BEFORE
MARGO R. NEWMAN
ARBITRATOR

In the Matter of the Arbitration Between	)	
	)	
VILLAGE OF BOLINGBROOK	)	
Employer	)	
	)	Interest Arbitration
and	)	FMCS Case No. 101222-01003-A
	)	
METROPOLITAN ALLIANCE OF POLICE, BOLINGBROOK CHAPTER #3	)	
Union	)	
	)	

DECISION AND INTERIM AWARD OF ARBITRATOR

This matter was heard in Bolingbrook, Illinois on September 28, 2010, before the undersigned arbitrator. The parties agreed to waive Section 14(b) of the Illinois Public Labor Relations Act ("the Act") requiring appointment of panel delegates, and agreed that I should serve as sole arbitrator in this dispute.

Representing the Village of Bolingbrook, hereinafter called the Village or Employer, was Mark Bennett of Laner, Muchin, Dombrow, Becker, Levin & Tominberg, Ltd. Also present for the Village were John Driscoll of Tressler LLP, Jim Boan, Tom Ross and Kevin McCarthy.

Representing Metropolitan Alliance of Police (MAP), Bolingbrook Chapter #3, hereinafter called the Union, were Richard J. Reimer and Alfred J. Molinaro of Richard J. Reimer & Associates, LLC. Also present for the Union were John P. Ward, Robert Liazuk, Christopher Salerno, and Robert Sudd.

At the hearing the parties were afforded the opportunity to examine and cross-examine witnesses, and to present documentary and other evidence. The hearing was transcribed by a court reporter. The parties submitted post-hearing briefs and supplemental documentation on December 15, 2010.

I. BACKGROUND

The Village is a home rule municipality. The Union has represented its Police Officers below the rank of Sergeant since 1990, and the parties have entered into successive three year collective bargaining agreements since then, without the need for interest arbitration until the 2002-2005 agreement. The Village's Sergeant's have been represented by MAP, Chapter #4 since 2003, with their first collective bargaining agreement being the subject of an interest arbitration award. Their current agreement is effective May 1, 2007 to April 30, 2012. The Village's Firefighters and Lieutenants are represented by the International Association of Fire Fighters (IAFF), Bolingbrook Local 3005, with it most recent agreement effective May 1, 2009 to April 30, 2012. The record also contains the 2005-2009 collective bargaining agreement covering the civilian employees of the Village (Public Works and Clerical units) who are represented by AFSCME, Local 2014.

The most recent collective bargaining agreement between the Village and the Union herein covered the period between May 1, 2005 through April 30, 2009. During the course of bargaining for the new agreement, the parties met only twice - September 3 and October 9, 2009 - where they exchanged proposals, and had one mediation session before arbitration. Prior to the arbitration hearing the parties exchanged final offers, and tentatively agreed upon all six outstanding economic issues, which they stipulated should be incorporated into the new collective bargaining agreement along with the status quo of all remaining contract provisions from the 2005-2009 agreement. The only remaining issues for resolution in this interest arbitration are stipulated to be mandatory subjects of bargaining and non-economic in nature, permitting the arbitrator to choose either the Village's or Union's final offer, or to write her own provision under the parameters set forth in Section 14(g) of the Act. Although

two contract articles are involved, the disputed issue arises from the Union's attempt to have disagreements regarding suspensions and terminations of Police Officers resolved through the contractual grievance-arbitration procedure.

The parties agreed upon five comparable communities - Downers Grove, Elmhurst, Lombard, Orland Park and Tinley Park. Of these, Downers Grove and Tinley Park have no provision for arbitration of discipline, Lombard and Orland Park permit the employee to elect review of discipline by either the appropriate Board or through the grievance-arbitration procedure, and Elmhurst has arbitration as the sole recourse for appealing discipline. The Union put forward Wheaton as a comparable community - it does not have arbitration of discipline. The Village proposed three additional comparable communities - Addison, Oak Lawn and Romeoville. Of these, neither Addison (whose agreement expired in 2009) nor Oak Lawn have a provision for arbitration of discipline, but Romeoville permits the employee to elect review from the Board or through arbitration.[1]

The most recent collective bargaining agreements between the Village and IAFF, Bolingbrook Local 3005 covering the Firefighters, and AFSCME, Local 2014 covering its civilian employees, have provisions for the resolution of disputes concerning discipline through the grievance-arbitration procedure. The MAP, Chapter 4 agreement with the Village covering the Sergeants has a provision similar to the one the Union is seeking to change in this case, and provides for disciplinary disputes to be resolved by the Board.

II. CURRENT CONTRACT PROVISIONS AND FINAL OFFERS

The relevant sections of the two provisions of the collective bargaining agreement that the Union seeks to modify read as follows:

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[1] The Union's proposed comparable communities fall within +/-60% of economic criteria (population, EAV, sales tax, per capita sales tax and per capita EAV) based upon the FY 2009 Annual Financial Reports (AFR). The Village's comparables are located within 25 miles of Bolingbrook, and fall within +/-50% of the following categories of census and financial data - population, EAV, per capita general revenue, per capita sales tax, estimated median home value and estimated median household income. It also lists total sales tax revenue and total general revenue as factors considered.

ARTICLE XIII - GRIEVANCE PROCEDURE

Section 13.1. Definition of Grievance.

A grievance is a claim of a Police Officer, or a group of Police Officers with respect to a single common issue, that there has been a violation, misinterpretation or misapplication of the express provisions of this Agreement.

It is understood that the grievance procedure herein does not affect or inhibit the rights of the Board of Fire and Police Commissioners or limit in any way its jurisdiction to discharge its duties and responsibilities pursuant to Chapter 24, Division 2.1 of Illinois Revised Statutes or the Rules and Regulations adopted by the Employer or the Board of Fire and Police Commissions pursuant thereto.

ARTICLE XIV - DISCIPLINE PROCEDURES/OFFICER BILL OF RIGHTS

Section 14.1. Officer Bill of Rights.

The parties will abide by the Uniform Peace Officers Disciplinary Act, 50 ILCS 725/1 *et seq*. In addition, during questioning as part of an "informal inquiry," as defined by the Act, an officer will be allowed reasonable time to consult with an attorney as long as it does not disrupt the daily activity of the Department.

Section 14.2. Informal Inquiry.

"Informal Inquiry" means correspondence with or a meeting by supervisory or administrative personnel with an officer upon whom an allegation of misconduct has come to the attention of such supervisor or command personnel, the purpose of which meeting is to meditate a violation of Department rule, regulation, policy and/or complaint and discuss the facts to determine whether a formal investigation would be commenced. An officer will be allowed reasonable time to consult with an attorney during questioning as long as it does not disrupt the daily activity of the Department.

Section 14.3. Discipline.

All discipline shall be in accordance to the laws of the State of Illinois and the Municipal Code of the Village of Bolingbrook.

Section 14.4. Review of Personnel File.

All Police Officers may review their respective personnel files pursuant to the authority of the Illinois Revised Statutes.

Section 14.5. Receipt of Written Reprimands.

Any time a Police Officer is given a written reprimand, said Police Officer shall receive a copy of such reprimand being placed in his personnel file within seven (7) days of the reprimand.

Section 14.6. Purge of Personnel File.

Upon written request from the employee, any written reprimand or counseling form shall be removed from the employee's record if, from the date of the last reprimand or counseling form, twelve months have passed without the Police Officer receiving an additional reprimand or other discipline for the same or substantially similar offense.

The Union proposes to modify Article XIII, Section 13.1 by deleting the entire second paragraph from the definition of a grievance. With respect to Article XIV, the Union seeks the addition of a new section as follows:

Section 14.7. Suspension or Termination.

The parties agree that the Chief of Police (or the Chief's designee) shall have the right to suspend a non-probationary officer for up to thirty (30) days (eight hour days) or dismiss a non-probationary officer for just cause, without filing charges with the Village Board of Fire and Police Commissioners. Upon providing the employee with written notice of the basis of the discipline (including all alleged rule violations and the factual basis upon which the discipline is based), the decision of the Police Chief or the Chief's designee with respect to the suspension or dismissal action shall be deemed final, subject only to the review of said decision through the grievance and arbitration procedure, provided a grievance is filed in writing within five (5) calendar days after such discipline is imposed. The sole recourse for appealing any such decision by the Chief of Police shall be for the employee to file a grievance as described herein.

If the employee elects to file a grievance as to his or her suspension or dismissal, the grievance shall be processed in accordance with Article XIII of this Agreement, except that it shall be filed at Step 4 of the procedure. If the grievance proceeds to arbitration and the arbitrator determines that the disciplinary action was not supported by just cause the arbitrator shall have the authority to rescind or to modify the disciplinary action and order back pay, or a portion thereof. No relief shall be available from the Board of Fire and Police Commissioners with respect to any matter which is subject to the grievance

> and arbitration procedure set forth in Article 6 of the Agreement. Any appeal of an arbitrator's award shall be in accordance with the provisions of the Uniform Arbitration Act as provided by Section 8 of the IPLRA.
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> Pursuant to Section 15 of the IPLRA and 65 ILCS 10-2.1-17, the foregoing provision with respect to the appeal and review of suspension and discharge decisions shall be in lieu of, and shall expressly supersede and preempt, any provisions that might otherwise be contained in the Rules and Regulations of the Village Board of Fire and Police Commissioners.
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> Discipline of probationary officers, as well as any verbal warnings, written reprimands, written warnings or other discipline not involving an unpaid suspension or dismissal shall not be subject to the grievance and arbitration procedure.

The Village proposes the status quo on both contract provisions, where all discipline is resolved by the Bolingbrook Board of Fire and Police Commissioners ("the Board").

III. BARGAINING HISTORY AND TESTIMONY

All of the collective bargaining agreements between the parties have contained a just cause provision with respect to discipline (including suspensions and discharge) within Article III, the Management Rights clause. As noted, there was a prior interest arbitration between the parties with respect to the 2002-2005 collective bargaining agreement. A review of the April 15, 2004 award of the arbitration panel chaired by Jack Fletcher reveals that there were twelve open issues resolved, one of which dealt with Section 14.1, Officer Bill of Rights. In that case the Village proposed the addition of reference to the Uniform Peace Officers Disciplinary Act in that provision, as well as the ability to consult with an attorney, and the language was adopted, as set forth in Section 14.1 of the current agreement. The predecessor agreement incorporated the Bolingbrook Police Officer Bill of Rights within Section 14.1. At that arbitration, the Union sought the maintenance of the status quo with respect to this provision. The parties agree that there have been no prior discussions in contract negotiations concerning the inclusion of discipline within the grievance procedure.

Patrol Officer John Ward, who has been the Union President since 2005-2006 and was a member of the Union's negotiating team for the 2005 and current collective bargaining agreements, testified that the Union made no proposal with respect to the arbitration of

discipline during prior negotiations because it was unaware it could do so. He stated that the Union did not learn of its ability to negotiate this subject matter until advised by Union counsel during the current set of negotiations. There was no discussion of the Union's proposal with respect to discipline and the grievance procedure during negotiations, other than the Village's negative response to the proposal. The Union did not explain the reasons for any of its proposals (including the arbitration of discipline) and the Village did not question them about it. Ward testified that this issue was important to his members and the Union decided to accept a lower wage increase (1.5% in each of the three years) and push for arbitration of discipline. However, he admitted that the Union never discussed this rationale with the Village, either verbally or in writing. Deputy Chief of Police Thomas Ross testified that there was no discussion of quid pro quo at all during negotiations.

The Board members are appointed by the Mayor. Ward explained that there are internal Police Department procedures for investigating potential rule violations, and the Union believes that its membership has been subject to improper investigations by the Board Chair. As examples, Ward cited a 2006 incident in the town of Westchester when certain Police Officers responding to a call were mandated to a meeting with the Mayor, Board Chair and Village attorney concerning the situation. He also noted that probationary Officer Meadows was questioned by the Board Chair concerning allegations of race and sex discrimination in 2006, and the Board Chair was present in 2009 when his grandson was up for hire as a Police Officer, creating a conflict of interest. Ward was unaware of Board procedures to deal with potential conflicts of interest or whether the Chair recused himself from the vote. Ward testified that his members expressed concern about these "investigations" and he spoke with the Village attorney about them, being told that he could not control the Chair's actions as he was not an employee of the Village. Ross admitted that the Chair and Mayor should not be investigating alleged misconduct which could come before the Board, and agreed that Police Officers were upset when they saw the Chair involved in these incidents.

After the conduct of an internal Police Department investigation, the Chief of Police can suspend an Officer for up to 5 days without going to the Board. However, in cases of discipline of greater than 5 days or termination, the Chief is required to file charges with the Board, which conducts a hearing to decide if discipline should issue and the amount of

discipline. Ross acknowledged that the Board can increase the amount of discipline recommended by the Chief. Both Ward and Ross agree that there has been a feeling of mistrust by Police Officers of the possibility of getting a fair hearing by the politically appointed Board and that they have expressed concern about being afraid to challenge an investigation for fear of retaliation.

IV. RELEVANT STATUTORY PROVISIONS

The parties agreed that the arbitrator shall base her findings and decision upon the applicable factors set forth in Section 14(h) of the Act, which include:

> (1) The lawful authority of the employer.
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> (2) Stipulations of the parties.
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> (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
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> (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
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> > (A) In public employment in comparable communities.
> >
> > (B) In private employment in comparable communities.
>
> (5) The average consumer prices for goods and services, commonly known as the cost of living.
>
> (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
>
> (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
>
> (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment

> through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Section 8 of the Act is also relevant to this dispute and provides:

> Section 8. Grievance Procedure. The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. Any agreement containing a final and binding arbitration provision shall also contain a provision prohibiting strikes for the duration of the agreement. The grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois "Uniform Arbitration Act". The costs of such arbitration shall be borne equally by the employer and the employee organization.

V. THE PARTIES' POSITIONS

The Union first argues that Section 8 of the Act mandates adoption of its proposal, as it requires arbitration of discipline unless the parties mutually agree otherwise, citing Village of Shorewood and FOP, 125 LA 1427 (Wolff, 2008); Highland Park and Teamsters, Local 714, S-MA-98-219 (Benn, 1999); Village of Lansing and FOP, S-MA-04-240 (Benn, 2007); City of Springfield and PBPA, Unit No. 5, S-MA-89-74 (Benn, 1989); Will Co. Bd. and AFSCME, Local 2961, S-MA-88-009 (Nathan, 1988); Village of Elk Grove and IAFF Local 3398, S-MA-93-164 (Nathan, 1994); Calumet City and FOP, S-MA-99-128 (Briggs, 2000); City of Markham and Teamsters, Local 726, S-MA-01-232 (Meyers, 2003); Village of LaGrange Park and FOP, S-MA-08-171 (Goldstein, 2008). It notes that since this collective bargaining agreement includes a "just cause" provision, it has the power to demand that disciplinary matters be resolved via arbitration under this section of the Act. The Union posits that it never "agreed otherwise" since this is the first time the matter has been raised during negotiations between the parties as it never knew it could do so previously. It asserts that, even if the arbitrator were to find that its acceptance of prior

language permitting review by the Board is deemed to be agreement, it clearly no longer agrees as evidenced by its proposal, which is sufficient to bring this case within the arbitration mandate set forth in Section 8 of the Act, relying on Calumet City, supra.

The Union maintains that the traditional "breakthrough" analysis is inapplicable in this case because the parties never bargained over this issue, citing City of Blue Island and FOP, S-MA-00-0138 (Perkovich, 2001); City of Lincoln, S-MA-99-140 (Perkovich, 2000). It points out that the provision mandating that discipline would be resolved by the Board predates the time when arbitration of discipline became a mandatory subject of bargaining for home rule communities, and argues that a formerly permissive issue does not automatically become a "negotiated status quo" if there is no bargaining over it, relying on City of Alton and PBPA, Unit 14, S-MA-02-231 (Kossoff, 2003); City of Blue Island and IAFF, Local 3547, S-MA-01-190 (Hill, 2002); City of Peoria and PBPA, S-MA-02-106 (Alexander, 2003); Village of LaGrange Park, supra. The Union asserts that, in any event, Section 8 of the Act preempts the Village's "breakthrough" argument, noting that arbitration was imposed by interest arbitrators in City of Springfield, Highland Park, and City of Markham despite the fact that the parties had agreed to Board-type dispute resolution language in prior agreements. The Union also claims that the Village's position regarding arbitration of disciplinary cases made a quid pro quo impossible, since the parties had reached a "philosophical impasse" citing Village of Western Springs and Teamsters, Local 714, 99 LA 125 (Goldstein, 1992); City of Alton, supra.

The Union next contends that arbitration is a more equitable forum.[2] It notes that the parties agree that arbitration is fair and impartial, pointing to Deputy Chief Ross' testimony in this regard, as well as the recognition by arbitrators that there is a trend favoring arbitration as a means of resolving disciplinary issues as set forth in Village of Western Springs and MAP 456, S-MA-09-019 (Meyers, 2010); City of S. Beloit and IL FOP Labor

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[2] The language of the Union's proposal deletes any power of the Board to deal with disciplinary appeals, opting for arbitration as the sole means of resolving disciplinary disputes involving unpaid suspensions and discharge. That is the way the Village addressed its proposal at the hearing and in its post-hearing brief and submitted evidence of "comparability." In its post-hearing brief the Union asserts that it is seeking to allow members to elect to resolve suspension of greater than 5 days or termination via the contractual grievance procedure or in front of the Board "(at the Union's option)." When presenting evidence of collective bargaining agreements with "option" language, these provisions make clear that the choice of forum is at the employee's option.

Council, S-MA-06-106 (Perkovich, 2009); Village of Shorewood, supra; Borough of Indiana, PA, 94 LA 317 (Lobow, 1989). The Union reasons that "just cause" is required by the contract and is a fairer standard of review than "cause" which is what is provided for in the Board's rules, citing Village of Western Springs, supra. It asserts that, under the Board's procedures, it is permitted to discharge an employee by showing some "substantial shortcoming" which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service or recognized by law or public policy to be just cause for his no longer holding the position, relying on Wierenga v. Board of Fire & Police Comm'rs, 40 Ill. App. 3d 270 (1st Dist. 1976); Burgett v. City of Collinsville Bd. of Fire & Police Commn'rs, 149 Ill. App. 3d 420 (5th Dist. 1986); Bultas v. Board of Fire & Police Comm'rs, 171 Ill. App. 3d 189 (1st Dist. 1988); Glenville v. Police Bd., 177 Ill. App. 3d 583 (1st Dist. 1988). The Union notes that the Board is not required to consider the "seven tests" of just cause applicable in arbitration, and that its determination of cause is only subject to review under an "arbitrary and unreasonable" standard, citing Schoenbeck v. Board of Fire & Police Comm'rs, 69 Ill App. 3d 366 (1st Dist. 1979).

The Union insists that arbitration avoids the appearance of impropriety that comes with a system where one party unilaterally appoints the decision-makers, citing Calumet City, supra; Town of Cicero v. Ill. FOP Labor Council, S-MA-06-012 (Briggs, 2009); Village of Western Springs, supra; City of Rock Island, supra; City of Elgin and PBPA, Unit 544, S-MA-00-102 (Goldstein, 2002). It stresses that both Ward and Ross testified that there is a widespread mistrust of the Board by Police Officers, and emphasizes the importance of these feelings on the process, even if they are not objectively proven, relying on City of Elgin, supra. The Union insists that the Board's power to increase discipline upon appeal has a chilling effect on an employee's willingness to seek review, and may be a better explanation for the minimum number of discipline cases brought to the Board for review than the fact that the current system is working, citing Village of Shorewood, supra. It points to evidence introduced concerning improprieties by the former Board Chair and Village Mayor with respect to protocol for reviewing alleged police misconduct as an example of the Union's real concern about the way discipline is administered under the current system.

The Union maintains that arbitration is private and avoids undue embarrassment, while Board hearings are public and discourage frank and honest dialogue to resolve disagreements, which acts as an additional deterrent to seeking review. It stresses that arbitrators are better equipped to deal with disciplinary matters and are trained to be reasonable decision-makers, unlike Board appointees, who have no such requirement. The Union asserts that Police Officers should not be subject to the inexpert opinions of political appointees, relying on Village of Shorewood, supra. Additionally, the Union argues that arbitration is faster and cheaper, since the Village is required to pay for two attorneys at Board hearings as well as the cost of any appellate review, while the parties split the cost of an arbitrator.

The Union argues that external comparability supports its proposal. It notes that three of the five agreed-upon comparable communities allow their officers to dispute discipline through a grievance procedure with binding arbitration. The Union takes issue with the inclusion of Addison, Oak Lawn and Romeoville based upon a comparison of their sales tax revenues (which are much lower) and Addison based, as well, upon its total general revenue. It asserts that the majority of agreed comparables have arbitration of discipline, and that, even if the arbitrator were to adopt the Village's proposed external comparables, four of eight permit their officers to have discipline reviewed via a grievance-arbitration procedure. The Union also contends that internal comparability weighs more heavily in support of its position, pointing to the fact that the Village has already agreed to arbitrate discipline for its Firefighters and civilian employees, whom, it argues, are more similar to Police Officers than are their immediate supervisors.

Finally, the Union contends that, even if the arbitrator were to apply the "breakthrough" analysis, it has established a compelling need to change the current system, and meets the requirements set forth in Will Co. Bd., supra; Clinton Co. and FOP, S-MA-05-026 (LeRoy, 2005); City of Burbank and FOP, S-MA-97-56 (Goldstein, 1998). It claims that there are numerous due process problems with the current system including the Officers' fear of appealing discipline to the Board, the fact that the Board is made up of unqualified political appointees, is subject to the Open Meetings Act, there is a widespread perception that the Board is unfair, and it ignores the negotiated *status quo* just cause

standard required by the agreement. The Union points to testimony establishing the Board's self-initiated investigations into perceived police misconduct which ignored the Rules of the Police Department concerning its internal investigation procedures. It also notes that permitting discipline to be reviewed in arbitration rather than through Board procedures would save the Village money and that no prejudice to the Village has been shown, pointing out that both the Firefighters and civilian employees have this right in their collective bargaining agreements with the Village, which, alone, would meet the "breakthrough" principle, citing City of Blue Island, supra. For all of these reasons, the Union urges the arbitrator to adopt its proposed changes to the agreement and permit the arbitration of suspensions of five days or more and terminations.

The Village believes that the Union's proposed change to the status quo should be rejected for the following reasons. First, it argues that the Union did not meet its burden of establishing that the current disciplinary system is broken and that it made reasonable efforts to negotiate with the Village about its concerns, as required by Will Co. Bd., supra, and Northlake Fire Protection District and Northlake Professional Firefighters, IAFF Local 3863, S-MA-03-074 (Kohn, 2003). The Village insists that the Union admitted at the hearing that it had the burden to present compelling evidence and that it had previously negotiated the status quo of Board review of discipline. It notes that the current system has been in place for at least 23 years and has been included in five agreements since 1993. The Village points out that the parties bargained for changes to Article XIV, Discipline Procedure, during the 2002-2005 negotiations, the Union advocated for maintaining the status quo and did not seek arbitration of discipline (despite the fact that it has been a mandatory subject of bargaining since 1999 for home rule municipalities, see Markham v. Teamsters, Local 726, 299 Ill. App. 3d 615 (1st Dist. 1998)), and the arbitrator accepted the Village proposal to incorporate changes into the Officer's Bill of Rights, as noted in the interest award concerning that agreement. The Village contends that the current system of Board review is a negotiated status quo, that can only be changed by applying the "breakthrough" analysis.

The Village argues that the Union failed to present evidence that the current system is broken, since none of the examples it relies upon were of hearings involving disciplinary

matters or Board review of discipline. It notes that the "Westchester" incident was a public meeting to mediate racial tension which arose from police response to a community situation, and did not result in any disciplinary action. With respect to the situation involving probationary officer Meadows, the Village asserts that there is no proof that she was involved in an investigation or received disciplinary action as a result of being questioned about harassment. Finally, the Village emphasizes that there was no conflict of interest proven in the situation where the Board Chairman's grandson was up for employment, as the Chair recused himself from participation in that issue. It notes that the Board Chair involved with the incidents in question is no longer in that position.

The Village claims that Board review of discipline is a fair system and has worked. It points out that only four disciplinary matters were referred to the Board since 1987; three had negotiated settlements approved before a hearing was held, and the fourth was a termination that was never appealed. The Village argues that the perception of the Union or its members that the Board review procedure is unfair and political is insufficient to meet its burden in this case, citing Northlake, supra; City of Rock Island, supra; Village of Deerfield and Illinois FOP Labor Council, S-MA-07-148 (Briggs, 2009). It contends that the rules contained in the Board of Fire and Police Commission Act provide sufficient procedural safeguards to Police Officers appealing discipline in that forum. The Village avers that there is no evidence that the Union made reasonable efforts to address its concerns at the bargaining table that were rejected by the Village. It stresses that the Union never raised any concerns with the system before or explained why it needed the change during these negotiations, and sought to preserve the status quo with respect to discipline in the arbitration leading to the 2002-2005 collective bargaining agreement.

Finally, the Village argues that the statutory factors support maintaining the status quo. It insists that public interest and welfare do not favor arbitration, relying on Northlake, supra. The Village stresses that Section 8 of the Act does not trump the negotiated status quo, citing City of Rock Island, supra, and Village of LaGrange Park, supra. It claims that there is no evidence that arbitration is less expensive than Board review, relying on Village of Deerfield, supra. The Village notes that five of the nine proposed comparables have the same type of Board review as exists in this contract, and only one has exclusive recourse to

arbitration as proposed by the Union in this case. In its brief the Village contends that its Firefighters do not have access to arbitration for discipline, and have Board review like the Police Officers. Additionally, the Village points out that there was no quid pro quo offered by the Union in exchange for its proposal about arbitration of discipline, and there is no evidence to support the contention that the Union accepted the Village's wage proposal of what it believed represented lower wage increases as a quid pro quo for the arbitration of discipline. For all of these reasons, the Village argues that the Union failed to establish the elements required to show that a change in the negotiated status quo through arbitration is necessary.

VI. DISCUSSION AND CONCLUSION

As seen from the number of cases cited by the parties, there have been many decisions addressing the issue of the arbitration of discipline after it became a mandatory subject of bargaining. A careful reading of these cases clearly reflects the acceptance by interest arbitrators of the principle that Section 8 of the Act mandates the inclusion in all collective bargaining agreements of a provision for the final and binding arbitration of disputes concerning the administration or interpretation of the agreement, which includes those concerning discipline, especially where there is the requirement of "just cause" for discipline in the contract, as there is here. The only exception to this statutory mandate is where the parties "mutually agreed otherwise." See, e.g. Village of Lansing, supra; Calumet City, supra; Village of Shorewood, supra; Village of Elk Grove, supra; Highland Park, supra; Will Co. Bd., supra. Thus, the inquiry in this case must focus on whether the bargaining history establishes that these parties "mutually agreed otherwise" - in other words, whether the provision for disciplinary review by the Board is a "negotiated status quo." As noted by Arbitrator Wolff in Village of Shorewood, supra, the only difference between the holdings in these cases is whether or not the arbitrator found there to be a negotiated status quo, thereby requiring the Union to sustain a heavier burden of proving the need for a breakthrough provision, as was the situation in Northlake, supra, and City of Rock Island, supra.

In this case, the current agreement section providing for disciplinary review by the Board, has been in all agreements between these parties since 1990. It was stipulated that, prior to the negotiations for the current agreement, there have never been any proposals by

the Union to have discipline covered by the grievance procedure, nor any discussions about the issue by the parties. The Village's assertion that the Union is attempting to change a negotiated status quo and must meet the higher burden associated with the breakthrough analysis is based upon the fact that no change was sought after the statute was amended to make this issue a mandatory subject of bargaining, and that the Union sought the status quo in response to its proposal to change Article 14, Discipline Procedures/Officer Bill of Rights, during the 2002-2005 negotiations resulting in the interest arbitration award adopting the Village's proposal.

I am unable to accept the Village's position that the procedure of Board review of discipline is a negotiated status quo. It is clear that the parties never bargained over this issue before. As noted by Arbitrator Perkovich in City of Blue Island, supra at p. 4, "when a matter is first before the parties after a history of tacit approval, rather than bilateral agreement, there is no status quo such that the issue can be characterized as a breakthrough." Accord, City of Alton, supra at p. 39; Village of LaGrange Park, supra; Village of Shorewood, supra. The fact that the Village proposed a substitution of reference to governing statutes in Section 14.1, Officers Bill of Rights, during the 2002-2005 negotiations and the Union sought the status quo **with respect to that issue**, does not indicate that the parties were also in contemplation of the procedure for review of discipline when they failed to seek additional changes in language to Article 14 at the time. As noted by Ward, the Union was unaware of its legal entitlement to bargain over that issue until the current round of negotiations, so the Village's unilaterally-imposed procedure of solely Board review of discipline was carried forward from contract to contract without thought, consideration or discussion. See, Calumet City, supra. This circumstance falls within the characterization of "tacit approval" rather bilateral agreement, distinguishing this case from the situations that were found to exist in Northlake, supra; City of Rock Island, supra; City of Markham, supra. The previous interest arbitration award leading to the 2002-2005 agreement does not address the issue of review of discipline, and the Union's proposal herein seeks to add an entirely new section to Article 14, rather than change language in sections that existed at the time of the 2002-2005 interest award.

In any event, as noted in Village of Lansing, supra at p. 18; Calumet City, supra at p. 14; Village of Elk Grove, supra at p. 139; and Highland Park, supra at fn. 12, the fact that the

Union now seeks to have disciplinary matters resolved through the grievance-arbitration procedure in the agreement rather than solely before the Board makes it clear that, regardless of what occurred in the past, the parties no longer "mutually agree otherwise" so as to fall within the only exception to the Act's Section 8 mandate for resolution of all disagreements about the meaning and interpretation of the agreement through binding arbitration. Thus, I find that there is no negotiated status quo with respect to the arbitration of discipline issue, the Union's proposal is not a breakthrough provision requiring a higher standard of proof of necessity, and there is no "mutual agreement" to negate the mandate of Section 8 of the Act.

As recognized in most of the interest arbitration awards on this issue, all of the statutory factors set forth in Section 14(h) of the Act are not relevant to the non-economic question of the validity of a provision for arbitration of discipline. See, Village of LaGrange Park, supra; Village of Shorewood, supra. The parties focused their evidence and arguments on factors # 4 (comparability) and #8 (other factors ... which are normally or traditionally taken into consideration in the determination of ... conditions of employment through voluntary collective bargaining ... arbitration or otherwise between the parties, in the public service or in private employment). I will deal with each in turn. As noted by the Village, at the hearing the Union acknowledged that it had the burden of proving the need for the change; the record does not support the assertion that the Union acknowledged that it must meet a "breakthrough" analysis. The record also contains two inconsistencies in positions which I will attempt to set forth in more detail when discussing the evidence on comparability.

At the hearing, the Union explained that it sought to change both the requirement that the Chief must submit disciplinary matters in excess of a 5 day suspension to the Board for approval, as well as the method of appealing such discipline, with sole recourse through the grievance-arbitration procedure. Its final offer confirms that the Union seeks to supersede and pre-empt the Rules and Regulations of the Board, and to eliminate the Board from the discipline and appeal process with respect to unpaid suspensions and terminations. When presenting information concerning the disciplinary appeal provisions in the collective bargaining agreements of comparable communities, the parties noted that only one of the agreed comparables - Elmhurst - has sole recourse to arbitration without Board review. Two other agreed comparables (Lombard and Orland Park), permit recourse to either the

applicable Board or arbitration at the employee's option. Of the remaining four proposed comparable communities, only Romeoville provides for recourse to arbitration at the option of the employee. In this case I find that there is no need to determine the issue of whether Addison, Oak Lawn and Romeoville are comparable communities to Bolingbrook, as argued by the Village, or whether Wheaton should be included, as maintained by the Union. The record reflects that three of the five agreed comparable communities provide some mechanism for appealing discipline to arbitration. If the list is expanded to include all nine communities in dispute, the result is that four of nine communities have recourse to arbitration for appealing discipline in some respect. Thus, the evidence on external comparability does not substantially change in favor of one parties' position over the other as a result of which comparable communities are selected, and it is fair to say that approximately half of the comparable communities have some provision in their collective bargaining agreements for arbitration of discipline.

In its brief, in support of its equity argument, the Union states that it is seeking "to allow members to elect to resolve suspensions of greater than five (5) days or termination/ discharge via the contractual grievance procedure contained in what will become the successor agreement or in front of the BOFPC (at the Union's option)." The language of the Union's final offer makes clear that no option is being provided, that the Union's choice is sole recourse to arbitration, and that it seeks to encompass all unpaid suspensions and terminations within the scope of the contract's grievance-arbitration procedure. However, since the issue is whether the Union has established a legal entitlement or justified need to change the current language to provide for arbitration of discipline, and the parties agree that I have the authority under Section 14(g) of the Act to provide an alternative to the final offers of either party on this non-economic issue, I do not find this inconsistency in the Union's position to be fatal to its case, although it raises the question of whether the proposed language of its final offer is really what is being sought.

The second inconsistency arises with respect to the evidence of internal comparability. The Village has three other collective bargaining agreements covering its employees - Police Sergeants (MAP, Chapter #4), Firefighters (IAFF, Local 3005) and Public Works and Clerical units (AFSCME, Local 2014). The applicable collective bargaining agreements were

introduced into evidence. The Union argues that Police Officers have more in common with other non-supervisory employees than they do with their first line supervisors, the Sergeants, and that those two contracts provide for discipline to be encompassed within grievance-arbitration procedure. It notes that, since the Village has already agreed to provide recourse to arbitration for many of its employees, it cannot now claim that it would be a hardship for it to do so for its Police Officers.

In its brief, the Village claims that its Firefighters do not have access to arbitration and only have Board review of discipline. A study of the three Firefighter contracts in evidence (2002-2004, 2005-2009, 2009-2012) reveals no change in the pertinent sections dealing with this issue. Therein, a grievance is defined as "any dispute or complaint regarding the interpretation of, application of, or compliance with the terms of this agreement," only probationary employee discipline is excluded from the grievance procedure, there is provision for binding arbitration, and, within the article on Discipline, the parties acknowledge that the provisions of the contract prevail with respect to any conflict between it and P.A. 83-783. It is clear that the specific language contained in the second paragraph of Article XIII, Grievance Procedure, in the Police Officer contract - making paramount the rights and duties of the Board - that the Union seeks to eliminate in this case, does not appear in either the Firefighter or AFSCME contracts. Those agreements encompass non-probationary employee discipline within the definition of a grievance and provide for arbitral review of discipline. Thus, despite the fact that the relatively new bargaining unit of Sergeants does not have this provision, I find that evidence of internal comparability favors the Union's position in this case. See, City of Blue Island, supra.

There are other general factors relied upon by the Union to support a showing of the need to change from a Board system of review to one of access to binding arbitration. The parties do not dispute the fairness of the process of arbitration, where trained neutrals are chosen by agreement of the parties for their impartiality. Village of Shorewood, supra. The multitude of State cases ordering arbitration of discipline reveal a trend toward this method of dispute resolution, Village of Western Springs, supra; City of S. Beloit, supra, a public policy favoring arbitration, City of Markham, supra, and a clear legislative preference for arbitration as set forth in Section 8 of the Act. Village of Oak Brook, supra; City of Rock Island, supra.

The just cause standard applied in arbitration to review discipline, and required by this agreement, provides a higher standard of proof and preservation of due process rights than the "cause" standard applicable under Board rules and subject to limited court review. See, Bultas, supra; Burgett, supra; Schoenbeck, supra.

The use of arbitration for the resolution of disciplinary disputes avoids the appearance of impropriety inherent in a system where one party unilaterally appoints the decision-makers. Village of Shorewood, supra; Town of Cicero, supra. In this case there is no evidence that Board disciplinary review has, in fact, been unfair or inequitable. The only impropriety put forward by the Union is the allegation that the past Board Chair inappropriately questioned certain employees in instances not resulting in discipline, without actual proof that what occurred constituted actual "investigations." However, I am agreement with those arbitrators who hold that it is sufficient for the Union to show the perception of unfairness by the affected employees to support the need for a change in system. See, Town of Cicero, supra; City of Rock Island, supra; Village of Western Springs, supra; Village of Oak Brook, supra. As Arbitrator Goldstein stated in City of Elgin, supra at pp. 71-72:

> .... perception is often reality. Any system set up to assess just cause for discipline must be perceived by at least most of the participants as fair and impartial. Under a collective bargaining arrangement, employees ought not be required to accept a pre-existing model for resolving disciplinary matters, if they lack basic confidence in that procedure and press a proposal for a voluntary procedure "which is nearly universal under collective bargaining agreements, i.e., arbitration." Therefore, although I certainly do not accept necessarily the factual underpinnings of the conclusions of bargaining unit members that the Board of Fire and Police Commissioners might not genuinely be neutral, feelings are entitled to weight, whether fully rational or not.

In this case both witnesses agree that there is widespread distrust of the Board review system amongst Police Officers. There also exists the possibility of the chilling effect of appealing discipline to a body that can increase the penalty under review, a practice inconsistent with the due process standard applied in arbitration. Village of Shorewood, supra. The fact that arbitration is a private, rather than a public forum, may also provide an additional safeguard against discouraging review of cases involving particularly sensitive or personal issues. Town of Cicero, supra.

All of these rationales provide an adequate basis for direction of arbitral review of discipline. This is true despite the fact that the Union did not prove that (1) arbitration was

cheaper or faster than Board review, (2) they offered any quid pro quo for this provision during contract negotiations, and (3) they shared with the Village in bargaining the reasons why a change in systems was desirable. I note that in all but two of the cited cases, the arbitrator granted the requested choice of arbitration as an alternative to Board review of discipline. I believe it appropriate to adopt the Union's position that the interpretation of whether there exists just cause for discipline including suspensions and terminations under this agreement should be encompassed within the definition of a grievance contained in Article XIII, Section 13.1. Thus, I grant the Union's request to modify that provision by deletion of the second paragraph.

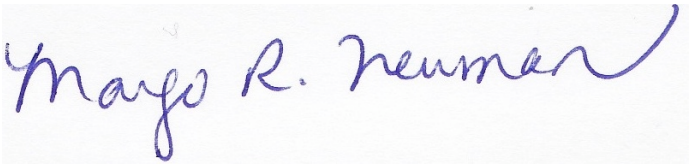
However, at this time, I am unable to adopt the Union's specific proposal to add Section 14.7 as written. While I agree that this collective bargaining agreement must provide for arbitral review of discipline including certain unpaid suspensions and termination, a review of the record raises some confusion about whether the Union is actually seeking an option, as suggested in their brief, and whether they desire all unpaid suspensions to be subject to the grievance-arbitration procedure, or just suspensions over 5 days and terminations. Since the parties have not had the opportunity to bargain about the terms and content of a provision changing the current method of Board review of discipline to review under the contractual grievance-arbitration procedure, they are most familiar with the applicable rules and regulations and practice with respect to the investigation, issuance and review of discipline in the Department, and the Act is intended to achieve a result most like what the parties would have agreed to in bargaining, I deem it appropriate to remand the matter to the parties for the purpose of arriving at agreed-upon language on the manner in which review of discipline by arbitration will take place. That provision may or may not contain an employee option for choosing review by the Board or arbitration. In the event the parties are unable to agree upon language effectuating this award within the remand period or any agreed extension thereof, the matter will come back to me for resolution of the specific language to be included in the current collective bargaining agreement based, in part, upon submission of the final proposals of each party. See, City of Highland Park, supra; Village of Lansing, supra.

VII. AWARD

1. I hereby adopt the parties' tentative agreements and direct that they be incorporated into the new collective bargaining agreement along with the status quo of all other provisions from the 2005-2009 agreement, except date changes, where applicable.

2. The Union's final offer with respect to the amendment to Article XIII, Section 13.1 is adopted.

3. The Union's position for including arbitral review of discipline in the collective bargaining agreement is accepted, as noted more fully in the Discussion section of this award. The case is remanded to the parties for a period of 30 days from the date of this award (or for any additional period agreed upon by the parties) for the purpose of negotiating the procedures, language, scope and standards to be used in effectuating this award. I will retain jurisdiction to resolve disputes which may arise over the drafting of such language.



Margo R. Newman, Arbitrator

Dated: January 31, 2011