

In the Matter of the Arbitration)
  
Between ) Case No. S-MA-15-130
  
) Interest Arbitration
  
VILLAGE OF WOODRIDGE )
  
)
  
and )
  
)
  
METROPOLITAN ALLIANCE OF POLICE,)
  
WOODRIDGE CHAPTER NO. 51 )

APPEARANCES

For the Union

Mr. Joseph R. Mazzone, Attorney

For the Employer

Mr. James J. Powers of Clark Baird Smith LLP, Attorney

O P I N I O N     A N D     A W A R D

Introduction

As a result of the inability of Village of Woodridge and Metropolitan Alliance of Police Woodridge Chapter #51 to reach agreement on a single issue, the method by which an officer may obtain review of discipline, the Union initiated impasse resolution proceedings under Section 14 of the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq. ("IPLRA" or "the Act"). The parties selected Sinclair Kossoff to serve as neutral arbitrator and stipulated that he "shall serve as the sole arbitrator in this bargaining dispute." By letter dated December 14, 2015, from the Illinois Labor Relations Board the undersigned was notified of his appointment and was requested to provide available hearing dates to the parties' representatives. According to the stipulation of the parties, "the procedural prerequisites for convening the arbitration hearing have been met, and the Arbitrator has jurisdiction and

authority to rule on those issues submitted to him." Hearing was held in Woodridge, Illinois, on April 5, 2016, at which time the parties exchanged final offers. The parties waived the provision in Section 1230.90 a) of the applicable Administrative Code Rules that the hearing commence within 15 days following appointment of the arbitrator. Post-hearing briefs were received on June 16, 2016.

### The Facts

The Village of Woodridge ("the Village") is a home rule municipality of approximately nine square miles situated about 25 miles west of downtown Chicago mostly in Du Page County, Illinois, with parts extending into Will and Cook Counties. Its population is almost 33,000. The Metropolitan Alliance of Police, Woodridge Chapter No. 51 ("the Union"), is the certified exclusive bargaining agent since 1991 for a unit of all employees classified as Patrol Officer, excluding supervisory personnel, civilian employees of the Police Department, and all other employees of the Village. Currently there are approximately 36 bargaining unit members. Since its certification the Union and the Village have been parties to seven successive collective bargaining agreements negotiated without interest arbitration for the following contract terms: 1991-1994, 1995-1998, 1998-2001, 2001-2004, 2004-2007, 2007-2012, and 2012-2015.

All prior collective bargaining agreements between the parties have excluded discharge and other forms of discipline from the grievance procedure. Instead the agreements provided that discipline and discharge were subject to the jurisdiction of the Chief of Police and the Board of Police Commissioners ("BOPC") and were not subject to the contractual grievance procedure. Disciplinary charges against an officer that are heard by the Board of Police Commissioners are governed by The Illinois Municipal Code, 65 ILCS 5/10-2.1-17, which provides in pertinent part as follows:

Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of collective bargaining agreement. Such bargaining shall be mandatory unless the parties mutually agree otherwise. Any such alternative agreement shall be permissive. . . . The board of fire and

police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time. In case an officer or member is found guilty, the board may discharge him, or may suspend him not exceeding 30 days without pay. The board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days. If the Board of Fire and Police Commissioners determines that the charges are not sustained, the officer or member shall be reimbursed for all wages withheld, if any. . . .

The provisions of the Administrative Review Law, and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners hereunder. . . .

Nothing in this Section shall be construed to prevent the chief of the fire department or the chief of the police department from suspending without pay a member of his department for a period of not more than 5 calendar days, but he shall notify the board in writing of such suspension. The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement. Such bargaining shall be mandatory unless the parties mutually agree otherwise. Any such alternative agreement shall be permissive.

Any policeman or fireman so suspended may appeal to the board of fire and police commissioners for a review of the suspension within 5 calendar days after such suspension, and upon such appeal, the board may sustain the action of the chief of the department, may reverse it with instructions that the man receive his pay for the period involved, or may suspend the officer for an additional period of not more than 30 days or discharge him, depending upon the facts presented.

The Village's Board of Police Commissioners has promulgated Rules and Regulations that govern the hiring, promotion, and discipline of sworn officers in the rank of Patrol Officer and Sergeant. They also govern hearings on charges, discharges, suspensions, and appeals. According to the Rules and Regulations, "All hearings shall be conducted and shall be public in accordance with the Open Meetings Act."

The Rules and Regulations of the Board of Police Commissioners permits the Chief of Police to suspend any officer for up to 80 hours without filing charges against the officer. The officer, however, has the right to appeal the suspension to the Board of Police Commissioners within five days, and the appeal stays the suspension until the Board rules on the appeal. The officer has the burden of proof to establish, by a preponderance of the evidence, that the suspension is not warranted. According to the Rules, "Upon such appeal, the Board may sustain such action of the Chief of Police, may reverse such suspension, may suspend the Officer for an additional period of not more than 720 hours, or discharge said Officer, depending on the evidence presented."

Where the Chief of Police seeks to suspend the officer for more than 80 hours or to discharge the officer, the Chief must file written charges with the Board, after which the Board holds a fact-finding hearing and renders a decision. The Chief of Police has the burden of proof to establish, by a preponderance of the evidence, the matters alleged in the charges.

The first time that the Union proposed to make discipline subject to the parties' contractual grievance-arbitration procedure was in its opening proposals for the May 1, 2012, to April 30, 2015 Agreement. At that time the Union proposed to provide "non-probationary employees with the right to choose between having a dispute as to disciplinary action resolved through the grievance arbitration procedure of this Agreement or by hearing conducted by the Police and Fire Commission." The Village rejected that proposal. In their negotiations the parties reached agreement on all other terms of the Agreement, and the Union withdrew its proposal permitting arbitration of discipline. Village counsel stated that "it appears that the Union's bargaining employees were comfortable enough with the Police commission back in 2012 that they decided to drop their proposal to eliminate it and to renew the commission for another three-year term, figuratively speaking." On cross-examination Village counsel acknowledged that there was no affirmative statement by Union counsel or another Union representative that the Union was withdrawing its discipline proposal

because they thought the Police commission was a good thing or worked perfectly.

On cross-examination Union counsel, who presented the Union's evidence in narrative form, testified that the Union withdrew the proposal not because it was comfortable with the commission but to settle the contract. "You had said no," Union counsel stated. "And rather than do what we did this time they said we will not allow it to block a contract. We will allow the current language to stand." The Union had the opportunity to go to arbitration at that time had it wanted to, Union counsel acknowledged.

The parties presented evidence about the history of disciplinary hearings in the Village. In the ten years between February, 2006, and February, 2016, there have been only two hearings before the Board of Police Commissioners involving bargaining unit members. The first one was held in February, 2011, brought by then Police Chief Steven Herron in the course of which the accused officer resigned on March 9, 2011. The second was held in October and November, 2015, brought by the current Police Chief, Gina Grady, and the Board rendered a decision discharging the officer. A third complaint filed with the Commission occurred in March, 2000, but involved a non-bargaining unit employee, a sergeant. That complaint was brought by then Police Chief Geoff Korous and resulted in an agreed order that the sergeant, who admitted his guilt, would serve a 25-day suspension, five days of which the sergeant was permitted to use vacation accruals.

The record shows that from the year 2000 through 2015 there were 66 disciplinary suspensions issued to bargaining unit officers. They may be broken down by years as follows: 2000, no suspension; 2001, no suspension; 2002, 1 one-day suspension; 2003, three suspensions, 2 for one day, and 1 for five days; 2004, 1 two-day suspension; 2005, no suspension; 2006, two suspensions, 1 day each; 2007, four suspensions, 3 for one day, and 1 for five days; 2008, five suspensions, 3 for one day, 1 for two days, and 1 for three days; 2009, six suspensions, 5 for one day, and 1 for five days; 2010, ten suspensions, 1 for one day, 3 for two days, 1 for three days, 3 for five days, 1 for six days, and 1 for ten days; 2011, five suspensions, 4 for one day and 1 for three days; 2012, seven suspensions, 3 for one day, 2 for two days, 1 for three days, and 1 for five days; 2013, ten suspensions, 6 for one day, 3 for two

days, and 1 for three days; 2014, six suspensions, 4 for one day, 1 for two days, and one for 18 days (144 hours); 2015, six suspensions, 2 for one day, 1 for two days, 2 for three days, and 1 for 30 days (240 hours).

None of the foregoing suspensions was appealed to the Board of Police Commissioners, although the disciplined officer had the right to do so for any discipline of not more than 80 hours (ten days). Village counsel pointed out that the bargaining unit experienced over 40 disciplinary suspensions between the year 2000 and the expiration of the 2007 - 2012 contract, but the Union membership nevertheless dropped its proposal to eliminate the police commission during the last round of negotiations for the 2009 - 2012 Agreement. From the Village's perspective, counsel stated, this defeats any claim that the bargaining unit feared that the commission was a biased agency or that they were not going to be given a fair shake if they ever pursued an appeal. On cross-examination Union counsel asked Village counsel whether the failure to appeal the discipline could be interpreted as compelling evidence "that maybe they don't feel confidence in the Police commission?" Village counsel answered, "By all means I think that shows they felt the discipline was fair."

As part of its case the Union presented signed written statements from some of the officers about discipline. According to Union counsel, the statements were obtained within the ten days preceding the arbitration hearing. One officer, Robert Fortino, wrote that he believed the Village Police Department should have arbitration for discipline in the current contract because it would "bring fairness and equality to the table." He stated, "Fairness and equality has been lacking for several years, and has progressively gotten worse." Many officers are suspended, he stated, "and as of late on a much more frequent basis." In 2015, he wrote, an officer was given a 30-day suspension for an incident that deserved discipline, "but not to that extreme. Sadly, extreme is the way discipline is being used."

Officer Fortino said that he personally received a two-day suspension for a "technicality" on a time sheet involving two hours, where he had "no malicious intent to deceive the Village Police Department." He felt that he was being treated disparately because officers are frequently asked to add or deduct hours from a time sheet where they had made a mistake and, contrary to how he was treated, receive no discipline. He feared, he stated, to go before the Board of Police Commissioners. "Ever since I was hired at the police department," he wrote, "it was always told to me never to

challenge discipline because you would get fired by the Board of Police Commissioners."

Officer Fortino explained why he believed that the Board of Police Commissioners is not impartial. The commissioners are appointed by the mayor of Woodridge and the Village Board. The Chief of Police, he explained, "works very closely with the board for hiring, promotion and other police department issues." "How would an officer stand a chance of a fair hearing," the officer asked, "when the people that are hearing the case are friends of the people bringing forward the charges?" The officer expressed the opinion that "a change is necessary" and suggested that "[a]rbitration could correct this problem and would make for a better work place." He believed, he stated, that "this would bring patrol and administration closer as things become less personal and make for a better work environment."

A second officer, who did not give his name, wrote that the Board of Police Commissioners format, although it "has been used in good faith for years," "is a naturally flawed system." This is so, the officer wrote, because "the commissioners themselves are appointed by the same government officials that are recommending the discipline. This does not create a fair and level playing field for the officer facing the discipline." The result, according to the officer, is "in general, a rubber stamp for a Police Chief or Village Manager's opinion." The officer stated that he would not want a union board panel either; that "discipline issues should be heard by an impartial third party so that neither side can claim any bias." This can be accomplished, the officer wrote, by an impartial arbitrator.

A third officer, John Phelps, stated that the main reason he is requesting that arbitration be allowed is fairness. He pointed out that the commissioners on the BOPC are appointed by the mayor and the Village Board and that the chief of police works very closely with the BOPC, which plays a role in the hiring and promotion of officers. The officer wrote that he served a 30-day suspension in 2015, "which I believe was excessive for the alleged 'misconduct.'" It was excessive, he stated, because he "did not steal, use excessive force, or do anything illegal . . ., [but] simply made a mistake of the mind." The last time a Woodridge police officer received a 30-day suspension, he stated, was in 1992, when the officer used

excessive force on an arrestee in the police station, something for which "[t]hat officer deserved his suspension."

Officer Phelps wrote that he has been on the force since 2009 with only a verbal warning and written warning on his record, the latter for damaging the tires on a vehicle "trying to traffic stop a theft in progress suspect on a wintery night." He was given two options with regard to his discipline, Officer Phelps stated, a 30-day suspension or a seven-day suspension, with a 12-month last chance agreement. He declined the lesser suspension, he explained, because "I knew in my heart that I could not physical[ly] and mentally work the next 12 months with this agreement over my head." He feared to go before the BOPC to contest his suspension, he stated, because of fear that "they would go for my job and would rule against me." He "truly believed," he said, if his case had gone to arbitration he would have taken discipline of a very few days "based on my work ethic and past history, as this was not the 'misconduct' or behavior you are probably accustom[ed] to seeing for 30 day suspensions." The officer expressed his positive feelings for his job and the Woodridge police department, describing it as "my dream department of Woodridge, somewhere I have always wanted to get to since I was in the academy."

A fourth officer, who did not give his name, expressed his own and what he said was the opinion of "many officers" that they would not get a fair chance if they chose to fight the length of any discipline they felt did not fit the violation they committed because they could "possibly face a harsher discipline or lose their job as an end result." "Over the past few years," the officer wrote, "it seems discipline has increased to all employees of the department, including civilian employees." The officer expressed concern over "the current political climate regarding law enforcement" and stated that "a third party arbitrator would hopefully be fair to an officer being disciplined" so "that the officer won't be 'thrown under the bus' or sacrificed to appease persons who protest against the police."

A fifth officer, who did not give his name, itemized examples of what he believed to be evidence of a lack of "[a] transparent objective process for discipline. . . ."

A sixth officer, who did not give his name, expressed the opinion that "it is too easy for a BOPC to be manipulated and corrupted to 'rubber stamp' any discipline handed out by the Chief of Police." The same officer stated that he feels "this may not be the case with current or past Chiefs of Police" but that in the future "a Chief that has yet to be hired may not be as honorable with their



discipline power and authority." "If MAP 51 had the opportunity to have legal counsel represent a case in an unbiased hearing," the officer wrote, "I feel that it would remove any doubt of any biases by the BOPC." The officer also said that "with the current climate in policing" he felt that arbitration could better protect the membership "against any unfair discipline that may result from outside political pressures."

A seventh officer, who did not give his name, wrote, ". . . Having a Police Commission appointed by the Mayor and not familiar with police procedure brings an unfair advantage to the Administration when discipline is being challenged. This causes officers to not bring forth complaints concerning the discipline being handed out and affecting overall morale of the department. A fair and impartial process is needed for officers to have the ability to challenge unwarranted amounts of discipline. . . ."

An eighth officer, who did not give his name, characterized the Board of Police Commissioners as being selected as commissioners based on relationships in the community but with no police experience; as being "politically tied to the municipality"; and as not taking a neutral approach to the situation so as to discipline based on fact and not emotion. These alleged characterizations were contrasted with the neutrality and experience with police discipline attributed to arbitrators.

The ninth and final written statement was that of the president of MAP Chapter 51 who wrote, "It is my belief that arbitration for discipline is a much more desirable system than utilizing the Board of Police Commissioners for disciplinary matters." An "outside arbiter," he stated, "is the only way to truly have an impartial decision on issues that are currently brought in front of the Board." However, he concluded his statement with the following remarks:

I feel that it is important to note that neither I, nor any member that I have spoken with in regards to this, feels that there have been any abuses by the Board or any unnecessary discipline handed out. It is not my feeling that the Board or anyone associated [with] the Board harbors any personal agenda or anti-police feelings that might unduly influence their decisions. That is not why I

want to see this change. I do, however, see the potential for problems in the future if there were to be a change in Board membership or leadership. Much has been discussed during negotiations these past few months of "closing loopholes," and that is exactly what I feel we are accomplishing if we move to arbitration for discipline. I see no system more fair in the application of discipline than using an outside arbiter.

Village counsel explained that although Officer Phelps was disciplined for more than 80 hours, no charge was filed in his matter before the Board of Police Commissioners because the amount of his discipline was negotiated by Union counsel with the chief of police. When the officer voluntarily accepts the discipline, Village council stated, no charge is filed. The 144 hour suspension assessed in July, 2014, also did not involve a charge before the Board because it was negotiated.

Regarding the discipline of Officer Fortino, Village counsel stated that the Village disagrees that he was disciplined for a "technicality." "Officer Fortino received a two-day suspension," counsel stated, "for what we view as falsifying a timecard, claiming pay for a personal medical appointment, not properly reporting his visits to this doctor through the chain of command and on top of it using a Village of Woodridge squad car to transport himself to his personal medical appointment." The discipline of Officer Phelps, Village counsel asserted, arose out of two separate incidents that occurred in close proximity to each other. The first incident, according to Village counsel, involved Officer Phelps's failure to properly handle and preserve a piece of important evidence, an anonymous threatening note left by someone on the windshield of a woman's car. Instead of preserving it as evidence for fingerprinting, he gave it back to the female victim. The second incident, Village counsel stated, involved investigative breakdowns in an incident where a 16-year-old teenage individual jumped or fell out of a moving car. For example, according to counsel, he did not interview witnesses properly; did not call and report the incident through the chain of command properly; and did not promptly call for a backup. "For both of these reasons together and those serious breakdowns in his investigative techniques and preservation of evidence," Village counsel asserted, "the Chief viewed either a 30-day suspension or 7-day suspension with a last chance agreement as appropriate." That arrangement, Village counsel noted, was negotiated with Union counsel representing the officer.

In response Union counsel stated that Officer Fortino was in touch with the Chief during the entire time. In Officer Phelps's

case, Union counsel stated, he received a call that a lady jumped out of a car. There are 20 or 30 people around, according to the Union, he has no backup, sergeants are listening to this on the radio, and nobody takes any corrective action. "So there is a presumption," the Union asserted, "the officer is doing things right and the crowd is dispersing." Because Officer Phelps was alone attending to a woman with significant injuries from her fall out of the car and the people were dispersing, Union counsel stated, he was unable to interview any of them. In addition, according to the Union, drugs were involved. The appropriate alternative to a 30-day suspension, according to the Union, would have been retraining, maybe a performance improvement plan, or ride-along.

Village counsel expressed the position of the Village that having a Police commission is a benefit to the officers because, under the Illinois Administrative Review Law, an officer has an individual right, independent of the Union, to challenge in court a Board of Police Commissioners decision regarding discipline where the employee believes the decision is wrong. Under a grievance and arbitration decision, counsel stated, the officer would have to rely on the Union to take the matter to arbitration. Similarly, according to Village counsel, it would be up to the Union to decide whether to appeal an arbitration award to the circuit court whereas, with regard to a decision by the Board of Police Commissioners, the individual officer would have the right to determine whether to appeal the Board's decision to the circuit court.

The Village prepared a table of all Illinois Appellate Court decisions involving administrative review appeals of decisions on discipline rendered by boards of fire and police commissioners and village civil service commissions during the period February 3, 2000, through August 6, 2015. Of 22 Appellate Court decisions issued, 20 affirmed the Board's or the Civil Service Commission's decision and only two reversed such decision. To the Village, counsel stated, this suggests that no inherent bias or rampant inexperience is present among such boards or commissions because otherwise one would expect a much higher reversal rate by appellate courts. On cross-examination Village counsel stated that the standard for review of a Board of Police Commissioners decision "would be exacting under an administrative review action, but it's even more exacting under an arbitration process." The review process, Village counsel acknowledged, is "a high standard."

The Village and the Union were unable to reach final agreement on a successor contract to their May 1, 2012, to April 30, 2015 Agreement. Negotiations for a successor agreement did not start until after 2012-2015 Agreement had expired when, near the end of July, 2015, the Union submitted a bargaining proposal to the Village. The first bargaining meeting of the parties was held on September 23, 2015, and at the end of the session the Union requested mediation through the Federal Mediation and Conciliation Service. Thereafter the parties together with an FMCS mediator held three bargaining sessions during which they were able to resolve and reach tentative agreement on all outstanding contract issues except for a proposal by the Union requiring that discharge or discipline involving time off with loss of pay shall be for just cause and subject to the grievance and arbitration procedure set forth in the Agreement. All of the prior collective bargaining agreements of the parties had provided that "[m]atters involving hiring, promotion, demotion, discipline, and discharge are subject to the jurisdiction of the Chief and the Board of Police Commissioners and are not subject to this grievance procedure." The Village proposed continuation of the status quo with regard to discharge and other discipline.

The Union's first offer, submitted by Union counsel to Village counsel by email on July 28, 2015, proposed to add the following new section to Article VI, GRIEVANCE PROCEDURE:

Section 6.6 Application of Grievance and Arbitration Procedure to Discipline

Discharge or discipline involving time off with loss of pay of non-probationary bargaining unit employees shall be for just cause and shall be subject to the grievance and arbitration procedure set forth in this Agreement. The contractual grievance and arbitration procedure shall be the sole recourse for appealing such disciplinary action and shall be in lieu of both the provisions of the Illinois Municipal Code governing discipline and discharge (65 ILCS 5/10.2.1-17) and disciplinary proceedings before the Village of Woodridge Board of Fire and Police Commissioners. An arbitrator's award shall be final and binding, as stated in Section 4.3 of this Agreement, and any request for judicial review shall be exclusively under and in accordance with the Uniform Arbitration Act (710 ILCS 5/1, et seq.) and Section 8 of the Illinois Public Labor Relations Act (5 ILCS 315/8).

The Village's opening economic and non-economic proposals, provided to the Union on September 23, 2015, contained the following response to the Union's proposal on discipline: "VILLAGE REJECTS MAP'S PROPOSED §6.6." In addition, the Village proposed to retain in the Agreement Sections 2.2 and 6.5, which had been included in every collective bargaining agreement between the parties going back to the 2001-2004 Agreement:

ARTICLE II - MANAGEMENT

\* \* \*

Section 2.2 Authority of the Board of Police Commissioners.

This Agreement is not intended and shall not be construed to diminish or modify the statutory authority of the Board of Police Commissioners, Woodridge, Illinois, and the parties hereto expressly recognized [sic] the authority of the Board with respect to hiring, promotion, demotion, discipline, and discharge of Patrol Officers.

ARTICLE VI - GRIEVANCE PROCEDURE

\* \* \*

Section 6.5 Certain Personnel Actions Excluded.

Matters involving hiring, promotion, demotion, discipline, and discharge are subject to the jurisdiction of the Chief and the Board of Police Commissioners and are not subject to this grievance procedure. However, in the event the Chief takes action against a Patrol Officer to impose suspension or present charges to the Board of Police Commissioners, the Patrol Officer and a representative of the Association may request a meeting to discuss the matter.<sup>1</sup>

---

<sup>1</sup>The 2001-2004 Agreement had erroneously used the title Board of Fire and Police Commissioners in Sections 2.2 and 6.5, but this was corrected to Board of Police Commissioners in all subsequent collective bargaining agreements. The Village does not employ sworn firefighters.

The Union's first offer to the Village submitted on July 28, 2015, also proposed to retain Sections 2.2 and 6.5 unchanged from the prior Agreement.

According to Village counsel many of the same arguments made by the Union in the present interest arbitration proceeding were made by the Union in the negotiations. One argument alluded to by Union counsel in the arbitration hearing based on Section 8 of the Illinois Public Labor Relations Act, Village counsel stated, "was not really raised." In the first bargaining session, according to Village counsel, "the focus was more on the perceived bias and perceived partiality of the commission members and the inherent unfairness." The Village did not feel, Village counsel stated, that the Union articulated a compelling significant change in the last three years that would have justified the need to eliminate the Board of Police Commissioners. The Village, counsel explained, therefore rejected the Union's proposal to eliminate the Police commission.

In the negotiations, according to Village counsel, the Village never informed the Union that it was totally unwilling to negotiate a modification to the Board of Police Commissioners system. He thinks, Village counsel stated, "there were some signals and hints provided that there would be some willingness to consider that. We always had an open mind." By contrast, Village counsel asserted, the Union never sent a similar signal during the first bargaining session that it was willing to possibly modify its position on the commission. The impression that the Village got, according to Village counsel, was that the Union felt very passionate about its position on discipline, and "the Village received the clear signal that the Union was unlikely to drop its proposal as part of any type of package." This impression, according to the Village, was confirmed as the negotiations progressed. The Union, Village counsel asserted, never offered some sort of a valuable quid pro quo in return for the Village's acceptance of its proposal.

On cross-examination Union counsel asked Village counsel, "What exactly did the Village offer the Union in terms of quid pro quo to get you to agree to an arbitration of discipline?" Village counsel answered, "Nothing, because we were not the moving party on that issue." Village counsel acknowledged that at one point in time the Village stated that "maybe there might be something to persuade" it. Asked, "And did you ever communicate as to what that might be?", Village counsel answered, "No." Union counsel followed up with the question, "In fact, there was nothing that could have persuaded you, wouldn't you say that's true?" Village counsel stated, "I would not say that's true." In one of the parties' mediation sessions,

according to Village counsel, he asked Union counsel to be creative and gave Union counsel the hypothetical "that if you gave 2 to 3 zeros a row in wages we would have to seriously consider that in exchange" permitting the arbitration of discipline matters. Quite a few times, Village counsel stated, he has traded non-economic issues for concessions on economic issues.

Evidence was presented regarding how the right to contest discipline is handled in surrounding communities. The Union presented excerpts from the collective bargaining agreements of the following jurisdictions where police officers have the right to challenge discipline through the grievance-arbitration procedure: city of **Naperville** (police sergeants unit may seek review of suspension of five days or less through the grievance/arbitration procedure or the Police and Fire Commission); village of **Burr Ridge** (police officers may seek review of a suspension or a dismissal through the grievance/arbitration procedure); village of **Hinsdale** (grievance/arbitration procedure sole method for police officers to appeal discipline); village of **Indian Head Park** (all suspensions and terminations of police officers subject to arbitration); village of **Oak Brook** (all suspensions and discharges subject to grievance/arbitration procedure); city of **Oakbrook Terrace** (all discipline of police officers subject to grievance/arbitration procedure); village of **Western Springs** (all discipline of police officers subject to review through grievance/arbitration procedure); city of **Wheaton** (police officer may elect between grievance/arbitration and Police and Fire Commission for review of suspension or termination of employment); city of **Darien** (suspension of more than five days or termination of employment appealable at officer's choice through grievance/arbitration or the Police Commission); village of **Lisle** (Board of Fire and Police Commissioners "no longer play a role in the discipline of bargaining unit members, which shall instead be accomplished in accordance with the specific provisions of this agreement"); village of **Westmont** (police officer may select grievance and arbitration procedure in lieu of Board of Fire and Police Commissioners for "appeal and review of of disciplinary action or discharge decisions"); village of **Clarendon Hills** (police officer may obtain review of suspension or dismissal action through the grievance and arbitration procedure); village of **Romeoville** (for suspension in excess of five days or discharge, police officer may contest discipline through arbitration or the Board of Fire and Police Commissioners); village of **Schaumburg**

(discipline involving discharge or time off with loss of pay subject to the grievance and arbitration procedure); village of **Bolingbrook** (suspension or dismissal of police officer reviewable through grievance and arbitration procedure).

Union counsel asserted that his method of selecting the foregoing list was that they were surrounding towns to Woodridge and all "have arbitration of discipline in some shape or form." He also looked for decisions on discipline, he stated, and found decisions by arbitrators Benn, McAlpin, Feuille, Elliott Goldstein, Margo Newman, and Peter Meyers wherein arbitration of discipline was allowed. Referring to Section 8 of the Illinois Public Labor Relations Act, Union counsel asserted that "there is a train of decisions and a train of thought that says it's an absolute right that any part of a contract should be subject to the grievance procedure, and discipline in a management rights clause ought to be grievable."

On cross-examination Union counsel stated that the comparable communities were selected on the basis of geographic area within 35 or 40 miles of Woodridge. The list is not exhaustive, he stated. He did not include contracts that still retain a board of fire and police commissioners, and there are probably some jurisdictions in Du Page County, he acknowledged, that still retain the commission for disciplinary purposes.

The Village did not provide any comparable communities for comparison by the arbitrator. Asked if there was any reason why the Village did not address the matter of comparable jurisdictions, Village counsel stated the Village disagrees with the way the Union compiled the external comparables. "It seems they cherry picked," Village counsel stated. "It's our understanding," Village counsel asserted, "there are a number of external comparables out there that don't have grievance arbitration and still retaining a commission, one involving Warrenville." The reason that the Village has not really addressed the issue, Village counsel explained, "is because we don't think you get to external comparability when you go through the break-through analysis." Counsel referred to a decision involving the city of Rock Island where 90 percent of the external comparables provided grievance/arbitration for discipline but the arbitrator ruled to maintain the status quo whereby the fire and police commission reviewed discipline.



## Final Offers

### Union Final Offer

The parties exchanged final offers on the morning of the arbitration hearing. The Union's final offer departs from its original offer regarding review of discipline in that it gives employees the option of choosing arbitration or the Board of Police Commissioners as the tribunal for the review of discipline. The Union's original proposal provided that the sole method for appealing discharge or time off with loss of pay was through the grievance and arbitration procedure of the Agreement to the exclusion of the Board of Police Commissioners. The final offer presented to the Village on the morning of the hearing provides as follows:

#### MAP OFFER ON ARBITRATION OF DISCIPLINE

April 5, 2016

#### Section 6.6 Application of Grievance and Arbitration Procedure to Discipline

No Officer, other than a probationary officer, shall be disciplined or discharged without just cause. Any such action must not violate the provisions of 50 ILCS 725/1. The Police Chief or his/her designee are hereby granted authority to discipline bargaining unit members for just cause (probationary employee without cause), including but not limited to oral or written warnings/reprimands, suspensions with or without pay of any appropriate and statutorily authorized duration or termination, so long as just cause for the imposition of such discipline exists.

Discharge or discipline involving any time off with loss of pay of non-probationary bargaining unit employees shall be only for just cause and shall be subject to resolution through the grievance and arbitration procedure set forth in this Agreement and shall commence at Section 6.2, Step 4 of the contract, that procedure, namely, Arbitration, or through an appeal to the Woodridge Board of Police Commissioners.

In the event an Officer is served, in writing, with a notification of a disciplinary suspension of any length, or notice of termination of employment, that Officer will have the sole discretion fourteen [sic] within (14) business days to serve written notice of his/her election to proceed either before the Woodridge Board of Police Commissioners or to proceed under the grievance procedure set forth in this agreement. Such notice shall be served upon the Chief of Police or his/her designee.

Once such written election has been made and served on the Chief of Police or his/her designee, the parties shall either follow the procedures set forth in the Rules of the Woodridge Board of Police Commissioners or, in the event the Officer elects the grievance procedure, in that Section of the grievance procedure that regards the selection process and appointment of an arbitrator, to resolve a disciplinary issue. The parties agree that they will accomplish the selection and appointment of an arbitrator and to schedule a hearing in as expeditious a manner as possible, excepting for the discovery procedure and other procedural necessities in order to allow a fully informed Officer and a fair and impartial hearing.

The contractual grievance and arbitration procedure or a hearing before the Woodridge Board of Police Commissioners shall be mutually exclusive of the other and, once such election has been made, it shall be sole recourse for appealing and resolving such disciplinary action and shall either follow the provisions of the Illinois Municipal Code governing discipline and discharge (65 ILCS 5/10.2.1-17) and the disciplinary proceedings rules of the Village of Woodridge Board of Police Commissioners, or the grievance procedure as contained in the contract.

An arbitrator's award shall be final and binding, as stated in Section 6.2, Step 4 of this Agreement, and any request for judicial review shall be exclusively under and in accordance with the Uniform Arbitration Act (5 ILCS 315/8). A decision by the Board of Police Commissioners is subject to administrative review.

#### Village Final Offer

The final offer of the Village is as follows:

Maintain the *status quo* for the term of the parties 2015-18 collective bargaining agreement, including the current contract language found in Sections 2.2 and 6.5 of the 2012-15 collective bargaining agreement.

### Statutory Criteria

Section 14(h) of the Act provides that ". . . the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:"

(1) The lawful authority of the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(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:

(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.

### The Union's Position

It is the position of the Union that Section 8 of the Illinois Public Labor Relations Act requires that the Union proposal regarding arbitration of discipline be adopted. It notes that Section 8, in two places, uses the mandatory term "shall" in stating, first, that the collective bargaining agreement shall contain a grievance resolution procedure and, second, that it shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. The Union cites three interest arbitration decisions by Arbitrator Edwin H. Benn that, it contends, hold that "[w]hen faced with the question of whether or not a collective bargaining agreement must contain an arbitration provision for discipline, arbitrators have held that it must."

The Union declares that "Arbitrator Benn is not alone in this analysis" and cites what it characterizes as "a long line of interest arbitration decisions that have allowed the Union's proposal for the arbitration of discipline." These include arbitration decisions by Arbitrators Perkovich (2013), Reynolds (2013), McAllister (2013), Nielsen (2013), Behrens (2012), Newman (2011), Hill (2011), McAlpin (2011), Feuille (2011), Meyers (2010), and Yaffe (2009). This line of decisions, the Union contends, "shows a trend toward more extensive application of grievance arbitration as an alternative method of reviewing disciplinary action."

The Union asserts that "[t]here can be little serious question that review of a disciplinary matter by a neutral third party, compared to the Commission, likely will involve fewer biases, less impact from personal relationships and interactions and a more dispassionate application of the applicable standard of review of facts." Even if there is no evidence of bias on the part of the Board, the Union argues, the fact that the Board of Police Commissioners is "essentially the same entity that issued the discipline" will raise the question of fairness and of perceived lack of due process. The "widespread distrust of the Commission review" and the possible chilling effect of the Board's right to increase the

disciplinary penalty, the Union contends, are an adequate basis in themselves for ordering arbitral review of discipline.

A further basis for selecting the Union's offer on discipline over the Village's, the Union argues, is that arbitrators are more experienced in handling disciplinary cases than the Commission, particularly in the light of the small number of cases that come before the Commission. Arbitrators, the Union asserts, are able to make rulings in accordance with the law and with just cause while the Woodridge Board of Police Commissioner lacks the necessary experience in legal proceedings or in handling police discipline cases.

This arbitrator's decision in City of Rock Island, S-MA-06-142 (2007), where the employer's proposal that the right of review of officer discipline reside in the police and fire commission was selected over the union's proposal permitting the arbitration of discipline, is distinguishable, the Union argues, because the right to arbitrate was denied in the previous interest arbitration. The Union quotes this arbitrator's statement in City of Rock Island that "it is one thing to award the right to arbitrate discipline when the issue is presented in arbitration for the first time but quite another to do so in an arbitration for the contract immediately succeeding the contract for which the right to arbitrate discipline was denied in arbitration." Since this is the first interest arbitration between the parties the Union requests the arbitrator "to follow the long line of interest arbitration decisions that awarded Union proposals for the arbitration of discipline."

The Union disputes the Village's position that its proposal permitting the arbitration of any discipline involving time off with loss of pay or termination of employment is a breakthrough subjecting the Union to a higher standard of proof. It argues that until 2007 the procedures regarding the appeal and review of discipline were not a mandatory subject of bargaining, and that the first time that this issue became negotiable on a mandatory basis regarding Woodridge patrol officers was for the 2009 - 2012 Agreement of the parties. Accordingly, the Union contends, relying on Village of Skokie, S-MA-12-124 (Robert Perkovich, 2013), neither the cost of the Union's proposal on discipline or the length of time that the current method for reviewing discipline has been in effect as a mandatory subject of bargaining would qualify its proposal regarding discipline as a

breakthrough. Concerning the latter point the Union cites City of Harvard, S-MA-11-235 (Curtiss K. Behrens, 2012), which stated, "Where an issue is not a mandatory subject of bargaining in prior negotiations, current practice is not considered 'status quo' for purposes of interest arbitration analysis."

The Union also cites two decisions, County of Madison, S-MA-12-093 (Brian E. Reynolds, 2013) and Village of Lansing, S-MA-04-240 (Edwin H. Benn, 2007) as holding that Section 8 of the Act provides for final and binding arbitration of disputes unless mutually agreed otherwise and that arbitration of discipline cannot be considered a breakthrough issue since it is required by Section 8 of the Act.

The Union further argues that even if the breakthrough standard were applied, it could meet the standard because there is a substantial and compelling need for employees to have the option of having an independent arbitrator review discipline. First, the Union asserts, the written statements of the Union members show concern about fairness and equity where the Commission decides discipline. These concerns are warranted, the Union argues, since the Commission can increase the penalty on an appeal by an officer. Second, according to the Union, there is no disagreement that the Village resisted and refused to bargain over the Union's proposal for the arbitration of discipline.

Moreover, the Union maintains, its proposal provides a quid pro quo in that it will eliminate any future litigation over the review of discipline, which is a very costly process running into thousands of dollars. In addition, the Union asserts, arbitration brings finality to the process much quicker since judicial litigation can take years. Further, the Union states, the employee gives up his rights under the Administrative Review Law.

Finally, the Union argues, its proposal requiring just cause for termination is a fairer standard than cause under cases before the Commission. Just cause, the Union asserts, is an almost universal standard for discipline and is often implied even when not specifically expressed. The Village, the Union contends, has not presented any evidence that it would suffer any harm if the Union's proposal is adopted. The Union requests the arbitrator to accept its final offer on the review of discipline as more reasonable than the Village's.

## The Village's Position

It is the position of the Village that this arbitrator has the authority to grant the Village's final offer, which would preserve the BOPC's role as the sole review mechanism for patrol officer discipline. On August 23, 2007, the Village notes, Section 10-2.1-17 of the Illinois Municipal Code was amended to make bargaining for the "arbitration of discipline" a mandatory subject of bargaining for non-home-rule units of local government. Even before the amendment, however, the Village argues, home rule municipalities were obligated to bargain over the use of arbitration to review discipline. This was made clear by the Illinois Supreme Court decision in Decatur v. AFSCME Local 268, 122 Ill.2d 353, 366-67 (1988), the Village contends, which, it states, held that home rule communities could legally bargain over the arbitration of discipline without violating the Illinois Municipal Code.

The Village maintains that because it is a home rule municipality the arbitration of discipline has been a mandatory subject of bargaining between the parties from the time of the negotiation of the first contract between them in 1991. Section 8 of the IPLRA does not require rejection of the Village's offer because, the Village argues, the phrase "unless mutually agreed otherwise" applies to the present situation where the parties have bargained for almost 25 years to have discipline reviewed by the Board of Police Commissioners. The Village cites City of Rock Island, S-MA-03-211 (Harvey Nathan, 2004), where the arbitrator reasoned, "Although the Union has a statutorily presumptive right to arbitration of discipline, once it has negotiated an alternative system it must meet the same burden of persuading the arbitrator of the need for a change as it would had the presumption not existed."

The Village asserts that in a subsequent interest arbitration involving the same parties this arbitrator adopted Arbitrator Nathan's approach and rejected the union's argument that Section 8 of the IPLRA gives one or the other party the absolute right to negate a historically agreed-upon commission form of disciplinary review. The fact pattern in the present case, the Village contends, even more persuasively calls for a "breakthrough analysis" than in the Rock Island case since here the Union voluntarily agreed to retain the BOPC for review of discipline in their negotiations in 2012 for the prior contract.

It is well-established, the Village argues, that in order to protect the bargaining process an arbitrator should not award any breakthrough that would substantially change the status quo in the absence of a substantial and compelling justification. The Village cites a number of published interest arbitration awards in Illinois recognizing the conservative nature of interest arbitration, that its aim, wherever reasonably possible, should be to achieve a result which the parties themselves would likely have achieved had they exhausted the collective bargaining process. In that light, the Village asserts, arbitrators require a party who wishes to change the existing state of affairs to provide compelling evidence of the need for change. The Village quotes one arbitrator who pronounced that in the absence of providing "strong reasons and a proven need" to change the status quo, a party who wishes "to significantly change the collective bargaining relationship" "must show that there is a quid pro quo or that other groups comparable to the group in question were able to achieve this provision without the quid pro quo." Another arbitrator is cited in support of the principle that "what the parties agreed to in the past is relatively strong evidence of what they would have agreed to had the current round of negotiations been successful."

It is undisputed that the status quo involves the BOPC, the Village asserts, as the exclusive tribunal for review of discipline of patrol officers. The Village notes that going back to the first Agreement of the parties, the 1991-1994 contract, and continuing in every contract thereafter, the BOPC has been the designated tribunal for reviewing discipline. Plainly, therefore, the Village observes, the Union's current proposal seeks to change the parties' negotiated status quo by permitting employees to choose between arbitration and BOPC review. The Union, the Village contends, has a heavy burden to establish that such a historical bargaining term should be changed, "especially without evidence demonstrating why the existing system is 'truly broken.'"

The Union, the Village asserts, has not demonstrated that the historical BOPC disciplinary review system is broken. At most, according to the Village, the Union has raised theoretical arguments than in no way justify a change in the status quo. Nor, the Village argues, do the written statements of the nine officers come close to proving that the current BOPC system is broken. The relevant period for showing problems with the existing state of affairs, the Village contends, would be beginning in November, 2012, when the parties executed their last collective bargaining agreement. Events happening prior to November, 2012, are irrelevant, the Village argues, because the MAP bargaining unit voluntarily accepted the BOPC



for another three-year term based on the facts as they existed in November, 2012. There were no examples, according to the Village, where the BOPC was accused of being unfair, arbitrary, or malicious. Since November, 2012, the Village points out, there has been only one disciplinary hearing before the BOPC, and the BOPC's ultimate discharge decision in that matter was affirmed by a Du Page County Circuit Court judge. Absent concrete examples, the Village argues, the Union has relied "on more generalized theoretical arguments based on the perception of a handful of bargaining unit employees and the Union counsel." Arguments of this kind, the Village maintains, have been rejected by arbitrators who, instead, have required concrete proof of bias or unfair treatment. The fact that the Union's final offer retains the BOPC option for review of discipline, the Village contends, shows that, in fact, the BOPC is not perceived as a biased tribunal.

As evidence of the BOPC's fairness and lack of bias the Village cites the MAP Local Chapter president's written statement wherein he says that "neither I, nor any member that I have spoken with in regards to this, feels that there have been any abuses by the Board or any unnecessary discipline handed out." The statement further disavows any "feeling that the Board or anyone associated [with] the Board harbors any personal agenda or anti-police feelings that might unduly influence their decisions." The reason he desires change, the president states, is that he sees "the potential for problems in the future if there were to be a change in Board membership or leadership."

With that message, the Village asserts, the Union's president has "essentially conceded that there is no pressing need to change the BOPC review process, and that the Union's desire for change is based on rank speculation that a future BOPC might be unfair." Such hypothetical concerns, the Village argues, fall far short of the type of concrete evidence that is necessary to carry a union's burden of proving the need for a breakthrough. The Village further remarks that the fact that only nine officers felt strongly enough about arbitral review of discipline, approximately 25 percent of the bargaining unit, shows that "approximately 75 percent of the bargaining unit did not feel strongly enough about eliminating the BOPC review process to even submit an *anonymous* letter."

Further, the Village argues, the review procedure outlined in the BOPC's Rules and Regulations bears no inherent unfairness for the officers and has just as many built-in procedural safeguards as arbitration. The Village contends that it is significant that "employees retain primary decision-making authority with regard to legal representation and appeals, and enjoy the opportunity to challenge the sufficiency of disciplinary charges prior to a hearing on the merits. By contrast," the Village asserts, "a union can potentially decline to pursue an employee's grievance altogether." The Village further argues that judicial review is less deferential under the Illinois Administrative Review Law than under the Uniform Arbitration Act; that the Board's review process generally requires the employee to remain on the employer's payroll until the disciplinary proceedings are completed whereas under arbitration the employee will be suspended or dismissed before arbitration commences; and that the BOPC hearing process is much speedier than arbitration. Any doubt about the fairness and professionalism of boards of fire and police commissioners, the Village contends, is removed by the evidence that since the year 2000 approximately 90 percent of all legal challenges to commission disciplinary decisions have been rejected at the appellate court level.

Another shortcoming in the Union's case, the Village contends, is the fact that the Union has not offered any *quid pro quo* for changing the status quo for reviewing discipline. The Village cites interest arbitration decisions requiring the party seeking change of existing conditions of employment not only to establish the need for the change but to offer a *quid pro quo* in exchange. The Village asserts that it would have seriously considered a significant economic concession in exchange for eliminating BOPC's role in reviewing discipline, but no substantive proposal or package toward that end was received from the Union.

Of the traditional statutory factors that are relevant to this case, the Village contends, none of them supports the Union's final offer. The Village anticipates that the Union may argue that "[t]he interests and welfare of the public" factor favors the Union's final offer because of a public policy preference for arbitral dispute resolution. That argument, the Village asserts, ignores the fact that Section 10-2.1-17 of the Illinois Municipal Code does not articulate a clear preference for either arbitration or commission review, but merely states that *unless* an employer and union have negotiated an alternative or supplemental form of due process based on impartial arbitration, the BOPC's review process will be used. Therefore, the Village concludes, "the General Assembly has declined to automatically *require* arbitration as the ultimate review process whenever a labor organization is involved, as it could have easily

done through a simple change in words." Arbitration, in the Village's interpretation, applies only if the parties agree to it, and, the Village asserts, "it would be disingenuous to claim that the General Assembly intended to require *all* municipalities with unionized workforces to adopt arbitration."

The Union's set of external comparables, the Village argues, does not satisfy its burden with regard to breakthrough. External comparability, the Village asserts, is largely irrelevant in the breakthrough context. The Village cites arbitration decisions where the external comparables heavily favored arbitration for review of discipline over commission review but where the union's final offer calling for arbitration was not accepted because of a failure to make out a need for change. The Village also faults the Union's evidence on external comparability because "[o]nly three of the Union's proposed external contracts were current as of the date of the interest arbitration hearing in this matter."

In addition to the Union's failure to prove the need for a breakthrough and to offer a *quid pro quo*, the Village argues, the Union's final offer suffers from several ambiguities and defects which are an additional reason for rejecting it. The Union final offer, the Village notes, requires that discipline "must not violate the provisions of 50 ILCS 725/1," which is the Uniform Peace Officers' Disciplinary Act ("UPODA"), a statute that regulates how police departments must conduct internal affairs investigations prior to the issuance of discipline. The UPODA has nothing to with arbitral review of discipline, the Village asserts. In addition, usually UPODA provisions are treated as stand-alone items in interest arbitration. Further, adding such a provision is a break from the parties' historical status quo, the Village states, since they have never included a provision in any past contract that addresses the UPODA. Finally, according to the Village, the UPODA reference creates an ambiguity in the Union's final offer since the offer does not clarify the consequences of an innocent failure to comply with the letter of the UPODA.

The Village also objects to the provision in the Union's final offer that a grievance protesting discipline commence at Step 4 of the grievance procedure, namely, arbitration. Skipping the earlier steps of the grievance procedure, the Village observes, especially Step 3, involving the Village Administrator, precludes the

possibility of settlement without entering into the expensive process of litigation. Another shortcoming with the Union's final offer, the Village contends, is that the proposed contract language does not make clear from which event the officer is allowed 14 days to elect to proceed before the BOPC or to submit the matter to the grievance-arbitration procedure.

If, as Union counsel clarified at the arbitration hearing, the 14 days are counted from when the Police Chief files charges with the BOPC, the Village asserts, the BOPC may schedule a disciplinary hearing before the expiration of the 14 days. Should the officer immediately select grievance-arbitration, the Village argues, the Union may ultimately decide not to take the case to arbitration, and the officer will be left in the lurch. These problems can be avoided, according to the Village, by selecting the Village's final offer.

Finally, the Village contends, the "expeditiously as possible" requirement for processing grievances in the Union's final offer is unworkably ambiguous. There is no definition of "expeditious," the Village points out, and the proposal is silent about the consequences for non-expeditious processing of the grievance. The reference in the offer to "discovery procedure" is particularly troublesome, the Village asserts, "in light of the well-established principle that there is no pre-hearing discovery in arbitration." If the discovery language is intended to permit deposing the grievant and other witnesses and the serving of extensive interrogatories and document production, the Village argues, the proposed language "would transform what is intended to be an expedited and cost-effective dispute resolution procedure into another form of state and federal court litigation."

Based on the facts, precedent, and arguments set forth in its brief, and in accord with the Section 14 criteria of the IPLRA, the Village urges, the arbitrator should and must select the Village's final offer on the issue of retaining the BOPC status quo.

### Analysis and Conclusions

The key to this arbitration is the interpretation of Section 8 of the IPLRA, which provides as follows:

#### **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.

The Union contends that Section 8 gives the bargaining unit a statutory right of final and binding arbitration of all disputes concerning the administration or interpretation of the agreement, and that there is no exception for disputes involving discipline. The Union asserts that the Village's contention that there was mutual agreement that for over 20 years the BOPC was the exclusive review mechanism for discipline "ignores the fact prior to 2007, procedures regarding the appeal and the review of discipline were not mandatory subjects of bargaining." It was only "[i]n 2007," the Union argues, that "the Act was amended to make such procedures a mandatory subject of bargaining."

The Village contends that in 2007 Section 10-2.1-17 was amended to make bargaining for the arbitration of discipline mandatory for non-home rule units of local government, but that home rule units, such as the Village, could legally bargain over arbitral disciplinary review without violating the Illinois Municipal Code. Bargaining over discipline, the Village maintains, has been a mandatory subject of bargaining for the Village both before and after the 2007 amendment to Section 10-2.1-17 of the Illinois Municipal Code, citing City of Decatur v. American Fed'n of State, County & Mun. Employees, Local 268, 122 Ill.2d 353, 366-367. City of Decatur held that Decatur could be required to bargain over a proposal by the union that would permit employees to submit disciplinary grievances to arbitration because Decatur's civil service system, which contained a procedure for reviewing discipline, was optional. The City had contended that it had no duty to bargain over the proposal because of the following provision in Section 7 of the IPLRA:

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The Illinois Supreme Court disagreed and stated as follows:

Given the purpose of the Act [IPLRA], the nature of that part of the civil service system at issue here, and the legislature's express preference for arbitration as a method for resolving disputes during the life of a labor contract, unless mutually agreed otherwise, we conclude that the State Board was correct in ordering the city to bargain over the union's proposal. In these circumstances, we construe the union's proposal as pertaining to a matter not specifically provided for or in violation of another law, and as supplementing, implementing, or relating to the provisions of the civil service scheme adopted by the city. We do not believe that the legislature would have intended that the civil service system it made available, as an optional matter, to municipalities in the Municipal Code would eliminate the duty to bargain over the union's proposal here. 122 Ill.2d at 366-367.

One can fairly make the same kind of argument with regard to Section 10-2.1-17 of the Illinois Municipal Code. Prior to the 2007 amendment, Section 10-2.1-17 stated that bargaining for impartial arbitration as an alternative to a hearing before the board of fire and police commissioners would be permissive rather than mandatory for non-home rule units. It would seem to follow by implication that for home rule municipalities bargaining for impartial arbitration as an alternative to the board of fire and police commissioners would be mandatory. Stated another way, for home rule jurisdictions the board of fire and police commissioners would be an optional method of reviewing discipline so that, under the City of Decatur decision, even prior to the amendment of the law in 2007, the Village could have been required to bargain with the

Union over a proposal to make disciplinary actions subject to the grievance-arbitration procedure.

The Village maintains that this arbitrator should reject the Union's argument that its final offer should be accepted on the basis of Section 8 of the IPLRA, which is reproduced above at pages 28-29. The Village argues that Arbitrator Nathan and this arbitrator have ruled that the phrase "unless mutually agreed otherwise" takes on a special meaning when the parties have a long history of agreeing to a commission form of disciplinary review.

The reference to Arbitrator Nathan is to his decision in City of Rock Island, S-MA-03-211 (April 1, 2004). He noted that the expired agreement and those before it mandated that disciplinary appeals be submitted to the Rock Island Board of Fire and Police Commissioners. Referring to Section 8 of the IPLRA, he stated that it provides a "statutory presumption that binding arbitration is the preferred method of deciding disputes" and mandates arbitration "unless mutually agreed otherwise." Arbitrator Nathan then concluded, "The parties are permitted to agree otherwise and maintain the Fire and Police Board. That is what the parties here have done." He further stated, "Although the Union has a statutorily presumptive right to arbitration of discipline, once it has negotiated an alternative system it must meet the same burden of persuading the arbitrator of the need for a change as it would had the presumption not existed." Arbitrator Nathan observed that the union offered evidence of one instance where an employee was allegedly treated unfairly and was unable to secure satisfactory relief from the Fire and Police Board. He found that the union "failed to demonstrate that the Fire and Police Board system has not worked fairly and appropriately" and did not select the union's final offer that would have permitted arbitration of disputes involving discipline.

Arbitrator Nathan's interest arbitration award pertained to the April 1, 2003, to March 31, 2006, collective bargaining agreement of the parties. The parties also entered into impasse interest arbitration for the successor agreement to that contract for the period from April 1, 2006, to March 31, 2009, and they selected the undersigned as their arbitrator. Once again the union proposed that review of discipline be through the grievance/arbitration procedure, and, when the employer did not accept its proposal, made the arbitration of disciplinary disputes part of the union's final offer.

This arbitrator selected the City of Rock Island's final offer on discipline, explaining his reasoning as follows:

I think that it is one thing to award the right to arbitrate discipline when the issue is presented in arbitration for the first time but quite another to do so in an arbitration for the contract immediately succeeding the contract for which the right to arbitrate discipline was denied in arbitration. Arbitrator Nathan's decision, I believe, must be given the same weight as if the parties had voluntarily negotiated exclusion of discipline from their 2003-2006 contract. Otherwise, arbitration has little meaning, and parties are encouraged to ignore direct collective bargaining and, instead, to resort to arbitration every contract. What one arbitrator fails to give, another will be free to bestow, and the parties will be relieved of any burden of showing changed circumstances from the prior arbitration. There will be no predictability because everything is up for grabs when the contract expires.

I do not think the foregoing is what the legislature envisioned or consistent with the principles that have developed in interest arbitration over the years. One of the principles is that when a contract is negotiated or is awarded in arbitration, the party desiring a significant change in the provision must provide compelling evidence of the need for change. . . .

This arbitrator articulated in the Rock Island interest arbitration case that it is one thing to award the right to arbitrate discipline when the issue is presented in arbitration for the first time but quite another to do so in an arbitration for the contract immediately succeeding the contract for which the right to arbitrate discipline was denied in arbitration. For example, Elkouri and Elkouri, How Arbitration Works (Sixth Edition, Alan Miles Ruben Editor-in-Chief, BNA, 2003) (hereinafter "Elkouri and Elkouri") pp. 575-576, states, "Prior labor arbitration awards that interpreted the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force that can be fairly characterized as authoritative. This is true of arbitration awards rendered both by permanent umpires and by temporary or ad hoc arbitrators."

Although Arbitrator Nathan interpreted a statute rather than a contract term, his interpretation of the statute related directly to a term of the parties' contract. In addition, Elkouri



and Elkouri further states at p. 591, "While precedential use of awards occurs primarily in rights arbitration such use is by no means unknown in interest arbitration. . . ." Further there was another very strong factor that influenced this arbitrator in the Rock Island case. This arbitrator noted in that case, "In a period of more than three years since the effective date of the preceding contract, there has been only one case of discipline." The discipline was a three-day suspension.

In this arbitrator's opinion it would be difficult to defend disregarding the prior arbitrator's award permitting the continuation of the commission system for review of discipline when in a period of more than three years from the expiration date of the prior contract there had been only a single instance of discipline, a three-day suspension, in the entire bargaining unit. Had the prior arbitrator's interpretation been clearly erroneous, that would be a different story. Elkouri and Elkouri observes at p. 586 that "arbitrators have agreed that an arbitrator is justified in refusing to follow an award considered to be clearly erroneous or one whose continued application is rendered questionable by changed conditions. . . ." (footnote omitted). But, as the undersigned noted in his opinion in the Rock Island case, "I think that the language [of Section 8 of the IPLRA] is ambiguous. It is not clear what constitutes 'mutual agreement.'"

In his Rock Island opinion this arbitrator stated that "Arbitrator Nathan apparently interpreted the section [Section 8] to include within the concept of mutual agreement a negotiated provision excluding discipline cases from arbitration that has been included by the parties in a series of prior collective bargaining agreements spanning a period of years." After giving Arbitrator Nathan's interpretation of Section 8, this arbitrator remarked, "I am not prepared to state that Arbitrator Nathan's interpretation is wrong." That is not the same, however, as saying that this arbitrator would have given the same interpretation of the statute had the matter initially come to him for decision. Rather this arbitrator, in effect, was stating that Arbitrator Nathan's interpretation was compatible with the statutory language of an ambiguous statute.

The facts of this case, however, are very different from the facts before this arbitrator in the Rock Island case. First, there has been no prior interest arbitration between the parties

involving the issue of discipline. Second, unlike Rock Island where, during the entire three-year period of the expired contract, there had been only one disciplinary action administered by the employer, a three-day suspension, in this case during the three-year period of the prior agreement (2012-2015), there had been 22 disciplinary actions. Although there had also been 22 disciplinary actions administered during the 2009-2012 Agreement, the degree of discipline assessed in the 2012-2015 contract far exceeded any discipline assessed in the immediately preceding Agreement.

In the 2009-2012 contract the harshest discipline assessed was an 80-hour suspension on November 22, 2010. In the 2012-2015 Agreement there were suspensions issued respectively in the amounts of 144 hours (the equivalent of 18 workdays) and 240 hours (30 workdays). In addition, during the course of negotiations for the 2015-2018 Agreement, in November, 2015, three months before tentative agreement was reached on the other terms of the contract besides discipline, the officer who received the 144-hour suspension was discharged by the Woodridge Board of Police Commissioners. In reaching its discharge decision the Board relied heavily on the officer's disciplinary record, including his 144-hour suspension.

In this arbitrator's opinion the significantly higher assessments of discipline than in any previous case involving a bargaining unit officer and the subsequent discharge of the officer who received the suspension of 144 hours were a sufficient basis under Section 8 of the IPLRA to require final and binding arbitration of disputes involving the review of discipline unless mutually agreed otherwise. In the present case the parties have not mutually agreed otherwise. The fact that the parties mutually agreed otherwise in the prior contract does not change the fact that they have not done so for the present contract in a context of escalated suspensions and a discharge. Those facts make this case very different from this arbitrator's Rock Island case where there had been only one disciplinary action during the entire term of the prior contract, a three-day suspension. The arbitrator has also discussed the deference given in arbitration to a prior award on the same issue involving the same parties which is not clearly erroneous even though the arbitrator may not have ruled the same way if he had initially made the decision.

Arbitrator Steven Briggs interpreted Section 8 of the IPLRA in his decision in Calumet City, Case No. S-MA-99-128 (2000). The existing contract language stated, "Any disciplinary action that would require suspension in excess of five (5) days or discharge shall be subject to the rules and regulations of the Police and Fire Commission. . . ." The union proposed to make such discipline

subject to the grievance/arbitration machinery of the contract. Calumet City is a home rule jurisdiction. Arbitrator Briggs noted, "As confirmed by the Appellate Court of Illinois, home rule communities such as Calumet City have the power to enter into collective bargaining agreements which allow submission of discipline or termination matters to grievance arbitration, even though a previously adopted city ordinance may have vested a board of fire and police commissioners with the exclusive authority to hear and decide such cases. . . ."

Arbitrator Briggs stated "that Section 8 of the Act mandates that collective bargaining agreements 'shall contain a grievance resolution procedure' and that such procedure shall provide for final and binding arbitration of 'disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise.'" Arbitrator Briggs further addressed the question of how Section 8 should be interpreted in a situation, present both in the case before this arbitrator and in Calumet City, where in a series of prior agreements the parties had agreed to submit discharges and certain suspensions to the exclusive jurisdiction of the board of fire and police commissioners for review:

The Union here "mutually agreed otherwise" in previous collective bargaining agreements when it accepted the language currently contained in Article VII, Sections B2 and B3. The Union no longer agrees that the Board should have the exclusive authority to hear and decide discharge cases and suspensions of greater than five days. The Neutral Chair concludes, then, that under the present circumstances the Act mandates arbitration as the means for resolving disputes concerning the "administration or interpretation of" the parties' collective bargaining agreement. (Decision, p. 14).

Other arbitrators have ruled the same way. See, for example, the decision of Arbitrator Margo R. Newman dated January 31, 2011, in Village of Bolingbrook and MAP Ch. 3, found on the Illinois State Labor Relation Board website among the archived interest arbitration decisions. As Arbitrator Newman noted, Bolingbrook is a home rule community. She further noted that "the current agreement section providing for disciplinary review by the Board, has been in all agreements between these parties since 1990." After discussing

and rejecting the village's position that the procedure for Board review of discipline was a negotiated status quo, finding that "tacit approval" was a more accurate characterization of the existing contractual arrangement regarding discipline, Arbitrator Newman made the following finding:

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.

Neither Arbitrator Briggs nor Arbitrator Newman, and none of the arbitrators relied on in Arbitrator Newman's decision, found the breakthrough approach applicable in the situation, such as the present case, where a union asserts a Section 8 right to arbitration of disciplinary disputes, or required the granting of a quid pro quo. In the case before her, Arbitrator Newman noted that she was adopting the union's position that there should be arbitral review of discipline "despite the fact that the Union did not prove that . . . they offered any quid pro quo for this provision during contract negotiations. . . ." Village of Bolingbrook, supra at pages 20-21.

With regard to quid pro quo, the Village would no doubt chafe, and rightly so, should a union request a quid pro quo for agreeing to insert into a collective bargaining agreement one of the management rights granted employers by Section 4 of the IPLRA. The same reasoning applies to what the Illinois Supreme Court has called "the public policy favoring arbitration as a means of public labor dispute resolution" expressed in Section 8 of the IPLRA. AFSCME, Council 31 v. Cook County, 145 Ill.2d 475, 486 (1991). Nor does it make sense to call the granting of a statutory preference a breakthrough.<sup>2</sup> Certainly none of the arbitrators named or referred

---

<sup>2</sup>In the AFSCME case the Court referred to the "the legislature's preference for arbitration as a means of dispute resolution, as

to in the first sentence of the immediately preceding paragraph thought it appropriate to consider the awarding of a statutorily preferred method of resolving disputes to be a breakthrough.<sup>3</sup>

After finding that as a matter of law the Act mandated arbitration as the means for resolving disputes concerning the administration or interpretation of the parties' collective bargaining agreement, Arbitrator Briggs stated as follows: "Aside from the legal questions, the Arbitration Panel should consider whether the current system for deciding discharge and lengthy suspension cases has been effective." He continued that whether the decisions of the Board of Fire and Police Commissioners in Calumet City had "been sustained or overturned on appeal are valid criteria for making such a determination." Recently, he noted, a jury had overturned three of the Board's discharges, a statistic which, he stated, called "its impartiality into question." Arbitrator Briggs then added the following observation:

Regardless of how one views the Board's impartiality or lack thereof, it is generally agreed among dispute resolution professionals that a decision-making body appointed unilaterally by one party to a dispute is less likely to have a neutral perspective than one mutually selected by both parties.<sup>20</sup>

---

<sup>20</sup> That principle is included in the *Due Process Protocol*, a treatise endorsed by the American Arbitration Association, the Labor and Employment Section of the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution.

---

expressed in section 8 of the Act," 145 Ill.2d at 486, citing City of Decatur, 122 Ill.2d at 366.

<sup>3</sup>See also Arbitrator Raymond E. McAlpin's decision in Village of Oak Brook, S-MA-09-017 (2011), where he stated that an interest arbitration where a union seeks the award of a Section 8 right to arbitrate disciplinary disputes "is not your typical status quo situation" and described the union's burden of proof as follows: "The Union does not have to show that the BFPC is broken, only that grievance/arbitration is significantly preferable." Decision, p. 16.

In the Village of Woodridge the mayor appoints the members of the Board of Police Commissioners subject to the advice and consent of the Board of Trustees. Village Code, Title 2, Chapter 4, §2-4-4. Such members are considered officers of the Village. Village Code §2-4-3. Title 2, Chapter 1 of the Village Code, §2-1-1 states, "Any member of a board or commission may for good cause be removed by a majority vote of the mayor and board of trustees." In addition to the Village Code, the Illinois Municipal Code, 65 ILCS 5/10-2.1-3, Sec. 10-2.1-3. states, "The members of the board [of fire and police commissioners] shall be considered officers of the municipality, and shall file an oath and a fidelity bond in such amount as may be required by the governing body of the municipality." The Woodridge Board of Police Commissioners, in this arbitrator's opinion, when they rule on and decide disciplinary matters, would fit what Arbitrator Briggs characterized as "a decision-making body appointed unilaterally by one party to a dispute". They are also officers of that party, namely, the Village of Woodridge.

If you are an officer of an organization called upon to make a decision in a matter of dispute between the organization and an employee of the organization that could affect the order and efficiency with which the organization operates, it takes a great deal of self-discipline and strength of character not to be inclined to favor the organization of which you are an officer. Even, however, if you have that self-discipline and strength of character you will not be able to avoid the appearance that you are not impartial. The arbitrator is aware that members of the Board of Police Commissioners are not subject to the Code of Conduct for United State Judges<sup>4</sup> (hereinafter "Code of Conduct"). The Code of Conduct, however, can serve as a touchstone for what would be considered appropriate conduct on the part of a person whose role it is to decide disputes between contending parties.

Canon 2 states:

**A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities**

(A) Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

---

<sup>4</sup> The Code of Conduct is available at the following website:  
<http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

\* \* \*

COMMENTARY

**Canon 2A.** An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. . . . A judge must avoid all impropriety and appearance of impropriety. . . .

The word "impair" is defined in The New Oxford American Dictionary as "v. [trans.] weaken or damage (esp. a human faculty or function): *drug use that impairs job performance.*" The arbitrator believes that a reasonable mind would conclude that a decision-maker's impartiality is impaired (weakened or damaged), at least to the extent that there is an appearance of impropriety, if that individual is called upon to make a judgment in a dispute between the organization of which he is an officer and another party. Other arbitrators are of the same opinion. For example, Arbitrator Raymond E. McAlpin, in selecting the Union's final offer regarding discipline in Village of Oak Brook, S-MA-09-017, stated, "Police/Fire Commissioners are appointed by the people who are making disciplinary decisions which affect this bargaining unit. There is an appearance, perhaps not a fact, but at least an appearance that this is patently unfair; and this Arbitrator agrees." (Decision, pp. 17-18). Similarly, Arbitrator Newman, citing five supporting interest arbitration decisions, stated in Village of Bolingbrook, *supra*, ". . . I am [in] 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 [the] system." Decision, p. 20.<sup>5</sup>

---

5 In view of the fact that, by Illinois statute and the Woodridge Village Code, members of the Board of Police Commissioners are officers of the municipality, Canon 3(C)(1)(d)(i) of the Code of Conduct is also highly pertinent. It states:

"(C)Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the

Also pertinent on the question of the appearance of impartiality is the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship dated May 9, 1995. The protocol was drafted by representatives of the American Arbitration Association; Federal Mediation and Conciliation Service; Management, Union, and Neutral Co-Chairs of the Arbitration Committee of the Labor and Employment Section of the American Bar Association; National Academy of Arbitrators; Society of Professionals in Dispute Resolution; American Civil Liberties Union; and National Employment Lawyers Association. The section on Panel Selection provides for selection of the mediator or arbitrator from a list of qualified individuals to "be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator." A copy of the Protocol is available on the National Academy of Arbitrators website.

Another important consideration in this case is what the City of Decatur Illinois Supreme Court decision referred to as "the legislature's express preference for arbitration as a method for resolving disputes during the life of a labor contract, unless mutually agreed otherwise." 122 Ill.2d at 366. The Illinois Supreme Court relied on that rule in finding that the Labor Board properly ordered the City of Decatur to bargain with the union regarding the latter's disciplinary proposal even though the Court was aware that "the parties' previous labor agreement did not attempt to affect the provisions of section 10-1-18 concerning discharges and suspensions, and it expressly left disciplinary suspensions of more than five days, multiple suspensions within a six-month period, and terminations within the exclusive jurisdiction of the municipal civil service commission." 122 Ill.2d at 363. This indicates that so far as the Illinois Supreme Court is concerned the mere fact that the parties, in a prior agreement, had negotiated a provision designating the board of fire and police commissioners as the exclusive forum for reviewing disciplinary suspensions of more than five days and discharges did not mean that in a subsequent negotiation the legislative preference for arbitration no longer applied. On the contrary, City of Decatur teaches that the legislative preference for arbitration should be taken into account so long as the union has not agreed otherwise in the current negotiations.

Applying that legislative preference in this case, the arbitrator finds it unnecessary to rule on whether it would be appropriate to order a change in the status quo regarding the review of discipline in a situation where there has been no change in the

---

spouse of such a person is: (i) a party to the proceeding, or an officer, director, or trustee of a party; . . ."



disciplinary landscape regarding bargaining unit members since the execution of the prior Agreement between the parties. Here, as outlined above, there have been more than trivial or insignificant changes in the disciplinary terrain. As noted, in the 2009-2012 contract the harshest discipline assessed was an 80-hour suspension on November 22, 2010. In the 2012-2015 Agreement there were suspensions issued respectively in the amounts of 144 hours and 240 hours. In addition, during the course of negotiations for the 2015-2018 Agreement, the officer who had received the 144 hour suspension, an officer with ten years of service, was discharged for an incident that was not considered especially serious in itself but largely on the basis of the prior 144 hour suspension and other discipline on that employee's record. Employer Exhibit 24, transcript of hearing before BOPC dated November 12, 2015, p. 79. In the arbitrator's opinion this escalation in the degree of bargaining unit discipline with no avenue available to the officers for a review of the discipline de novo by an objectively impartial tribunal is an adequate basis for awarding final and binding arbitration of disciplinary disputes in light of what the Illinois Supreme Court has recognized as the legislature's preference for arbitration as a means of dispute resolution, as expressed in Section 8 of the Act.

Citing Collura v. Bd. Of Police Comm'nrs of Vill. of Itasca, 113 Ill.2d 361, 370 (1986) and Caliendo v. Martin, 250 Ill. App. 3D 409, 421-22 (1<sup>st</sup> Dist. 1993), the Village argues that Illinois law presumes the impartiality of administrative agency officials and that "[a] mere possibility of prejudice is insufficient to show that a board, or any of its members was biased." It is important to point out that the issue of whether the decision of a board of police commissioners should be reversed on the grounds of bias and the issue of whether arbitration or the police commission should be selected in the first instance as the preferred tribunal for reviewing discipline are very different. The decisions cited in the Village's brief are concerned with the former issue. They do not speak to the question of which tribunal is the appropriate one for determining discipline under the IPLRA. This arbitrator has not stated that the members of the Village BOPC were biased or unfair in their discharge decision or that they would be biased or unfair in reviewing disciplinary cases. He has stated that because of their method of appointment and the fact that, by Illinois statute and the Village Code, they are officers of the Village their appearance of impartiality is impaired. That, together with the legislature's express preference for arbitration as

a means of dispute resolution, as recognized by the Illinois Supreme Court, is a reason for preferring arbitration as a method of resolving disciplinary disputes over the police commission, but it is not a reason for overturning the decisions of the commission.

The Village also argues that “[i]nstead of relying on concrete examples of bias or unfairness, the Union has chosen to rely on more generalized theoretical arguments based on the perception of a handful of bargaining unit employees and the Union’s counsel.” This arbitrator, however, has quoted Arbitrator Briggs to the effect that “it is generally agreed among dispute resolution professionals that a decision-making body appointed unilaterally by one party to a dispute is less likely to have a neutral perspective than one mutually selected by both parties,” citing the *Due Process Protocol* in support of his statement. See above at page 37. At page 39 above he has quoted Arbitrator McAlpin who opined, “Police/Fire Commissioners are appointed by the people who are making disciplinary decisions which affect this bargaining unit. There is an appearance, perhaps not a fact, but at least an appearance that this is patently unfair; and this Arbitrator agrees.”

In addition in Village of Bolingbrook, supra, at page 20, Arbitrator Newman stated:

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 [125 LA 1427 (Wolff, 2008)]; Town of Cicero, supra [S-MA-06-012 (Briggs 2009)]. In this case there is no evidence that Board disciplinary review has, in fact been unfair or inequitable. . . . However, I am [in] 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 [99 LA 125 (Goldstein, 1992)]; 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.

Contrary to the Village's contention that the Union's argument based on a perception of a lack of impartiality on the part of a police commission appointed by the Village mayor finds no support in arbitral decisions, there is strong support among arbitrators for the principle that the appearance of a lack of impartiality in a system whereby one party to the dispute appoints the decision-makers strongly favors the choice of arbitration for resolving disciplinary disputes.

The arbitrator will now consider whether the statutory criteria found in Section 14(h) favor the Village's or the Union's final offer. The eight statutory factors are reproduced above at pages 19-20. Factor (1), the lawful authority of the employer, does not favor one party's offer over the other. Neither final offer if implemented would compromise the Village's lawful authority. The stipulations of the parties, factor (2), are not relevant to the determination of which of the final offers to select. The financial ability of the unit of government to meet the costs of putting the offer into effect, part of factor (3), is not a consideration since there is no indication that either offer would present a financial hardship in its implementation. Nor is it clear which offer would cost the Village more money over the life of the Agreement.

The second half of factor (3), the interests and welfare of the public, clearly favors the Union's final offer. This is so because the Illinois Supreme Court has interpreted Section 8 of the IPLRA as expressing a "public policy favoring arbitration as a means of public labor dispute resolution" and "the legislature's preference for arbitration as a means of dispute resolution . . . ." AFSCME, Council 31 v. Cook County, 145 Ill.2d 475 (1991) respectively at 486 and 482. In addition, the morale of the bargaining unit is likely to be uplifted when working under a system where discipline is subject to review by a tribunal jointly selected by both parties rather than

one composed of officers of the Village unilaterally appointed by the mayor with the advice and consent of the Board of Trustees.

The Village argues that the public policy preference for arbitral dispute resolution is not a factor supporting the Union's final offer because "such an argument ignores the fact that Section 10-2.1-17 of the Illinois Municipal Code does not articulate a clear preference for either arbitration or commission review." It asserts that "arbitration will control only if the parties agree to it" and that therefore "it would be disingenuous to claim that the General Assembly intended to require *all* municipalities with unionized workforces to adopt arbitration." The provision of the Municipal Code cited by the Village does not purport to deal with the preferred content of a collective bargaining agreement with regard to the method of resolving disputes concerning the administration or interpretation of the agreement. Section 8 of the IPLRA does deal with that subject and, as the Illinois Supreme Court has interpreted that section, expresses the legislature's preference for arbitration as a means of resolution of such disputes. The applicable statute therefore does articulate a clear preference for arbitration over commission review for resolving disputes concerning the administration or interpretation of the agreement with regard to disputes concerning the imposition of discipline to bargaining unit employees.

The fourth factor, commonly called "external comparables," clearly favors the Union's final offer. According to the Village brief, Woodridge is located primarily in Du Page County, with portions extending into Will and Cook Counties. The Union has introduced into evidence collective bargaining agreements for patrol officer bargaining units from 15 municipalities that provide for arbitration of disciplinary disputes. Eleven of those communities are located either entirely in Du Page or in Du Page and an adjacent county. The Village argues that "there is no indication that the Union considered whether a particular municipality was comparable to Woodridge in terms of population and equalized assessed valuation ("EAV")." Three of the jurisdictions in Du Page County selected by the Union as comparables, however, have populations within 50% of the population of Woodridge: the city of Darien and the Villages of Lisle and Westmont. In the absence of any comparable jurisdictions offered by the Village, this arbitrator is satisfied that the factor of external comparables favors the Union's final offer.

The Village also objects that the collective bargaining agreements offered into evidence by the Union are not current except for the Hinsdale, Clarendon Hills, and Schaumburg contracts. The City of Darien collective bargaining agreement introduced into evidence is

for the term May 1, 2010 to April 30, 2014. It provides for arbitration or appeal to the police commission, at the officer's choice, of all discipline involving a suspension of more than five days or termination of employment. No objection was made to the admission into evidence of the Darien agreement at the arbitration hearing. Nor has any evidence been offered that the 2010-2014 agreement is not the latest agreement in effect between the parties for patrol officers. In addition it is rare that a contract provision permitting arbitration of disciplinary disputes will be eliminated in a subsequent agreement. For these reasons the arbitrator accepts the Darien agreement admitted into evidence as reflective of the current situation with regard to the arbitration of disciplinary disputes involving patrol officers in the City of Darien.

The Village of Lisle collective bargaining agreement introduced into evidence covering patrol officers is for the period May 1, 2012, to April 30, 2015. It provides that the Board of Fire and Police Commissioners "shall no longer play a role in the discipline of bargaining unit members, which shall instead be accomplished in accordance with the specific provisions of this agreement." No objection was made at the arbitration hearing to the admission of the agreement into evidence. No evidence has been presented that there is a later agreement in effect between the parties. In addition, it is rare that a provision depriving a fire and police commission of any role in the discipline of employees would be altered in a future agreement to permit such commission to decide disciplinary disputes exclusively to the exclusion of a concurrent role, at the option of the employee, for arbitration. This arbitrator is satisfied that the Village of Lisle collective bargaining agreement admitted into evidence covering patrol officers reflects the current arrangement in effect in that municipality for the resolution of disciplinary disputes involving the bargaining unit.

The Village of Westmont collective bargaining agreement in evidence is for the period May 1, 2010, to April 30, 2014. It provides, "At the election of the Officer, discipline can be appealed through the Labor Agreement's Grievance Procedure Article 6 or the Village's Board of Fire and Police Commission, but not both." All discipline appears to be subject to arbitration, at the officer's choice, except for written or verbal warnings. There was no

objection to the admission of the agreement into evidence. No evidence has been presented that there is a later collective bargaining in agreement between the parties. It is rare that a provision in a collective bargaining agreement permitting the arbitration of disciplinary disputes will be eliminated from a future agreement between the parties. This arbitrator is satisfied that the collective bargaining agreement admitted into evidence for the Village of Westmont shows the current procedure in effect in that municipality for the resolution of disciplinary disputes involving patrol officers.

What has been said about the Darien, Lisle, and Westmont agreements applies equally to the other collective bargaining agreements. No objection was made to the receipt of any of them into evidence. No evidence has been presented that they are not the latest collective bargaining agreements in effect between the parties for those jurisdictions as of the date of the arbitration hearing. For example, as of the date of the arbitration hearing on April 5, 2016, the latest agreement in effect between these parties was for the period May 1, 2012, to April 30, 2015, and was therefore also not current. This arbitrator has no way of knowing that the jurisdictions for which a current agreement was not presented are not in negotiations or impasse proceedings for such an agreement or in the process of drafting and printing it. Absent an objection to the receipt into evidence of the Union's exhibits consisting of the agreements for the other jurisdictions, any post-hearing challenge to those agreements must be accompanied by evidence that there are later agreements in effect.

The fifth factor, the average consumer prices for goods and services, does not apply to the present issue, which the parties are in agreement is non-economic. Nor is the sixth statutory factor, the overall compensation presently received by the employees, applicable to the disciplinary issue. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings, the seventh factor, is not applicable because there is no evidence of the occurrence of a relevant change.

The eighth and final item, "[s]uch other factors, not confined to the foregoing, which are normally 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," also favors the Union's position. Some of these considerations were enumerated by Arbitrator Newman in Village of Bolingbrook, supra, at pages 19-20:

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, [citations omitted], a public policy favoring arbitration [citation omitted], and a clear legislative preference for arbitration as set forth in Section 8 of the Act. [citations omitted]. . . .

As discussed above the choice of arbitration also avoids the appearance of impaired impartiality and complies with the Due Process Protocol. Arbitration, in addition, will eliminate a system whereby appeal of discipline is allowed on the one hand, but discouraged on the other, by subjecting the employee to the possibility of being assessed more severe discipline during the course of the appeal process. The arbitrator concludes that the applicable factors of Section 14(h) of the IPLRA favor the Union's final offer. The arbitrator selects the Union's final offer. Since the parties are in agreement that the issue is non-economic, the arbitrator will modify the Union's proposed disciplinary language to read as set out below.

Before doing so, however, the arbitrator notes that he is retaining the Union's proposal to provide employees with the choice of arbitration or a hearing before the Board of Police Commissioners for contesting discipline. The retention of the BOPC as a means for reviewing discipline will permit those officers who agree with the Village's arguments about the advantages of BOPC review to make use of that system. Those, on the other hand, who deem arbitration a fairer system will be entitled to utilize that process. The Village correctly points out in its brief that an employee who chooses arbitration may not know at the time he chooses that forum whether the Union will indeed process his or her grievance all the way to arbitration. The arbitrator, however, does not deem such problem to be insuperable. The Union presumably was aware of that problem but nevertheless decided to insist on impartial arbitration as a means available to non-probationary bargaining unit employees for resolving disciplinary disputes.

The following language concerning disciplinary action is adopted by the arbitrator:

Section 6.6 Disciplinary Action. (a) Discipline of non-probationary Patrol Officers shall be for just cause and shall consist of Oral Reprimand, Written Reprimand, Suspension, or Discharge depending on the seriousness of the offense. Any such discipline may be administered by the Employer without filing charges with or obtaining the permission of the Board of Police Commissioners.

(b) A grievance with respect to any disciplinary action may be raised by the affected Patrol Officer within seven working days of being notified by the Employer of the discipline. A grievance contesting an Oral Reprimand or Written Reprimand shall be initiated at Step One of the grievance procedure and may not be processed beyond Step Three. A grievance contesting a suspension or discharge shall be initiated by the affected Patrol Officer at Step Three of the grievance procedure and shall be accompanied by a signed statement by said Officer electing to contest the said discipline through the grievance and arbitration procedure and waiving the right to do so before the Board of Police Commissioners. Said statement of election and waiver may be included as part of the grievance document.

(c) Any suspension or discharge with respect to which a grievance is not initiated and a signed statement of election and waiver not presented by the affected Patrol Officer at Step Three of the grievance procedure within seven working days of notification by the Employer of said discipline may no longer be processed as a grievance but shall automatically be subject to appeal by said Patrol Officer before the Board of Police Commissioners. Such appeal must be initiated with the Board within ten working days of notification of the suspension or discharge or the right of appeal will be considered waived.

(d) Once an affected Patrol Officer has properly elected, in a timely manner, to contest a suspension or discharge through the grievance and arbitration procedure said discipline shall no longer be subject to appeal or review before the Board of Police Commissioners.

(e) The provisions contained in this Section 6.6 shall be subject to the Illinois Uniform Arbitration Act.



(f) The provisions of this Section 6.6 shall be controlling with regard to discipline of non-probationary Patrol Officers notwithstanding anything to the contrary contained in Section 2.2, 6.2, 6.3, or 6.5 of this Agreement.

Two additional comments are in order. Since the new Section 6.6 awarded by the arbitrator is inconsistent in some respects with parts of Sections 2.2, 6.2, 6.3, and 6.5 of the Agreement the parties might want to consider modifying the wording of those other sections. The parties should also feel free to modify the language awarded on discipline should they jointly agree on substitute language.

A W A R D and O R D E R

1. The Union's final offer on Discipline, as modified by the arbitrator, is adopted for the parties' collective bargaining agreement effective May 1, 2015, through April 30, 2018.

2. All terms and condition of employment on which the parties reached tentative agreement are hereby incorporated into and made part of said agreement. All provisions of the collective bargaining agreement between the parties effective May 1, 2012, through April 30, 2015, shall remain in full force and effect except as modified, altered, or changed by this Award and Order.

Respectfully submitted,

Sinclair Kossoff  
Arbitrator

Chicago, Illinois  
August 22, 2016