ARBITRATION

ILRB NO. S-MA-18-084

COUNTY OF MCLEAN AND
MCLEAN COUNTY SHERIFF

JOINT EMPLOYERS

INTEREST ARBITRATION
CORRECTIONAL OFFICERS UNIT

AND

ILLINOIS FRATERNAL
ORDER OF POLICE
LABOR COUNCIL

UNION

JAMES A. MURPHY
ARBITRATOR

DECISION AND AWARD

APPEARANCES:

FOR THE EMPOYERS: JESSICA WOODS

FOR THE UNION: JAMES DANIELS

FEBRUARY 14 , 2020

BACKGROUND

McLean County (County or Employer) is located in north central Illinois and has a population of approximately 170,00, most of which is located in the cities and villages in the County. The County employs about 679 full time employees, of whom about 514 are unrepresented while about 165 are represented among three unions (the Fraternal Order of Police Labor Council (FOP or Union), Laborers, and AFSCME.) The Sheriff's Department employs both the Correctional Officer Unit and the Deputy Sheriff Unit. The Correctional Officers unit involved here consists of about 60 members composed of Correctional Officers, Correctional Sergeants, and Control Operators. They are represented by FOP, and have been for some time including the current CBA. The only other public safety unit for the County is the Deputy Sheriff Unit – also represented by FOP.

The current CBA expired December 31, 2017. The Parties conducted extensive negotiations for this successor contract, and reached agreement on a number of issues (the TAs of which are incorporated in this Award), but came to impasse on five issues. One of which was resolved at the outset of the Arbitration Hearing.

A Hearing was held on September 17, 2019 at the McLean County Government Center. The Parties stipulated that the Arbitration was properly convened, and that the Arbitrator had authority to rule on the issues submitted, including authority to award wage increases retroactive to January 1, 2018. Both Parties were ably represented by counsel who introduced written and oral evidence in narrative form and through

witnesses and argued issues in their turn. The Hearing was adjourned, and the Parties submitted their Briefs on December 13, 2019. This Decision and Award is submitted on February 14 , 2020.

RELEVANT STATUTES

5 ILCS 315/14(h)

THE STATUTORY FACTORS

Where there is no agreement between the parties, or where there is an agreement, but the parties have begun negotiations for a new agreement or amendment of the existing agreement, and wage rates other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinion and order upon the following factors, as applicable:

(1) The lawful authority of the Employer;

(2) Stipulations of the parties;

(3) The interest 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 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 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 private employment.

Not all factors are relevant to every case; and the weight given to each will vary depending on the facts and circumstances of each case.

5 ILCS 315/4

MANAGEMENT RIGHTS

Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.

5 ILCS 315/8

GRIEVANCE PROCEDURES

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.

55 ILCS 5/3-8012

DISCIPLINARY MEASURES

Disciplinary measures for actions violating either the rules and regulations of the Commission or the internal procedures of the sheriff's office may be taken by the sheriff. Such disciplinary measures may include suspension of any certified person for reasonable periods, not exceeding a cumulative 30 days in any 12-month period. However, on and after June 1, 2007, in any sheriff's office with a collective bargaining agreement covering the employment of department personnel, such disciplinary measures and the method of review of those measures shall be subject to mandatory bargaining, including, but not limited to, the use of impartial arbitration as an alternative or supplemental form of due process.

RELEVANT CONTRACT PROVISIONS

Article 6
Management rights

The Employer has and will continue to retain the right to operate and manage its affairs in each and every respect. The rights Reserved to the sole discretion of the Employer shall include, but not be limited to, rights:

• • •

m. To suspend, demote discharge, or take other disciplinary action against employees for just cause.

Section 10.2b
Referral

Regarding disciplinary grievances, employees who have been disciplined may challenge their discipline as follows:

• • • • •

b. Employees may appeal suspensions of thirty-one (31) days or more and terminations either by (a) by filing a written appeal with the Sheriff's Merit Commission within seven (7) calendar days of being notified of the discipline, or (b) by filing a written grievance directly with the Sheriff or his designee within seven (7) calendar days of being notified of the discipline. The employee's choice of an appeal procedure must be submitted in writing to the Sheriff or his designee within this seven-calendar day timely filing period. The employee's choice of an appeal procedure is a one-or-the-other choice, and when this choice is submitted in writing to the Sheriff or his designee this choice shall become irrevocable.

COMPARABLES

The Parties have stipulated the external comparables to be:

CHAMPAIGN COUNTY

MACON COUNTY

PEORIA COUNTY

ROCK ISLAND COUNTY

SANGAMON COUNTY

TAZEWELL COUNTY

WAGES

The Union proposes retroactive wage increases of:

2018 – 2.50%
2019 – 2.75%
2020 – 2.75%

The Employer proposes retroactive wage increase of:

2018 – 2.00%
2019 – 2.25%
2020 – 2.50%

The Union's position is that its offer is the more reasonable because it makes steady incremental gains in Employee's wages which are below average, and can well be afforded by the Employer. The Employer's position is that its offer is the more reasonable because it is only slightly less than the Union's and it too makes small incremental gains in employee wages which are overall competitive and well ranked among the comparables.

The Parties utilize different methods to calculate wage comparisons. Each has its advantages and disadvantages. The Employer rank orders this Unit's wages compared to the wages of the comparable unit's wages, and simply removes the comparables for the years in which they have no signed contract. While this is a cleaner method, it results in smaller groups of comparables. For example, in 2020 there are only two comparables for sergeant wages.

The Union compares the wages of this Unit with the average of the wages of the comparable units. In the years in which a comparable unit does not have a signed contract, the Union estimates what contract settlements would be based upon prior recent settlements and an estimate by those parties and then reduced by a small amount that the author believes is appropriate for comparison. This is a highly unscientific method, particularly for 2020. We know what the economy did in 2018 and 2019, but what 2020 holds is a real unknown. The "experts" predict everything from recession to boom. The advantage of this method is that it allows for a broader base of comparability.

The bottom line in this case is that both analyses produce substantially similar results.

It appears that CPI increase for the first year of this contract (2018) was 1.9% while the Union's offer is 2.5% and the Employer's offer is 2.0%. The second year (2019) CPI was 2.3%, while the Union's offer is 2.75% and the Employer's offer is 2.25%. The third year (2020) is, of course unknown. With the economy as volatile as it presently is, it

would be highly speculative to try to assign an annual increase to CPI for 2020. The so-called experts prognosticate everything from recession to boom. Accordingly, I find that CPI does not strongly favor either offer.

Reviewing the percentage increases in the stipulated comparable agencies which have contracts in place (Union exhibit 11), it appears that both Parties' offers exceed the average of those of the comparables. Obviously, the Union's offer exceeds by more.

The Union' argument stresses the fact that the more senior employees are treated less favorably than the less senior employees. Union exhibit 4, the seniority list of 61 names, shows 25 employees who will not surpass five years on the job prior to the contract expiration. Also, there are 6 employees who are at top pay at 23 years of service. Although the ranks of the employees on the list are not disclosed, one might assume that, at least, some of the Sergeants have been employed for more than five years but less than 23.

All of that leads to this: Union exhibit 13 shows that employees less than five years and those at top pay at 23 years are paid above the average for the comparables and will continue to be for the duration of the contract. Exhibit 14 shows that sergeants are paid well above average at all comparison points, and will continue to be so for the duration of the contract.

That is not to overlook the situation of the remainder of the Correctional Officers who have served more than 5 but less than 23 years. Union exhibit 13 shows that salaries for this group were somewhat below average in the last contract and will remain below but closer to average under either offer. Employer exhibit 3 also confirms that generally through this period this Unit's relative ranking is lower. The Union's offer obviously closes the gap faster than the Employer's, but even at its worst, the gap would only be around 4%; and considerably less at most comparison points. Further, this contract will be up for re-negotiation before the large group of younger employees reach the critical stages of below average salaries.

The Employer's non-public safety internal comparable argument is not really relevant since it is generally held that public safety units are only comparable to other public safety units. Information about the other bargaining units and possibly curtailing important services they provide might be relevant only if it was evidence of the employer's inability to pay a proposed increase. Clearly, the financial data presented here shows that ability to pay is not an issue here.

The Union seeks to draw a parallel between this Unit and the Deputy Sheriff Unit. It is conceded that there is no evidence of a pattern of lock step parity between the two Units. The Union argues that both Units have had below average wages, and recently this Unit has gotten the same raises as the Deputy Unit, but a year later so this Unit should receive the same increase as the Deputy Unit. The fact is, though that the

Deputy Unit was farther behind average than this Unit in which half or more of its members are above average.

The Union's historical argument goes that averaging the percentage increases over the past nine years yields a nine-year average of 2.586%; and the Union proposal which averages 2.66% is closer to the nine-year average than the Employer's which averages 2.16%. Furthermore, the Union has never agreed to an average annual increase of 2.16% in any contract in the past nine years. Aside from what other weaknesses this argument has, it rests on a mathematical error. The fact is that the Employer's proposal averages 2.25%, and Union exhibit 11 shows that the agreed wage increase was 2.25% in 4 of the past 9 years. The argument is not persuasive.

The Employer does not contend that it is unable to pay the increases in the Union's final offer. The Employer does argue that it has many financial obligations, and that the General Fund Balance is misleading because significant funds from that account are restricted to specific purposes. A review of the financial data submitted in this proceeding,(including, by stipulation, data from the 2019 interest arbitration before me with the Deputy Sheriff Unit - ILRB NO. S-MA-18-083) discloses that McLean County is financially sound; and possesses more than adequate means to pay either offer without jeopardizing other county functions. The 1.5% difference between the two offers is minimal.

The issue then is whether they should pay the slightly higher wage increases under the Union's final offer or the slightly lower wage increases under the Employer's final offer. It has been held by many arbitrators that just because a governmental unit would be able to pay a higher wage increase does not mean that it should pay that higher increase unless the Union's proposed increases provide a benefit to the public beyond those proposed by the Employer.

No evidence was introduced by either Party suggesting a problem with hiring, retention, turnover, morale, training or competence of the staff. There is an unusual number of relatively new employees in the Unit, but staff expansion for the new jail would presumably account for such an increase in recent hiring. Hence, there appears no increased benefit to the public to pay the Union proposal over the Management proposal.

Since this is an economic issue, I am compelled to award one offer or the other *in toto.*

I find the Management proposal to be the more reasonable

Management rights. The Employer advocates an expansive view of management rights as regards the non-economic issues. Section 4 of the Illinois Public Labor Relations Act (5 ILCS 315/4) states that Employers are not requires to bargain over matters of inherent managerial policy; but also states that they are requires to bargain

collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives. It is hardly subject to serious argument or necessity of citation that disciplinary demotions, drug testing and sick leave usage come within terms and conditions of employment.

Demotion

The Union seeks to add the term "demotion" to the grievance and arbitration provisions of Section 10.2b, of the Contract, "To suspend, demote, discharge, or take other disciplinary action against employees for just cause".

Management Rights Article 6m appears to list demotion as a possible disciplinary measure that the Sheriff can take. However, the Contract does not list demotions as being appealable through the grievance/arbitration process in Article 10.2.

The Employer argues that this absence of the term "demotion" in Section 10.2b was adopted by agreement, and is covered by "unless mutually agreed otherwise" clause in Section 8 of The Illinois Public Labor Relations Act. Thus, demotions are appealable only to the Sheriff's Merit Commission. The Union counters that this disciplinary arbitration procedure was adopted from another contract in whole, and there was never direct discussion of the arbitrability of demotions or a meeting of the minds in this Unit's negotiations. The Union's argument might perhaps carry a little more weight but for the fact that the contract from which this procedure was adopted was a contract between

the same Parties for the Sheriff's Deputies Unit which was being negotiated at the same time as the contract for Correctional Officers. No evidence was introduced by either Party concerning the extent of negotiations or meeting of the minds on this issue with the Deputies Unit.

The Employer does not deny that demotion can be used as discipline, but it may also be for the officer's inability to perform the promoted job duties adequately. A reasonable judgement whether an employee is adequately performing in a promoted job position is something that is apart from discipline. There is still the option to seek review of a "performance" demotion by the Merit Commission if the employee chooses to appeal the Sheriff's decision. The expressed fear in the scenario in the one demotion of which the union representative was aware in the past 14 years was that the Commission would increase a demotion to a discharge. Such consideration is not present in the matter of a "performance" demotion. The Commission could only uphold or reverse the demotion. Any effort to impose a sanction in addition to or instead of the demotion would clearly be discipline, and *ipso facto* subject to arbitration if the employee and the Union chose to appeal.

The Union makes a compelling case by statute and numerous arbitration decisions that disciplinary demotions, like any other discipline, should be included in the choice of venue provisions of Section 10.2b. Accordingly, the first sentence of Section 10.2b shall be amended to read:

Employees may appeal suspensions of thirty-one (31) days or more, disciplinary demotions, and terminations either by (a) by filing a written appeal with the Sheriff's Merit Commission within seven (7) calendar days of being notified of the discipline, or (b) by filing a written grievance directly with the Sheriff or his designee within seven (7) calendar days of being notified of the discipline.

The Union's Final Offer as amended is adopted.

Drug Testing

The Union seeks to add a detailed drug testing provision to the Contract.

Management calls for status quo.

The Union argues that a standard drug testing provision in the Contract is necessary so that employees ordered to be tested know their rights and that department personnel involved in the testing know how the tests must be conducted to avoid having the testing and any consequent discipline disallowed by an arbitrator or the courts. They contend that the current Drug Free Workplace Policy # 236 lacks sufficient detail to properly order and conduct a valid drug or alcohol testing process. They point to testimony at the arbitration hearing by Deputy Chief Jamey Kessinger indicating that he was unsure just how drug testing would have to be conducted. Finally, they point out that every one of the comparable Units have a similar drug testing provision.

Management contends that the current policy is working, as evidenced by the testimony of Mr. Kessinger that the witness could only recall 3 instances in his 22 years' experience in administration where it was used. Further, it would just give the Parties one more thing to bargain over. Also, the .04 intoxication standard would allow officers on a transportation detail to carry firearms and drive prisoner transportation vehicles even if they tested for some alcohol, but less than .04. Finally, the Deputy Unit operates under the current policy, and has not requested a change.

Especially in public safety employment, drug and alcohol cases frequently involve an employee's career, livelihood and reputation. Therefore, management is held to a very high standard of proof including very detailed procedures for ensuring the integrity of the samples and of the procedures for scheduling, gathering, testing, handling, storing, and preserving samples. Even a small deviation from standard procedures could be fatal to a disciplinary case. It would seem an advantage to both Parties to have those standards available to them to them to easily reference in the Contract. What is contained in this proposal is pretty standard language, not only among the comparables, but pretty much throughout law enforcement in Illinois; and to which Management would likely be held whether it is in their contract or not.

Finally, this proposed language does not mandate that an employee who tests positive for alcohol at less than .04 be allowed to work. In fact, the proposed Section 34.4(h)

provides that an employee who tests greater than .01 but less than .04 may be disciplined.

The Union's Final Offer is adopted

Sick Leave Policy

This proposal by the Union is its third consecutive attempt to amend and incorporate Management's sick leave policy into the Contract. As noted by the Union, its proposal makes only minimal changes to the existing sick leave policy; none of which create new rights or benefits for the employees. It is argued that it would be more convenient to include the language of the Sick Time Policy #238 so one did not have to look at two documents.

The Union also points to one incident in which an employee was cautioned about over average sick leave use for 3 consecutive days in one quarter, and 2 days and then 1 day in another quarter. The employee was never accused of sick leave abuse, and received no discipline. While there may be anomalies in the current method of calculation, there would undoubtedly occur anomalies in the Union's proposed method of calculation as well.

While I would discount Management's assertion of management rights to implement any policy, they see fit, I do agree that there is no evidence that the current policy has not worked over time, does not need to be amended.

The Employer's Final Offer is adopted.

SUMMARY OF AWARD

1) WAGES	THE EMPLOYER'S FINAL OFFER IS AWARDED
2) DEMOTIONS	THE UNION 'S FINAL OFFER AS AMEDED IS AWARDED
3) DRUG TESTING	THE UNION'S FINAL OFFER IS AWARDED
4) SICK LEAVE	THE EMPLOYER'S FINAL OFFER IS AWARDED

ALL OF THE TENTATIVE AGREEMENTS REACHED BY THE PARTIES ARE ADOPTED.

AS AGREED BY THE PARTIES, I SHALL RETAIN JURISDICTION FOR 90 DAYS IN THE EVENT OF IMPLEMENTATION PROBLEMS.

/s/ JAMES A. MURPHY February 14, 2020