STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

City of Decatur,	)	
	)	
Employer,	)	
	)	
and	)	Case No. S-DR-18-003
	)	
Decatur Police Benevolent and Protective Assoc. Labor Committee,	)	
	)	
Labor Organization.	)	

DECLARATORY RULING

On November 20, 2017, the Employer, the City of Decatur (City), unilaterally filed a Petition for Declaratory Ruling (Petition) with the General Counsel of the Illinois Labor Relations Board pursuant to Section 1200.143 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. The Petition seeks a determination as to whether proposals regarding compensatory time and holiday pay[1] offered by the City concern mandatory, permissive, or prohibited subjects of bargaining within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2016), as amended (Act), and if it is determined to be permissive, whether the subjects can be excluded from interest arbitration.

The Labor Organization, Decatur Police Benevolent & Protective Association Labor Committee (Union), objected to the Petition as untimely. I bifurcated the procedural and

[1] The City also included in the Petition a request for a determination on its proposal concerning employee attendance at the City's health fair. According to the transcript of the November 20, 2017 proceedings, however, it appears the Union agreed to the City's health fair proposal and the Union's merit brief was silent on this proposal. Accordingly, this Ruling will only address the City's compensatory and holiday time proposals.

substantive aspects and required parties to brief the issue of timeliness before addressing the merits. After considering briefs from both parties, I issued an Interim Ruling determining the Petition was timely filed and advising that the reasons for that determination would be set forth in my ruling on the substantive issues.

Parties submitted briefs on the merits of the Petition. Upon receiving the Union's brief on the merits, the City sought to file a response contending the Union raised an objection to the City's proposals that it had not raised previously. The Union submitted an email asserting that it represented its reply to the City's response. I granted the City's request and allowed the additional responses by both parties. For the following reasons, I find the proposals at issue to be mandatory subjects of bargaining.

I. BACKGROUND

The City of Decatur and the Decatur Police Benevolent and Protective Association Labor Committee, representing a unit comprising the City's full-time police officers and sergeants, are parties to a collective bargaining agreement dated May 1, 2012, through April 30, 2015 (2012-2015 CBA). Sometime in 2015, the parties began negotiations for a successor collective bargaining agreement. Unable to reach agreement, the parties proceeded to interest arbitration, selecting Arbitrator Robert Perkovich and scheduling the arbitration hearing for December 14, 2016.

On December 14, 2016, the parties and Arbitrator Perkovich had an off the record discussion about the status of negotiations and the parties' proposals. Based on these discussions and the nature of the outstanding issues, the arbitrator ordered the parties to return to the bargaining table and canceled the December 14, 2016 hearing. The arbitrator stated his order on the record; a copy of the transcript of the December 14, 2016 proceedings was submitted by both parties along

with their respective briefs. The transcript of the December 14 proceedings indicates neither party made opening statements or submitted any testimony or documentary evidence into the record.

Pursuant to Arbitrator Perkovich's order, the parties returned to the bargaining table, meeting on five subsequent dates and continuing to exchange proposals in May 2017. Still unable to reach an agreement, the parties notified Arbitrator Perkovich they needed to proceed to interest arbitration. The arbitration was then scheduled for November 20, 2017. Before the November 20, 2017 hearing date, the City sent the Union a package proposal addressing all open issues including the compensatory time and holiday pay proposals at issue here and submitted final offers during a pre-hearing conference at the November 20, 2017 hearing.

The City's final offer included the following proposals on compensatory time and holiday pay:

1. Compensatory Time

> (h) Officers required to work overtime pay may elect to receive compensatory leave time in lieu of pay at the rate of one and one-half (1 ½) hours leave for each hour of overtime worked. The election to take compensatory leave time shall be given to the officers shift commander in writing prior to the end of the pay period in which said overtime was worked. Such leave shall be taken at the convenience of the employee and the Department in the same manner that holiday time is taken and shall be taken during the ~~fiscal year~~ annual period of May 1 to the following April 30 in which it was accrued. If such leave is not taken during ~~the fiscal year~~ said annual period, any and all such time remaining on the books upon the commencement of the last pay period in ~~a fiscal year~~ said annual period shall be purchased by the Employer at the employee's then current rate of pay and the monies deposited by the Employer into the employee's Retirement Health Savings (RHS) account. Upon the commencement of the last pay period in ~~a fiscal year~~ in each said annual period, such accrued time shall not be available to the employee for cash or time off. Overtime worked during the last full pay period of ~~the fiscal year~~ said annual period and thereafter shall be compensated by pay or compensatory leave during the succeeding ~~fiscal year~~ annual period of May 1 to the following April 30. ~~Accumulation of compensatory time shall be limited to no more than 80 hours per employee at any given time. Overtime hours worked beyond that shall be paid at the overtime rate, and not eligible for conversion to compensatory time.~~ All (-compensatory-) time (-accrued-) **earned** in excess of eighty (80) **eighty-five (85)** hours during the annual period of May 1 to the

following April 30 shall be purchased by the Employer at the employee's then current rate of pay and the monies deposited by the Employer into the employee's RHS account. Such purchase of excess compensatory time shall be made at the end of each regular pay period so that the affected officer begins the following pay period with a balance of no more than (-eighty (80)-) **eighty-five (85**) hours of accumulated compensatory time off, up to and including (-eighty (80)-) eighty-five (85) hours, at any time. Officers may request compensation for any accrued compensatory time off, up to and including (-eighty (80)-) **eighty-five (85)** hours, at any time. Such compensation shall be made by regular payroll direct deposit on the next full pay period.

All costs associated with services provided by and opinions obtained from the IRS, if any, will be born equally by the City and the Union.

2. Holiday Pay

Section 4: A classified employee required to work on any of the authorized holidays shall be given equivalent time off. Employee holiday accumulations shall be capped at 26 holidays (208 hours) per fiscal year. Provided, however, any employee with an accumulation in excess of 208 on October 1, 2017, shall have a cap equal to the hours in effect on that date (until such time as an employee uses time from such bank which shall reduce the cap until such usage, if any, decreases the bank to 208 hours). Such time off shall be taken at the convenience of the employee and the Department. If holiday time in excess of the applicable cap is not taken during the fiscal year, any and all such holiday time in excess of the cap, upon the commencement of the last pay period in a fiscal year, shall be cashed out by the Employer at the employee's then current rate of pay and the monies deposited by an employee's 457 deferred compensation account or paid to the employee in cash, at the employee's option. Upon the commencement of the last pay period in a fiscal year, such accrued time above the applicable cap referred to above shall not be available to the employee for cash or time off. In addition, a classified employee required to work on the following holidays shall be paid one and one half (1 ½) times the regular rate of pay for said holidays:

Thanksgiving Day Christmas Day.

A classified employee required to work overtime on the holidays listed in this section shall be paid two (2) times the regular rate of pay for any time worked in excess of normally scheduled hours on the holidays. A classified employee called into work on the holidays listed in this section for which he/she is scheduled off shall be paid two (2) times the regular rate of pay for all time worked. A classified employee called into work from an approved paid leave day shall be shall be paid two (2) times the regular rate of pay, and shall retain the paid leave day for use at a later time or for cash buy out, depending upon the type of leave used and pursuant to the terms of this agreement. Holiday pay shall begin at the beginning of the shift on the holiday, and shall continue for the entirety of said shift.

The Union objected to these proposals at the November 20, 2017 proceeding, contending they both concerned permissive subjects of bargaining. Specifically, the Union contended that the City's compensatory time proposal would result in a waiver of rights under the Fair Labor Standards Act (FLSA) and violates certain provisions of the FLSA and corresponding regulations. Similarly, the Union contended the City's holiday pay proposal violated certain provisions of the Internal Revenue Service Rules and Regulations. The Union informed that arbitrator he could not consider these issues because the proposals concerned permissive subjects.

The City in turn contended its proposals concerned mandatory subjects of bargaining and advised the arbitrator of its intention to seek a declaratory ruling that same day, November 20, 2017. In view of the parties' positions and intentions, the arbitrator recessed the hearing until further notice.

II. RELEVANT STATUTORY PROVISIONS

The duty to bargain is set out in Section 7 of the Illinois Public Labor Relations Act, relevant portions of which provide:

> For the purposes 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.**
>
> The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act" unless agreed by the parties.

5 ILCS 315/7 (2016) (emphasis added).

Section 4 shields certain areas from the duty to bargain. Generally, it provides:

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

5 ILCS 315/4 (2016) (emphasis added).

Section 15(a) of the Act provides, in relevant part:

> In case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by this amendatory Act of the 96th General Assembly), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control.

5 ILCS 315/15(a) (2016).

III. ISSUES

The issues involved in this Petition are (1) whether the City's petition is timely filed and (2) whether the City's compensatory time and holiday pay proposals concern mandatory or permissive subjects of bargaining.

IV. DISCUSSION AND ANALYSIS

A. Whether the City's Petition is Timely Filed?

In my Interim Ruling issued on December 22, 2017, I informed the parties I would set forth the reasons for my ruling on timeliness along with my ruling on the substantive issues. For the reasons set forth below, I found the City's Petition timely filed.

The Union argued the City's Petition is untimely filed under Section 1200.143(b) of Board's Rules because the City filed it unilaterally, after the first day of the parties' December 14, 2016 interest arbitration hearing.[2] The Union claimed the Petition is "drastically more untimely" than the petition found to be untimely in Illinois State Police, 32 PERI ¶ 162 (IL LRB-SP G.C. 2016). The Union further asserted that I should not grant a variance from the Board's Rule to allow a late filing because doing so would result further delay of the interest arbitration proceedings which have been already delayed by the arbitrator's remand. Such delay would impair its right under Section 14 of the Act to have the interest arbitration proceeding concluded with in a reasonable amount of time and granting a variance would further delay unit members' wage increases under the City's most recent wage offer. Finally, the Union argued, contrary to Section 14 of the Act, the interest arbitration proceedings are indefinitely in recess and the City should be not be excused from its late filing because its conduct resulted in the recess.

The City countered that its petition is timely filed under Section 1200.143(b). It claimed the first day of the interest arbitration hearing was November 20, 2017, the date the Petition was filed, and not December 14, 2016. The City contends no hearing commenced on December 14, 2016, pointing to the lack of opening statements by the parties and the lack of any introduction of

[2] I note the Union did not contend that the Petition was untimely because it was filed on November 20, 2017.

evidence. In the alternative, the City asserted that if its petition is deemed untimely filed under Section 1200.143(b), I should grant a variance. The City argued that application of the regulatory deadline in this case would be unduly burdensome where the topics at issue only arose during the remand negotiations and the Union did not raise any objections or contend the City's proposals involved permissive subjects until November 20, 2017.

Section 1200.143(b) of the Board's Rules sets forth the procedures for filing petitions for declaratory ruling that address protective service employee bargaining units at issue here. It states that a party to an interest arbitration covering such protective service units may file a unilateral request for a declaratory ruling provided that it has "requested the other party to join it in filing a declaratory ruling petition[,]…the other party has refused the request[, and] the petition is filed *no later than the first day of the interest arbitration hearing*." 80 Ill. Admin. Code 1200.143(b) (emphasis added).

Here, the City's Petition is timely under Section 1200.143(b) because the City filed it on November 20, 2017, the first day of the interest arbitration hearing. I found the City's contention that the interest arbitration hearing had not commenced on December 14, 2016, persuasive. The City submitted the transcript of the December 14, 2016 proceeding in support of its arguments. According to the transcript, no opening statements were made by either party, no substantive issues were discussed on the record, and no testimony or other evidence was introduced. Indeed, all that occurred on December 14, 2016, was an off the record discussion and the arbitrator's ordering of the parties to go back to the bargaining table.

Although it also submitted the transcript of the December 14 proceeding as exhibit to its brief on timeliness, the Union fails to point to anything that occurred on December 14, 2016, indicating a hearing commenced. The Union merely refers to the General Counsel's declaratory

ruling in Illinois State Police, 32 PERI ¶ 162 (IL LRB-SP G.C. 2016) finding the petition in that case untimely under application of Section 1200.143(b) because it was filed after the first day of hearing. Id. The General Counsel, however, granted a variance and found the petition to be timely. Id. That case, however, is distinguishable because although no evidence regarding the *topics at issue* had been introduced on the day the employer filed the petition, the hearing process had commenced on *other* topics at issue. In the instant case, the transcript from the December 14, 2016 proceeding clearly shows that the hearing process had not yet started on that date.

Accordingly, the Petition is timely filed under Section 1200.143(b). Because the Petition is timely filed under application of the Board's rules, I need not address the City's alternative request for a variance.

B. Whether the City's Compensatory Time and Holiday Pay Proposals Concern Mandatory Subjects of Bargaining?

The City's proposals regarding compensatory time and holiday pay both concern mandatory subjects of bargaining.

1. Compensatory Time

The issue surrounding the City's compensatory time proposal centers on whether the proposal violates the FLSA and its corresponding regulations. The City maintains its proposal to change the cap on the accrual of compensatory time from eighty to eight-five hours does not violate the FLSA because that law sets a ceiling for the accrual of compensatory time and the proposal's cap is below that ceiling. Thus, the City contends its proposal concerns a mandatory subject of bargaining under a Central City analysis. See City of Belvidere v. Ill. State Labor Rel. Bd., 181 Ill.2d 191 (1998) (applying the analysis in Central City Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Relations Bd., 149 Ill. 2d 496 (1992)). The City further claims its proposal does not require the waiver of a statutory right under the FLSA, pointing to federal case law indicating that the FLSA

does not grant employees a right to compensatory time. The City also notes the FLSA and corresponding regulations requires employers to keep records of the number of compensatory hours earned and used by their employees.

According to the transcript of the November 20, 2017 proceedings, the Union initially objected contending the City's proposal to cap unit members' accrual of compensatory time unit members to eighty-five hours requires a waiver of statutory rights under the FSLA. In its brief, however, the Union does not explain this initial objection or offer additional support for it. Instead, the Union focuses its contentions on the proposal's failure to distinguish between contractual overtime and FLSA overtime and on the aspect of the proposal regarding unit members' requests to use compensatory time. The Union asserts the City's proposal violates federal law because it fails to separately account for compensatory time and contractual overtime. The Union further contends the City's proposal regarding unit members' use of compensatory time violates the FLSA and corresponding regulations citing Heitmann v. City of Chicago, 2007 WL 2739559 (N.D. Ill. Sept. 11, 2007).

In its supplemental response, the City contends the Union raised in its brief, for the first time, an objection to the City's proposal affecting unit members' use of compensatory time which it claims violates the FLSA. The City further contends the language forming the basis of the Union's objection is current contract language and appears in the Union's compensatory time proposal. Finally, the City asserts the Union's objections pertain to the application of the proposal's language requiring a factual determination thereby removing it from my review under the declaratory ruling process under 80 Ill. Adm. Code 1200.143(b)(2).

The City's arguments, explanation of the FLSA in relation to its proposal, and the authority it offers in support of its contentions, are persuasive. The accrual and use of compensatory time

obviously affect wages, hours, or conditions of employment, and as the City claims, concern a mandatory subject of bargaining.

The Union's contentions that the proposal somehow violates the FLSA or requires a waiver of rights under it are unavailing. The Union's brief fails to explain how the proposal violates federal law or requires a waiver of rights and merely offers broad assertions that are not supported by the authority identified. For example, the Union's claim that the proposal's failure to distinguish between contractual and compensatory overtime in recordkeeping, misapprehends the very regulation it cites as support. See 29 C.F.R. § 553.50. A review of that regulation, reveals the regulation merely requires employers to keep of record of the number of hours of compensatory time earned, used, and compensated in cash and does not impose the requirements the Union claims.

The Union also points to Heitmann v. City of Chicago in support of its claims that the FLSA regulations require distinguishing of contractual and FLSA overtime and employers to allow employees to use compensatory time requested within a "reasonable period" as long as the use does not "unduly disrupt" the employer's operations. A review of that case reveals the Union's reliance on it is misplaced. Indeed, a further review of the Heitmann case actually lends support to the City's arguments regarding the cap on accrual of compensatory time. See Heitmann, 2007 WL 2739559 at *8-9. The Union's reliance on other cases is likewise misplaced.

Regarding contractual versus FLSA overtime, the court was merely noting the facts of the case involved two types of overtime, contractual and FLSA, and that the City of Chicago kept separate accounts for each type. See Heitmann, 2007 WL 2739559 at *4-5. The court did not state that the FLSA or its regulations required separate recordkeeping. See id.

Finally, I disagree with the Union regarding the aspect of the City's proposal on an employee's request to use compensatory time. Although the FLSA may require employers to allow its employees to use compensatory time, nothing in Heitmann or the FLSA compels a finding that the parties are not obligated to bargain over how compensatory time will be used. The proposal obviously affects wages, hours, or terms and conditions of employment and, on its face, does not violate the FLSA or require waiver of rights, under the FLSA or otherwise. Accordingly, I find the City's compensatory time proposal to concern a mandatory subject of bargaining.

2. Holiday Pay

The parties each make similar arguments regarding the City's holiday pay proposal as they did with compensatory time. The holiday pay proposal caps the accrual of holiday time and "grandfathers" employees who have accumulated holiday time over the proposed cap. Unused holiday time exceeding the cap would be "cashed out" at the employee's then rate of pay and the employee can choose to be paid directly or have the resultant monies placed in a deferred compensation account. The City contends its holiday pay proposal is a mandatory subject of bargaining because it involves wages, hours, or terms and conditions of employment. The Union claims the proposal violates federal law, in this case, the Internal Revenue Service code, so it is a permissive subject under Section 7 of the Act.

The Union asserts Section 457 of the Internal Revenue Service code governs the taxing of deferred compensation plans. 26 U.S.C.A. § 457, I.R.C. § 457. The Union claims the City's proposals are in direct conflict with 26 U.S.C.A. § 457, I.R.C. § 457 (e)(11) which provides in relevant part: "Certain plans excluded.—(A) In general. – The following plans shall be treated as not providing for the deferral of compensation: (i) Any bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan." Id.

The Union argues that although holiday time is not expressly included in Section 457(e)(11), the IRS "treats all paid time off the same" and alleges holiday time at the City of Decatur is a "bona fide" paid time off system. The Union also claims the proposal violates the IRS code because it fails to specify contribution limits citing Section 1.457-11 of the IRS code. See 26 C.F.R. 1.457-4.

The City counters the holiday proposal is "entirely consistent" with the IRS code noting the decision to defer holiday pay and how much to defer is at the employee's discretion. The City further alleges that all holiday compensation is currently taxed.

Admittedly, I have little to no experience in interpreting the tax ramifications of deferred compensation plans, and the Union, the party claiming the proposal to be violative of the IRS code, offers little assistance in that regard. Instead, the Union offers broad assertions pointing to authority that either does not support its arguments outright or fails to adequately articulate how that authority provides the support the Union claims. For example, the Union contends that although Section 457(e)(11) does not reference holiday time, it can be inferred because the IRS treats all paid time off, including holiday time, in similar fashion. In support, the Union cites to an explanation from the IRS website, entitled "Bona fide sick leave and vacation leave plans," which discusses whether a plan is "bona fide" but only in terms of vacation and sick leave, and not paid time off in general as the Union claims.

On its face Section 457(e)(11) does not include holiday time and the IRS explanation cited by the Union only addresses "bona fide" sick time and vacation time. So, I cannot conclude that the holiday pay proposal at issue here violates Section 457(e)(11). Similarly, the City's proposal does not appear to violate those regulations cited by the Union relating to contribution limits.

Section 7 of the Act obligates parties to "negotiate over any matter with respect to wages, hours and other conditions of employment, . . . not specifically in violation of the provisions of any law" and instructs that "[i]f 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] and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws." As noted above, the holiday proposal concerns wages, hours, or other terms and conditions of employment, and because the proposal does not specifically violate the IRS code as the Union asserts, I conclude the proposal concerns a mandatory subject of bargaining.

V. CONCLUSION

For the above reasons, I find the City's compensatory time and holiday pay proposals concern mandatory subjects of bargaining.

Issued in Chicago, Illinois, this 26th day of March, 2018.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD

/s/ Helen J. Kim

Helen J. Kim
General Counsel