

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
GENERAL COUNSEL**

City of Mattoon (Fire Department),)	
)	
Employer)	
)	Case No. S-DR-18-005
and)	
)	
Mattoon Firefighters Association, Local 691,)	
)	
)	
Labor Organization/Petitioner.)	

DECLARATORY RULING

On May 7, 2018, the Mattoon Firefighters Association, Local 691, (Union) unilaterally filed a Petition for Declaratory Ruling pursuant to Section 1200.143 of the Rules and Regulations of the Illinois Labor Relations Board. 80 Ill. Admin. Code 1200.143. The Petition seeks a determination as to whether it is a permissive subject of bargaining, within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2016), *as amended* (Act), for the City of Mattoon Fire Department (Employer) to use individuals not qualified for regular appointment to the fire department as substitutes for classified members of the fire department in providing paramedic services. Both parties filed briefs. On brief, the Employer requested oral argument. I denied that request as unnecessary on October 9, 2018.

I. BACKGROUND

The Union represents all members of the Employer’s Fire Department subject to the jurisdiction of the Employer’s Board of Fire and Police Commissioners, excluding the positions of fire chief and assistant chief. Union members historically performed both firefighter and

paramedic work. However, since 2010, the Employer has also used two private paramedic companies to supplement its ambulance services.

The Employer and the Union were parties to a collective bargaining agreement with a term of May 1, 2014 through April 30, 2018. That agreement incorporated, by reference, the Employer's Code of Ordinances, including an ordinance that required the Department to provide "Emergency Advance Life Support Ambulance Rescue Services."

On July 11, 2017, the Employer's City Council voted to repeal the above-referenced ordinance, and on July 18, 2017, the Employer's City Council voted to adopt a "Resolution Eliminating the City-Operated Ambulance Service Effective May 1, 2018." The Employer did not give the Union notice before taking these actions, nor did the Employer ask to bargain these matters with the Union. The following day, the Union filed a grievance over the Employer's decision to eliminate its ambulance service and to use private ambulance services in its place. The grievance later proceeded to arbitration before Arbitrator George Fitzsimmons.

Prior to the resolution of the grievance, the parties began negotiations for a successor contract. On December 29, 2017, the Employer proposed to modify the parties' contract by eliminating various contract provisions that referred to the provision of ambulance services and paramedics. It proposed that, as of May 1, 2018, bargaining unit members would no longer perform ambulance work.

On February 28, 2018, the Union initiated the interest arbitration process by filing a request for mediation.

On April 18, 2018, Arbitrator George Fitzsimmons issued his award ("Fitzsimmons Award") on the Union's grievance and ruled that the Employer did not violate the parties' soon to expire contract when it eliminated the Employer-operated ambulance services and instead used the

services of private ambulance companies. The arbitrator held that the contract's management rights clause authorized the employer to eliminate, relocate, transfer, or subcontract work, and that the Substitutes Act did not bar the Employer's actions. I take notice that the Union is currently challenging the arbitration award in court.

On May 4, 2018, the Union requested compulsory interest arbitration. On May 7, 2018, the Union filed this petition, which was held in abeyance at the parties' request until September 24, 2018.

On June 7, 2018, the Employer presented the Union with a proposal that redefined firefighter work by removing the firefighters' ambulance work (Article 14, Section 2), and by removing all remaining references to ambulance work from the contract.¹ At the same time, the Employer proposed to retain the authority to subcontract (Article 3) and also retained language stating that the parties would follow the Substitutes Act (Article 14, Section 2). The proposal included an explanation. In that explanation, the Employer indicated that the proposed changes furthered the Employer's objectives of discontinuing its ambulance services. The Employer further specified that the Fitzsimmons Award declared that the Substitutes Act did not prevent the Employer from "pursuing the discontinuance of the ambulance service."

The Employer's proposal states the following in most relevant part:

Article 14, Section 2 – Bargaining Unit Integrity

For purposes of Sections 1 and 2 of Article 14, work done by Bargaining Unit members, will no longer include ambulance work. Such work will be eliminated by the Employer pursuant to Article 3 of the CBA and the Fitzsimmons Award. Notwithstanding the elimination of the ambulance service, no current member of the Bargaining Unit as of the date of this proposal shall be laid off, suffer a loss or diminution of regular hours, or not be afforded overtime opportunities as provided for in the CBA....

¹ This included modifications to Article 6H (Overtime Rules) and Article 13 (Rules, Regulations, and Policies).

In a communication to the Union on August 29, 2018, the Employer identified the names of two ambulance services that would satisfy the Employer's ambulance/paramedic needs. It further stated that none of the individuals employed by either private contractor appeared on the Employer's current eligibility lists for employment within the Fire Department. On brief, the Employer does not claim that any of the individuals employed by the private contractors appear on the Employer's current eligibility lists.

II. RELEVANT STATUTORY PROVISIONS

The duty to bargain is defined in Section 7 of the Act which provides in relevant part:

A public employer and the exclusive representative have the authority and duty to bargain collectively set forth in this Section.

For the purpose of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

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.

5 ILCS 315/7 (2014).

Section 17 of the Act preserves the right to strike for most employees, but not for security employees, fire fighters, paramedics, and, relevant here, peace officers. 5 ILCS 315/17 (2016). Section 2 requires an alternate means of dispute resolution for those precluded from striking, 5

ILCS 315/2 (2016), and Section 14 provides the procedures for such alternative dispute resolution: binding arbitration, 5 ILCS 315/14 (2016).

Section 10-2.1-4 of the Illinois Municipal Code (Substitutes Act), provides the following in relevant part:

In any municipal fire department that employs full-time firefighters and is subject to a collective bargaining agreement, a person who has not qualified for regular appointment under the provisions of this Division 2.1 shall not be used as a temporary or permanent substitute for classified members of a municipality's fire department or for regular appointment as a classified member of a municipality's fire department unless mutually agreed to by the employee's certified bargaining agent. Such agreement shall be considered a permissive subject of bargaining. Municipal fire departments covered by the changes made by Public Act 95-490 that are using non-certificated employees as substitutes immediately prior to June 1, 2008 (the effective date of Public Act 95-490) may, by mutual agreement with the certified bargaining agent, continue the existing practice or a modified practice and that agreement shall be considered a permissive subject of bargaining. A home rule unit may not regulate the hiring of temporary or substitute members of the municipality's fire department in a manner that is inconsistent with this Section. This Section is a limitation under subsection (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State.

65 ILCS 5/10-2.1-4 (2016).

Section 14(i) provides, in relevant part:

In the case of fire fighter, and fire department or fire district paramedic matters, the arbitration decision shall be limited to wages, hours, and conditions of employment (including manning and also including residency requirements in municipalities with a population under 1,000,000, but those residency requirements shall not allow residency outside of Illinois) and shall not include the following matters: i) residency requirements in municipalities with a population of at least 1,000,000; ii) the type of equipment (other than uniforms and fire fighter turnout gear) issued or used; iii) the total number of employees employed by the department; iv) mutual aid and assistance agreements to other units of government; and v) the criterion pursuant to which force, including deadly force, can be used; provided, however, nothing herein shall preclude an arbitration decision regarding equipment levels if such decision is based on a finding that the equipment considerations in a specific work assignment involve a serious risk to the safety of a fire fighter beyond that which is inherent in the normal performance of fire fighter duties. Limitation of the terms of the arbitration decision pursuant to this subsection shall not be construed to limit the facts upon which the decision may be based, as set forth in subsection (h).

5 ILCS 315/14(i) (2016)

Section 14(l) provides:

During the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this Act. The proceedings are deemed to be pending before the arbitration panel upon the initiation of the arbitration procedures under this Act.

5 ILCS 315/14(i) (2016).

III. ISSUES

The issue is whether the Employer's proposed removal of contract language pertaining to firefighters' paramedic functions is a permissive subject of bargaining where the Employer also proposes to reserve its authority to subcontract all paramedic work.

The Union argues that the Employer's proposal is a permissive subject of bargaining because its acceptance would require the Union to waive its rights under the Substitutes Act. The Union asserts that the stated aim of the proposal is to permit the Employer to maintain the decision it effectuated under the parties' prior contract, to transfer all paramedic work to a private contractor whose employees are not qualified to substitute for sworn firefighters. The Union explains that the Substitutes Act applies to paramedic work and that the individuals employed by the private ambulance companies are not qualified substitutes for firefighters because they do not appear on the Employer's eligibility list.

The Employer confirms that the purpose of its proposal is to allow it to use a private ambulance company to perform paramedic work, formerly performed by firefighters. However, the Employer asserts that Substitutes Act does not bar it from using a third-party contractor to provide paramedic services because it pertains only to a municipal employer's hiring practices. The Employer asserts that it is appropriate to rely on legislative history in support of this claim

because the Substitutes Act is ambiguous absent an express prohibition on the use of private ambulance services. In the alternative, the Employer asserts that the Union has waived any claim that the Substitutes Act bars the Employer's use of private ambulance services by permitting the Employer to use such services in the past. It similarly asserts that its actions are consistent with past practice. Finally, the Employer contends that the Union's interpretation of the Substitutes Act would render it unconstitutional.

IV. DISCUSSION AND ANALYSIS

The Employer's proposal is a permissive subject of bargaining because it seeks the waiver of the Union's right, under the Substitutes Act, to insist that the Employer use only individuals who are qualified for regular appointment as substitutes for firefighters in the performance of paramedic work.

A proposal that seeks the waiver of a statutory right is a permissive subject of bargaining. Wheaton, 2016 IL App (2d) 160105 ¶ 17 (2d Dist. 2016) aff'ing City of Wheaton, 31 PERI ¶ 131 (IL LRB-SP 2015); Vill. of Midlothian, 29 PERI ¶ 125 (IL LRB-SP 2013); Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB-SP 2001); County of Cook (Cook County Hospital), 15 PERI ¶ 3009 (IL LRB 1999). A proposal may be permissive by virtue of its effect on statutory rights, even where it appears on its face to address an otherwise mandatory subject of bargaining.² Village of North Riverside, 33 PERI ¶ 33 (IL LRB-SP 2016) (citing Vill. of Midlothian, 29 PERI ¶ 125). A proposal seeks the waiver of a union's statutory rights where it conflicts with a statutory mandate by offering the union fewer rights than provided under statute. City of Wheaton, 31 PERI ¶ 131

² I note that the Employer's proposal modifies several provisions addressing traditionally mandatory subjects, but the parties have appropriately focused on the overarching purpose of the Employer's proposal, to permit the Employer's continued use of a contractor to provide paramedic services.

(IL LRB-SP 2015); Vill. of Midlothian, 29 PERI ¶ 125; Vill. of Elk Grove Vill., 21 PERI ¶ 14 (IL LRB-SP GC 2005). Thus, a proposal may seek a waiver of a statutory right even where the proposal's language does not expressly reference waiver. Ehlers v. Jackson Cnty. Sheriffs Merit Comm'n, 183 Ill. 2d 83 (1998); Vill of Elk Grove Vill., 21 PERI 14 (IL LRB-SP GC 2005).

As a preliminary matter, the Union has the right to insist that the Employer use only those individuals who are qualified for regular appointment as firefighters to substitute for classified members of its fire department. Furthermore, its right to insist upon the use of qualified substitutes extends to individuals used by the Employer to perform solely paramedic functions. The Substitutes Act prohibits a municipal fire department with full-time, unionized firefighters from substituting classified members of its fire department with individuals who are not qualified for regular appointment as firefighters, unless the union agrees. 65 ILCS 5/10-2.1-4.³ In addition, the Municipal Code's eligibility and appointment requirements for firefighters apply even to those firefighters sworn and commissioned to perform solely paramedic duties. 65 ILCS 5/10-2.1-6.3. To that end, the section of the code that applies to original appointments defines the term "firefighter" broadly as "any person who has been...appointed to a fire department or fire protection district...and sworn or commissioned to perform firefighter duties *or paramedic duties*, or both..."⁴ 65 ILCS 5/10-2.1-6.3 (emphasis added). Accordingly, the Substitutes Act prohibits an employer from unilaterally using individuals, not qualified for regular appointment, in place of firefighters for the performance of paramedic work.

³ The Substitutes Act provides that "in any municipal fire department that employs full-time firefighters and is subject to a collective bargaining agreement, a person who has not qualified for regular appointment ... shall not be used as a temporary or permanent substitute for classified members of a municipality's fire department...unless mutually agreed to by the employee's certified bargaining agent." 65 ILCS 5/10-2.1-4.

⁴ The definition excludes, in relevant part, part-time firefighters and paid-on-call firefighters. 65 ILCS 5/10-2.1-6.3.

Here, the Employer's proposal seeks a waiver of the Union's right to insist upon the use of qualified substitutes in the performance of paramedic work. Waiver of a statutory right must be clear and unequivocal. Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. State Labor Relations Bd., 190 Ill. App. 3d 259, 269 (1st Dist. 1989). Express contractual language, the parties' bargaining history, and the circumstances under which contracts are negotiated are all critical in determining whether a waiver was clear and unmistakable. Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. State Labor Relations Bd., 190 Ill. App. 3d at 270; Forest Preserve District of Cook County, 21 PERI ¶ 43 (IL LRB-LP 2005), aff'd, Forest Preserve District of Cook County v. Ill. Labor Rel. Bd., 369 Ill. App. 3d 733 (1st Dist. 2006); Illinois Dep't of Military Affairs, 16 PERI ¶ 2014 (IL SLRB 2000).

The standard for finding waiver is met here. The proposal's language, the parties' bargaining history, and the Employer's current practices demonstrate that the Employer proposes to preserve its authority to substitute unqualified contactors for firefighters in the performance of paramedic work. The proposal maintains the subcontracting language of the parties' prior contract that authorized the Employer's use of contractors to perform paramedic functions historically performed by firefighters. This proposed authority to substitute is rendered more apparent by the fact that the Employer has sought to remove all contractual references to firefighters' ambulance/paramedic functions and has already transferred all paramedic work to private contractors. Furthermore, the Employer's current practices show that it intends to reserve its authority to subcontract paramedic work, irrespective of whether the contractors are qualified for regular appointment as firefighters. Indeed, there appears to be no factual dispute that the private contractors now used by the Employer do not employ anyone who is qualified for regular

appointment as a firefighter, and the Employer has stated its intention to continue that practice.
65 ILCS 5/10-2.1-6.3.

The Employer's concomitant promise to abide by the Substitutes Act does not cure the proposed waiver for two reasons. First, the Employer has sought to avoid the reach of that statute by redefining firefighter work to exclude paramedic functions. It has thereby proposed to eliminate any overlap between the work of the firefighters and the contractors to ensure that the contractors cannot be viewed as "substituting" for firefighters at all. Second, the parties' bargaining history demonstrates that their earlier incorporation of the Substitutes Act into their prior contract did not prevent the Employer from using unqualified substitutes. Under these circumstances, an interest arbitrator's award of the Employer's proposal would force the Union to waive its right to insist that the Employer use only individuals who are qualified for regular appointment as substitutes for classified members of its fire department. City of Streator, 34 PERI 133 (IL LRB-SP GC 2018) (employer's proposal to meet its minimum manning obligations in part with "paid-on-call and/or contracted personnel" was a permissive subject of bargaining, which sought a waiver of the union's rights under the Substitutes Act); cf. Village of North Riverside, 33 PERI ¶ 33.

There is no merit to the Employer's claim that the Substitutes Act applies only to the Employer's internal hiring practices and not to the Employer's use of private contractors. Principles of statutory construction do not support the Employer's interpretation. The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature. Gaffney v. Board of Trustees of the Orland Fire Protection District, 2012 IL 110012, ¶ 56. The most reliable indicator of that intent is the language of the statute itself. Id. If the statutory language is clear and unambiguous, it must be applied as written, without resorting to further aids of statutory

construction. Id. The provisions of a statute must be viewed as a whole and its words and phrases must be interpreted in light of other relevant provisions. Raintree Homes, Inc. v. Vill. of Long Grove, 209 Ill. 2d 248, 256 (2004). The statute must be construed so that each word, clause, or sentence is given reasonable meaning and not deemed superfluous or void. Raintree Homes, Inc. 209 Ill. 2d at 256.

Here, the Substitutes Act is unambiguous because it utilizes the word “use” rather than the word “hire” when it places restrictions on who may perform work as a substitute for a full-time firefighter employed by a municipal fire department. 65 ILCS 5/10-2.1-4. The plain meaning of the word “use” denotes the means of accomplishing a certain result and is broader than the word “hire,” which refers to an employment relationship. Furthermore, the legislature’s selection of the word “use” rather than “hire” must be deemed intentional because the Substitutes Act employs the word “hire” in another instance. “When the legislature uses certain words in one instance and different words in another, different results are intended.” Jackim v. CC-Lake, Inc., 363 Ill. App. 3d 759, 768 (1st Dist. 2005). Accordingly, the terms “use” and “hire” cannot be construed as equivalents, as the Employer argues.⁵

Contrary to the Employer’s contention, the Union has not forfeited its rights under the Substitutes Act by failing to object to the contractors’ qualifications in 2010, when the Employer first started using them. A forfeiture is a failure to make a timely assertion of a right. Gallagher v. Lenart, 226 Ill. 2d 208, 229 (2007). Here, the Union’s assertion of its right was timely made during negotiations for a successor agreement. The Employer’s assertion to the contrary overlooks the well-established principle of collective bargaining that a party’s past agreement to bargain over

⁵ I decline to address the Employer’s claim that the Union’s interpretation of the Substitutes Act, accepted here as valid, would render the Substitutes Act unconstitutional. Such constitutional issues are beyond the scope of this declaratory ruling and are more properly presented in a judicial forum.

a permissive subject does not compel it to bargain over that subject in the future. Village of Maywood, 34 PERI ¶ 77 (IL LRB-SP G.C. 2017); City of Mattoon, 13 PERI ¶2004 (IL SLRB G.C. 1997). The Substitutes Act confirms that this principle applies here because it invokes the language of collective bargaining and states, in no uncertain terms, that a union’s agreement to the use of unqualified substitutes “shall be considered a permissive subject of bargaining.” 65 ILCS 5/10-2.1-4.

Similarly, the Union has not waived its rights under the Substitutes Act by previously acquiescing to the use of these contractors to perform some paramedic work. Whether a past practice exists is irrelevant to determining whether the matter at issue is a mandatory or permissive subject of bargaining because a nonmandatory subject does not become mandatory through past practice. Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971); NLRB v. Pennsylvania Telephone Guild, 799 F2d 84, 91 (3rd Cir. 1986). Accordingly, a union may insist upon its rights under the Substitutes Act, even if it has relinquished them in the past. Skokie Firefighters Union, Local 3033 v. Illinois Labor Relations Bd., State Panel, 2016 IL App (1st) 152478, ¶ 20 (union was entitled to object to a proposal that maintained the status quo where it waived union’s statutory rights; employer violated the Act when it nevertheless presented the proposal to arbitrator, who then awarded it).

In sum, the Employer’s proposal is a permissive subject of bargaining because it seeks to perpetuate the Employer’s current practice of using individuals, who are not qualified for regular appointment, as substitutes for firefighters in the performance of paramedic work.

Issued in Chicago, Illinois, this 2nd day of November, 2018.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD**

/s/ Helen J. Kim

**Helen J. Kim
General Counsel**