ILLINOIS LABOR RELATIONS BOARD

FEDERAL MEDIATION AND CONCILIATION SERVICE

BEFORE ARBITRATOR ROBERT PERKOVICH

In the Matter of an Interest

Arbitration between

Village of La Grange, Illinois	)	ILRB #S-MA-11-248
and	)	FMCS #110926-04889-A
Illinois Fraternal Order of Police Labor Council	)	

INTEREST ARBITRATION OPINION AND AWARD

A hearing was held on October 12, 2012 in La Grange, Illinois before Arbitrator Robert Perkovich who was jointly chosen to serve as such by the parties, Village of La Grange, Illinois ("Employer") and Illinois Fraternal Order of Police Labor Council ("Union"). The Employer was represented by its counsel, Ronald Kramer, and the Union was represented by its counsel, John Roche. Both parties presented their proofs in narrative fashion and submitted timely post-hearing briefs that were received on January 17, 2013.

ISSUES PRESENTED FOR RESOLUTION

The issues presented for resolution are as follows:

1. Discipline

2. Overtime Calculation

3. Wages

THE COMPARABLE COMMUNTIES

The parties have agreed that the appropriate external communities are as follows: Bellwood, Bensenville, Bloomingdale, Brookfield, Darien, Elmwood Park, Forest Park, Franklin Park, Hinsdale, La Grange Park, Lisle, Melrose Park, Norridge, River Forest, Schiller Park, Villa Park, Warrenville, West Chicago, Westchester, Western Springs, Westmont, and Wood Dale.

BACKGROUND

The Employer is a community of on or about 15,500 residents that is a western suburb of Chicago, Illinois. Although, as most if not all communities, it has faced serious economic issues in recent years, it also adopted a number of measures designed to meet those issues and is generally in sound financial condition.

The Employer is comprised of six operating departments: police, fire, public works, administration, finance, and community development. Its police officers and investigators are currently represented by the Union herein and there are nineteen bargaining unit employees. In addition the Employer's fire fighters and public works employees are also organized.

The Employer's patrol officers were first organized by the American Federation of State, County, and Municipal Employees (AFSCME) in 1984 and they continued to be represented by AFSMCE until 2007 when the Union herein became certified as the bargaining unit's exclusive bargaining representative.

The most current collective bargaining agreement between these two parties expired on April 30, 2011 and in January of that year the Union notified the Employer of its intent to negotiate a successor agreement. Negotiations ensued and after unsuccessful mediation of their negotiations the instant interest arbitration took place.

DISCUSSION

A. The Relevant Statutory Factors

Section 14(h) of the Illinois Public Labor Relations Act sets forth the factors that are to be used in resolving any interest dispute as follows:

-the lawful authority of the employer

-the stipulations of the parties

-the interests and welfare of the public and the financial ability of the employer

-a comparison of the wages, hours, and terms and conditions of public and private employees performing similar services in comparable communities

-the cost of living

-the employees' overall compensation

-changes in any of the foregoing during the pendency of the proceedings and

-such other factors that are normally and traditionally taken into consideration

Using those benchmarks I consider the issues raised herein.

B. Discipline

Under the parties' most recent agreement they have provided that all discipline up to suspensions of five days shall be subject to the contractual grievance and arbitration procedure and that all suspensions and discharges, are "within the exclusive jurisdiction of the Board of Police and Fire Commissioners" and are not "subject to (the) grievance procedure."

The Union seeks to change this provision so that all discipline can be challenged either through the contractual grievance and arbitration procedure or before the Board of Police and Fire Commissioners (BPFC or "Commission") at the election of the employee. The Employer on the other hand seeks to maintain the status quo.

The threshold issue is to determine whether the Union's final offer is such a change to the status quo that it must meet a heightened burden of proof. On this issue the Union cites to a number of interest arbitration awards, including two of my own, that stand for the proposition that when parties

negotiate over an issue for the first time there is no status quo such that a heightened burden of proof is to be used. To that end the Union points out that when the parties first negotiated over this issue in negotiations for their last agreement Illinois law had just been changed so that the issue became a mandatory subject of bargaining and the parties agreed to differ the matter to negotiations for this contract. The Employer concedes that arbitrators, including me, have ruled as the Union has described, but goes on to say that nevertheless the Union, as the party seeking the change "should have *some* burden of demonstrating a need for the change and that its proposal is more reasonable." (Emphasis supplied). Thus, the parties seem to agree that the heightened burden of proof is not applicable and that the Union bears some burden[1].

To this end the Union relies on a series of interest arbitration awards that stand for the proposition that because Section 8 of the Illinois Public Relations Act requires that all collective bargaining agreements contain a grievance and arbitration clause any final offer that seeks such a clause for the resolution of disciplinary disputes must be adopted. Indeed, I myself, in *City of South Beloit,* S-MA-06-106, so held, adopting that same rationale that was applied by Arbitrators Benn and Wolff, respectively, in *City of Highland Park,* S-MA-98-219 and in *Village of Shorewood,* S-MA-07-199. In reply, the Employer does not argue that these awards, as well as the others cited by the Union, are inapplicable or distinguishable, but rather argues that the Union's misgivings about its Board of Fire and Police Commissioners are misplaced and instead relies on the internal and external comparables.

In light of this long history of interest arbitrators awarding final offers that provide, in various forms, for the arbitration disciplinary matters I find that the Union's final offer must be adopted and I do so[2].

C. Overtime Calculations

In its final offer the Union wishes to add, in the last year of the parties' agreement, hours used by employees for sick leave to the list of those hours to be used in determining the calculation of overtime. The Employer on the other hand wishes to maintain the status quo.

The threshold issue on this matter is to determine whether the Union's final offer constitutes a "breakthrough" that requires a heightened quantum of proof. On this point the Union argues that is not a breakthrough and relies on the holding of Arbitrator Feuille in *North Aurora,* S-MA-11-389 (2011) that a similar provision was not a breakthrough because it was nothing more than an "incremental change," rather than a new benefit, to an provision already in the parties' collective bargaining agreement. In addition, the Union points to the parties' bargaining history which includes changes to the calculation of overtime. The Employer however argues that *North Aurora* is distinguishable and/or plainly in error and relies on the very same bargaining history to compel a finding that the issue is a breakthrough.

Unfortunately, a "breakthrough" is much like beauty, i.e., it lies in the eyes of the beholder. However, one thing seems certain to me, and that is that a "breakthrough" must be an item that is a "comprehensive, game-changing alteration" to the parties' collective bargaining agreement. (See e.g., *City of Danville,* S-MA-07-220 (Meyers, 2010) and *City of Canton,* S-MA-1-0-316 (Perkovich, 2013).

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[1] Indeed in their negotiations for the prior agreement the parties agreed that the Union would not in any subsequent arbitration "bear any burden *greater* than it would" in those negotiations.

[2] With regard to the Employer's argument that the internal and external comparables compel adoption of its final offer I note that Arbitrators Nathan and Benn, respectively in *Will County* and *City of Highland Park, supra,* ruled that because of the mandate of Section 8 a resort to a comparability analysis is not in order.

There are undoubtedly a number of ways to determine whether an issue is a "comprehensive game-changing alteration." For example, a relatively easy method would be to determine whether the item is a new benefit or provision in the agreement. Using that test, the Union's final offer is of course not a breakthrough. Another method would be a quantitative analysis, e.g., the cost of a final offer. In the instant case however I find that because any such analysis would require predictions as to how many sick leave hours will be used, that approach is less than helpful. There remains then a qualitative approach and, as explained below, when that approach is used I find that the Union's final offer is a "breakthrough."

First, because the Union's final offer is nothing more than an addition to the list of hours worked that can be used for overtime calculation I cannot find that it is "comprehensive." However, when one looks to the parties' bargaining history it seems that the Union's final offer is indeed a "game changing alteration[3]."

This is true because since at least 1994, with AFSCME, the Employer has been steadfast in excluding sick leave hours from the calculation of overtime and in fact agreed to trade-offs with AFSCME to obtain that goal. More importantly, the Employer continued that approach with the Union herein in their first, and most recent, agreement. Thus, to alter this pattern would in my estimation constitute a "game change" and requires the application of the "breakthrough" analysis, rather than the use of traditional factors such as comparability and the interests and welfare of the public[4].

The "breakthrough" analysis requires that I determine whether there is a substantial and compelling need for the change, whether the status quo has failed, whether the status quo has caused inequities, whether the party opposing the change has resisted without justification, and whether the proponent of the change has offered a sufficient quid pro quo.

In an apparent attempt to meet the first three of these five considerations the Union argues out that some bargaining unit employees have lost overtime pay because they used sick leave and that because of this "penalty" employees may report for duty despite the fact that they are ill, a result that works to no one's benefit, in order to receive overtime pay. In reply, the Employer points out that although some employees have in fact lost overtime pay when using sick leave, a result mandated by the parties' bilateral bargain in the last agreement, the Union's argument that employees will therefore report for duty although ill is speculative.

I have held elsewhere, see e.g., *Sheriff/County of Cook,* L-MA-11-002 (2012) that "vague and anecdotal assertions" are insufficient. In this case the Union has provided nothing more than that. Rather, the record is devoid of actual instances where employees have in fact report for duty although ill and the consequences, if any, of such action. Thus, I must find that the Union has failed to establish a substantial and compelling need, that the status quo has caused inequities, nor that the status quo has failed.

On the issue of resistance from the Employer on this desire of the Union in the past, the record, as noted above, does indeed demonstrate that the Employer has constantly declined to agree to any such change. However, the record is equally clear that in doing so the Employer has not simply refused, but has offered what must have been meaningful trade-offs, since the Union agreed to them, for

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[3] As the Employer points out, I have not been averse to using bargaining history to determine whether a final offer is a breakthrough. See e.g., *City of Highland,* S-MA-06-159 (2007).

[4] With this finding Arbitrator Feuille's award in *North Aurora, supra* is easily distinguishable and I need not address the Employer's argument that it is erroneous.

keeping sick leave from being used for calculating overtime. Moreover, the record also shows that in the tentative agreement that was rejected by the Union herein, the Employer agreed that sick leave could be used for such purposes with restrictions. This hardly qualifies as the type of resistance that could lead one to conclude that there has been resistance such that a "breakthrough" must be adopted[5].

The final consideration when weighing a "breakthrough" proposal is whether the party seeking the change has offered a sufficient *quid pro quo.* On this point the Union argues that it has and points to its final offer on wages which is, in the last year of the agreement, less than the Employer's. The Employer on the other hand concedes that the Union's final offer is less than its own, but points out that it is so by only .25%. Moreover, it points out that the valued of that difference is on or about $207 per year at the top base wage rate and pales, in its view, in comparison to the *quid pro quo* it offered and the Union accepted in prior negotiations which amounts to approximately 1.04% of that same rate.

In my view, the Employer has the better of this argument. Although I am sure that it would be happy with a lesser rather than higher wage adjustment that alone is not the point. Rather, the point is whether that lesser adjustment is sufficient to justify compelling the Employer to use sick leave for calculating overtime. When viewed in that fashion, it is not.

I therefore adopt the Employer's final offer.

D. Wages

The parties agree that wages should increase in the first two years of their collective bargaining agreement by 2%. They differ however with respect to the last year of the agreement, with the Union offering a 2% wage increase, that it has styled as noted above as it its *quid pro quo* for its overtime calculation proposal, and the Employer offering 2.25%.

Interestingly, both final offers are reasonable when viewed against the benchmarks of external comparability, internal comparability and the cost of living. For example, both final offers will place the bargaining unit at the rank of eight among the external comparables and are similar to the wage increases for the Employer's other unionized employees, its fire fighters and public works employees, at, respectively, 3.5% and 2.5% for 2012. Similarly, both final offers are reasonable in light of the cost of living which, although that measure is not known with certainty for 2013, is expected to be between 1.4 and 2.2%.

There remains however the interests and welfare of the public and it is here, in my view, where the balance must be struck. The Employer's proposed greater wage increase in the last year of the parties' agreement is more likely, under the circumstances, to lead to a greater level of morale and productivity and contribute to a lower rate of turnover. In light of this, and especially since the benchmarks of comparability and the cost of living do not strongly favor one final offer over the other, I adopt the Employer's final offer.

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[5] I am mindful of my admonitions in prior awards that the mere fact that a tentative agreement was reached must not lead to the adoption of a party's final offer and I continue to adhere to that point of view. In this case however I am merely relying on the existence of a tentative offer to conclude that the Union has not met the test of proving resistance at the bargaining table to its proposal regarding the use of sick leave for overtime such that it has met the "breakthrough" analysis.

AWARD

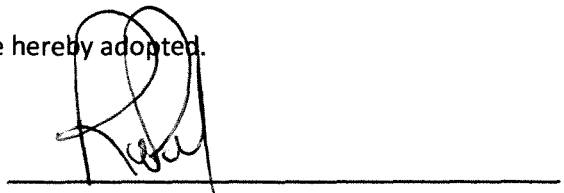
I therefore award as follows:

1. The Employer's final offer on wages is hereby adopted.

2. The Employer's final offer on overtime calculation is hereby adopted.

3. The Union's final offer on discipline is hereby adopted.

4. The parties' tentative agreements are hereby adopted.



DATED: March 11, 2013

Robert Perkovich, Arbitrator