



¶ 3 The Illinois Fraternal Order of Police Labor Council (the Union) and the County of St. Clair and the Sheriff of St. Clair County (the Employer) are parties to a collective bargaining agreement in which the Union represents all sworn peace officers below the rank of sergeant employed by the Employer. The bargaining unit employees are sworn peace officers and fall within the purview of section 14 of the Act. 5 ILCS 315/14 (West 2010). Section 14 prohibits the bargaining unit employees from striking, and sets up a mediation and arbitration procedure for resolving differences between the bargaining unit and the employer. 5 ILCS 315/14 (West 2010). It also provides that 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. 5 ILCS 315/14(l) (West 2010). It is this provision which the Employer was found guilty of violating.

¶ 4 The collective bargaining agreement (Agreement) between the parties expired on December 31, 2008, and the parties had begun negotiations for a successor Agreement. At the beginning of these negotiations, there were three divisions within the St. Clair County sheriff's department: the Road Deputy Division, the Correctional Unit Division, and the Court Security Division. Members of the Road Deputy Division were assigned to patrol the county roads, as well as to patrol that part of the regional mass transit system, MetroLink, which runs through St. Clair County.

¶ 5 The Employer's contract with MetroLink required that the Employer assign 12 sworn police officers to the MetroLink detail. While assigned to MetroLink duty, a deputy was expected to spend 80% of his shift on board a MetroLink train. While on a train, the deputy would engage in roving patrol duties, handle calls, check fares, issue citations, and provide assistance to riders. The remaining 20% of the deputy's shift would be spent in a squad car or on foot. While in his squad car, the deputy would occasionally make traffic stops and respond to crimes such as robberies and assaults.

¶ 6 A patrol deputy who was not assigned to the MetroLink detail would patrol county roads, handle traffic duties, and respond to other crimes, such as assaults, batteries, and murders. A road patrol deputy would spend roughly half of his time in his vehicle and half of his time on calls. Regardless of which duty a patrol deputy was assigned to, they all received the same wages and benefits.

¶ 7 The parties first met in negotiations on February 3, 2009, and the Union presented its proposals to the Employer. On April 23, 2009, the Employer responded to the Union's proposals and offered its own proposals, including a modification in the Agreement to provide for a two-tiered pay and benefits system for deputies assigned to MetroLink duty:

"Create a Tiered Compensation System for new hires or non-probationary entry level deputies assigned to the MetroLink. Persons assigned to the MetroLink shall remain in the assignment for a minimum of 3 years. Such tiered system would have a separate base wage rate and longevity scale. There would be no 'buyout' provisions for sick leave or other benefits subject to 'buyout' provision because MetroLink will not reimburse the Employer for such costs. Seniority would still accrue from the date of hire."

The Employer again proposed this two-tiered system to the Union on May 4, 2009.

¶ 8 On May 5, 2009, the Union rejected the two-tiered proposal and made additional proposals of its own. The Union did not offer an alternative or counterproposal to the Employer's proposal of the two-tiered system. On June 2, 2009, the parties met and further discussed how the two-tiered system would work. At this meeting, the Employer indicated to the Union that it might withdraw the proposal and instead create a different division for officers performing the MetroLink patrol, which it believed would fall outside of the parties' collective bargaining agreement.

¶ 9 The parties met again on June 9, 2009, and the Union set forth its position that the

status quo, a single-tiered system in which the patrol deputies assigned to MetroLink would receive the same pay and benefits as those deputies assigned to road patrol, should be maintained. The parties reached an impasse in negotiations, and they proceeded to mediation in September 2009 and then to arbitration. The MetroLink issue was not submitted to mediation or arbitration by either party.

¶ 10 On January 11, 2010, the Union learned that the Employer was going to proceed with its plan to create a new division for MetroLink assignments, staff it with new hires outside of the bargaining unit, and pay them less than the Union's patrol deputies. On January 13, 2010, the Union sent the Employer a letter warning that the Employer was obligated to maintain the status quo during arbitration proceedings. Believing that the issue was already subject to negotiations, the Union did not explicitly demand to negotiate over creation of the new division.

¶ 11 On April 12, 2010, the Employer announced that it was creating a new MetroLink Patrol Division with a different pay scale and benefit level than the road patrol division. The memorandum announcing this action stated, "This new division was created out of necessity and to promote longevity for our department." It further stated that these new positions would not eliminate current positions but would replace positions through attrition. The memorandum repeated, "This division was created to save money and help keep the department going into the future."

¶ 12 A new employee was promptly hired, given a nearly identical uniform to that of bargaining unit employees, and assigned to patrol MetroLink alongside bargaining unit employees. This employee was a sworn peace officer but was not included in the bargaining unit. The new MetroLink deputies are expected to handle fewer felony calls than road patrol deputies and do not go to murder scenes or domestic battery scenes. Both road patrol deputies (members of the bargaining unit) and the new MetroLink patrol deputies

(nonbargaining unit employees) now perform the same duties side by side on MetroLink patrol; however, the new MetroLink deputies are paid less and receive fewer benefits than the road patrol deputies doing the same work.

¶ 13 The Union filed this unfair labor practice charge against the Employer on May 21, 2010. The complaint for hearing alleged that the transfer of MetroLink patrol duties to a nonbargaining unit employee concerns the wages, hours, or working conditions of bargaining unit employees and is a mandatory subject of bargaining within the meaning of section 7 of the Act (5 ILCS 315/7 (West 2010)), that by implementing the change without the consent of the Union the Employer had failed to maintain existing terms and conditions of employment during the pendency of interest arbitration proceedings in violation of section 14(l) of the Act (5 ILCS 315/14(l) (West 2010)), and that by this conduct the Employer has failed and refused to bargain in good faith with the Union, in violation of sections 10(a)(4) and (a)(1) of the Act (5 ILCS 315/10(a)(4), (a)(1) (West 2006)).

¶ 14 A hearing was held before an administrative law judge on October 14, 2010. In its posthearing brief, the Employer argued that it had not changed the status quo for the road deputy bargaining unit when it created the new MetroLink patrol division. The road deputies continue to perform MetroLink patrol alongside the MetroLink patrol division deputies and the wages, hours, and terms and conditions of employment for the road deputies as they perform MetroLink patrol have not changed. There have been no layoffs as a result of the creation of the MetroLink patrol division.

¶ 15 The Employer also argued that there can be no wrongful refusal to bargain where the Union never requested to bargain over the creation of the MetroLink patrol division. Finally, the Employer argued that under *Central City Education Ass'n v. Illinois Educational Labor Relations Board*, 149 Ill. 2d 496 (1992), the creation of the MetroLink patrol division was not a subject of mandatory bargaining because it did not affect the wages, hours, or terms and

conditions of employment, and it was an exercise of inherent managerial authority under section 4 of the Act (5 ILCS 315/4 (West 2010)). In any event, the Employer argued, any benefits of bargaining are outweighed by the burden placed on the Employer thereby. The Employer argued that the creation of the MetroLink patrol division did not alter the status quo in violation of section 14(l).

¶ 16 On March 8, 2011, the administrative law judge issued his recommended decision and order. The administrative law judge framed the issue as whether the Employer had changed existing wages, hours, or other terms and conditions of employment during the pendency of an arbitration proceeding and, by so doing, had failed and refused to bargain in good faith with the Union in violation of sections 10(a)(4) and (a)(1) of the Act. The administrative law judge characterized the Employer's defenses to the charge as being that the Employer did maintain the status quo *with respect to bargaining unit members*, and that the Union failed to request to negotiate as required by the Act.

¶ 17 The administrative law judge analyzed the facts of the case pursuant to *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205-07 (1998),<sup>1</sup> to determine whether the creation of the MetroLink patrol division was a subject of mandatory bargaining or was an exercise of the Employer's inherent managerial authority over which no bargaining was required. The judge concluded that the decision to transfer work from bargaining unit to nonbargaining unit employees is a mandatory subject of bargaining because it affects the wages, hours, and working conditions of the original bargaining unit. The creation of the MetroLink patrol division concerned the wages, hours, and terms and

---

<sup>1</sup>*City of Belvidere*, 181 Ill. 2d 191, discussed the analysis set forth in *Central City Education Ass'n v. Illinois Educational Labor Relations Board*, 149 Ill. 2d 496 (1992), relied upon by the Employer.

conditions of employment because its impact includes a loss of actual or potential bargaining unit work. The administrative law judge concluded, however, that because the creation of the new division was a cost-saving measure which could implicate the standards of protective services offered by the Employer, the Employer's action could also be viewed as a matter of inherent managerial authority. Accordingly, as required by *City of Belvidere*, 181 Ill. 2d at 206, the administrative law judge balanced the benefits of bargaining against the burdens that bargaining would impose on the Employer's authority. The judge concluded that, because the issue in the case at bar is chiefly an economic issue—that is, the MetroLink patrol division was created to save labor costs—the issue was particularly amenable to bargaining and the benefits outweighed the burden. Accordingly, the Employer had failed and refused to bargain in good faith over a mandatory subject of bargaining in violation of the Act.

¶ 18 With respect to the Employer's argument that the Union had failed to request to bargain as required by section 4 of the Act, and that without such a request the Employer cannot be found to have wrongfully refused to bargain, the judge concluded that the parties had already been in negotiations about the creation of the MetroLink patrol division and no demand to bargain was required. In any event, section 14(*l*) requires that neither party change the status quo without the other's consent, and no such consent was sought or obtained by the Employer.

¶ 19 The administrative law judge concluded that the Employer, in contravention of section 14(*l*) of the Act, had changed existing wages, hours, and other conditions of employment of its patrol deputies during the pendency of an arbitration proceeding and, by doing so, had failed and refused to bargain in good faith with the Union, in violation of sections 10(a)(4) and (a)(1) of the Act. The judge recommended that the Employer be ordered to cease and desist from implementing its creation of the MetroLink patrol division and from failing and refusing to bargain in good faith with the Union as to the creation of the MetroLink patrol

division. The administrative law judge further recommended that the Employer be ordered to make whole any bargaining unit employees for all losses incurred as a result of the creation of the MetroLink patrol division, including back pay and interest at 7% per annum.

¶ 20 The Employer filed its exceptions to the recommended decision and order of the administrative law judge on April 13, 2011. For the first time, the Employer raised the argument that it had created the MetroLink patrol division pursuant to section 2.01 of the parties' expired collective bargaining agreement, a "management rights" clause, and that by agreeing to this clause in the original Agreement, the Union had waived its right to bargain over the creation of the MetroLink patrol division. This "management rights" clause provided that the Union recognized the Employer's sole and exclusive right to operate and direct the sheriff's department in all aspects, including the rights to "plan, direct, control, assign and determine the operations or services to be conducted by officers" and to "determine the methods, processes, means, job classifications and number of personnel" by which operations are to be conducted.

¶ 21 The Employer argued for the first time in its exceptions that the creation of the MetroLink patrol division fell within this management rights clause and that the Union had agreed to this management rights clause in the original Agreement and had thereby waived any right to bargain over the creation of the MetroLink patrol division. The Employer argued that "the language of Section 2.01, agreed to by the Union[,] reflects the Union's intent to waive its right to bargain over issues of reorganization, job classifications and assignment of duties."

¶ 22 The Employer argued that the administrative law judge had erred in finding that the creation of the MetroLink patrol division had changed the status quo because the status quo was defined by the existing Agreement, and that Agreement provided, in the management rights clause, that the Employer had authority to create the MetroLink patrol division without

bargaining. Accordingly, the Employer had not changed the status quo by creating the MetroLink patrol division without bargaining, but had maintained the status quo.

¶ 23 The Employer argued the administrative law judge had also erred in determining that the Employer had changed the status quo because the judge had failed to recognize that the employees had no reasonable expectation in the continuation of the MetroLink patrol duties. The Employer argued that in determining the status quo, the administrative law judge was obligated to examine whether the bargaining unit employees had a reasonable expectation in the continued performance of MetroLink patrol duties, which they did not because those duties were dependent on MetroLink and its contract with the Employer. The administrative law judge failed to consider that the status quo was that the employees had no reasonable expectation in the continued performance of the MetroLink patrol duties.

¶ 24 The Employer also argued that the administrative law judge erred in finding that the benefits of bargaining over the creation of the MetroLink patrol division outweighed the burdens of bargaining because the Union failed to offer any counterproposal to the creation of a separate division to patrol MetroLink which addressed the basis of the Employer's decision. Finally, the Employer argued that the administrative law judge erred in awarding a "make whole" remedy.

¶ 25 On June 27, 2011, the Board issued its decision and order adopting the recommended decision and order of the administrative law judge for the reasons set forth by the judge. With respect to the Employer's exceptions, the Board held as follows.

¶ 26 The Board rejected the Employer's argument that it had not changed the status quo because the Union had waived its right to bargain over the creation of the MetroLink patrol division by virtue of the "management rights" clause. The Board held that this was an affirmative defense which had been forfeited by the Employer because it was not raised until after the administrative law judge had ruled.

¶ 27 The Board rejected the Employer's argument that the administrative law judge erred in failing to consider the reasonable expectations of the employees in determining the status quo. The Board pointed out that the Employer had transferred bargaining unit work out of the unit and that this necessarily affects the bargaining unit members' terms and conditions of employment. The Board pointed out that the effect on employees from such a transfer of bargaining unit work inheres from its impact on the unit as a whole, not merely from the consequences on individual unit members. Thus, the fact that no presently employed bargaining unit member lost his job due to the transfer of bargaining unit work out of the unit is not dispositive. As a result, the Board held that it need not examine the bargaining unit employees' reasonable expectations of continued employment to determine whether the status quo was changed by the Employer where the Employer transferred bargaining unit work out of the bargaining unit.

¶ 28 The Board next rejected the Employer's argument that the administrative law judge erred in finding that the benefits of bargaining outweighed its burdens because the Union had failed to present any counterproposal. The Board held that the question was not whether the Union *did* make a proposal, but whether it was *capable* of offering proposals that were an adequate response to the Employer's concerns. Because the Employer's action was motivated by the Employer's desire to reduce labor costs, the subject was particularly amenable to bargaining and the benefits of bargaining did outweigh its burdens. Finally, the Board accepted the administrative law judge's decision in its entirety, including the "make whole" remedy.

¶ 29 On appeal, the Employer raises four arguments: that by virtue of its agreement to the "management rights" clause in the parties' Agreement, the Union waived any right to bargain over the creation of the MetroLink patrol division and therefore the Employer did not change the status quo; that the Employer's action did not change the status quo because the

bargaining unit members had no reasonable expectation in the continuation of the MetroLink patrol duties; that the benefits of bargaining did not outweigh its burdens where the Union did not offer any counterproposal to creation of the MetroLink patrol division; and that the Board erred in awarding a "make whole" remedy.

¶ 30 The Illinois Supreme Court established the standard for reviewing the decision of an administrative agency in *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204-05 (1998). The standard of review applicable to the agency's decision depends on whether the question presented is one of fact or of law. 181 Ill. 2d at 204.

¶ 31 An administrative agency's findings and conclusion on questions of fact are deemed to be *prima facie* true and correct. 181 Ill. 2d at 204. In examining an administrative agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of the agency. 181 Ill. 2d at 204. Instead, a reviewing court is limited to ascertaining whether such findings of fact are against the manifest weight of the evidence. 181 Ill. 2d at 204. The agency's factual determinations are contrary to the manifest weight of the evidence where the opposite conclusion is clearly evident. 181 Ill. 2d at 204.

¶ 32 On the other hand, an administrative agency's findings on a question of law are reviewed with less deference, on a *de novo* basis. 181 Ill. 2d at 205. The agency's decision on a question of law is not binding on the reviewing court. 181 Ill. 2d at 205.

¶ 33 Where a case involves an examination of the legal effect of a given set of facts, it involves a mixed question of fact and law. 181 Ill. 2d at 205. Thus, the applicable standard of review is somewhere between a manifest weight of the evidence standard and a *de novo* standard, so as to provide some deference to the agency's experience and expertise. 181 Ill. 2d at 205. In such a case, the "clearly erroneous" standard of review is appropriate to examine the agency's decision. 181 Ill. 2d at 205. An agency decision will be reversed because it is clearly erroneous only if the reviewing court, based on the entirety of the record,

is left with the definite and firm conviction that a mistake has been made. *Board of Trustees of the University of Illinois v. Illinois Labor Relations Board*, 224 Ill. 2d 88, 97-98 (2007). While this standard is highly deferential, it does not relegate judicial review to mere blind deference. 224 Ill. 2d at 98.

¶ 34 Finally, because the Board's remedial authority is a broad discretionary one, subject to limited judicial review, its remedial order is reviewed for an abuse of discretion. *Paxton-Buckley-Loda Education Ass'n v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 353 (1999).

¶ 35 We first address the Employer's argument that by virtue of the Union's agreement to the "management rights" clause in the parties' Agreement, the Union waived any right to bargain over the creation of the MetroLink patrol division. The Employer argues that the Board erred in construing this waiver argument as an affirmative defense which had to have been raised in the Employer's answer or be deemed forfeited.

¶ 36 We note that there is no indication in the record that the Employer raised as a defense, whether affirmative or otherwise, that its creation of the MetroLink patrol division was permitted without bargaining by the management rights clause of the parties' Agreement, until after the administrative law judge had issued his recommended decision and order. The Employer's prehearing memorandum, which presented three issues to be resolved at the hearing, did not include this issue as one to be resolved at the hearing. Accordingly, whether the issue of the management rights clause was an affirmative defense or not, the Board did not err in deeming it forfeited. See *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 279 (1989). The Employer's delay in raising this argument denied the Union the opportunity to develop facts in response and denied the Board the benefit of the administrative law judge's informed recommendation on the merits of the argument. Accordingly, the Board did not abuse its discretion in deeming the Employer's argument to be forfeited.

¶ 37 The Employer next argues that, in determining the status quo and whether the Employer changed it, the Board must consider whether the bargaining unit employees had a reasonable expectation in the continuance of the existing terms and conditions of employment. The Employer argues that, because the MetroLink patrols were subject to an agreement between the sheriff's department and MetroLink which MetroLink could terminate at any time, and indeed MetroLink had steadily been reducing the number of sheriff's department deputies it needed, the bargaining unit employees could not have reasonably expected to continue the MetroLink work.

¶ 38 The Board rejected this argument, finding that it did not matter what the employees' reasonable expectations were; the Employer changed the status quo by transferring bargaining unit work out of the unit. The Board held that, even if the employees did not reasonably expect to continue MetroLink work because a third-party contract could be changed, the Employer still changed the status quo when it transferred bargaining unit work out of the unit. The Board's decision is not clearly erroneous.

¶ 39 The Employer next argues that the Board clearly erred in holding that the benefits of bargaining over the creation of the MetroLink patrol division outweighed its burdens upon the Employer because the Union was not able to, and did not, offer any proposal which would address the basis of the Employer's decision to create the MetroLink patrol division.

¶ 40 In *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191 (1998), our supreme court discussed at length the three-pronged test for determining whether an issue is a mandatory subject of bargaining. The first prong of the test involves a determination of whether the matter is one of wages, hours, and terms and conditions of employment. 181 Ill. 2d at 206. The Board determined in the case at bar that the creation of the MetroLink patrol division was a matter of wages, hours, and terms and conditions of employment, and the Employer does not dispute this holding on appeal.

¶ 41 The second prong of the test considers whether the matter, in addition to affecting wages, hours, and terms and conditions of employment, is also one of inherent managerial authority. 181 Ill. 2d at 206. Again, the Board determined in the case at bar that the decision to create the MetroLink patrol division not only affected wages, hours, and terms and conditions of employment, but was also one of inherent managerial authority. The Employer does not challenge this holding on appeal.

¶ 42 If the answer to the second prong of the test is yes, as in the case at bar, the third prong of the test is whether the benefits of bargaining to the decisionmaking process outweigh the burdens that bargaining imposes on the Employer's authority. 181 Ill. 2d at 206. The Board held that because the Employer's decision to create the MetroLink patrol division was based chiefly on economic factors, the balance weighs in favor of bargaining.

¶ 43 The Employer argues on appeal that in order for bargaining to benefit the decisionmaking process, the Union must offer some proposal which addresses the basis of the Employer's decision. The administrative law judge found only that the Union *could theoretically* have offered concessions that would have addressed the Employer's financial concerns. The Employer argues that the Union must offer some proposal and could not and did not do so in the case at bar.

¶ 44 The Board rejected this argument, holding that the core of the analysis is whether the matter is amenable to bargaining. The Union need not present evidence that it offered proposals which benefitted the bargaining process. The Board need only consider whether the Union *is capable* of offering proposals which are an adequate response to the Employer's concerns. The instant action was particularly amenable to bargaining because the Employer's action was in large part motivated by its desire to reduce labor costs. Such economic concerns tend to be particularly amenable to bargaining. Thus, the Board held, the benefits of bargaining did outweigh the burdens of bargaining.

¶ 45 The Board's decision was not clearly erroneous. In *Chicago Park District v. Illinois Labor Relations Board*, 354 Ill. App. 3d 595, 603 (2004), the court pointed out that the benefits of bargaining an economically motivated decision can be substantial. The court also pointed out that the fact that contract negotiations concerning other issues were occurring at the same time is another indication that the subject would be amenable to bargaining because the existence of simultaneous negotiations on other issues would have facilitated the development of alternatives and concessions, and increased the opportunities for discussion.

¶ 46 The Employer argues that its decision to create the MetroLink patrol division was not solely motivated by economic factors, but was also a matter of maintaining standards of service, and that the Board ignored this fact. To the contrary, in its decision and order, the Board explicitly recognized that, though the Employer's decision was in large part motivated by its desire to reduce labor costs, the Employer "may have had additional concerns regarding its standards of service." The Board's finding in this regard is supported by the manifest weight of the evidence, and it is clear that the Board took this fact into consideration in concluding that the benefits of bargaining outweighed its burdens.

¶ 47 Finally, the Employer argues that the Board erred in ordering, as a remedy for its violation of the Act, that the Employer make the Union whole. The Board adopted the remedy recommended by the administrative law judge: that the Employer make whole any employees in the bargaining unit for all losses incurred as a result of the MetroLink patrol division that affect wages, hours, or terms and conditions of employment of those employees, including back pay plus interest at 7% per annum. The Employer argues that the evidence at the hearing established that the creation of the MetroLink patrol division did not result in a reduction in force or a reduction in hours, nor did it result in any damages to any bargaining unit employees. The Employer argues that a monetary damage award is punitive in nature, rather than compensating a loss or harm actually suffered. The Employer points out that the

Union failed to offer any evidence of monetary damages at the hearing and a "make whole" remedy is not supported by the evidence.

¶ 48 The appropriate standard under which to review a remedial order of the Board is whether the order constitutes an abuse of the Board's broad discretion. *Paxton-Buckley-Loda Education Ass'n v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 353 (1999).

¶ 49 Section 11(c) of the Act authorizes the Board to "take such affirmative action, including reinstatement of public employees with or without back pay, as will effectuate the policies of this Act." 5 ILCS 315/11(c) (West 2006). Section 11(c) further provides that if the Board awards back pay, it shall also award interest at the rate of 7% per annum. 5 ILCS 315/11(c) (West 2006). This statutory grant of power, at a minimum, permits the Board to fashion a remedy that will make the charging party whole. *Sheriff of Jackson County v. Illinois State Labor Relations Board*, 302 Ill. App. 3d 411, 416 (1999).

¶ 50 The evidence presented at the hearing established that three nonbargaining unit employees had been hired to do bargaining unit work, thus depriving three bargaining unit employees of that work. The Board did not abuse its discretion in ordering the Employer to make the bargaining unit employees whole.

¶ 51 For the foregoing reasons, the decision and order of the Board is hereby affirmed.

¶ 52 Affirmed.