

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

Illinois Council of Police,)	
Petitioner)	
and)	
)	
Village of Lyons,)	
Employer)	
and)	
)	
Illinois Fraternal Order of Police Labor)	
Council, ¹)	Case No. S-RC-14-073
Incumbent)	
and)	
)	
Metropolitan Alliance of Police,)	
Lyons Chapter #705,)	
Intervenor)	
and)	
)	
Aaron Gatterdam, ²)	
Objector)	

**ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

On March 11, 2014,³ the Illinois Council of Police (ICOP), filed a petition with the State Panel of the Illinois Labor Relations Board (Board), in the above captioned case seeking an election in a bargaining unit of all sworn full time peace officers employed by the Village of Lyons (Village) below the rank of lieutenant, originally certified by the Board in Case No. S-RC-86-155 (Unit). The Illinois Fraternal Order of Police (FOP) currently represents the Unit. On March, 27 the Metropolitan Alliance of Police, Lyons Chapter #705 (MAP) filed a petition to intervene in the election. On May 12, the Board, pursuant to the parties' Stipulation for Certification upon Consent Election (Stipulation), conducted an on-site, secret ballot election among the Unit's employees. At the election, 17 ballots were cast, and six of those ballots were challenged and set aside. After the election, the unchallenged ballots were tallied and the result

¹ With the exception of Illinois Fraternal Order of Police Labor Council, all named parties were present at the hearing held in his case, though only Metropolitan Alliance of Police and Illinois Fraternal Order of Police Labor Council participated in the hearing.

² Party dismissed on June 11, 2014.

³ Unless otherwise stated, all events occurred in 2014.

was four votes were cast for ICOP, and seven votes were cast for MAP. MAP, ICOP, and Village employee Aaron Gatterdam each filed timely objections to the election. The objections were investigated pursuant to the Act and Section 1210.100 of the Board's Rules and Regulations, 80 Ill. Admin Code sections 1200-1240, (Rules), and on June 11, 2014, the Board's Executive Director issued a Report on Challenged Ballots and Objections to An Election (Report) in which she ordered the Board to conduct a hearing to determine the eligibility of six voters who cast ballots that were not counted, and in which she dismissed Gatterdam's objections. A hearing was held on July 18 in Chicago, Illinois, at which time the parties appeared and were given a full opportunity to participate, present evidence, examine witnesses, and argue orally. After a full consideration of the parties' stipulations, evidence, and arguments, and upon the entire record of the case, I recommend the following:

I. ISSUES AND CONTENTIONS

There are two issues to be resolved. First, whether MAP is bound by the Stipulation that the Unit includes approximately 19 employees; and second, whether the challenged ballots should be opened and tallied toward the election results. Regarding the Stipulation, ICOP argues that MAP's objection should be rejected because MAP agreed in the Stipulation that the Unit includes approximately 19 employees, but is now objecting that seven of those 19 employees are ineligible to vote, and allowing such objection would render the Stipulation meaningless. MAP argues that at the time of the election the seven employees were laid off, that these layoffs alter the size of the bargaining unit, and it should not be bound to the stipulated size of the Unit because the layoffs were effective after MAP signed the Stipulation.

Regarding the challenged ballots, MAP argues that the laid off officers' ballots should not be counted because they were not eligible to vote at the time of the election. MAP argues that because the employees were laid off with no indication of recall, they were not in the bargaining unit. ICOP argues that the employees were eligible to vote because the officers had a reasonable expectation of recall thus making the layoffs temporary, and the Stipulation expressly provides that temporarily laid off employees are eligible to vote.

II. INVESTIGATORY FACTS

The Illinois Fraternal Order of Police Labor Council (FOP) has been the certified exclusive bargaining representative for all full time peace officers employed by the Village of Lyons with the rank below sergeant for nearly 30 years. The current collective bargaining agreement between FOP and the Village involving the Unit began on January 1, 2009 and expired on December 31, 2012 but remains in full effect while FOP and the Village negotiate a successor agreement.⁴

Village Manager Thomas Sheahan reports directly to the Village Board and works under Mayor Christopher Getty. Sheahan creates the Village's budget, which is then approved or rejected by the Village Board. Sheahan also has the independent authority to hire, to lay off and to recall Village employees, and is not required to obtain approval from the Mayor or the Village Board before taking such actions.

Over a period of nine months FOP and the Village negotiated a successor collective bargaining agreement in which they discussed the possibility of laying off Unit employees. As a result of unsuccessful negotiations, on or around April 9, Sheahan determined that budgetary constraints required him to lay off seven officers in the Unit. Sheahan presented his decision to Mayor Getty and the Village Board, and received no indication that either the Mayor or the Board disagreed with his decision. On April 9, Police Officers Richard Brown, Damien Dyas, Christopher Kudla, Jennifer Markowski, Nicholas Muller, Jeffrey Studlow, and Jonathan Szablewski each received a letter informing them that they were laid off. Each letter was signed by Sheahan and stated:

This is to inform you that you will be laid off from your employment with [t]he Village of Lyons Police Department effective April 11, 2014. The layoff is not in any way reflective of your service to the Village or the performance of your duties. The layoff is due to budgetary constraints.

The record does not indicate how each officer received each letter, nor does it indicate if anyone from the Village discussed the implications of the layoffs at the time the officers received the layoff letters. Within the last five years, at least one officer, Officer Mullen, was laid off and

⁴ While the Collective Bargaining Agreement between FOP and the Village was not entered as an exhibit, Section 1200.145 of the Board's Rules requires each labor organization and each employer to file with the Board any collective bargaining agreement that is subject to the Act within 60 days after such agreement is reached. As such, I am taking judicial notice of the agreement between FOP and the Village which was reached in January 2011, but effective through December 2012.

subsequently recalled eight months later. Within the last two years the Village has laid off a nurse, a public works employee, an administrative employee in the fire department and a part time parks and recreation employee. The Village has not recalled these employees from layoff. The Village has also declined to hire replacements for a position in the public works department and a position in the building department when vacancies arose. Sheahan testified that the Village is more inclined to recall the recently laid off police officers rather than the other laid off employees because these officers directly affect public safety, which is a higher priority than the functions of the positions in the other departments.

Also on April 9, FOP filed a grievance alleging that the layoffs violated Article XII of the collective bargaining agreement, which states:

Prior to laying off any permanent Employees, all probationary, temporary, or part-time Employees functioning within the Police Department shall be laid off or terminated as the case may be. In the event of lay-off of sworn personnel, the Employer agrees not to hire civilian personnel to perform the duties that only a peace Officer can perform. [...] In the event of further lay-off sworn personnel shall be laid off in the reverse order of their seniority. Re-hiring shall be in accordance 65 ILCS 5/10-2.8-18.

65 ILCS 5/10-~~2.8~~-18 is not included in the record and could not be otherwise located. However, I do take judicial notice of 65 ILCS 5/10-2.1-18 which states, in relevant part:

Fire or police departments - Reduction of force - Reinstatement. When the force of the fire department or of the police department is reduced, and positions displaced or abolished, seniority shall prevail and the officers and members so reduced in rank, or removed from the service of the fire department or of the police department shall be considered furloughed without pay from the positions from which they were reduced or removed.

Such reductions and removals shall be in strict compliance with seniority. [...] Such officers or members laid off shall have their names placed on an appropriate reemployment list in the reverse order of dates of layoff.

If any positions which have been vacated because of reduction in forces or displacement and abolition of positions, are reinstated, such members and officers of the fire department or of the police department as are furloughed from the said positions shall be notified by the board by registered mail of such reinstatement of positions and shall have prior right to such positions if otherwise qualified, and in all cases seniority shall prevail.

The status of the grievance as of the date of the election or the date of the hearing is not included in the record.

At the time of the layoffs and subsequently, at least one laid off officer has been paid his accrued benefit time, vacation, comp time, holiday pay, and at least a portion of his pension payment. Currently, Officer Richard Brown is in a dispute with the Village over allegations of some unpaid holiday time. On April 15, FOP voted that the seven laid off officers were not required to pay dues for the remainder of 2014 to remain bargaining unit members. Six of the seven laid off officers voted in the May 12 election. The Village has not recalled any of the officers.

In May, two Unit employees informed the Village that they would retire within the year. The Village decided to recall two laid off officers to fill those vacated positions. In July, Sheahan informed Officer Brown that he was one of the two officers to be recalled, though the specific recall date has not been set. Sheahan testified that the Village does anticipate eventually recalling all the officers, but is unlikely to do so in 2014.⁵

Election Procedures

On March 11, ICOP filed the election petition. On March 13, Board agent Michael Dunne requested that the Village provide the Board with the names and job classifications of the employees included in the petition. On March 21, the Village provided the Board and FOP with a list of the 19 police officers and sergeants requested. The Village also informed the Board that it was not taking a position on the election petition. On March 27, MAP filed a petition to intervene in the election.

In April, Dunne submitted the Stipulation articulating the terms under which the Board would conduct the election to ICOP, the Village, MAP and IFOP, for their approval. Paragraphs 3 and 6 state that employees temporarily laid off during the April 19 payroll period are in the bargaining unit and are eligible to vote in the election. Paragraph 11 defines the bargaining unit,

⁵ The parties submitted two news videos of the Village Mayor commenting on the reasons behind the Village's decision to lay off the police officers, and the possible length of the layoffs. The videos will not be considered because they have not been properly authenticated to the extent that I have no indication that the Mayor made these statements during the pertinent period before the election, and because both statements were made to a television reporter outside the hearing room, the statements are hearsay and I find them inherently unreliable. Even if I considered the statements in my analysis, I would find that the Mayor's statement regarding the length of the layoffs are consistent with Sheahan's testimony that the Village cannot yet provide a definitive recall date. Also, since Sheahan testified that he possesses the independent authority to recall the officers, the Mayor's opinion as to the likeliness of how long the layoffs may last carries less weight than Sheahan's testimony.

and provides that the “[a]pproximate number of employees in the unit [is] 19.” Paragraph 11 also provides that:

[Board a]pproval of this Stipulation does not constitute a Board determination that the bargaining unit herein is the most appropriate one which could be petitioned for, and is predicated upon the parties’ knowledge of the unit issues involved, their desires to stipulate to the unit and a finding that the stipulated unit is not inappropriate within the meaning of the Illinois Public Labor Relations Act.

FOP agreed and signed the Stipulation on April 9th. The Village, ICOP, and MAP, each agreed and signed the Stipulation on April 10. On April 21, the Board’s Executive Director approved the Stipulation

On April 21, Dunne requested that the Village provide the Board with a list of the employees eligible to vote in the election. On April 23, the Village provided the Board, and all parties to the election, two lists of employees. The first list identified the 12 active officers and sergeants that the Village employed as of April 19. The second list identified the seven police officers that the Village laid off on April 11.

III. DISCUSSION AND ANALYSIS

If MAP is bound to the size of the Unit as stated in the Stipulation, then its objections are improper, and will not be addressed. Accordingly, the Stipulation issue must be resolved first.

A. Stipulation

The Stipulation does not preclude MAP from objecting to the ballots cast by the laid off employees. The Board has long held parties to their stipulations regarding bargaining unit inclusions and exclusions, unless a change in circumstances warrant a reevaluation of the stipulation. City of Chicago, 23 PERI ¶145 (IL LRB-LP 2007); Vill. of Bensenville, 20 PERI ¶12 (IL LRB-SP 2003); City of Carmi, 9 PERI ¶2012 (ISLRB 1993); Rockford Twp. Hwy. Dep’t., 2 PERI ¶2013 (ISLRB 1986); Vill. of Maywood, 1 PERI ¶2012 (ISLRB 1985). In interpreting stipulations for certification upon consent election the National Labor Relations Board (NLRB) has held that an agreement to enter consent election is a contract and binds the parties according to its terms, unless it is contrary to law or settled Board policy. Nat’l Labor Rel. Bd. v. Sonoma Vineyards, Inc., 727 F. 2d 860, 885 (9th Cir. 1984); Nat’l Labor Rel. Bd. v. Detective Intelligence Service, Inc., 448 F. 2d 1022 (9th Cir. 1971); Nat’l Labor Rel. Bd. v. United Dairies, Inc., 337 F. 2d 283 (10th Cir. 1964).

Here, as the party seeking to enforce the contract, ICOP has the burden to prove that MAP is bound to the Stipulation, and that MAP is therefore precluded from arguing that the employees are not in the bargaining unit because this argument is inconsistent with the Stipulation's agreed upon terms; and that binding MAP to the Stipulation is consistent with Board policy. The Stipulation provides that the bargaining unit includes temporarily laid off employees, and that the approximate number of bargaining unit members is 19. In its objections, MAP argues that the officers cannot vote because they are not temporarily laid off, rather the layoffs are permanent and the employees are no longer in the bargaining unit. ICOP argues in order for the bargaining unit to be 19 officers, the unit must include the seven laid off officers, and MAP's objections are inconsistent with its stipulation. I find that the layoffs certainly raise a question of whether employees are in the Unit, and constitute a change in circumstances sufficient to allow an argument that the stipulated size of the Unit is no longer applicable. Since the Stipulation is predicated on the knowledge of the parties when they entered into the Stipulation, if MAP was aware of the layoffs when it signed the Stipulation, then it should be bound to the terms of the Stipulation, which includes that the Unit is "approximately 19" which includes temporarily laid off employees. However, if the layoffs occurred after MAP signed the Stipulation, I find that the layoffs constitute sufficient cause to reevaluate the Stipulation.

MAP is not bound to the stipulated size of the bargaining unit, because the record contains insufficient evidence that it was aware of the layoffs when it entered into the Stipulation, and because binding MAP to the Stipulation would be inconsistent with Board policy. The Stipulation provides that Board approval of the Stipulation is "predicated upon the parties' knowledge of the unit issues involved." On April 10, ICOP, MAP, and the Village signed the Stipulation. On April 11 the layoffs became effective. On April 21, the Executive Director approved the Stipulation. On April 23, the Village informed the Board that seven of the employees previously identified as "in the bargaining unit" were laid off, effective April 11. The record indicates that MAP was not provided the original list, but only the April 23rd lists. MAP accurately argues that the record does not demonstrate that it was aware of the layoffs prior to signing the Stipulation, and further argues that the layoffs constitute a change in circumstance. More to the point, binding MAP to the stipulation would prohibit the investigation into whether the officers in question were eligible voters, and is contrary to the Board's purpose. Section 9(d) of the Act provides the Board with the authority to certify the exclusive bargaining representative

of a group of public employees when such representative has been “fairly and freely chosen by a majority of employees in an appropriate unit.” If employees who are not in the bargaining unit are authorized to vote in a representation election, then such bargaining representative was not fairly and freely chosen, because only bargaining unit members are authorized to choose their representative. Accordingly, I find that the Stipulation does not prevent MAP from objecting to the laid off police officers’ voter eligibility.

B. voter eligibility

Section 1210.130(a) of the Board’s Rules states that in order to be eligible to vote in an election, an employee must be “in the bargaining unit as of the last day of the payroll period immediately prior to the date of the direction of the election or the approval of a consent election agreement, and must still be in the bargaining unit on the date of the election.”

The phrase “in the bargaining unit” includes active duty employees and inactive employees who have a reasonable expectation of future employment. Town of Normal, 30 PERI ¶32 (IL LRB SP 2013; Town of Cicero, 2 PERI ¶2028 (IL SLRB 1986); Rockford Twp. Hwy. Dep’t, 1 PERI ¶2017 (IL SLRB 1985). The Board has adopted the following four factors used by the NLRB and by public employee labor boards in other jurisdictions, including the Michigan Employment Relations Commission (MERC), and the Pennsylvania Labor Relations Board (PLRB), for determining whether an employee has an “objectively reasonable” expectation for future employment: 1) the employer's past experiences; 2) the employer's future plans; 3) circumstances surrounding the layoff; and 4) what the employees were told about the likelihood of recall. Town of Normal, 30 PERI ¶32 citing Beloit Corp. Casting Div. v. Nat’l Labor Rel. Bd., 867 F. 2d 1154 (7th Cir. 1988); Quincy Park Dist., S-RC-95-18, (IL SLRB July 17, 1995); Garden City Pub. Schls., 20 MPER ¶8 (MERC 2007); Clearfield Twp., 27 PPER ¶27080 (PLRB 1996).

The NLRB has noted when an employee has been laid off there is not a presumption of either voter eligibility or voter ineligibility; rather the factors must be applied on a case-by-case basis. Raley’s Inc., 348 NLRB 382, 558 (2006). The party seeking to exclude employees from voting has the burden of proof. Town of Normal, 30 PERI ¶32; Pavilion at Crossing Point, 344 NLRB 582, 584 (2005). In this case, MAP has the burden to prove by a preponderance of the evidence that on the date of the election it was unreasonable for the laid off police officers to have an expectation of recall.

1. employer's past experiences

The Village's past layoffs provide some evidence in predicting its future actions in the instant matter. Over the last two years the Village laid off several employees and has not recalled them. Sheahan has the authority to recall employees from layoff, and he distinguishes between the current laid off officers and the other laid off employees' possibility of recall. Sheahan maintains that police officers are necessary to public safety, and thus are more likely to be recalled than other laid off employees. However, because the record lacks any indication as to the likelihood of the non-police employees being recalled, stating that the police officers have a greater chance than some unknown chance provides little evidence to the question at hand. In 2009, the Village laid off at least one police officer and recalled him eight months later. I find that the previous layoff and recall of Officer Muller supports Sheahan's testimony that the officers are more likely to be recalled than other employees, because the Village has recalled at least one officer in the past. Accordingly, I find that the Village's past experience weighs in favor of the officers having a reasonable expectation of recall.

2. employer's future plans

The Village's future plans weighs in favor of the officers having an objectively reasonable expectation of future employment because the Village maintains that it intends to recall the laid off officers. The lack of a definitive recall date does not make any expectation for recall unreasonable. Pavilion at Crossing Point, 344 NLRB 582, 583 (2005); Atlas Metal Spinning Co., 266 NLRB 180 (1983). Sheahan testified that he plans to recall the officers once the budget constraints alleviate, and does not anticipate this occurring in 2014. The future financial condition of the Village is unknown, but since Sheahan creates the budget, and a recall is at his discretion, the fact that the budget prevents him from recalling the employees within this budget year does not indicate that he will be unable to recall the officers in the upcoming budget years. The purpose of the election is to certify a bargaining representative which would then enter a collective bargaining agreement with the Village. Given that the last collective bargaining agreement between the Village and the employees' certified bargaining representative lasted four years, I find that the fact that on the date of the election the Village did not plan to recall the officers within 2014, when the implications of the election could extend into 2018, is an important consideration in analyzing the weight of the Village's intent to recall the employees. Also, the Village signed the Stipulation on April 10, and while MAP may have been

unaware of the layoffs, the Village certainly was, since it had notified the employees the day before. As such, I find that since the Village intends to recall the officers, and results of the election last much longer than the length the employees were laid off at the time of the election and is much longer than the minimum estimated length of the layoffs, I find that the Village's future plans weigh in favor of the officers having a reasonable expectation of recall.

3. circumstances surrounding the layoffs

The record evidence regarding the circumstances surrounding the layoffs does not support MAP's position that there is no reasonable expectation of recall. The officers were laid off due to "budgetary constraints," and as a direct result of failed negotiations between FOP and the Village to enter into a successor collective bargaining agreement. The record does not indicate what those specific constraints were, or how negotiations between FOP and the Village broke down. Sheahan testified that when the budgetary constraints alleviate it is the Village's intentions to recall the officers. The record does not indicate that the Village has taken action to limit its need for the officers, such as taking squad cars out service or subcontracting police officer work. Cf. S&G Concrete Co., 274 NLRB No. 116 (1985)(the employer took a truck out of service, thus indicating that the laid off employees who drove the truck would not be recalled); Foam Fabricators, 273 NLRB No. 80 (1984)(employer laid off an employee and then closed the division where the employee worked).

The circumstances surrounding the layoffs and any subsequent recall are unclear. The Village has not indicated how it anticipates the budgetary constraints to be alleviated, or how negotiations were unsuccessful. Since the Village is a party to the unsuccessful negotiations, successful negotiations are at least somewhat within its control. The fact that the Village, which has the complete discretion to recall the officers, included the laid off officers in list of employees eligible to vote in the election suggests that it considered the layoffs to be temporary. The effective collective bargaining agreement provides that the laid off officers are on a reemployment list and if the Village fills those vacated positions the officers have "prior right" to the positions and are to be recalled in the order of seniority. While the fact that the Village is required to recall the employees if it fills the positions, is not dispositive, I find that it weighs in favor of the employees having a reasonable expectation of recall because it increases such chance. See Cnty. of Arenac, 2 MPER 20040 (Mich. MERC 1989)(finding that an employee had a reasonable expectation of reasonable employment because the collective bargaining agreement

provided the employee with recall rights, and while the employee was not on active duty during the relevant payroll period, he had in fact been recalled by the date of the election). On this record, because the budgetary constraints are unidentified, the record contains no explanation as to what it anticipates would alleviate these constraints, the Village has not taken affirmative steps to limit its need for the officers, and the employees are on a reemployment list that must be used if the Village hires police officers, I find that the circumstances surrounding the layoffs are conflicting to the extent that this factor is neutral and does not weigh in favor of any expectation of recall being unreasonable.

4. what the employees were told about the likelihood of recall

The Village did not provide the officers with any information regarding the likeliness of recall. The record indicates that the only information the employees were given is what they were told in the lay off letters, that the layoffs were due to “budgetary constraints.” Accordingly, this factor is also neutral and does not weigh in favor of any expectation of recall being unreasonable because the employees were not informed that the layoffs were permanent or temporary.

In sum, the Village’s past history of officer layoffs and its future plans to recall the officers weigh in favor of finding a reasonable expectation of recall; while the circumstances surrounding the layoffs and what the Village told the officers about the likelihood of recall are neutral. Based upon consideration of the four factors, I conclude that on the date of the election the seven laid off officers had a reasonable expectation of recall, were in the bargaining unit, and thus eligible to vote.

IV. CONCLUSIONS OF LAW

1. I find that MAP is not bound to its stipulation that the size of the Unit is 19.
2. I find that challenged ballots were cast by persons eligible to vote in the election and thus should be opened and counted.

V. RECOMMENDED ORDER

Unless this Recommended Decision and Order is rejected or modified by the Board, it is hereby ordered the challenged ballots be opened, counted, and added to the previously counted ballots.

VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 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 five (5) days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, IL 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 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 29th day of August, 2014.

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



**Deena Sanceda
Administrative Law Judge**