STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Metropolitan Alliance of Police, Bolingbrook Chapter #3	)	
Charging Party,	)	
and	)	Case No. S-CA-18-092
Village of Bolingbrook (Police Department),	)	
Respondent,	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On April 29, 2018, Administrative Law Judge (ALJ) Donald Anderson issued a Recommended Decision and Order dismissing as untimely a charge filed by Charging Party Metropolitan Alliance of Police, Bolingbrook Chapter #3 (Union) alleging Respondent Village of Bolingbrook (Police Department) (Village) engaged in unfair labor practices within the meaning of Section 10(a)(4) and (1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2016), as amended. The Union timely filed exceptions and the Village timely responded. After reviewing the record, the RDO, the exceptions and response thereto, we reject the ALJ's recommendations dismissing the complaint for hearing and remand to the ALJ for the reasons discussed below:

I. DISCUSSION

Central to this case is Section 8.8 of the parties' collective bargaining agreement concerning health insurance benefits for employees upon their retirement through a retiree healthcare fund (Fund) established by the parties in a prior collective bargaining agreement and later extended to all Village employees by an ordinance adopted on April 11, 2000. In the event

of insufficient funds to pay the benefits contained in Section 8.8, paragraph 5 of that section, *i.e.*, Section 8.8.5, requires the parties to negotiate a resolution of the Fund's deficiency. In addition, Section 8.8.5 sets forth, among other things, the parties' agreement regarding the continuation of the retiree health insurance benefit from successor agreements:

> The parties further agree that the employer may not terminate the existing benefit from future contracts. Any dispute as to the continuance of such benefit as part of a successor agreement may be submitted to interest arbitration at the election of either party in accordance with the authority granted by Section 14 of the [Act]. The arbitrator shall have the authority to mandate the continuance of the program in the successor contract, but shall not have the authority to expand or reduce the benefit, or expand the amount of the Employer or Employee contributions required under this Agreement. Upon a showing that there are insufficient funds to maintain the Benefit provided by this Agreement, the arbitrator shall have the authority to reduce the percentage of the premiums paid or modify the benefits package to reduce the premium cost.

During negotiations for a successor agreement, the Union proposed increasing the Village's contribution to the Fund. When the parties were unable to agree on a successor contract, they proceeded to interest arbitration. The Village filed a pre-hearing motion objecting to the arbitrator's consideration of the Union's proposal to increase the Village's Fund contributions believing Section 8.8.5 precluded its consideration. The parties then submitted final offers on September 14, 2016. The Union's final offer included deleting the language in Section 8.8.5 concerning the arbitrator's authority to consider issues other than continuing the benefits in subsequent contracts. The Village amended its pre-hearing motion to include its objection to the arbitrator's consideration of the Union's offer regarding the authority given to an arbitrator under Section 8.8.5. On November 7, 2016, the arbitrator denied the Village's pre-hearing motion.

The interest arbitration hearing began on November 30, 2016, with the parties submitting final offers and ground-rules to the arbitrator. The Union again submitted elimination of language in Section 8.8.5 regarding arbitrator authority as one of its non-economic final offers. On October

15, 2017, the arbitrator issued his award selecting, *inter alia*, "the Village's Final Offer to maintain the status quo regarding language in Section 8.8.5 of the Agreement as it relates to the arbitrator's authority."

Approximately four months after receiving the award, on February 13, 2018, the Union filed the charge in this case alleging the Village committed an unfair labor practice when it "insisted to impasse on a permissive subject of bargaining, over the objections of the Charging Party. . . . Prejudice inured to the Charging Party because the Arbitrator's ruling on the permissive subject forced a waiver of statutory rights." After the charge was investigated, on May 24, 2018, the Executive Director issued a Complaint for Hearing (Complaint) based on the charge's allegations.

In lieu of a hearing, the parties submitted a stipulated record. After observing that the limitation period in Section 11(a) of the Act is jurisdictional, the ALJ, on his own motion, dismissed the Complaint finding the alleged unlawful conduct occurred outside the six-month limitations period, and thus, the Board lacked jurisdiction. The ALJ determined the Union should have filed the charge on November 30, 2016, the first interest arbitration hearing date when the parties submitted their final offers and ground-rules to the interest arbitrator rather than the date the arbitrator issued his award.

Relying on Amalgamated Transit Union v. Illinois Labor Relations Board, 2017 Il App (1st) 160999 ¶ 50, the ALJ reasoned that the Village's alleged unlawful conduct occurred when the Village "unambiguously announced," over the Union's objection, its intent to pursue the status quo regarding Section 8.8.5 to interest arbitration, thus, the Union should have known the Village was insisting to impasse on a permissive subject. The arbitrator's award constituted the "implementation of Village's final offer" rather than the actual conduct forming the unfair labor

practice and so the charge was untimely. The ALJ found the Board's decisions in Village of Bensenville, 14 PERI ¶ 2042 (IL SLRB 1998) and Wheaton Firefighters Union, Local 3706 v. Illinois Labor Relations Board, State Panel, 2016 IL App (2nd) 160105, ruling that the mere submission of a permissive subject of bargaining to interest arbitration did not amount to an unfair labor practice controlling in this case.

The Union filed exceptions contending the ALJ incorrectly relied on Amalgamated Transit Union v. Illinois Labor Relations Board, 2017 Il App (1st) 160999 ¶ 50, and should have instead relied on Skokie Firefighters Union, 2016 IL App (1st) 152478. The Union claims under Skokie Firefighters, the unlawful conduct took place when the arbitrator issued an award maintaining the status quo, *i.e.*, the waiver of the unit members' rights to interest arbitration, rather than when the permissive subject of bargaining was submitted. In the alternative, the Union contends the matter involves a continuing violation because it denies employees, who are prohibited from striking, their statutory right to interest arbitration.

In response, the Village maintains the ALJ correctly dismissed the case, not only because the Board lacked jurisdiction, but also because on the merits, it did not commit an unfair labor practice. It claims it did not submit any proposal concerning a permissive subject, and it was the Union that submitted the permissive subject.

We find the Union's exceptions in this case have merit. We agree with the Union that the ALJ's reliance on Amalgamated Transit Union is misplaced and that Skokie Firefighters is the controlling authority.

In Skokie Firefighters, the interest arbitrator selected the Village of Skokie's status quo offer resulting in the continuation of an agreement with the Village of Skokie's firefighters' union regarding promotion standards. Skokie Firefighters Union, 2016 IL App (1st) 152478, ¶ 6-8

(modified upon denial of rehearing March 31, 2017). The firefighters' union objected contending maintenance of the current agreement on promotion standards would force a waiver of its statutory rights under the Fire Department Promotion Act, 5 ILCS 742/1. Id. at ¶ 7. The court distinguished Village of Bensenville and Wheaton Firefighters, finding those decisions were premised on the lack of prejudice resulting from the submission of a permissive subject because an arbitrator presumably would not consider the permissive subject over a party's objection. Skokie Firefighters Union, 2016 IL App (1st) 152478, ¶ 21 (modified upon denial of rehearing March 31, 2017) ("The holdings [in Bensenville and Wheaton] were based on the proposition that, if a party objects to the consideration of a permissive subject and the arbitrator does not consider it, the objecting party has no claim for an unfair labor practice because there is no prejudice."). The court, in finding the Village of Skokie committed an unfair labor practice, focused on the consequence of the Village of Skokie's conduct and concluded the offensive conduct was not the mere submission of the permissive subject but also the submission combined with the prejudice resulting from that submission—the arbitrator's award forcing the Union to waive the statutory rights of its members. See id. ¶ 29-30.

Likewise, the Union is alleging the wrongful conduct in this case occurred when the arbitrator issued his award on October 15, 2017. The allegations contained in the Complaint were based not only the submission of a permissive subject to interest arbitration over the Union's objection, but also on the consequence of that submission—the arbitrator's selection of the status quo offer forcing the waiver of the Union's bargaining unit members' statutory right to interest arbitration.

Rather than applying Skokie Firefighters, the ALJ relied on Amalgamated Transit Union in finding the charge untimely. Reliance on that case, however, is misplaced. Although the ALJ

correctly noted the court's observations that "a decision by an employer that the union alleges is an unfair labor practice" does not have to be implemented before triggering the Section 11(a) limitation period, he failed to focus on the conduct the Union alleged constituted the unfair labor practice. As discussed above, the Union and the Complaint allege the submission of the permissive subject *and* the arbitrator's selection of the status quo offer constituted the unfair labor practice. That conduct occurred upon the issuance of the arbitrator's award on October 15, 2017, not on November 30, 2016, as the ALJ found. Accordingly, we find the charge was filed within the six-month limitation period giving the Board jurisdiction over the charge.

For the above reasons, we reject the ALJ's recommendations dismissing the case as untimely and find the charge timely filed. Because the ALJ did not render findings or conclusions regarding the merits, we remand the case to the ALJ to issue a supplemental recommended decision and order containing his analysis, determinations, and recommendations on the Complaint's allegations.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John S. Cronin
John S. Cronin, Member

/s/ Kendra Cunningham
Kendra Cunningham, Member

/s/ Jose L. Gudino
Jose L. Gudino, Member

/s/ William E. Lowry
William E. Lowry, Chairman

/s/ J. Thomas Willis
J. Thomas Willis, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on November 14, 2019, written decision approved at the State Panel's public meeting in Chicago, Illinois on December 10, 2019, and issued on December 11, 2019.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Metropolitan Alliance of Police, Bolingbrook Chapter #3,	)	
Charging Party,	)	Case No. S-CA-18-092
and	)	
Village of Bolingbrook (Police Department),	)	
Respondent.	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On February 13, 2018, Metropolitan Alliance of Police, Bolingbrook Chapter #3 (the "Union" or the "Charging Party") filed a charge in Case No. S-CA-18-092 with the State Panel of the Illinois Labor Relations Board (the "Board") alleging that the Village of Bolingbrook (Police Department) (the "Village", "the Employer", or the "Respondent") engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2017), as amended ("the Act"). The charge was investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On May 24, 2018, the Board's Executive Director issued a Complaint for Hearing alleging that the Respondent violated Sections 10(a)(4) and 10(a)(1) of the Act. The Respondent's Answer to the Complaint was timely filed on June 11, 2018.

Thereafter, the case was assigned to me for hearing and recommended decision and order. Upon the joint motion of the parties, the hearing in the case was cancelled, and on February 11, 2019, a Revised Scheduling Order was issued ordering, by agreement of the parties and the concurrence of the ALJ, that the case be decided on the basis of a Stipulated Record and the filing of briefs, the parties having been stipulated that there are no issues of credibility

requiring resolution by the ALJ. The Stipulated Record, consisting primarily of an electronic record contained in a zip drive duly filed with the Board, and the written briefs of the parties were timely filed. Accordingly, after full consideration of the parties' stipulations, evidence, arguments, and upon the entire record of this case, I recommend the following.

I. PRELIMINARY FINDINGS

A. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.

B. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a-5) of the Act.

C. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.

D. At all times material, the Charging Party has been the exclusive representative of a bargaining unit ("Unit") composed of Respondent's full-time police officers holding the rank of Patrol Officer as certified by the Board on February 5, 1990 in Case No. S-RC-90-047.

E. Effective May 1, 1999, the parties adopted a Retiree Healthcare Fund provision in their collective bargaining agreement, pursuant to which Unit employees contributed 1% of their salaries to the fund and Respondent matched that amount.

F. On April 11, 2000, Respondent passed an ordinance created the Retired Employees Health Insurance Premium Fund ("Fund"), and participation in the Fund became available to employees in other Village employee bargaining units, as well as non-represented employees.

G. The Fund is designed to pay health insurance costs for retirees from their date of retirement until they are eligible for Medicare.

H. In May of 2015, after an evaluation of the Fund was performed, Respondent determined that the Fund had a deficit of $19.9 million.

I. Soon thereafter, the Union and the Village entered into a memorandum of understanding ("MOU"), pursuant to which employee contributions were increased temporarily to 2.5% of their salaries. The terms of the MOU were then extended to other represented and non-represented employees of the Village.

J. The Charging Party and the Respondent were parties to a collective bargaining agreement ("CBA") that expired on April 30, 2015. At least since May of 1999, the CBA contained the following provision relating to the Fund:

> **Section 8.8.5**
>
> The parties further agree that the employer may not terminate the existing benefit from future contracts. Any dispute as to the continuance of such benefit as part of a successor agreement may be submitted to interest arbitration at the election of either party in accordance with the authority granted by Section 14 of the Illinois Public Labor Relations Act. The arbitrator shall have the authority to mandate the continuance of the program in the successor contract, but shall not have the authority to expand or reduce the benefit, or expand the amount of the Employer or Employee contributions required under this Agreement. Upon a showing that there are insufficient funds to maintain the Benefit provided by this Agreement, the arbitrator shall have the authority to reduce the percentage of the premiums paid or modify the benefits package to reduce the premium cost.

K. Following expiration of the CBA in 2015, the parties engaged in negotiations over a successor agreement.

L. During negotiations, the Charging Party made proposals to increase Respondent's contributions to the Fund.

M. In 2016, the parties determined they were unable to reach an agreement and selected an arbitrator to preside over interest arbitration proceedings. The arbitrator selected by the parties was Arbitrator Dennis P. McGilligan.

N. On September 12, 2016, Respondent filed a Prehearing Motion on Arbitrability, objecting to the Arbitrator's consideration of a proposal seeking to increase Respondent's contributions to the Fund because it believed that Section 8.8.5 of the CBA precluded this subject from the Arbitrator's jurisdiction.

O. On September 14, 2016, both parties submitted their final offers to the Arbitrator.

P. Charging Party's final offer included the removal of the following portion of Section 8.8.5 of the CBA:

> The arbitrator shall have the authority to mandate the continuance of the program in the successor contract, but shall not have the authority to expand or reduce the benefit, or expand the amount of the Employer or Employee contributions required under this Agreement. Upon a showing that there are insufficient funds to maintain the Benefit provided by this Agreement, the arbitrator shall have the authority to reduce the percentage of the premiums paid or modify the benefits package to reduce the premium cost.

Q. On September 21, 2016, Respondent filed an Amended Prehearing Motion on Arbitrability.

R. On September 24, 2016, Charging Party filed a Response to Respondent's Amended Prehearing Motion on Arbitrability, reiterating its demand to strike part of Section 8.8.5 of the CBA and asserting that "[t]he Employer…is committing an Unfair Labor Practice by insisting on inclusion of the §8.8.5 language, despite the fact that it is a non-mandatory subject of bargaining."

S. On November 7, 2016, the Arbitrator denied Respondent's objections and allowed Charging Party to submit its proposals relating to the Fund, including the proposal to

remove the language quoted in Paragraph P of these Preliminary Findings from Section 8.8.5 of the CBA.

T. Interest arbitration hearings before Arbitrator McGilligan were held on November 30, 2016, January 17, 2017, and June 14, 2017.

U. On October 15, 2017, the Arbitrator issued an Award that, in pertinent part, denied the Charging Party's proposal to strike the language quoted in Paragraph P, above.

V. On February 13, 2018, the Charging Party filed its Charge Against Employer in this case, asserting, *inter alia,* that "[t]he Respondent insisted to impasse on a non-mandatory subject of bargaining, submitted a non-mandatory subject of bargaining to an Interest Arbitrator, and received an Interest Arbitration Award on a non-mandatory subject of bargaining."

W. The Complaint for Hearing in this case was issued May 24, 2018.

II. CONTENTIONS OF THE PARTIES

The Charging Party contends that the Village committed an unfair labor practice by submitting a permissive subject of bargaining to interest arbitration over the objection of the Union. The permissive subject of bargaining, the Union says, was "a limitation on the Union's right to interest arbitration." "By placing it before the arbitrator, and arguing for its inclusion, the Union asserts, "the Employer forced a waiver of the Union's statutory rights, over the Union's repeated objections."

In prior collective bargaining agreements, the Union had agreed to contractual provisions relating to a retiree health insurance plan, including a provision, set forth in Section I, Paragraph

P, above[1], that limited the authority of an interest arbitrator in future cases "to expand or reduce the benefit, or expand the amount of Employer or Employee contributions…" When the parties were unable to agree upon the terms of the retiree health insurance benefit in connection with negotiations over a successor agreement to the May 1, 2012 to April 30, 2015 collective bargaining agreement, the Union submitted a proposal in interest arbitration to delete the Paragraph P language.

When the Village opposed the deletion of this language and proposed that the Arbitrator maintain the status quo by issuing an award that retained all of the current language of Section 8.8.5, including the Paragraph P language, the Union objected to the Village proposal. On September 27, 2016, in response to a pre-hearing motion by the Village, the Union said:

> ¶ 14. The language found in §8.8.5 of the expired CBA, which limits the authority of an arbitrator in future interest arbitrations, is a non-mandatory subject of bargaining. The Union's proposal removes this language….
>
> ¶ 15. The Union does NOT consent to the inclusion of this language in any future contract because it is a non-mandatory subject of bargaining.

Despite this objection, the Union says, the Employer never sought a declaratory ruling under § 1230(k) of the Board's Rules and Regulations. Instead, the Village continued to assert its position in interest arbitration that the Arbitrator should adopt the Village's proposal to retain the current language of Section 8.8.5.

The Union asserts that the Paragraph P language that the Village sought to retain is a "second generation interest arbitration clause," one that is designed not to regulate impasse procedures with respect to the present collective bargaining agreement but, rather, to regulate those procedures with respect to future contracts. Since such a proposal has no bearing on terms

[1] That language will be referred to hereafter as the "Paragraph P" language.

and conditions of employment under the present contract, it is a non-mandatory subject of bargaining that may not be submitted for a decision by an interest arbitrator in the face of an objection from the opposing party. When the Arbitrator decided in favor of the Village on this issue, the Union contends, "[t]he end result was a forced waiver of the Union's statutory rights, the very thing that was prohibited by *Skokie Firefighters Union v. ILRB,* 2016 IL App (1st) 152478."

The Respondent contends that "while this dispute does not involve retiree health care benefits *per se,* the language of Section 8.8.5 of the CBA, which limits an interest arbitrator's authority to consider proposals by either party to expand/reduce the insurance benefit or expand the amount of required contributions of participating employees or the Village, cannot logically be separated from the economic issue of retiree health insurance and thus constitutes a mandatory subject of bargaining." The Village notes that the Union's proposal to delete the Paragraph P language was not made until the submission of final offers of the parties on September 14, 2016 and it was not, therefore, the subject of bargaining by the parties prior to its submission to arbitration. The Village further states:

> Because the parties' pre-arbitration conduct illustrates a genuine impasse was never reached on the issues surrounding Section 8.8.5 prior to invoking interest arbitration, the Village thus could not have "insisted to impasse" on the topic. On the contrary,…it was the Union that actually submitted this proposal to the Arbitrator, without providing any opportunity to the Village during the initial negotiations to consider, discuss, and submit a counter-proposal (if warranted). As detailed by the Arbitrator in his Award, the Village did not argue that 8.8.5 "must' remain in the CBA, but only noted at arbitration that the benefits of leaving the language outweighed the benefits of removing it from the contract.

(Footnote omitted).

Denying any violation of the Act, the Village contends that it was the Union, not the Village, that violated the Act. While acknowledging that the statutory timeframe for submitting its own unfair labor practice charge against the Union has passed, the Village nonetheless asserts that "making a proposal on 8.8.5 for the first time on the eve of the interest arbitration constituted bad faith bargaining, plain and simple…. The Union's hands are unclean and its pre-arbitration bargaining tactics should not be rewarded by the Board."

III. FINDINGS OF FACT

When the Village and the Union were unable to agree in bargaining to the terms of a successor agreement to the collective bargaining agreement ("CBA") in effect from May 1, 2012 through April 30, 2015, the parties proceeded to interest arbitration in accordance with the provisions of Section 14 of the Act, 5 ILCS 315/14. Arbitrator Dennis P. McGilligan was selected by the parties to hear and decide the matter, with the appointment of Employer and Union delegates to the arbitration panel having been waived by the parties. In the Ground Rules for arbitration established by the parties, the hearing was to begin on September 14, 2016. On September 12, however, the Employer submitted a Prehearing Motion on Arbitrability seeking to preclude the Arbitrator from deciding certain issues, including issues relating to Section 8.8 of the CBA. This submission resulted in a delay in the commencement of the hearing while the prehearing issues raised by the Village were decided by the Arbitrator.

Section 8.8 related to a "retiree health insurance program" providing for the payment of monthly health insurance premiums for eligible employees and their spouses upon retirement and until the retirees become Medicare-eligible. Prior to May of 2015, the retiree health insurance program was funded by monthly payroll deduction contributions from covered employees of

1/12 of 1% of annual gross compensation and a matching contribution from the Village. In May of 2015, in order to prevent cancellation of benefits because of perceived insolvency of the retiree health insurance fund, the Village and the Union entered into a memorandum of understanding ("MOU") whereby the annual contribution of employees was increased from 1% to 2.5% of gross annual compensation, without a corresponding increase in the Employer's contribution.

Initially, the Village's objection was to the inclusion of the MOU into the new collective bargaining agreement to be effective from May 1, 2015 to April 30, 2018. When the parties, by agreement, submitted final offers on outstanding issues on September 14, 2016, however, the Respondent noted that, for the first time, the Union was proposing deletion of the Paragraph P language. Accordingly, on September 21, 2016, the Village submitted an Amended Prehearing Motion on Arbitrability specifically asking the Arbitrator to reject as substantively not arbitrable the Union's proposed deletion of the Paragraph P language. The Union responded on September 27, 2016 by stating, *inter alia*:

> The Union is not seeking an increase in the Employer's contribution at this time, however, it has an absolute right to seek such action in the future. It's called collective bargaining, and it is a right protected by the Illinois Public Labor Relations Act (5 ILCS 315 et. seq.). The Employer is asking the Arbitrator to overrule the Statute, and issue what amounts to a permanent injunction, denying the Union the ability to ever seek an increase in the Employer's contribution, at any time in the future.

The Union then went on to contend that:

> The Employer on the other hand, is committing an Unfair Labor Practice by insisting on inclusion of the §8.8.5 language, despite the fact it is a non-mandatory subject of bargaining.

On October 5, 2016, the Village submitted a reply brief in continued support of its substantive arbitrability arguments. In opposition to the Union's proposed deletion of the Paragraph P language, the Village said, among other arguments, that:

> If this clause were removed, future arbitrators would then be free to consider, and possibly order, increases in both employee and employer contributions.

On November 7, 2016, the Arbitrator denied the Village's pre-hearing motion. With respect to the Village's objection to the Union's final offer seeking to remove the Paragraph P language, the Arbitrator held that the Union had the right under the terms of Section 14 of the Act to submit its proposal to final and binding arbitration. The Arbitrator then concluded by saying, in pertinent part:

> Having reached the above conclusions, it is unnecessary to address the other arguments of the parties as it relates to the Employer's Amended Motion. The Arbitrator has no jurisdiction to make unfair labor practice determinations and does not have the authority to determine mandatory or permissive subjects of bargaining. These determinations are properly made elsewhere.

The parties proceeded to interest arbitration before Arbitrator McGilligan on November 30, 2016, January 17, 2017, and June 14, 2017. At the convening of the hearing on November 30, 2016, the parties submitted their final offers and a set of ground rules adopted by the parties. The Union's final offer contained its proposal, labeled as "Issue No. 4", to "modify Section 8.8.5 of the Agreement by striking" the Paragraph P language. The Village's final offer did not refer to Section 8.8.5 specifically, but the Village maintained at the hearing, as it had articulated in its reply brief in support of its pre-hearing motion on arbitrability, its opposition to the deletion of the Paragraph P language. In the ground rules, submitted at the November 30 commencement of the hearing as Joint Exhibit 4, the parties agreed that "final offers may not be changed except by mutual agreement of the parties."

Post-hearing briefs were submitted by the parties to the interest arbitration proceeding on September 15, 2017, and the Arbitrator's Award was issued on October 15, 2017. In that Award, Arbitrator found for the Village on the disputed issue concerning Section 8.8.5. of the parties'

collective bargaining agreement, finding that "[t]he Union has not shown that the current system is not working as anticipated or originally agreed to" and thus favoring "the Village's status quo on the issue", including retention of the Paragraph P language in the collective bargaining agreement to be in effect from May 1, 2015 to April 30, 2018.

During the arbitration proceedings, there was no compliance by the parties or the Arbitrator with the requirements of subsection 1230.90(k) of the Board's Rules and Regulations, 80 Ill. Admin. Code 1230.90(k), which provides:

> Whenever one party has objected in good faith to the presence of an issue before the arbitration panel on the ground that the issue does not involve a subject over which the parties are required to bargain, the arbitration panel's award shall not consider that issue. However, except as provided in subsections (l) and (m) of this Section, the arbitration panel may consider and render an award on any issue that has been declared by the Board, or by the General Counsel pursuant to 80 Ill. Adm. Code 1200.140(b), to be a subject over which the parties are required to bargain.

Instead, the parties briefed the substantive issue before the Arbitrator, with the Union continuing to insist that the Village's proposal retain the Paragraph P language was a permissive subject of bargaining and that, accordingly, "the Arbitrator must award the Union's proposal on §8.8.5." In its post-hearing brief, the Union asserted that the Village's proposal to retain the Paragraph P language was designed to "perpetually maintain the expired bar on interest arbitration found in §8.8.5." The Village's position, the Union contended, was one favoring the adoption of a "second generation interest arbitration clause", a type of clause found to be a permissive subject of bargaining by the Board and by courts interpreting the National Labor Relations Act.

In presenting its post-hearing arguments, the Union cited the decision of the First District Appellate Court in *Skokie Firefighters Union, Local 3033 v. ILRB,* 2016 IL App (1st) 152478 (*"Skokie Firefighters"*). The Union said:

> *Skokie* provides excellent guidance for the Arbitrator. Here, the Union has made its position unambiguous – the Union does not consent to continuing the second-generation interest arbitration clause. It is a non-mandatory subject of bargaining, the Village cannot force the Union to waive its statutory rights. Just like *Skokie* here, the Village is not entitled to seek, and the Arbitrator is not empowered to award, a status quo ruling on §8.8.5.

Notwithstanding the Union's arguments, the Arbitrator issued a status quo ruling on §8.8.5. The Union's unfair labor practice charge against the Village then followed on February 13, 2018.

IV. DISCUSSION AND ANALYSIS

The Union's Unfair Labor Practice Charge Is Untimely And Must Be Dismissed.

Subsection 11(a) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board…." The six-month limitations period begins to run when the charging party has knowledge of the alleged unlawful conduct, or reasonably should have known of the conduct. *Moore v. Illinois State Labor Relations Board,* 206 Ill.App.3d 327, 335 (1990); *County of Cook (Department of Central Management Services)*, 17 PERI ¶ 3009 (ILRB-LP 2001); *Village of Dolton*, 17 PERI ¶ 2017 (ILRB-SP 2001); *Chicago Transit Authority*, 16 PERI ¶ 3013 (IL LRB 2000).

The six-month limitations period is jurisdictional, rather than a limitations period that is subject to waiver or tolling. In construing an identical provision of the Illinois Educational Labor Relations Act, and ruling that the limitations period therein was jurisdictional, rather than procedural, the Illinois Appellate Court said:

> [I]f the right being asserted is one unknown to the common law, the time limitation is an inherent element of the right and of the power of the tribunal to hear the matter. On the other hand, … if the right upon which the request for relief is based is a common law right, the time limitation is merely a procedural matter not affecting the jurisdiction of the tribunal and is subject to waiver." (Citing cases)

Charleston Community Unit School District No. 1 v. Illinois Educational Labor Relations Board, 203 Ill.App.3d 619, 622 (1990), citing *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill.2d 202 (1985). *Accord, Jones v. Illinois Educational Labor Relations Board*, 272 Ill.App.3d 612, 618-19 (1st Dist., 1995); *Caloca and Chicago Newspaper Guild, Local 34071,* 32 PERI ¶ 133 (ILRB-SP, 2016); *Brown and State of Illinois, Department of Central Management Services (Department of Public Aid),* 19 PERI ¶ 105 (ILRB-SP, 2003).

Because the six-month limitations period in Subsection 11(a) is jurisdictional, it is a limitation on the statutory *power* of the Board to hear and decide a case. Jurisdiction is conferred upon the Board by statute and cannot be conferred by a party or the parties jointly, since "the parties cannot create subject-matter jurisdiction by consent, acquiescence, waiver or estoppel." *Swope v. Northern Illinois Gas Company*, 221 Ill.App.3d 241, 243 (3rd Dist. 1991), citing *Board of Education of the City of Chicago v. Box,* 191 Ill.App.3d 31 (1st Dist. 1989). And since it is not subject to waiver, a jurisdictional time limit cannot be preserved by a party merely by declining to waive substantive rights under the statute. Nor can it be waived by the respondent by virtue of having failed to raise the statute of limitations as an affirmative defense to the charge. When necessary, the lack of subject-matter jurisdiction can be raised *sua sponte* by the trier of fact. *Camp v. Chicago Transit Authority*, 82 Ill.App.3d 1107 (1st Dist. 1980). In this case, because neither party raised the issue in the pleadings or in their briefs, I raise the issue *sua sponte* because it goes to the power of the Board to decide this case on the merits.

The key factual finding in ascertaining when the six-month limitations period begins to run is to determine when the charging party knew or should have known of the allegedly unlawful conduct. In this regard, "a decision by the employer that the union alleges is an unfair labor practice does not need to have been implemented before the time is triggered to file a charge. Rather, the limitations period can begin to run when the employer's decision is 'unambiguously announced,' and this may be before the decision is implemented." *Amalgamated Transit Union v. Illinois Labor Relations Board*, 2017 IL App (1st) 160999, ¶ 50, citing *Wapella Education Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 2011 IL App (1st) 101497.

In this case, the Charging Party first had knowledge of the Respondent's intent to submit an allegedly permissive subject to arbitration on September 27, 2016, when it filed its objection to the Respondent's articulation of its intent to submit its status quo proposal with regard to Section 8.8.5 of the parties' CBA. Because the Board has ruled that "the mere submission to an interest arbitrator of a contract proposal pertaining to a permissive subject of bargaining does not violate the statutory duty to bargain in good faith," *Village of Bensenville*, 14 PERI ¶ 2042 (ILLRB 1998), however, the limitations period did not begin to run on the September 27 date. Rather, the operative date in this case was November 30, 2016, when the Respondent submitted the case to interest arbitration over the Charging Party's objection.

This conclusion follows from the reasoning of the Second District Appellate Court in *Wheaton Firefighters Union, Local 3706 v. Illinois Labor Relations Board, State Panel* (*"Wheaton Firefighters"*), 2016 IL App (2d) 160105 ¶ 22, 23. In resolving the perceived conflict between *Village of Bensenville* and the Board's decisions in *Wheeling Firefighters*

Association, 17 PERI ¶ 2018 (ILRB – SP 2001) and *Midlothian Professional Fire Fighters Association*, *Local 3148*, 29 PERI 125 (ILRB – SP 2013), the court said:

> We agree with the Board that its holding in *Bensenville* is dispositive in this appeal. *Bensenville* stands for the proposition that a party does not act in bad faith merely because it submits to an interest arbitrator a proposal pertaining to a permissive subject of bargaining. This is because, if the other party objects to the arbitrator's consideration of that issue, then the arbitrator "shall not consider that issue." 80 Ill.Admin.Code 1230.90(k), amended at 27 Ill. Reg. 7456 (eff. May 1, 2003). Thus, a party is not prejudiced by the submission of the issue, because its objection will preclude the arbitrator from considering it. As that is what happened in this case, the Board's reliance on *Bensenville* was not clearly erroneous. See *AFM Messenger Service*, 198 Ill.2d at 391.
>
> In so ruling, we find the Union's reliance on such cases as *Midlothian* and *Wheeling* to be misplaced because in those cases the parties had already been negotiating over the controversial issue when one of the parties submitted it to an interest arbitrator. *As one party had already indicated to the other that it did not intend to relinquish its rights regarding a permissive subject of bargaining and have that issue submitted to an interest arbitrator, it was indeed bad faith for the other party to continue to press the issue and submit it to an interest arbitrator anyway.*

(Emphasis added).

Thus, for purposes of the statute of limitations, the six-month limitations period did not begin to run when the Union filed its objection to the alleged unfair labor practice but when the Village "unambiguously announced", over the Union's objection, its intent to pursue the status quo as to Section 8.8.5. That occurred on November 30, 2016, when the parties submitted their final offers to the Arbitrator in accordance with a ground rule providing that the parties could not change their final offers except by mutual agreement. There is no evidence in the Stipulated Record that either party changed its position, with or without agreement of the other party, between the submission of final offers on November 30, 2016 and the issuance of the Arbitrator's Award on October 15, 2017. Thus, while the Arbitrator's Award contained the

implementation of the Village's final offer, the actual conduct giving rise to a charge of unfair labor practices occurred much earlier.

Inasmuch as the running of the six-months limitations period began on November 30, 2016, an unfair labor practice charge alleging the submission of a permissive subject to interest arbitration over the objection of the Union would have to have been filed, to be timely, no later than May 30, 2017. The February 13, 2018 filing of the Charge in this case, therefore, was clearly untimely.

This case is complicated by the fact that there was no compliance with subsection 1230.90(k) of the Board's Rules, nor was there a request for a declaratory ruling under subsection 1200.140(b) of the Rules. The rule allowing for a declaratory ruling is optional, providing that the parties "may jointly petition" for such a ruling. But subsection 1230.90(k) is mandatory.

Ironically, the court in *Wheaton Firefighters* was presented with just such a scenario. The union in that case argued that "the Board's remedy is insufficient because an interest arbitrator might still improperly consider an issue even if a party objects to it." *Wheaton Firefighters*, at ¶ 25. The court declined to address that issue substantively on the ground that it was a hypothetical situation not before the court. But this case presents the issue more concretely.

The Union argues that it was the Respondent's duty to invoke subsection 1200.140(b). But nothing in the rule says this and the Union cites no authority for this proposition. In fact, the responsibility to invoke the subsection 1200.140(b) option is, if anything, joint. The rule says that if the parties "have a good faith disagreement over whether the Act requires bargaining over a particular subject or particular subjects, they may jointly petition for a declaratory ruling

concerning the status of the law." The rule goes on to provide that if one party requests the other to join in requesting a declaratory ruling, and the other party refuses, "the requesting party may file the petition on its own, provided that the petition is filed no later than the first day of the interest arbitration hearing."

But the failure to exercise this option is of lesser concern than the failure to comply with subsection 1230.90(k). That rule provides that '[w]henever one party has objected in good faith to the presence of an issue before the arbitration panel on the ground that the issue does not involve a subject over which the parties are required to bargain, the arbitration panel's award shall not consider that issue", provided, however, that the panel may consider the issue if the General Counsel has ruled pursuant to subsection 1200.140(b) that the issue is a mandatory subject of bargaining. Clearly, the Arbitrator should not have considered and ruled on the contested issue regarding Section 8.8.5 in the absence of a declaratory ruling to the effect that, notwithstanding the Union's objection, the issue was a subject over which bargaining was required.

Nevertheless, the Arbitrator did consider and rule upon the Section 8.8.5 issue. This should have come as no surprise to the parties, given his ruling on the Village's Amended Prehearing Motion on Arbitrability that "[t]he Arbitrator has no jurisdiction to make unfair labor practice determinations and does not have the authority to determine mandatory or permissive subjects of bargaining." In that November 7, 2016 ruling, the Arbitrator gave clear guidance to the parties that he was going to rule on the issues presented to him, irrespective of the arbitrability or unfair labor practice claims of either party.

Given the Arbitrator's position, the Union, as the party raising the objection to the continued presence of the Paragraph P language in Section 8.8.5, had at least two options. First,

it could have initiated the subsection 1200.140(b) procedure and requested the Village to submit the issue jointly to the General Counsel.[2] Or second, as tacitly acknowledged by subsection 14(d) of the Act, it could have filed an unfair labor practice charge against the Village, with or without a subsection 1200.140(b) procedure, even though arbitration proceedings were pending. Such a filing, even though it would not have delayed arbitration proceedings or necessarily produced a definitive ruling prior to the issuance of the arbitration award, nevertheless would have preserved the Board's jurisdiction over the Charging Party's claims.

Rather than exercising either of these options, the Union chose to treat the six-month limitations period as procedural rather than jurisdictional. Accordingly, it took pains to preserve its claims against any assertion by the Village that it had waived them. For example, in the parties' ground rules, paragraph 8 states:

> The listing of an issue in dispute, is not intended and shall not be construed to waive objections to the appropriateness of submitting the issue to the Arbitrator. Both parties reserve the right to object to and/or contest in an appropriate forum (including in this arbitration proceeding) under applicable laws the submission of any offer of the other party on the ground that it constitutes a non-mandatory subject of bargaining or bad faith bargaining.

Because the law is clear that the six-month limitations period is jurisdictional, however, it is likewise clear that such efforts to avoid a claim of waiver are simply without effect. The Union's unfair labor practice charge is barred by subsection 11(a) of the Act.

[2] Note that, while the invocation of the subsection 14(b) procedure does not toll the running of the limitations period, a timely invocation of that procedure would provide the parties with authoritative guidance as to whether the issue in question is mandatory or permissive. Moreover, the time constraints imposed on the parties and the General Counsel in the subsection provide assurance that a ruling almost certainly would be issued before the running of the limitations period.

VI. RECOMMENDED ORDER

The Complaint Against the Respondent styled as Case Number S-CA-18-092 is hereby dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued in Chicago, Illinois on April 29, 2019

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ *Donald W Anderson*

Donald W. Anderson
Administrative Law Judge