BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration **between** **VILLAGE OF SKOKIE** **and** **SKOKIE FIREFIGHTERS LOCAL 3033 IAFF**	**CASE NO.:** Arb. Ref. 12.250 (Interest Arbitration)

INTERIM AWARD (PROMOTIONS)

I. BACKGROUND

The parties are currently in the process of briefing issues that were presented to me in an interest arbitration.[1] At the hearing held August 29, 2013, one issue relating to the promotional process resulted in a bench ruling by me. This ruling came about because of a potential need for a ruling as the promotional process may be implemented in the relatively near future. As set forth in detail in the transcript of the proceedings, I ruled that the provisions of the prior contract governing promotions shall remain for the contract in dispute without prejudice to the parties' ability to raise the promotional issues in future negotiations or interest arbitration proceedings:[2]

---

[1] Briefs are currently due to be filed October 11, 2013. Tr. 437.

[2] Tr. 403-404. As of the hearing, the majority of the changes sought by the Union were in Article XXI governing promotions to the rank of Lieutenant. Union Exh. 4, Tab 1. Changes were also sought by the Union in Article XXII for promotions to the rank of Captain. *Id*. After the hearing, the parties exchanged their final offers. With respect to the Union's offer for promotions to the rank of Captain, the Union withdrew it pre-hearing offer "with reservation of

[footnote continued]

> ARBITRATOR BENN: ... So for purposes of this case, this contract, I am going to say that there will be no change to the status quo with respect to the promotion language. ...
>
> You are free to raise it at any time in the future without prejudice ... but as of right now I haven't heard anything that's broken, so even if I could change it, I wouldn't, at least for this contract.

The Union requested that the bench ruling be reduced to writing.[3] I advised the parties that I would do so.[4]

II. THE PARTIES' ARGUMENTS AND EVIDENCE

The parties' arguments and evidence are set forth in detail in the transcript and the exhibits.[5] While there are many prongs to the parties' positions, the evidence and arguments are essentially the following:

First, the Fire Department Promotional Act ("FDPA"), 50 ILCS 742, became effective August 4, 2003.

Second, the parties had promotional language which pre-dated the FDPA and after the effective date of the FDPA, the parties continued to place into their contracts language addressing the promotional process.[6]

[continuation of footnote]
rights to argue legal position". With respect to its final offer concerning promotions to the rank of Lieutenant, the Union continued to seek changes from the existing language.

As shown in the transcript, my initial reaction was to take the parties' arguments with the case and rule when the full award issued. Tr. 349-371. However, after lengthy argument and to prevent further delay (particularly if the promotional process is implemented prior to issuance of the final award in this case), it became apparent to me that a bench ruling was necessary to move the process along. Tr. 349-409.

[3] Tr. 409.

[4] *Id*.

[5] Tr. 349-410.

[6] *See e.g.*, Articles XXI and XXII of the predecessor Agreement.

Promotions were the subject of a pre-FDPA interest arbitration between the parties. *Village of Skokie and International Association of Firefighters, Local #3033*, S-MA-96-151, AAA 51 390 00278 96 (Briggs, 1998) also reported at:

www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Skokie%20&%20IIAF-S-MA-96-151.pdf

[footnote continued]

Third, Article XXI, Section 21.7 of the predecessor Agreement governing promotions to the rank of Lieutenant provides that "[t]he written examination shall be administered *before* any of the other predictors and *only* those candidates who pass it *with a score of 70% or better* shall be eligible to participate in the remaining components of the process" [emphasis added].

Fourth, Section 35(a) of the FDPA provides [emphasis added]:

> **Sec. 35. Written examinations.**
>
> (a) The appointing authority may *not* condition eligibility to take the written examination on the candidate's score on any of the previous components of the examination. … The written examination shall be administered *after* the determination and posting of the seniority list, ascertained merit points, and subjective evaluation scores. …

Fifth, with respect to the written examination component, the Union argues that the existing provisions of the promotional process in the Agreement violate the FDPA because — particularly for promotions to the rank of Lieutenant — the written examination is administered first with a cutoff score of 70% for the candidates to advance for further consideration in the promotional process, when the FDPA provides that the written test is to be administered last and there can be no requirement for a passing score on the written test to preclude further consideration in the promotional process.[7] According to the

---

[continuation of footnote]

Thereafter, promotional language appeared in the parties' 1999-2002, 2002-2006, 2006-2009 and 2009-2010 Agreements. Bargaining History Volume, Tabs 13-16. There were also two interest arbitration awards which included disputes over promotions for the 2006-2009 Agreement. *Village of Skokie and Skokie Firefighters, IAFF 3033, S-MA-07-007*, AAA 51 390 01383 06 (Hill) awards dated September 28, 2007 and March 9, 2009, reported at:

www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Skokie%20&%20Skokie%20Firefighters%20-%20S-MA-07-007.pdf

www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Skokie%20&%20Skokie%20Firefighters%20-%20S-MA-07-007,%20Continuation.pdf

[7] Tr. 359.

Union, "... the statute precludes you [an arbitrator] from granting the *status quo* language."[8]

Sixth, the Village counters the Union's arguments asserting that the issues raised by the Union and many of the changes the Union now seeks were not first completely vetted through the bargaining process and the Union's proposals in their totality did not appear until the interest arbitration process began in this case and therefore, according to the Village, were not raised in a timely fashion.[9] The Village further argues that the FDPA makes the issue of promotions a permissive subject of bargaining; the parties negotiated something different than the specifics in the statute and the process works and there is no need for a change.[10]

III. DISCUSSION

For the sake of discussion and to focus upon a major contention made by the Union underpinning the reasons for the changes it seeks, I will assume that the Union is correct that the FDPA makes the written component last in the promotional process and the FDPA further precludes establishing a cutoff on the written examination in order to proceed further in the process for the other examination components.

However, the FDPA provides at Section 10:

> **Sec. 10 Applicability.**
>
> * * *
>
> (d) This Act is intended to serve as a minimum standard and shall be construed to authorize and not to limit:

---

8 *Id.*

9 Tr. 361.

10 Tr. 361-362.

* * *

> (2) The right of an exclusive bargaining representative to require an employer to negotiate clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees to ranks, as defined in Section 5, covered by this Act.
>
> * * *
>
> (e) Local authorities and exclusive bargaining agents affected by this Act may agree to waive one or more of its provisions and bargain on the contents of those provisions, provided that any such waivers shall be considered permissive subjects of bargaining.

The relevant portions of the FDPA are that under Sections 10(d) and (e), the FDPA "... is intended to serve as a minimum standard ..." and the parties have the right "... to negotiate clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees ..." and the parties "... may agree to waive one or more of its [the Act's] provisions and bargain on the contents of those provisions, provided that any such waivers shall be considered permissive subjects of bargaining."

And that is what the parties did. For example, after passage of the FDPA, by codifying a different order for the written examination than specified in the FDPA and also by placing a cutoff score on the written examination in order to proceed further in the promotional process when the FDPA provided otherwise, the parties "... agree[d] to waive one or more of its [the FDPA's] provisions ...." The result is the language found in the parties' promotional language as specified in the Agreement, which has been in existence since the FDPA became law (and before).[11] I cannot find that the FDPA strictly prohibits

---

[11] Where codified in the parties' Agreements (both pre- and post-FDPA), the written portion of the promotional exam has always come first with a 70% cutoff score for continuation in the
[footnote continued]

the parties from doing what they did here — *i.e.,* previously negotiating something different from the requirements of the FDPA as a permissive subject of bargaining as permitted by the FDPA.

Therefore, procedural issues aside, the real question in this interest arbitration proceeding on the promotional issue is whether as the party seeking the change the Union has met its burden to show that the existing promotional process is "broken". *See* my award in *City of Highland Park and Teamsters Local 700 (Sergeants Unit)* at 5-6**:**[12]

> In simple terms, the interest arbitration process is *very* conservative; frowns upon breakthroughs; and imposes a burden on the party seeking a change to show that the existing system is broken and therefore in need of change (which means that "good ideas" alone to make something work better are not good enough to meet this burden to show that an existing term or condition is broken). The rationale for this approach is that the parties should negotiate their own terms and conditions and the process of interest arbitration — where an outsider imposes terms and conditions of employment on the parties — must be the *absolute* last resort. *See* my award in *Cook County Sheriff & County of Cook and AFSCME Council 31*, L-MA-09-003, 004, 005 and 006 (2010) at 7-8:
>
>> … [I]nterest arbitration is a *very* conservative process which does not impose terms and conditions on parties which may amount to "good ideas" from a party's (or even an arbitrator's) perspective. For a party in this case to achieve a

---

[continuation of footnote]
process. *See* the 1999-2002 Agreement at Article XII, Section 28(3); 2002-2006 Agreement at Article XII, Section 12.28(4); 2006-2009 Agreement at Article XXI, Section 21.7(A) and the 2009-2010 Agreement at Article XXI, Section 21.7(A). Bargaining History Volume at Tabs 13-16.

[12] www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-09-273.pdf
The *Cook County* award is published at the Illinois State Labor Relations Board's website:
www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Cook%20Co%20Sheriff%20&%20AFSCME,%20L-MA-09-003.pdf
The *City of Chicago* award is published at the Illinois State Labor Relations Board's website:
www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/Chicago%20&%20FOP%20Lodge%20No.%207%20(2010).pdf

> changed or new provision in the Agreements — particularly for non-economic items — the burden is a heavy one. *See* my recent award in *City of Chicago and [Fraternal Order of Police, Lodge No. 7*, (2010)] ... at 6-7 [citation omitted, emphasis in original]:
>
> > ... "The burden for changing an existing benefit rests with the party seeking the change ... [and] ... in order for me to impose a change, the burden is on the party seeking the change to demonstrate that the existing system is broken."
> >
> > As shown by the burdens placed on the parties to obtain changes to existing collective bargaining agreements, interest arbitration is a *very* conservative process. It would be presumptuous of me to believe that I could come up with a resolution satisfactory to the parties on these issues when the parties with their sophisticated negotiators could not do so, particularly after years of bargaining. For these issues, at best, the parties' proposed changes were good ideas from their perspectives. However, it is not the function of an interest arbitrator to make changes to terms of existing collective bargaining agreements based only on good ideas. That is why the party seeking the change must show that the existing condition is broken and therefore in need of change.

The following exchange at the hearing shows that the existing contractual promotional process is not "broken":[13]

---

[13] Tr. 401-402.

ARBITRATOR BENN: … The [promotional] language [in the Agreement] came in in 2003-2004, right? It was negotiated?

MR. CLARK: Yes.

ARBITRATOR BENN: And that was in response to the passage of the Act, which was August 4th?

MR. CLARK: Yes.

ARBITRATOR BENN: How many exams have there been since this language has been in place?

* * *

MS. MOSS: We believe there have been two exams. No, three exams.

MR. CLARK: Three exams. We'll accept that.

ARBITRATOR BENN: You said there have been no grievances?

MR. CLARK: Correct.

ARBITRATOR BENN: No disputes?

MR. CLARK: No.

ARBITRATOR BENN: Do you agree with that, no grievances have been filed?

MS. MOSS: Yes, they are not aware of any ….

At best and giving the Union the benefit of the doubt for purpose of this discussion, the Union's proposals altering the existing promotional language constitute "good ideas". This benefit of the doubt can be given not only to the Union's proposal on the written examination (placement in the process and cutoff score), but for other changes the Union seeks concerning incorporation of the FDPA into the Agreement; other modifications (concerning components, points, interviews, assessment center, evaluations, seniority, ascertained merit, monitors, right of review, order of selection, duration of the list) and precedence of the contract provisions governing promotions.[14]

---

[14] *See* Union Exh. 4, Tab 1.

However, as shown by the above-quoted exchange at the hearing, notwithstanding what may well be "good ideas", the Union has not shown a "broken" system in need of change. Absent a showing of a broken system, any changes to that system must come about through the bargaining process and not through the interest arbitration process.[15]

---

[15] There is a distinct difference between parties' having the ability to negotiate something different than the provisions of the FDPA as a permissive subject of bargaining with the requirement that a union must show that existing promotional language is broken to achieve a change in that language through interest arbitration as compared to a union's request for a provision for binding arbitration even though for years it had agreed to resolve disputes through a board of fire and police commissioners. *See* my award in *City of Rock Island and Illinois FOP Labor Council*, S-MA-11-183 (2013) at 22-23 [footnotes omitted]:

> I have previously found that, if requested, the statutory language in Section 8 of the IPLRA requires arbitration of discipline. *See* my award in *Village* of *Lansing and Illinois FOP Labor Council*, S-MA-04-240 (2007) at 20-21:
>
> > The language in Section 8 of the Act that "[t]he collective bargaining agreement ... *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" [emphasis added] leaves little to the imagination and, most important, that language leaves me with no discretion.
>
> *See also*, my awards in *City of Springfield and PBPA, Unit 5*, S-MA-89-74 (1990) at 2 ("[s]ince the parties have not 'mutually agreed otherwise', the language '*shall* provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement' [emphasis added] determines this question and requires the expansion of the right to arbitration as sought by the Union") and *City of Highland Park and Teamsters Local Union No. 714*, S-MA-98-219 (1999) at 10-11 ("According to Section 8 of the Act, there must be an ability to appeal to arbitration over the 'administration or interpretation of the agreement' which includes the provisions concerning discipline.").
>
> Because the parties are presently in disagreement over the extent of inclusion of arbitration of discipline, they have not " .... mutually agreed otherwise" as required in Section 8 of the IPLRA so as to exclude an arbitration provision from being inserted into the Agreement. And there is nothing in the IPLRA permitting a parsing of that statutory entitlement to arbitration of disciplinary matters through the agreement-forming interest arbitration process leaving certain minor disciplinary actions such as suspensions of five days or less under the authority of a BFPC or providing for options for an employee to choose between a BFPC or the arbitration process for protests over disciplinary actions.

City of Rock Island is published at the Illinois State Labor Relations Board's website:

www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-11-183.pdf

In simple terms, a union may request and receive final and binding arbitration in an interest arbitration proceeding even if a different system for resolving disputes such as a board of fire and police commissioners has been in a contract without the need to show that the existing system is broken. That is because Section 8 of the Illinois Public Labor Relations Act requires that an arbitration provision be inserted in a contract if requested. However, because the FDPA gives parties the ability to negotiate something different than the provisions of the FDPA as a permissive subject of bargaining and then the parties do so, there is no similar require-

[footnote continued]

As earlier noted, this is a limited ruling. This ruling is made without prejudice to either party raising the issue in future negotiations or interest arbitration proceedings. This ruling on this issue is for this contract only.

In light of the above, the Village's argument that the Union's raising of the issue is untimely is moot.

This Interim Award will be appended and incorporated into the final award issuing in this case.

Edwin H. Benn
Arbitrator

Dated: September 25, 2013

[continuation of footnote]
ment in the FDPA or in the IPLRA that mandates that a union's request to change the system to track specified portions of the FDPA must automatically be granted. To achieve the change the Union seeks in this case requires the traditional showing that the existing system is broken. Assuming that the procedural issues raised by the Village can be overcome, the Union has not shown a broken promotional process.