

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

International Association of Firefighters,)	
Local 429,)	
)	
Charging Party)	
)	Case No. S-CA-15-076
and)	
)	
City of Danville,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On December 8, 2014, the International Association of Firefighters, Local 429 (Charging Party or Union) filed a charge with the Illinois Labor Relations Board’s State Panel (Board) alleging that the City of Danville (Respondent or City) 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 (2014), as amended. On January 21, 2015, the Union amended its charge. The charge was investigated in accordance with Section 11 of the Act. On January 27, 2015, the Board’s Executive Director issued a Complaint for Hearing. A hearing was conducted on October 22, 2015, in Chicago, Illinois, before ALJ Thomas Allen, at which time the Union presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs.

The parties filed simultaneous briefs on or about December 10, 2015. The Union’s brief was 61 pages long. On December 14, 2015, the Respondent filed with ALJ Allen a Motion for Enforcement of Section 1200.60 of the Board’s Rules, which provides in relevant part that “all briefs shall be no more than a total of 50 double-spaced pages” and that “all of the pages in excess of the 50 page limit will be rejected.” 80 Ill. Admin. Code 1200.60. The Respondent moved to strike the pages of the Union’s brief that were in excess of 50 pages on the grounds that the Union had not moved to file an oversized brief. In the alternative, the Respondent argues that there are no extraordinary circumstances that would warrant granting such a motion, had the Union filed one. On December 17, 2015, the Union filed a response to the Respondent’s

motion and moved to file an oversized brief instanter. The Union argued that it needed more than 50 pages to address the arguments that the Respondent suggested at hearing that it would present on brief, specifically, that over 20 contractual issues were not mandatory subjects of bargaining under the Central City test.

The Respondent's Motion for Enforcement of Section 1200.60 of the Board's Rules is denied and the Union's Motion to File an Oversized Brief Instanter is granted. The decision-maker¹ may grant a party permission to file an oversized brief in extraordinary circumstances, which include cases that present matters of first impression or extremely complex issues. 80 Ill. Admin. Code 1200.60. This case presents both. It presents the first opportunity for the Board to determine whether a respondent's submission of multiple new proposals on the first day of interest arbitration constitutes bad faith. In addition, it presents complex issues in light of the Respondent's representations at hearing. The Respondent asserted that it would claim its conduct was lawful because each submitted proposal addressed a permissive subject of bargaining. The Union's reasonable response to that defense is that the Respondent's proposals addressed mandatory subjects, and it is that response that accounts for a large part of the Union's brief.² Vill. of Libertyville, 21 PERI ¶ 211 (IL LRB-SP 2005 (allowing oversized brief on exception in case involving matter of first impression)).

In April 2016, 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:

¹ The Respondent observes that rule 1200.60 requires the Union to request permission to file an oversized brief from the General Counsel. However, the rules do not bar ALJs from granting motions to file oversized briefs and instead confer upon the ALJ broad authority to rule on motions more generally, and also confer other authority related to the filing of post hearing briefs. 80 Ill. Admin. Code 1200.40(j) & (k). In light of these provisions and the fact that the case is pending before me, I adopt as my role to consider the Union's motion to file an oversized brief in tandem with the Respondent's motion to strike the pages in excess of the 50.

² Whether the resolution of this case ultimately requires application of the framework presented by the parties is a separate matter.

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Respondent has been under the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act.
3. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
4. At all times material, the Union represented a historical bargaining unit (Unit) of the Respondent's employees in the Danville Fire Department, including Probationary Firefighters, Firefighters, Fire Lieutenants, Captains and Assistant Chiefs, but excluding the Director of Public Safety and clerical personnel.
5. The Union and the Respondent are parties to a collective bargaining agreement for the Unit, which has a stated expiration date of April 30, 2014.
6. Article 16.1 Vacancy of the collective bargaining agreement referenced in paragraph 5 provides:

A vacancy shall be deemed to occur in a position of Lieutenant, Captain or Assistant Chief on the date upon which the position is vacated, and on that same date, a vacancy shall occur in all ranks inferior to that rank, provided that the position or positions continued to be funded and authorized by the City Council.
7. On or about February of 2014, the parties commenced negotiations for a successor collective bargaining agreement.
8. On or about March 19, 2014, the parties initiated the interest arbitration process by requesting mediation.
9. On or about November 25, 2014, an Assistant Chief retired from the City of Danville Fire Department.
10. The Respondent has not permanently promoted anyone to replace the Assistant Chief who retired on or about November 25, 2014.
11. Promotions within the Unit are a mandatory subject of bargaining.

II. ISSUES AND CONTENTIONS

There are two issues in this case. The first issue is whether the Respondent violated Sections 10(a)(4) and (1) of the Act by allegedly failing to maintain the status quo of employees' terms and conditions of employment during the pendency of interest arbitration proceedings when it refused to permanently promote any bargaining unit member to the vacant Assistant Chief position. The second issue is whether the Respondent violated Sections 10(a)(4) and (1) of the Act when it allegedly tendered proposals on 23 additional matters to the Union on the first scheduled day of interest arbitration, most of which it had never presented to the Union during negotiations.

The Union argues that the Respondent's failure to promote a unit member to the Assistant Chief position unlawfully changed the status quo during the pendency of interest arbitration proceedings because the language of the expired contract requires the Respondent to make such a promotion.

The Union next argues that the Respondent engaged in bad faith bargaining when it tendered new proposals on the first scheduled day of the parties' interest arbitration that the parties had not previously discussed. The Union reasons that the new proposals were substantial in number and scope, observes that Respondent had no reasonable justification for its delay in presenting them, and notes the proposals addressed mandatory subjects of bargaining.

The Union also asserts that the Respondent's submission of these new proposals constitutes bad faith because the proposals were regressive. The Union contends that the parties had tacitly agreed to maintain the status quo of provisions of the expired contract that they did not seek to change during bargaining and that the Respondent's new proposals sought to modify these previously unaddressed provisions. The Union additionally states that the Respondent's proposed reduction of minimum shift manning to ten was a regressive proposal where the Respondent had proposed a higher number throughout the parties' prior bargaining.³

Finally, the Union claims the Mayor's statement, that the Respondent could violate the collective bargaining agreement if the Respondent did not have appropriate funding, constitutes bad faith disregard for the bargaining process.

³ The Union also notes that the Respondent offered inconsistent proposals on manning on the date of the scheduled arbitration and suggests that such conduct also evidences bad faith.

The Respondent argues that it did not violate the Act by failing to permanently promote a bargaining unit member to the Assistant Chief position because the terms of the expired contract do not require the Respondent to make such a promotion. In the alternative, the Respondent argues that the contract is ambiguous and the Board therefore lacks jurisdiction to determine whether the Respondent made a unilateral change. Even if the identified contract language were clear, the Respondent claims it would not be bound to maintain its terms because the Respondent's decision not to promote a unit member to the Assistant Chief position is a permissive subject of bargaining.

Next, the Respondent denies that it bargained in bad faith when it submitted its proposals to the arbitrator on the first day of the parties' scheduled arbitration hearing. First, it argues that the timing of its proposals was not unlawful where the Act allows an arbitrator to direct submission of final offers at any time prior to the conclusion of the hearing and where the arbitrator in this case had not yet directed the parties to submit their final offers. Second, the Respondent denies that it submitted 23 new proposals and instead frames them as three global changes. Third, the Respondent denies that it failed to bargain over all of them and notes the parties extensively discussed manning. In the alternative, the Respondent asserts that its proposals were a logical extension of the parties' first declaratory ruling process and that the Union knew of the circumstances that spurred the Respondent's new proposals. Fourth, it denies that it engaged in regressive bargaining where the parties had reached no tentative agreements on the subjects at issue. Finally, the Respondent claims that it was not required to bargain over the proposals in advance of their submission to the interest arbitrator because they address permissive subjects of bargaining related to the Respondent's plan to effect a legitimate reorganization of the fire department.

III. FINDINGS OF FACT

Scott Eisenhauer is the Mayor of Danville. Director of Public Safety Larry Thomason oversees the Police Division and the Fire Division, also known as the Fire Department. The Union represents a historical bargaining unit of the Respondent's employees in the Fire Department, including Probationary Firefighters, Fire Lieutenants, Captains and Assistant Chiefs, but excluding the Director of Public Safety and clerical personnel. The Union and the

Respondent are parties to a collective bargaining agreement for the Unit, which has a stated expiration date of April 30, 2014.

On January 7, 2014, the Union President Lieutenant Jerome Sparks sent Mayor Eisenhower a letter demanding to bargain over a successor agreement.

The Union's bargaining team included Union President Sparks, Union Vice President Lieutenant Aaron Marcotte, and the following four shift stewards, David Jones (first shift), Timothy McFadden (second shift), Tom Darby (third shift), and Duane Hall (command steward).⁴ The Respondent's bargaining team included Corporation Counsel Dave Wesner, Comptroller Gail Brandon, Director of Human Resources Bill Westfall, and Director of Public Safety Thomason. Wesner was lead spokesperson for the Respondent and he assembled the Respondent's bargaining proposals; however, Mayor Eisenhower determined the content of the proposals.

On February 13, 2014, the parties met for their first bargaining session. All members of the Union's bargaining team and the Respondent's bargaining team were present for the bargaining session. The Union presented the Respondent with its initial bargaining proposal and a document entitled Ground Rules for Negotiations. The meeting was brief and included a short discussion. The Respondent raised the issue of manning as an important matter. The Respondent sought to adjust manning to meet its financial goals. The Respondent did not discuss the elimination of any rank in fire suppression staffing, or specifically, the elimination of the merit rank of Assistant Chief. It also did not discuss the elimination of promotional opportunities for firefighters to the position of Assistant Chief. The parties did not discuss station assignments, vacation scheduling, compensation for travel time, Kelly Days, duty trades, maintenance of vacation calendar, return from sick leave, compensation time, jury witness duties, station closings, uniforms, callbacks, the grievance procedure, clothing and insignia, or the field training program.

On March 7, 2014, the parties met for their second bargaining session. All members of the Union's bargaining team attended the session. All members of the Respondent's team likewise attended, except for Comptroller Brandon. The Respondent offered the Union proposals addressing changes to the following sections of the expired contract: Section 6.3 Work Day;

⁴ In November 2014, Captain Todd Spicer replaced Lieutenant Marcotte as Vice President and bargaining team member. In addition, Chris McMahon replaced Tom Darby as third shift steward and member of the bargaining team.

Section 7.1 Manning Requirements; Section 7.2 Manning recall rules; Section 17.1 Call Backs Special Assignments; Section 17.2 Emergency Call Back; Section 17.3 Fire Watch Call Back; Section 17.4 Fire Investigation Call Back; Section 17.5 Call Backs for Haz Mats or Tech Rescue Incidents; Appendix B, Base Salaries; and Section 15.3 Recovery of Employment Expenses.⁵ More specifically, the Respondent sought to eliminate the following provisions in the expired contract: Article 7, which addresses manning; the call-back provisions, which likewise relate to manning; and language that required the Respondent to maintain four fire stations in operation during the term of the agreement.

On March 19, 2014, the parties met for their third bargaining session. At this session, the Union tendered counter proposals to the Respondent's March 7, 2014 proposals. The Union made counter proposals addressing the following sections of the expired contract: Section 6.3 Work Day; Section 11.9 Specialty Team Members Incentive; Section 11.2 Working out of classification Article 7.1 Manning, Overtime and Compensatory Time; Section 17.1 Paid Recalls to Duty; Section 17.2 Emergency Call Back; Section 17.3 Fire Watch Call Back; Section 17.4 Fire Investigation Call Back; Section 17.5 Callbacks for Haz Mats or Tech Rescue Incident; Section 15.3 Recovery of Employment Expenses; Section 12.5 Fire Helmets⁶. The Union's counter proposal on manning sought to maintain the status quo.

The Union also offered separate proposals on the following sections of the expired contract: Section 6.4 40 hour per week employees; Section 9.2 Vacation Scheduling; Section 14.4(c) Application of Seniority; Section 16.14 Voluntary Demotion; Section 11.4 Longevity Pay; Section 15.2 (B) Probationary Employees Initial Training; Section 17.2 Emergency Call Back⁷; Section 6.8 Station Assignments; Section 6.9 Riding Above Rank (new article); and Section 16.3 (A) Temporary Promotional Appointments/Above Rank.

That same day, the parties initiated interest arbitration proceedings by jointly requesting mediation and filing the request for mediation with the Board.

On March 28, 2014, the parties met for their fourth bargaining session. At the session, the Respondent tendered to the Union its first package proposal. The package tendered by the Respondent included proposals on the following contract sections: Section 6.3 Work Day; Section 7.1 Manning Requirements; Section 7.2 Manning Recall Rules; Appendix B – Base

⁵ The proposal referencing Section 15.3 was a proposal to add a new section to the contract.

⁶ This was a new section proposed by the Union but was included in the counter proposals.

⁷ The Union also addressed Emergency Call Backs in its counter proposal.

Salaries ; New Section 15.3 Recovery of Employment Expenses; Section 11.9 Specialty Team Members Incentive; Section 9.2 Vacation Scheduling. It also included a withdrawal of its earlier proposals on Section 17.1 Call Backs, Section 17.2 Emergency Call Back, Section 17.3 Fire Watch Call Back, Section 17.4 Fire Investigation Call Back; Section 17.5 Callbacks for Haz Mats or Tech Rescue Incident. The package proposal additionally contained responses to the Union's proposals on the following contract provisions: Section 11.2 Working out of Classification; Section 12.5 Fire Helmets; Section 16.14 Voluntary Demotion; Section 6.8 Station Assignments; and Section 6.9 Riding Above Rank.

Specifically and in relevant part, the Respondent no longer proposed to eliminate section 7 of the contract, which related to manning, and instead proposed changes to its language. To that end, the Respondent proposed to eliminate reference to equipment manning and sought to reduce minimum shift manning from 13 to 11. It again proposed to remove contract language that required the Respondent to maintain in operation four fire stations during the term of the agreement. At the bargaining session, the Respondent discussed closing a station, but did not discuss its plan to close Station 3. The Union counter proposed to maintain the status quo on these matters.

Sometime in April, 2014, the Mayor and his staff discussed restructuring the Fire Division.

On April 1, 2014, the Respondent's City Council determined that it would no longer commit, by ordinance, to assigning an Assistant Chief to each of the three battalions. Prior to April 1, 2014, Chapter 35 of the City Code included the following language: "One assistant chief may be assigned to each of the 3 shift battalions as shift commander and the others may be assigned to perform duties, and assume responsibilities as determined by the fire chief." On April 1, 2014, the Respondent's City Council removed this language.

That same day, the City Council adopted its 2015 budget, which took effect on May 1, 2015.⁸ Page 70 of the itemized budget provides for the salaries of 49 firefighters. The 49 firefighters in the Respondent's 2015 budget represented all firefighters then employed by the Division. The budget does not specify how many of those firefighters are Assistant Chiefs. Page 66 of the budget is entitled "The Functions and Duties of the Divisions of the Department of Public Safety." It describes the then-existing operations of the fire department as follows: "The

⁸ The Respondent's fiscal year runs from May 1 through April 30.

division has 50 sworn personnel and one civilian that provide 24/7 fire suppression services from four stations. Sworn personnel are divided into three battalions each supervised by an assistant chief and a captain. The daily operations of the battalion are handled by each assistant chief who report to the Director of Public Safety.” Sparks testified that the “Functions and Duties” description in the budget articulates a commitment to maintain one assistant chief to oversee each of the three battalions. However, he admitted that the language addressing the equipment used by the division was a “snapshot” of the division’s operations at the time.

On April 16, 2014, the parties met for their fifth bargaining session. The Respondent tendered the Union a package proposal on non-economic issues. The Respondent’s package proposal addressed the following sections of the contract: Section 6.3 Work day; Article 7 manning; Section 15.3 Recovery of Employment Expenses; Section 21.2 Drug and Alcohol Policy and Testing (new section); Section 12.5 Fire Helmets; Section 16.14 Voluntary Demotion; Section 6.8 Station Assignments; Section 6.9 Riding Above Rank. The part of the Respondent’s proposal that addressed manning was unchanged from that offered by the Respondent on March 28, 2014. The Union did not accept the Respondent’s package proposal.

The Union made an off-the-record, handwritten counter proposal. The proposal included a contract of a 3-year term, wages increases of 3%, 2%, and 2% for each respective year of the contract, fire suppression manning of 48, status quo shift manning, a “blue ribbon committee with (3) union representatives;” “TAs as agreed upon,” “all other items status quo,” “traditional helmets,” and a provision that stated that a pending “grievance [would be] dropped upon settlement.” There is no indication from the record that the Respondent agreed to the Union’s proposal or any part of it.

On April 30, 2014, the parties met for their sixth bargaining session. The Union made another off-the-record proposal. The Union proposed to maintain the status quo on shift manning but to reduce fire suppression manning from 51 to 45. The proposal also addressed issues concerning recovery of expenses, voluntary demotion, riding above rank, and helmets. It further proposed the following: “if the City chooses to consolidate fire stations[,] the parties agree to establish a committee to study the best option for station locations & staffing, etc. The Local shall have 3 personnel on said committee.” The Union’s proposal did not include the elimination of the Assistant Chief from fire suppression duties.

Wesner thanked the Union for the proposal and stated, “this is good, this sounds like right where we want to be.” He further stated that he would take it to the Mayor “to discuss.” Wesner did not represent that he had authority to accept the proposal on behalf of the Respondent. The parties never signed an agreement to reflect the terms of the Union’s proposal. Wesner denies that the parties reached a handshake agreement on the Union’s proposal.

Sometime prior the next bargaining session, the Respondent rejected the Union’s proposal on the grounds that it did not address its fiscal concerns because it would require the Respondent to hire back at least one employee each day at the overtime rate.⁹

On May 13, 2014, the parties met again for their seventh bargaining session. The Respondent tendered a package proposal to the Union that included proposals addressing the following contract sections: Section 6.3 Work day; Article 7 manning; Appendix B – Base Salaries; 15.3 Recovery of Employment Expenses; Section 21.2 Drug and Alcohol Policy and Testing¹⁰; Section 12.5 Fire Helmets; Section 16.14 Voluntary Demotion; and Section 6.8 Station Assignments Section 6.9 Riding Above Rank. That proposal incorporated the Respondent’s March 28, 2014 proposal on shift manning, which sought to reduce minimum shift manning from 13 to 11. None of the Union witnesses testified that they were surprised or outraged that the Respondent offered a proposal that sought to reduce minimum shift manning from 13 to 11. The Union did not accept the Respondent’s proposal.

On June 11, 2014, the Union demanded compulsory interest arbitration.

On July 24, 2014, the Respondent filed a Petition for Declaratory Ruling with former General Counsel Jerald Post in Case No. S-DR-15-003. It requested a determination as to whether the Union’s proposals concerning suppression of force strength, equipment levels, and station minimum requirements addressed mandatory or permissive subjects of bargaining.

From mid-August through September of 2014, the Respondent’s City Counsel assembled its budget for the following fiscal year.

On September 4, 2014, the Former General Counsel Post issued his Declaratory Ruling. In relevant part, he found that the Union’s proposal that “all four fire stations shall remain open and in service at all times during this Agreement” was a permissive subject of bargaining. He

⁹ Wesner suggested that he had an off-the-record discussion with the Mayor that day and came back to inform the Union that the proposal was unacceptable. Spicer testified that the parties did not reconvene after the Union tendered its proposal because the Mayor was unavailable for discussion that day.

¹⁰ This was a new provision.

likewise found the Union's proposal requiring the Respondent to fill vacancies when the "authorized strength of the 24/48 suppression force...falls below 51" was a permissive subject of bargaining.

On or about September 11, 2014, the parties selected Peter Meyers as their interest arbitrator.

On November 18, 2014, the City Council discussed its plan to reduce the total number of firefighters in its budget at a public meeting. It did not discuss the removal of the Assistant Chief position from fire suppression or the closure of Station 3.

Sometime in mid-November, 2014, Public Safety Director Thomason approached Mayor Eisenhower to inform him that Assistant Chief Larry Jagers would likely retire before the end of the month.¹¹ On November 24, 2014, Jagers formally informed Public Safety Director Larry Thomason of his intent to retire, effective November 26, 2014.

Mayor Eisenhower testified that he believed Jager's retirement presented a good time for the Division to change its structure because the planned restructuring included only two Assistant Chiefs. The Respondent considered moving one of the remaining Assistant Chiefs into a newly created Chief position and using the other in a 40-hour a week position to expedite inspections and site review, and to perform training. Eisenhower explained that the current structure allowed the Division to perform inspections and site review only two days per standard work week because the Assistant Chief assigned those tasks worked a 24-on/48-off schedule.

On December 2, 2014, the City Council made a formal presentation of its budget and voted to place the budget on display until December 16, 2014.

That same day, the Union filed a grievance alleging that the Respondent violated Section 16.1 of the contract by failing to permanently fill the vacancy created by Assistant Chief Jagers's retirement. Article 16.1 of the collective bargaining agreement, addressing vacancies, provides the following in relevant part: "A vacancy shall be deemed to occur in a position of Lieutenant, Captain or Assistant Chief on the date upon which the position is vacated, and on that same date, a vacancy shall occur in all ranks inferior to that rank, provided that the position or positions continued to be funded and authorized by the City Council."

¹¹ Eisenhower testified that he heard about the possibility of Jagers's retirement only a couple weeks before he received formal notice of it.

Sparks testified that he believed the Respondent was contractually required to fill the Assistant Chief's vacancy because the budget in existence at the time Assistant Chief Jagers retired contained funding for his vacated position. Mayor Eisenhower received the grievance on December 19, 2014. Neither the Mayor nor the City Council ever made a determination that former Assistant Chief Jagers's retirement created a permanent vacancy in the third Assistant Chief position.

As of the hearing date in this case, the Respondent has not permanently promoted any bargaining unit member to replace Assistant Chief Jagers. However, since Jagers's retirement, the Respondent has staffed each shift with a bargaining unit member assigned as a Division 1 Assistant Chief or Acting Assistant Chief. A Captain is currently acting up as Assistant Chief to perform shift commander duties on the third shift.

On December 4, 2014, Respondent attorney Timothy Guare wrote a letter to Union attorney Margaret Angelucci. In the letter, Guare stated that Assistant Chief Larry Jagers had retired and that the Respondent had decided to restructure the department in the following four ways: (1) Re-establish a Fire Chief position; (2) Establish a "Division 2" Assistant Chief position which would perform, inter alia, fire prevention and inspection duties and administrative responsibilities, and assign an incumbent Assistant Chief to that "Division 2" position; (3) Eliminate Assistant Chief positions assigned to "Division 1" fire suppression staffing; (4) Assign the function of "Shift Commander" to the ranking Captain on each shift.

The letter further stated the following: "Under current ILRB jurisprudence, the decision to re-structure protective service departments, including the elimination of positions, is a permissive topic of bargaining. However, the current contract has numerous references to Assistant Chiefs as part of the Department's regular fire suppression staffing, and which cannot be allowed to appear in the next or future contracts without creating potential arguments that the City does not have the management right to eliminate Assistant Chiefs from the Departments regular fire suppression staffing. Accordingly, in addition to its other proposals on the open issues we have previously discussed, the City will be proposing changes to the contract to delete any reference to the mandatory functions of Assistant Chiefs as fire suppression 'shift commanders,' as well as any other language that would impede the City's right to implement the re-structuring of the Department upon the issuance of Arbitrator Meyers' Award."

On December 8, 2014, the Union filed an unfair labor practice charge in this case alleging that the Respondent unilaterally changed employees' terms and conditions of employment during the pendency of interest arbitration proceedings by failing to permanently promote an employee to the vacant Assistant Chief position.

Sometime between November 26, 2014 and December 16, 2014, President Sparks drafted a letter to the community.¹² The first paragraph of the letter states the following in relevant part: "The City of Danville budget currently on display stands to cut seven fire fighters from the staff and the mayor has stated that this change will also include the closure of a fire station and reorganization of the department." Sparks drafted this letter because the City's proposed budget allotted only enough money for 42 firefighters rather than for the existing 49 firefighters.

On December 16, 2014, the Respondent's City Council approved the fiscal year 2015-16 budget, which would take effect on May 1, 2015. The budget appropriated funds for 42 sworn firefighter positions, but did not specify which ranks or particular positions that figure included. The number listed in the budget next to salaries for firefighters specifies that the Respondent may not exceed that number.

That same day, the parties appeared before Arbitrator Meyers and intended to go on the record for an interest arbitration hearing. The Respondent presented the Union with the proposals set forth in the parties' Joint Exhibit 1. The Respondent's proposed changes affected the following contract provisions: Section 6.6 Scheduling Kelly Days; Section 6.7 Trading Time; Article 7 Manning; Section 9.2 Vacation Scheduling, including maintenance of the vacation calendar; Section 10.1 Sick Leave; Section 10.5 Compensatory Time-Off; Section 10.6 Jury and Witness Duties; Section 11.2 Working out of Classification; Section 12.1 Station Clothing; Section 17.1 Call Backs; Section 17.2 Emergency Call Back; Section 17.3 Fire Watch Call Back; Section 20.2 [Grievance] Procedure; Appendix C – Clothing and Insignia; and Appendix F – MABAS Training Procedure.

The Respondent's proposal included changes that it had not previously proposed during bargaining. The proposal modified some provisions over which the parties had bargained, but its

¹² The letter is undated. Sparks initially stated that he could not remember the date on which he wrote the letter. He later stated that he could have written the letter after December 16, 2014 and then modified his claim to state that he "[could]n't imagine that [he] would have written the letter to citizens prior to December 16, 2014. The letter's reference to a "proposed budget" weighs against a finding that Sparks wrote the letter after December 16, 2014 because the budget was final as of December 16, 2014 and would no longer have been a mere proposal.

proposals also impacted contract provision over which the parties had not bargained at all. The parties had never bargained over the following provisions addressed by the Respondent's proposals: Section 6.6 Scheduling Kelly Days; Section 6.7 Trading Time; Section 10.1 Sick Leave; Section 10.5 Compensatory Time-Off; Section 10.6 Jury and Witness Duties; Section 12.1 Station Clothing; Section 20.2 [Grievance] Procedure; Appendix C – Clothing and Insignia; Appendix F – MABAS Training Procedure; and Appendix G Probationary Firefighter – Field Training Program (FTP).

The changes proposed by the Respondent to each of the modified provisions were similar in nature, with the exception of its proposal on manning. The Respondent removed every reference to “Assistant Chief”¹³ and replaced it with “Shift Commander.”¹⁴ The Respondent also added a parenthetical following each reference to Station 3 that stated, “or, if taken out of daily fire suppression operations, a station designated by the City.”

The Respondent's proposal on Section 7.1 Manning included the following four changes. First, it removed the Assistant Chief position from fire suppression manning. Second, it offered two alternative manning options, depending on the number of stations the Respondent maintained in operation. It offered minimum manning of 13 members per shift, if the Respondent maintained four fire stations in operation; it offered minimum manning of 10 members per shift,¹⁵ if the Respondent maintained only three stations in operation. Third, it

¹³ In one instance, the Respondent replaced “Battalion Chief” with “Shift Commander.”

¹⁴ In two instances, the Respondent also included the words “or designee.” See Section 10.5 Compensatory Time and Section 20.2 Procedure.

¹⁵ This part of the proposal provided the following:

Except as otherwise provided herein, the City agrees that, if there are four (4) fire stations in operation, no fewer than thirteen (13) members of the bargaining unit shall function in a fire suppression capacity at all times during the term of this Agreement, including

~~One (1) Assistant Chief~~

One (1) Captain

Three Lieutenants

~~Eight (8)~~ Nine (9) Firefighters

There shall be ~~two (2)~~ one (1) Division I Command (~~Assistant Chief~~ and Captain) positions per shift, ~~at least one of~~ which shall be a commissioned command officer. Any vacancy created by the use of a Kelly Day shall not result in a recall.

If there are three (3) fire stations in operation, no fewer than ten (10) members of the bargaining unit shall function in a fire suppression capacity at all times during the term of this Agreement, including:

One (1) Captain

Two (2) Lieutenants

Seven (7) Firefighters

removed the following sentence from its equipment manning proposal in response to the Declaratory Ruling issued by former General Counsel Post (Case No. S-DR-15-003), which found that language to address a permissive subject of bargaining: “The City agrees to man at least four (4) Engines, three (3) of which will be manned with a Lieutenant, and one (1) truck company as the minimum apparatus in the Fire Department.” Fourth, the Respondent modified Section (e) of its manning proposal to add the underlined language: “If the City places any additional units in service, it agrees to man the new unit with one (1) Lieutenant and two (2) firefighters and increase manning under 7.1(a) accordingly. The foregoing shall not serve as any bar to the City’s right to remove any unit from service, with resulting adjustment in manning under 7.1(a).”

The Respondent offered these changes to eliminate the Assistant Chief from fire suppression operations and to remove any contractual obstacles to its planned reorganization. Mayor Eisenhauer anticipated that if the contract retained express reference to Station #3, the Union would argue that the Respondent could not close Station #3. The Respondent wanted the flexibility of being able to close any one of its four stations.

Prior to December 16, 2014, the Respondent’s proposals on shift manning always included the Assistant Chief and the Respondent consistently proposed shift manning at 11 members per shift. It had not previously offered alternative proposals on manning based on the number of fire stations it planned to maintain and it did not propose to move the Assistant Chiefs to an administrative position. It never informed the Union during bargaining that it planned to remove Station 3 from service or that it planned to remove the Assistant Chief from fire suppression duties. However, Eisenhauer directed his bargaining team to discuss station closures at the negotiation sessions and noted that he discussed station closure at public meetings. Eisenhauer conceded that the Respondent had not presented its plan to change the Assistant Chief position into an administrative position and to use Captains as shift commanders. He stated that “that would have been new information to [the Union] on [December]...16th.” He further conceded that the manning proposal included a new element, which reflected the Respondent’s plan to eliminate a fire station and thereby reduce shift manning by the three employees who would otherwise work at that fire station. Sparks testified that the Respondent’s December 16, 2014 proposals “completely blindsided” the union and that the Respondent’s conduct made it difficult for the parties to have further discussions.

The Union, upon receiving the Respondent's new proposals, informed the Respondent that it intended to file a second unfair labor practice charge alleging that the Respondent engaged in bad faith bargaining by tendering proposals to the Union that the parties had not discussed during two months of contract negotiation. On January 27, 2015, the Union filed an amended charge to include that stated allegation.

On February 4, 2015, the Respondent filed a petition for Declaratory Ruling to address to address whether the Union's proposals to maintain the status quo constituted permissive or mandatory subjects of bargaining. Notably, the Respondent in that petition did not contend that its own proposals addressed permissive subjects of bargaining.

On February 6, 2015, the Union filed a petition for Declaratory Ruling to address whether the Respondent's proposed modifications to those proposals identified in the Respondent's petition addressed permissive or mandatory subjects of bargaining. The Union based its objections to the Respondent's proposals on the grounds that they sought a waiver of the Union's right to midterm bargaining. The General Counsel consolidated the petitions.

On April 30, 2015, the General Counsel issued a Declaratory Ruling (Case Nos. S-DR-15-007 & S-DR-15-008) holding that the disputed proposals addressed mandatory subjects of bargaining, except for those parts that he deemed to address permissive subjects in the prior declaratory ruling between the parties (Case No. S-DR-15-003). On June 3, 2015, Arbitrator Meyers ordered the parties to return to negotiations for 45 days to attempt to resolve matters involving minimum manning of stations and the Respondent's desire to eliminate a position. He also rescheduled the interest arbitration for September 28 and 29, 2015. The parties subsequently met to bargain, but did not resolve matters.

The parties jointly requested to reschedule their interest arbitration. At the request of the parties, Arbitrator Meyers rescheduled the interest arbitration hearing to January 20 & 21, 2016. However, parties agreed to hold the hearing in abeyance until the issuance of this decision.

At hearing in this case, Union Counsel asked Eisenhauer why the Respondent could reduce total fire suppression manning below the total of 51 mandated under the expired contract. Eisenhauer answered "it is our position that utilizing financial resources that we have, we will appropriate the money that we have available to use in the best way we see fit." Counsel then asked him, "[i]t is your position that if you don't have the appropriate funding, you can violate the Collective Bargaining Agreement?" Eisenhauer answered, "[y]es that is my position."

Former General Counsel Post in Declaratory Ruling Case No. S-DR-15-003 noted that the Union's proposal to maintain the status quo of fire suppression manning at 51 employees was a permissive subject of bargaining.

IV. DISCUSSION AND ANALYSIS

1. Alleged Unilateral Change in violation of Sections 10(a)(4), 10(a)(1), and 14(l)

The Respondent did not violate Section 10(a)(4), 10(a)(1), or 14(l) of the Act when it refused to permanently promote a bargaining unit member to the Assistant Chief position. The language of the expired contract establishes the status quo with respect to such promotions. However, I cannot determine whether the Respondent violated the Act without interpreting the language of the expired contract because the contract language is ambiguous.

Under Section 10(a)(4) of the Act, at impasse, an employer is prohibited from making unilateral changes in the terms and conditions of employment of the employees subject to the negotiations. Vill. of Oak Park, 25 PERI ¶ 169 (IL LRB-SP 2009); Vill. of Crest Hill, 4 PERI ¶ 2030 (IL SLRB 1988); City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987). Section 14(l) extends this prohibition through the period from the expiration of a collective bargaining agreement to the conclusion of the required impasse procedures listed in Section 14, for security employees, peace officers, firefighters, and paramedics. Existing terms and conditions of employment for such employees must be maintained by the employer and exclusive bargaining representative during that period—to do otherwise violates Section 10(a)(4) of the Act. Vill. of Oak Park, 25 PERI ¶ 169; Cnty. of Cook (Dep't of Cent. Serv.), 15 PERI ¶ 3008 (IL LLRB 1999). In general, the express terms of the recently expired collective bargaining agreement are the primary indicator of the status quo as to wages, hours and other conditions of employment. The past practices of the parties to the contract are relevant especially as to matters not covered thereunder. Cnty. of Cook (Dep't of Cent. Serv.), 15 PERI ¶ 3008; Vill. of Crest Hill, 4 PERI ¶ 2030; City of Peoria, 3 PERI ¶ 2025. Notably, the employer's obligation to maintain employees' terms and conditions of employment extends only to those terms and conditions of employment that qualify as mandatory subjects of bargaining. City of Chicago (Department of Police), 21 PERI ¶ 83 (IL LRB-SP 2005); Vill. of Maywood, 10 PERI ¶ 2045 (IL SLRB 1994); Vill. of Oak Park, 9 PERI ¶ 2019 (IL SLRB ALJ 1993).

However, the Board does not allow parties to use the Board's processes to remedy alleged contractual breaches or to obtain specific enforcement of contract terms. Vill. of Oak Park, 25 PERI ¶ 169; Vill. of Creve Coeur, 4 PERI ¶ 2002 (IL SLRB 1987). To that end, the Board has repeatedly dismissed unfair labor practice charges where the Board's resolution of the unfair labor practice charge would require the Board to interpret the parties' collective bargaining agreement. For example, in Village of Creve Coeur, the Board dismissed an allegation that the respondent violated Section 10(a)(4) of the Act by refusing to arbitrate a grievance where that refusal stemmed from a good faith disagreement as to whether the contract language required arbitration of the grievance at issue. Vill. of Creve Coeur, 4 PERI ¶ 2002 (no repudiation found where refusal to arbitrate arises from a good faith disagreement as to the interpretation of the agreement). Likewise, in Village of Oak Park, the Board dismissed an allegation that the respondent violated Sections 10(a)(4) and 14(1) of the Act by changing employees' longevity pay during the pendency of interest arbitration proceedings where the Board was required to interpret the parties' contract to determine whether its terms allowed the change. Vill. of Oak Park, 25 PERI ¶ 169.

Contract terms are ambiguous if they "can reasonably be interpreted in more than one way," although the "mere fact that parties disagree on some term...is not a sign that the term is ambiguous." J.M. Beals Enterprises, Inc. v. Indus. Hard Chrome, Ltd., 194 Ill. App. 3d 744, 748 (1st Dist. 1990).

Here, the contract is ambiguous because the parties offer differing yet reasonable interpretations of the contract language pertaining to the creation of a vacancy. The contract states in relevant part that "a vacancy shall be deemed to occur...on the date upon which the position is vacated...provided that the position or positions continued to be funded and authorized by the City Council." The Respondent suggests that the terms "continued to be...authorized" indicate that the City Council must reaffirm its desire to maintain a position left open by an employee's departure from service, before that departure creates a "vacancy" that the Respondent must fill. The Respondent reasons that the residual funding for the open position within the 2014-2015 budget did not by itself create an obligation to fill the open position where the City Council did not continue to authorize that position's continued existence following the incumbent's departure.

The Union, on the other hand, denies that the contract requires the City Council to take affirmative action, following the incumbent's departure, to trigger the Respondent's contractual obligation to fill a vacancy. Rather, the Union claims that the Respondent's obligation to fill the open position stems from a preexisting authorization and funding of the position that is contained in the budget in effect "on the date upon which the position [was] vacated." Relying on this interpretation, the Union asserts that the contract required the Respondent to permanently fill the Assistant Chief position because the Respondent's fiscal year 2014-2015 budget funded that position and specifically authorized its maintenance by referencing the existence of three Assistant Chief positions.

These reasonable, competing interpretations of the vacancy-related contract language illustrate that the contract language is ambiguous. Such ambiguous contract language precludes a finding that the Respondent unilaterally changed employees' terms and conditions of employment when it refused to permanently promote a bargaining unit member to the Assistant Chief position. Vill. of Oak Park, 25 PERI ¶ 169.

Thus, the Respondent did not unilaterally change employees' terms and conditions of employment in violation of Sections 10(a)(4) and (1) of the Act.

2. Alleged Bad Faith Bargaining

The Respondent did not engage in bad faith bargaining because the totality of the circumstances does not demonstrate bad faith. There is no case law to support a finding that submission of new proposals to an interest arbitrator constitutes a per se violation of the Act, and neither the character of the Respondent's proposals nor the circumstances of their submission indicate bad faith here.

The duty to bargain in good faith requires parties to actively participate in negotiations, with an open mind and a sincere effort and intention to reach an agreement. Cnty. of Cook (Dep't of Central Services), 15 PERI ¶ 3008. The Board uses a "totality of the circumstances" test to determine whether a party bargained in good faith or was instead motivated by a bad faith desire to avoid reaching an agreement altogether. Id. Types of conduct that are indicative of a bad faith intent include delaying tactics, unreasonable bargaining demands, an employer's implementation of unilateral changes involving mandatory subjects of bargaining, failure to designate a representative with sufficient bargaining authority, withdrawal of previously

accepted proposals, and arbitrary scheduling of bargaining meetings. Cnty. of Woodford and the Woodford Cnty. Sheriff, 8 PERI ¶ 2019 (IL SLRB 1992).

The National Labor Relations Board (NLRB) has additionally held that bad faith may be inferred from a party's introduction of significant new proposals late in the negotiations. Yearbook House, 223 NLRB 1456 (1976); see also Board of Education, Granite City Community School District No. 9, 19 PERI ¶ 175 (IL ELRB ALJ 2003)(citing Yearbook House in finding bad faith where employer engaged in regressive bargaining and repudiated tentative agreements). In addition, at least one public sector jurisdiction has applied a similar principle to the interest arbitration context. The New York Public Employment Relations Board (NY PERB) has held that "introduction of any new proposal at interest arbitration or fact-finding can breach the duty to engage in good faith negotiations" where it is "not reasonably related to the subject matter of the negotiations and/or the discussions during mediation." Village of Wappingers Falls, 40 PERB ¶3020 (IL LRB-SP 2007). Notably, the NY PERB expressly declined to apply a per se rule that the submission of new proposals at interest arbitration constitutes bad faith bargaining. Village of Wappingers Falls, 40 PERB ¶3020. The Board's regular reliance on NLRB case law in issues of first impression¹⁶ and its emphasis on parties' obligation to bargain in good faith prior to employing interest arbitration¹⁷ warrant application of these related rules to this case.

Applying these principles here, the Respondent's submission of new proposals to the Union on the first day of interest arbitration does not evidence bad faith. The Respondent's new proposals were not significant in number. Two of the Respondent's proposals were reasonably related to matters that the parties discussed during bargaining. The remaining proposal made only de minimis changes to status quo language, and the Respondent gave the Union advance notice of it. Finally, the Respondent did not engage in other conduct that would buttress the

¹⁶See Bd. of Educ. of City of Chicago v. Illinois Educ. Labor Relations Bd., 2013 IL App (1st) 122447 n. 2 (Rulings of the NLRB and federal courts construing labor relations acts are persuasive authority when analyzing similar provisions in Illinois acts); American Federation of State, County & Municipal Employees v. Illinois State Labor Relations Board, 190 Ill. App. 3d 259, 264 (1st Dist. 1989) (same); Chicago Newspaper Guild, Local 34071 (Caloca), 32 PERI ¶ 133 (IL LRB-SP 2016) (adopting NLRB's unilateral settlement procedures); North Shore Sanitary Dist., 13 PERI ¶ 2006 (IL SLRB 1997) (applying NLRB case law to novel backpay issue in the compliance context); Village of Hazel Crest, 30 PERI ¶ 72 (IL LRB-SP 2013)(applying NLRB case law to consideration of employees' the right to display union stickers/insignia).

¹⁷ Tri-State Professional Firefighters Union, Local 3165, 31 PERI ¶ 78 (IL LRB-SP 2014) aff'd by unpub ord. no. No. 1-14-3418.

Union's claim of bad faith.

As a preliminary matter, The Respondent's new proposals submitted to the interest arbitrator on the first day of hearing were not significant in number because they are most accurately classified as simply three proposals, not 23 as the Union claims. The Respondent submitted a manning proposal, which offered alternative shift manning levels based on the number of stations in operation and removed the Assistant Chief from shift manning. Next, the Respondent proposed to substitute the term "Shift Commander" for every reference to "Assistant Chief" or "Battalion Chief," and in some instances removed the reference to "Assistant Chief" without substitution.¹⁸ Finally, the Respondent proposed to add a parenthetical following each reference to "Station 3" that stated, "or, if taken out of daily fire suppression operations, a station designated by the City." Contrary to the Union's contention, these latter two global proposals cannot be viewed as distinct proposals on each contract provision in which the identified terms appear because the proposed changes are uniform and inseparable. Cf. Yearbook House, 223 NLRB at 1465 (finding that the proposed elimination of seven different articles constituted one new proposal where articles all related to struck work, but finding bad faith where respondent also advanced 12 other new proposals following union's strike).

Moreover, the Respondent's proposals related to shift manning and Station 3 address matters previously bargained by the parties. As the Respondent notes, the parties bargained extensively over shift manning during negotiations. Indeed, the Respondent opened bargaining with the comment that manning was an important matter, the parties discussed shift manning at every one of their bargaining sessions, and the Respondent offered a number of different shift manning proposals throughout bargaining. The Union correctly observes that the Respondent had never previously proposed the removal of the Assistant Chief position from shift manning and that the parties had discussed only the number of firefighters required per shift. However, the Respondent's proposal to eliminate the Assistant Chief from shift manning cannot be parsed from its proposal to reduce shift manning numbers where the Assistant Chief's removal effects a reduction in shift manning. Accordingly, the Respondent's new proposal on shift manning is reasonably related to its earlier ones, despite this addition.

Similarly, the Respondent's proposal regarding Station 3 is a reasonable response to the

¹⁸ In two instances, the Respondent also included the words "or designee." See Section 10.5 Compensatory Time and Section 20.2 Procedure.

Union's April 30, 2014 off-the-record proposal. On that date, the Union proposed that the parties would jointly "study the best option for station locations & staffing, etc.," if the City chose to close a station, and that a committee of Union members and management would thereby help determine the Respondent's course of action following a station closure. The Respondent's Station 3 proposal rejects this collaborative approach and instead reserves to itself the discretion to make changes to employees' terms and conditions of employment based on the station that it chooses to substitute for the one it closes.¹⁹ The Respondent's own proposals on these issues admittedly address the particularities of that reserved discretion and the added language accordingly appears in each section of the contract where the Respondent seeks to reserve that discretion. However, such specificity does not render the Respondent's proposal indicative of bad faith where the Union's proposal includes a catch all ("etc.") that acknowledges that the Respondent's station closure could impact more contract terms than those expressly listed by the Union. Village of Wappingers Falls, 40 PERB ¶ 3020 (finding no bad faith where proposal introduced by employer to interest arbitration was reasonably related to union proposal that parties had discussed during negotiations and also constituted a counterproposal).

Furthermore, the Respondent's remaining "Assistant Chief" offer proposes only de minimis changes, if any, to employees' terms and conditions of employment as set forth under the status quo contract language. The Respondent simply substituted a specific title (Assistant Chief) with a generic one (Shift Commander).²⁰ The Union equates the Respondent's "Assistant Chief" proposal with one that seeks to eliminate a merit rank, but the proposal makes no mention of such a change and the Union's anticipation of such a change does not alter the immediate impact of the proposal, if adopted by the arbitrator.²¹ In addition, the Union introduced no evidence at hearing to illustrate how the substitution of "Shift Commander" for "Assistant Chief" or "Battalion Chief" materially changes unit members' rights or obligations with respect to the

¹⁹ Former General Counsel Post determined that the proposal's reservation to the Employer of this limited and well-defined discretion did not render it a permissive subject of bargaining. City of Danville, 32 PERI ¶ 115 (IL LRB-SP 2015).

²⁰ Currently, all Shift Commanders are Assistant Chiefs.

²¹ If the Respondent does decide to eliminate the merit rank of Assistant Chief, and if such a decision is a mandatory subject of bargaining, as the Union claims, then the Respondent will be required to bargain over it. However, any assessment of that change and the Respondent's anticipated post-interest arbitration reorganization, more broadly, is beyond the scope of this decision.

provisions to which the Respondent proposed those changes.²² Even an unaided review of these proposed changes reveals little impact on employees' terms and conditions of employment. The status quo contract reference to Assistant Chief appears where a bargaining unit member must obtain certain permissions from that title, where that title must grant unit members approval for certain actions, or where that title is assigned certain administrative tasks. However, the unit members' obligation to obtain approval for the various requests referenced in the changed contract provisions, a position holder's authority to grant those requests, and the administrative tasks enumerated in the modified sections remain unchanged. Thus, the proposal that substitutes "Shift Commander" for "Assistant Chief" has only a de minimis effect, even though the proposed changes appear in some contract provisions over which the parties did not previously bargain. Cf. Yearbook House, 223 NLRB at 1464-65 (bad faith found where employer offer 13 new proposals late in bargaining that included change to work day and elimination of the union's security clause and strike/lockout provisions and "substantially stripped the [Union] of its statutory representative capacity to the employees"); Cf. Universal Fuel, Inc., 358 NLRB 1504, 1505 (2012)(bad faith found where late in negotiations employer offered new proposals including a subcontracting proposal, a proposal to waive employees' right to picket, and a proposal for unlimited discretion in the creation of work rules).

Notably, the Respondent gave the Union notice of its intent to submit its Assistant Chief proposal on December 4, 2015, in a letter to Union attorney Angelucci and did not wait until the first day of interest arbitration on December 16, 2015 to inform the Union of its proposal.

Finally, the remaining circumstances identified by the Union as indicative of bad faith do not support the Union's allegation. First, the Respondent did not engage in regressive bargaining when, at the parties' first day of interest arbitration, it presented new proposals on shift manning and on contract terms that the parties had not expressly discussed before. 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. Vill. of Midlothian, 29 PERI ¶ 125 (IL LRB-SP 2013); see also Granite City Comm. School Dist. No. 9, 19 PERI ¶ 175 (IELRB ALJ 2003) and Driftwood Convalescent Hosp., 312 NLRB 247, 252 (1993). However, the

²² These include the scheduling of Kelly days, trading time, vacation scheduling, sick leave, compensatory time-off, jury and witness duties, working out of classification, station clothing, call backs, emergency call back, fire watch call back, grievance procedure, clothing and insignia, the MABAS training procedure, manning, and station assignments.

withdrawal of previous proposals does not in and of itself establish bad faith. Vill. of Midlothian, 29 PERI ¶ 125; 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 character of regressive bargaining is whether it is designed to "frustrate the bargaining process." Vill. of Midlothian, 29 PERI ¶ 125; Chicago Local No., 458-3M v. NLRB, 206 F.3d 22 (D.C. Cir. 2000). If the parties were not close to agreement when the allegedly regressive proposal was made, it cannot be found to have frustrated bargaining. Vill. of Midlothian, 29 PERI ¶ 125; Irving Ready-Mix, Inc., 357 NLRB No. 105 (2011).

Here, Respondent's proposals on shift manning were not regressive because the parties were not close to agreement on that subject when the Respondent withdrew its earlier proposal and they had never reached tentative agreements on that subject. The Union had already rejected the Respondent's latest shift manning proposal, offered on May 13, 2014, when the Respondent submitted its modified proposal on December 16, 2014. The mere fact that the Respondent's new proposal on manning is less favorable to the Union than the Respondent's earlier proposal does not demonstrate bad faith. Vill. of Midlothian, 29 PERI ¶ 125 (offer of less favorable proposal, standing alone, did not indicate bad faith).

Contrary to the Union's contention, the Respondent did not enter into a tentative agreement with the Union, on April 30, 2014, to maintain the status quo on shift manning and to instead reduce fire suppression manning. An agreement requires offer, acceptance, and a meeting of the minds—parties must truly assent to the same things in the same sense on all of the agreement's essential terms and conditions. City of Park Ridge, 32 PERI ¶ 151 (IL LRB-SP 2016)(setting forth this principal with respect to a complete contract); Tri-State Fire Protection Dist., 31 PERI ¶ 78 (IL LRB-SP 2014); Chicago Transit Auth., 29 PERI ¶ 156 (IL LRB-LP 2013); Recorder of Deeds, 28 PERI ¶ 14 (IL LRB-LP 2011). Whether the parties had a meeting of the minds is determined by their objective conduct rather than their subjective beliefs. Paxton-Buckley-Loda Educ. Ass'n v. Ill. Educ. Labor Rel. Bd., 304 Ill. App. 3d 343 (4th Dist. 1999); Tri-State Fire Protection Dist., 31 PERI ¶ 78; Ill. Fraternal Order of Police Labor Council, 19 PERI ¶ 39 (IL LRB-SP 2003); City of Chicago (Police Dep't), 14 PERI ¶ 3010 (IL LRB 1998).

Here, the Respondent's statements at the table and the Union's subsequent conduct demonstrate that the parties had no meeting of the minds on the Union's proposal. Respondent's counsel Wesner withheld expression of the Respondent's unequivocal intention to abide by the Union's terms and instead expressed his intent to further vet the proposal. Although he stated "this is good, this sounds like right where we want to be," he also stated that he would need to bring the proposal to the Mayor "to discuss." Cf. Leader Communications Inc., 359 NLRB No. 90, 14 (2013)(ALJ found tentative agreement where respondent's agent did not inform union that he wished to consult with upper management until after the bargaining session had ended and until after he agreed to proposal). The record reflects that the Union understood that Wesner wished to investigate the shift manning proposal before accepting it because Union agents expressed no surprise or outrage when the Respondent sought to continue negotiations over this allegedly settled matter at the parties' next meeting on May 13, 2014. Cf. City of Waukegan, 30 PERI ¶ 33 (IL LRB-SP ALJ 2013) (using attorney's silence in face of characterization of state of negotiations to support finding that parties had reached agreement).

In the alternative, even if the Board determines that the Union and the Respondent reached a tentative agreement on April 30, 2014, the Respondent's withdrawal from that agreement would not indicate bad faith. The Respondent's conduct was not designed to frustrate the bargaining process because the Respondent withdrew its proposal for good cause and in a timely fashion. Village of Midlothian, 29 PERI ¶ 125 (key issue in evaluating bad faith in regressive bargaining context is whether it is designed to "frustrate the bargaining process"). The Respondent rejected the proposal after Wesner discussed the proposal with the Mayor and determined that a reduction of total fire suppression manning would not address the Respondent's economic concerns. Instead, it would impose a financial burden because the proposal's concomitant maintenance of shift manning would require the Respondent to call firefighters back on overtime. Moreover, the Respondent's withdrawal was timely, conveyed within two weeks of the proposal's receipt, early during negotiations, and seven months prior the parties' scheduled interest arbitration on December 16, 2015. Alternative Cmty. Living, Inc., 362 NLRB No. 55, 7 (2015)(withdrawal of tentative agreement based on "practical business considerations," which was not made to impede negotiations, did not evidence bad faith; finding violation on other grounds); Cf. Universal Fuel, Inc., 358 NLRB 1504 (2012) (withdrawal of tentative agreements demonstrated bad faith where withdrawal occurred late in negotiations and

where employer provided no legitimate business reason for its actions and instead relied on “philosophical” objections to proposal).

In addition, there is insufficient evidence that the Respondent withdrew from any tentative agreements on sections of the expired contract that the parties did not expressly discuss. Rather, the evidence indicates that the parties had no agreement to maintain the status quo of those unaddressed terms. The existence of a tentative agreement requires an analysis of whether the parties reached a meeting of the minds. Bd. of Educ., Granite City Cmty. Unit Sch. Dist. No. 9 v. Sered, 366 Ill. App. 3d 330, 336 (1st Dist. 2006). The existence of a meeting of the minds is determined by the parties’ objective conduct rather than by their subjective beliefs since a test based on subjective beliefs would enable a party to evade its contractual commitments. Paxton-Buckley-Loda Educ. Ass’n, IEA-NEA v. Illinois Educ. Labor Relations Bd., 304 Ill. App. 3d 343, 350 (4th Dist. 1999).

Here, the parties’ conduct demonstrates that the creation of a tentative agreement to maintain terms of the expired contract required affirmative assent from the Respondent because the Union expressly sought the Respondent’s assent. On April 16, 2014, the Union specifically proposed to maintain the status quo of “all other items” aside from those specifically listed in its proposal. The Respondent’s failure to expressly agree to maintain those unaddressed portions of the contract precludes a finding that parties tentatively agreed to maintain them because the Union’s proposal demonstrates that such express agreement was required. Thus, there is no merit to the Union’s claim that the parties implicitly agreed to maintain the status quo of the contract terms that the parties did not discuss. Cf. DeKalb County Sheriff’s Office, Chapter 318, 23 PERI ¶ 170 (IL LRB-SP ALJ 2007)(unaddressed terms were included in new contract by implicit agreement where parties presented their proposals as highlighted changes to the expired contract and where parties did not separately discuss treatment of unaddressed terms).

Finally, the Mayor’s statement at hearing does not indicate bad faith because it is a mere expression of the Mayor’s opinion that was made without a threat or promise of a benefit. Under Section 10(c) of the Act, “the expressing of any views, argument, or opinion...shall not constitute or be evidence of an unfair labor practice under any provision of [the] Act...if such expression contains no threat of reprisal or force or promise of benefit.” 5 ILCS 315/10(c). Here, the Union’s counsel asked the Mayor, “[i]t is your position that if you don’t have the appropriate funding, you can violate the Collective Bargaining Agreement,” and the Mayor

stated his opinion on the law by answering in the affirmative.

Even if the Mayor's statement could be used to color the Respondent's overall bargaining conduct, that statement would not indicate bad faith when read in context. The earlier line of questioning indicates that the Mayor's statement was a comment on the Respondent's obligations with respect to total fire suppression manning, rather than on its contractual obligations more broadly. The Union's counsel had asked the Mayor why the Respondent could reduce total fire suppression manning below the total of 51 employees mandated under the expired contract. The Mayor accurately answered that it was management's prerogative to use its financial resources "in the best way we see fit" on this particular matter. See City of Danville, 31 PERI ¶ 187 (IL LRB-SP G.C. 2014) (finding employer had no obligation to bargain over a proposal to maintain total fire suppression manning at 51). The Union next asked whether the Mayor believed the Respondent could "violate" the then-expired Collective Bargaining Agreement in the absence of sufficient funding. The Mayor's broad affirmative answer should be read more narrowly as addressing the Respondent's authority to deviate from total fire suppression manning provisions because that was the subject of all the prior questions.

Thus, the Respondent did not bargain in bad faith in violation of Sections 10(a)(4) and (1) of the Act.

V. CONCLUSIONS OF LAW

1. The Respondent did not violate Sections 10(a)(4) and (1) of the Act when it refused to permanently fill the open Assistant Chief position.
2. The Respondent did not bargain in bad faith in violation of Sections 10(a)(4) and (1) of the Act by submitting to the Union a number of new proposals on the first day of the parties' interest arbitration hearing.

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 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 seven 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 General Counsel Kathryn Zeledon Nelson 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 28th day of June, 2016

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

/S/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**