipper clause. First, it contains express language that clearly and unmistakably waives the Union’s right to bargain over future changes to members’ health care benefits. Indeed, it “reserves [to the Respondent] the right to change...any and all terms of such benefits,” provided that the “changes apply equally to non-bargaining unit employees.” Am. Fed’n of State Cnty. and Mun.Empl., 274 Ill. App. 3d at 334 (Union waived the right to bargain layoffs where contract granted employer the exclusive right “to relieve employees from duty because of lack of work or other legitimate reasons.”). Second, that express language applies to matters covered by the midterm right to bargain because the Union cannot foresee the Respondent’s midterm changes to bargaining unit members’ health benefits and cannot control the indicia on which those changes are based. Clearly, the Union is blind to the Respondent’s plans for non-union members’ health benefits, to which its members’ benefits are linked. Likewise, the Union has no power to impact those non-union employees’ health benefits since it cannot negotiate on behalf of individuals it does not represent. In short, the Respondent may unexpectedly hike non-members’ deductibles or markedly decrease their benefits, and rely on the proposal’s language to apply those changes to bargaining unit members. Thus, the proposal is permissive because the Respondent’s broad discretion to make midterm changes to Union members’ health care benefits constitutes an abdication of the Union’s right to midterm bargaining on those issues. Mt. Vernon Educ. Ass’n, IEA-NEA, 278 Ill. App. 3d at 817 & 825 (language expressly waiving bargaining over matters unforeseen or unknown by either party at the time of the contract’s execution waives the right to midterm bargaining); see also City of Danville, 26 PERI ¶ 32 (IL LRB-SP GC 2010).

Notably, the uniformity of health care benefits offered to management and the Union under this proposal does not provide the Union with “valuable protection” against a marked midterm decrease in health benefits. Members of management may well accept a significant reduction in their health benefits, when that reduction is offset by an increase in their wages. By contrast, the Union is powerless to demand a similar wage increase once it is locked into its contractual package of benefits. Thus, the Union can take no reassurance in receiving the same health care benefits as management where management can protect itself from a net decrease in compensation, but the Union cannot.

Finally, it is inappropriate to find this proposal a mandatory subject of bargaining based on federal precedent because the private sector applies a different approach than Illinois to proposals that affect the midterm right to bargain. In the private sector, a proposal that seeks the waiver of a union’s statutory right to midterm bargaining is a mandatory subject of bargaining; in Illinois, it is not. Mt. Vernon Educ. Ass’n, IEA-NEA, 278 Ill. App. 3d at 821. Accordingly, federal precedent is inapplicable here because it conflicts with well-established Illinois Appellate Court case law. Id. (noting that some jurisdictions find all zipper clauses to be mandatory subjects of bargaining, but finding broad zipper clauses permissive subjects of bargaining in Illinois) (citing National Labor Relations Board v. Tomco Communications, Inc., 567 F.2d 871, 879 (9th Cir.1978)); but see KSM Industries, 336 NLRB 133 (2001)(Respondent was entitled to bargain to impasse on its proposal that reserved to it sole discretion during the term of the contract to unilaterally change employees’ health insurance benefits, so long as the change was companywide); McClatchy Newspapers, 321 NLRB 1386, 1387 (1996)(employer was entitled to bargain to impasse on its proposal to institute a wholly discretionary merit pay plan).

Thus, the Respondent's health care proposal addresses a permissive subject of bargaining.

b. Subcontracting proposal

The Respondent’s subcontracting proposal is a mandatory subject of bargaining because it contains no clear and unmistakable waiver of the Union’s rights under the Substitutes Act.⁵

⁵ The Central City test is not applied here because the parties appear to agree that the proposal's alleged impact on the Union's statutory rights determines the proposal's classification as permissive or mandatory. Neither party argues otherwise on brief.

As noted above, a proposal seeking the waiver of a statutory right is a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶ 125; Vill. of Wheeling, 17 PERI ¶ 2018; Cnty. of Cook (Cook Cnty. Hosp.), 15 PERI ¶ 3009; 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 (1993); Bd. of Regents of the Regency Univ. System (Northern Ill. Univ.), 7 PERI ¶ 1113 (IL ELRB 1991). A proposal may be permissive by virtue of its affect on statutory rights, even where it appears on its face to address an otherwise mandatory subject of bargaining. See Vill. of Midlothian, 29 PERI ¶ 125. Distinguishing between permissive and mandatory proposals under such circumstances requires more than merely reading the proposal in isolation. Instead, it requires a comparison of the proposal to the statutory right allegedly implicated by the proposal's acceptance.

A proposal seeks the waiver of a union's statutory rights where it conflicts with a statutory mandate by offering the union fewer rights than provided under statute. Vill. of Midlothian, 29 PERI ¶ 125; Vill. of Elk Grove Vill., 21 PERI ¶ 14 (IL LRB-SP GC 2005). Thus, a proposal may seek a waiver of a statutory right even where the proposal's language does not expressly reference waiver. Ehlers v. Jackson Cnty. Sheriff's Merit Comm'n, 183 Ill. 2d 83 (1998); see also Vill. of Elk Grove Vill., 21 PERI ¶ 14. Yet, a finding of waiver by contract is absolutely precluded where a contract is silent on the subject matter in dispute. Am. Fed'n of State, Cnty. and Mun. Empl. v. State Labor Rel. Bd., 274 Ill. App. 3d 327, 334 (1st Dist. 1995); Chicago Transit Auth., 14 PERI ¶ 3002 (IL LLRB 1997).

Here, the Respondent's proposal does not seek the waiver of the Union's rights under the Substitutes Act because the proposal is silent with respect to the contractors' qualifications and the Respondent's discretion to specify them. The proposal's general permission to subcontract does not grant the Respondent authority to depart from the more specific statutory mandate that limits the Respondent's choice of subcontractors to those qualified for regular appointment. The management rights clause, as a whole, supports this conclusion because it constrains the Respondent's managerial authority to that authorized under applicable law. Am. Fed. of State Cnty. and Mun Empl. v. State Labor Rel. Bd., 190 Ill. App. 3d 259 (1st Dist. 1989) (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'")); but see Ehlers, 183 Ill. 2d at 94 (where contract allowed for Weingarten right to union representation only during an "interrogation" and was

otherwise silent as to when that right attached, it necessarily waived that right in all other circumstances).

Consequently, the Respondent's broadly worded subcontracting proposal does not conflict with the narrower statutory mandate of the Substitutes Act. Rather, the Respondent may exercise its contractual authority granted under the proposal while remaining in compliance with the Substitutes Act. The Substitutes Act by default merely limits the Respondent's choice of subcontractors to those individuals who are qualified for regular appointment under that Act; it does not generally bar the Respondent from subcontracting, as the Union asserts. Thus, the Respondent may lawfully subcontract firefighter work under the instant proposal as long as it uses qualified individuals within the meaning of the Substitutes Act. But see Vill. of Midlothian, 29 PERI ¶ 125 (proposal conflicted with statutory right to arbitrate disputes over substantive provisions in the CBA where proposal excluded from the parties' grievance procedure certain disputes over interpretations of the "just cause" standard.); Vill. of Wheeling, 17 PERI 2018 (IL LRB-SP 2001) (same); Vill. of Elk Grove Vill., 21 PERI ¶ 14 (proposal conflicted with statutory rights granted under the Fire Department Promotion Act where it provided that the contract would take precedence over the FDPA but omitted rights granted by that statute).

In light of the proposal's broad language, the parties' narrow zipper clause maintains rather than waives the Union's rights under the Substitutes Act. Zipper clauses have an extremely limited purpose, to prevent changes during the contract period in subjects that are not covered by the collective bargaining agreement. Vill. of Bensenville, 19 PERI ¶ 119 (IL LRB-SP 2003). Although a narrow zipper clause waives bargaining over matters actually negotiated by the parties before the execution of the contract, it does not grant the employer license to change employees' terms and conditions of employment. Mt. Vernon Educ. Ass'n, IEA-NEA, 278 Ill. App. 3d at 825; Vill. of Bensenville, 19 PERI ¶ 119 (a "zipper clause serves as a 'shield' which a party may use against the other party's request for midterm bargaining, but not as a 'sword' to accomplish unilateral changes in terms and conditions of employment."). Rather, where an employer relies on the zipper clause as its authority to make such a unilateral change, it must additionally point to express contract language that grants it authority to make the change in question, or it must present "evidence that the particular matter at issue was fully discussed or consciously explored during bargaining, and that the union knowingly yielded and unmistakably

waived its interest in that matter.” Vill. of Bensenville, 19 PERI ¶ 119; City of Chicago (Dep’t of Police), 21 PERI ¶ 83 (IL LRB-LP 2005).

Here, the zipper clause cannot justify the Respondent's use of unqualified⁶ substitutes because neither the subcontracting proposal's language nor the Union's bargaining conduct demonstrates that the Union agreed to it. As noted above, the subcontracting proposal does not contain clear and unmistakable language to that effect. Likewise, the Union did not yield its interest, during negotiations, to withhold that agreement because it consistently refused to waive its rights under the Substitutes Act. Thus, the zipper clause preserves, as the status quo, the Respondent's default statutory obligation to use substitutes who are qualified for regular appointment under the Substitutes Act. Vill. of Bensenville, 19 PERI ¶ 119; City of Chicago (Dep’t of Police), 21 PERI ¶ 83 (zipper clause did not permit unilateral change where contract did not also contain express language permitting the conduct in question); but see City of Chicago, 18 PERI ¶ 3025 (IL LRB-LP 2002) (basing waiver of bargaining over the alleged unilateral change on the existence of a generally worded zipper clause and other contract language regarding the specific matter at issue); City of Chicago, 4 PERI ¶ 3025 (IL LLRB 1988), *aff’d*, Water Pipe Extension, Bureau of Engineering Laborers Local 1092 v. Ill. Local Labor Rel. Bd., 195 Ill. App. 3d 50 (1st Dist. 1990) (same).

In sum, the Respondent’s subcontracting proposal is a mandatory subject of bargaining.

d. Sanctions

The Union’s motion for sanctions is denied because the Respondent did not 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

⁶ For purposes of this decision, the term “unqualified” refers to individuals who are not qualified for regular appointment under the Substitutes Act.

¶ 2029 (IL SLRB 1998), *aff'd*, 315 Ill. App. 3d 459 (3rd Dist. 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; 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 courts view a party's legal arguments in the context of all its submissions. Wood Dale Fire Protection Dist. v. Ill. Labor Rel. Bd., State Panel, 395 Ill. App. 3d 523, 535-36. They have held the imposition of sanctions to be inappropriate, even where the 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. Wood Dale Fire Protection Dist., 395 Ill. App. 3d at 535-36. Only the first test is at issue in this case.

Here, on the whole, the Respondent's arguments were not only debatable but meritorious. The Respondent successfully argued that it did not violate the Act by insisting to impasse on a permissive subject of bargaining. Similarly, the Respondent correctly asserted that its subcontracting proposal addresses a mandatory rather than a permissive subject of bargaining.⁷

Indeed, even the Respondent's unsuccessful position concerning its health care proposal is debatable. It does not contradict well-established precedent and instead addresses an issue of first impression before the Board. The Board has never determined whether an employer's proposal, reserving unfettered discretion to change employees' health benefits, addresses a mandatory or permissive subject of bargaining. Although the declaratory ruling in City of Danville resolves a similar issue in a manner contrary to the Respondent's position, that case is non-precedential. City of Danville, 26 PERI ¶ 32. 80 Ill. Admin. Code 1200.143(a)(5); Wood Dale Fire Protection Dist., 395 Ill. App. 3d at 535-36 (declining to find bad faith and frivolous litigation where Respondent's position was debatable); Vill. of Midlothian, 29 PERI ¶ 125 (denying sanctions even where respondent argued unsuccessfully against well-established Board precedent); 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

⁷ For this reason, it is unnecessary to address the import of the article on the Substitutes Act, posted by opposing counsel's former law firm.

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).

Finally, opposing counsels' prehearing representations do not indicate bad faith. Counsels' public acknowledgment of the cited declaratory ruling is immaterial because the ruling does not have the force of law.⁸ Further, counsels' offer to stipulate to the permissive nature of the health care proposal is equivalent to an offer of settlement and is therefore inadmissible to prove the Respondent's alleged bad faith. Cnty. of Cook v. Ill. Labor Rel. Bd., 2012 IL App (1st) 111514 ¶ 32. The parties' broader agreement to admit their correspondence into evidence does not permit the Union to use the included settlement offer in a manner that contravenes public policy. Id.

Consequently, the Union's motion for sanctions is denied.

V. Conclusions of Law

1. The Respondent did not violate Sections 10(a)(4) and (1) of the Act when it submitted its health care and subcontracting proposals to the interest arbitrator.
2. The Union's motion for sanctions is denied.
3. The Respondent's health care proposal addresses a permissive subject of bargaining.
4. The Respondent's subcontracting proposal addresses a mandatory subject of bargaining.

VI. Recommended Order

The Complaint is dismissed.

VII. 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

⁸ For this reason, it is unnecessary to determine whether Counsel's knowledge of that case is imputed to the Respondent and what effect, if any, that knowledge would have on the Union's motion for sanctions.

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, 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 of 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 15th day of August, 2014

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**