STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Oak Lawn Professional Fire Fighters Association, Local 3405, International Association of Fire Fighters,	)	
Charging Party	)	Case No. S-CA-09-007-C
and	)	
Village of Oak Lawn,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED COMPLIANCE DECISION AND ORDER

On July 28, 2008, the Oak Lawn Professional Fire Fighters Association, Local 3405, International Association of Fire Fighters (Charging Party or Union) filed a charge with the Illinois Labor Relations Board's State Panel (Board) alleging that the Village of Oak Lawn (Respondent or Village) engaged in unfair labor practices within the meaning of Sections 10(a)(4) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2012) when it refused to bargain over a mandatory subject of bargaining—minimum shift manning. In 2009, the ALJ found the Respondent violated the Act and awarded a make-whole remedy including a return to the status quo ante. In 2010, the Board affirmed the ALJ's determination. The Respondent appealed the Board's decision to the Illinois Appellate Court. In 2011, the Union filed a petition for enforcement of the Board's Order and the Board assigned the case to a Compliance Officer for investigation. In that same year, the Appellate Court affirmed the Board's 2010 Order. In 2015, the Compliance Officer issued a Compliance Order finding that the Respondent had not sufficiently demonstrated that it had complied with the Board's Order. He ordered the Respondent to pay the Union approximately $3.1 million in backpay. The Respondent objected to the backpay order and the Board assigned the case to the undersigned. A more detailed procedural history follows below.

I. BACKGROUND

The relevant background to this compliance RDO includes a grievance that arose from a

collective bargaining agreement, effective from 2003 to 2006; the parties' concurrent negotiations for a successor agreement, effective 2007 to 2010, from which the unfair labor practice arose; the parties' 2014 interest arbitration proceedings; and the parties' current negotiations for yet another contract. The extensive procedural histories of the grievance and the charge complicate a chronological narrative because the parties engaged in parallel litigation. Accordingly the summary below addresses the relevant matters in the following order: (1) the factual background applicable to the grievance and the unfair labor practice charge; (2) the procedural history of the parties' grievance and various contract negotiations; and (3) a detailed procedural history of the unfair labor charge up to compliance.

1. Facts Relevant to the Charge and the Grievance

The Union and the Respondent were parties to a collective bargaining agreement with a term of January 1, 2003 through December 31, 2006. The parties began negotiating a successor agreement in late 2006 or early 2007, but the terms of the expired contract remained in place during that time as the status quo. That expired contract included a minimum manning provision, an overtime provision, and an overtime distribution provision. The minimum manning provision did not expressly include a set number of employees required for each shift. Instead, it addressed apparatus manning and stated the following in relevant part:

> 7.9 Minimum Manning
>
> a. The parties recognize that for purposes of efficient response to emergency situations and for reasons of employee safety, sufficient personnel and apparatus need to be maintained in a state of readiness at all times. If the number of on duty personnel falls below the daily minimums, employees shall be hired back pursuant to Section 6.4. "Overtime Distribution."
>
> b. The Village shall exercise its best efforts to maintain the following apparatus minimum manning requirements:

On each engine:	four (4) employees
On each ALS ambulance:	two (2) paramedics (EMPT)
On each BLS ambulance:	two (2) employees (EMTA or EMPT)
On each squad:	three (3) employees

The Respondent had staffed each shift with 21 employees per shift since 1998. In December 2007, the Respondent's Fire Chief announced that the Department would discontinue

the policy of using a minimum of 21 personnel as of January 1, 2008, and that the use of overtime for replacement personnel could only be used with the authorization of the Chief. To implement this change, the Department issued a directive that if manning fell below 21, the Department would take a squad out of service. The Department later issued a revised directive that if manning fell below 21, the Department would reduce engine manning to three employees on an engine.

2. Procedural History of the Grievance and the Parties' Various Contract Negotiations

In January 2008, the Union filed a grievance alleging that the Respondent had violated the parties' 2003-2006 agreement by reducing shift manning below 21 employees per shift and by failing to call firefighters in to perform overtime when manning fell below that number. The grievance proceeded to arbitration before Arbitrator Stanley Kravit.

Before the Arbitrator, the Respondent argued that the contract permitted it to reduce shift manning below 21 because the contract did not require the Respondent to maintain in service any particular types of equipment, any specific numbers of pieces of equipment, or any total number of firefighters per shift. The Union argued that the contract incorporated the Respondent's long-established policy of maintaining certain equipment types and numbers: three engines, three ambulances,[1] and one squad. In turn, it asserted that the contract required shift manning at 21 employees because that number was a function of agreed-upon apparatus manning and the number/types of equipment the Respondent had historically used.

On September 23, 2008, Arbitrator Kravit issued an award finding that the Respondent violated the parties' collective bargaining agreement when it reduced manning below 21 employees per shift by removing equipment from service. He reasoned that, "based on contract language, testimony regarding the original negotiations, and past practice, the Union has proved that the parties intended and maintained for 15 years under five contracts a mutual commitment to assign 21 employees per shift." His remedy required the Respondent pay employees for the overtime work they would have performed between January 2008 and September 28, 2008, had the Respondent called them back to work when manning fell below 21 employees per shift.

[1] As acknowledged by the Arbitrator, the Village no longer operates a BLS ambulance and instead has three ALS ambulances.

In the award, the Arbitrator explained the meaning of the phrase "21 employees per shift" by performing a calculation based on the parties' agreed-upon historical practices. Initially, he acknowledged that the parties' practices did not reflect the contract language. Although the contract stated that the Respondent would use two ambulances, the Respondent in fact used three. Similarly, although the contract stated that the Respondent would man each squad with three employees, the parties had agreed for the last 10 years that the Respondent would man a squad with only two employees. The Arbitrator considered these agreed-upon deviations from the written contract and arrived at the number of "21 employees per shift" by performing the following calculation: "each shift had three engines – requiring 12 employees; 3 ambulances – requiring 6 employees; and one squad manned by two employees...[t]hese 20 are supplemented by the Battalion Chief as Shift Commander." The Arbitrator stated that he used the number 21 to refer to the total number of employees on the shift under these apparatus manning conditions because that was the number used by the parties to reflect their established state of affairs.

Sometime in September 2008, the parties proceeded to interest arbitration before Arbitrator Robert Perkovich to reach a successor contract to their 2003-2006 agreement. The Respondent objected to the arbitrator's consideration of minimum shift manning proposals and his inclusion of any such proposals in an award.[2] The parties ultimately reached agreement on a contract in November 2008 without Perkovich's aid. The parties' successor contract, effective January 1, 2007 to December 31, 2010, incorporated the very language on minimum shift manning that was at issue in the grievance.

Meanwhile, the Respondent filed a motion before the circuit court to vacate the Arbitrator's award on the grounds that the Arbitrator exceeded his powers and that the award did not draw its essence from the parties' agreement. The Union opposed the motion. It filed a counterclaim to confirm the arbitration award and then moved for summary judgment. In support of its motion, the Union described the parties' past practice, the Respondent's conduct at issue in the grievance, and the Arbitrator's award as follows:[3]

> **Past practice:**
>
> The minimum manning level remained at 22 until about 1998. At that time, the Union and the Village agreed to reduce the minimum staffing level to twenty-one (21).

[2] This conduct formed the basis for the Union's unfair labor practice charge.
[3] The headings are mine. The Union's citations to the record are omitted.

The reduction was accomplished by reducing manning on the squad to a minimum of two. After the reduction, equipment and staffing was distributed as follows:

3 engines	4 members per engine	12 members
3 ambulances	2 members per ambulance	6 members
1 squad	2 members	2 members
1 shift commander		1 member
		21 members

Respondent's conduct:

On January 1, 2008, the Village shut down the squad, failed to hire back personnel for overtime, and operated with less than 21 personnel. It had never done so over a span of nearly twenty (20) years.

The Arbitrator's Award:

Finally, the arbitrator considered the parties' past practice, and noted that the Village did not deny the existence of a practice of assigning 21 firefighters per shift (after the parties had agreed to reduce the number from 22). Accordingly, the Arbitrator concluded that, based on contract language, testimony regarding the original negotiations, and past practice, the parties had intended and maintained for 15 years a mutual commitment to assign (first 22 then) 21 employees per shift [sic].

The circuit court denied the Respondent's motion to vacate the award and granted the Union's motion for summary judgment.

On June 30, 2011, the Appellate Court affirmed the lower court's denial of the Respondent's motion to vacate the award. The Court summarized the Arbitrator's reasoning, stating that "the 22 personnel minimum manning requirement (***later reduced by agreement of the parties to 21***) was expressed in the Agreement as a distribution of personnel among the various types of equipment that the parties had been utilizing." Vill. of Oak Lawn v. Oak Lawn Professional Firefighters Ass'n Local IAFF, 2011 WL 10068742 at 9 (1st Dist. 2011) (emphasis added). The Court held that the Arbitrator's "interpretation of the parties' contract to include a minimum manning requirement of 21 personnel per shift" was not "inherently unreasonable." Vill. of Oak Lawn, 2011 WL 10068742 at 19.

On June 4, 2012, the Respondent complied with the backpay order in the Kravit award. The backpay totaled $285,866.72 and covered the period between January 1, 2008 and October 15, 2008.

In 2014, the parties proceeded to interest arbitration on their successor contract before Interest Arbitrator Edward Benn. The Union proposed to maintain the status quo language on manning. The Respondent proposed to change the status quo on manning and offered the following language, based off of the prior contract's terms. Underscored text indicates language added to the prior contract's terms, strike-through text indicates removed language, and plain text indicates language that remained unchanged:

> **Section 7.9 Minimum Manning.**
>
> The daily shift staffing should consist of 21 employees. However, if staffing falls below 21 personnel, the employer may modify the staffing on each apparatus as follows:
>
> On each engine (or quint): four (4) employees, unless daily staffing on each engine (or quint) may be reduced to three (3) employees on any or all of the engines (or quint)(the staffing on any engine (or quint) shall not be less than three (3) employees on any day; should staffing be insufficient to staff each engine (or quint) with a minimum of three (3) employees, employees will be hired back pursuant to Section 6.4 "Overtime Distribution"). The Fire Chief shall have the sole discretion to determine whether staffing on any engine (or quint) should be reduced to three (3) employees any time the daily staffing falls below 21 employees.
>
> On each ALS ambulance: two (2) paramedics EMTP)
> On each BLS ambulance: two (2) employees
> (EMTA or EMTP)
> On each squad: three (3) ~~two (2) employees~~
>
> The Village shall exercise its best efforts to maintain at a minimum the following employees in the described ranks:
>
> Twelve (1) Lieutenants
> Eighteen (18) Engineers
> Twenty-four (24) Firefighter/Paramedics

On July 7, 2014, Arbitrator Benn issued his Award (Benn Award) and granted the Union's proposal to maintain the status quo language.

In 2015, the parties began negotiations for a successor agreement to the 2014 Benn

Award. During negotiations, the Union made a proposal on minimum manning and the Respondent offered two package counterproposals. Under both counterproposals, the Respondent would agree to withdraw its objection to a pending unit clarification petition filed by the Union if the Union accepted the Respondent's minimum manning terms. The minimum manning portion of the Respondent's first package proposal provides the following in relevant part:

> The parties' 2003-2006 collective bargaining agreement includes the following minimum manning clause:
>
> The parties recognize that for purposes of efficient response to emergency situations and for reasons of employee safety, sufficient personnel and apparatus need to be maintained in a state of readiness at all times. If the number of on duty personnel falls below the daily minimums, employees shall be hired back pursuant to Section 6.4. "Overtime Distribution."
>
> The parties agree that the daily minimums shall be:
>
> - 21 bargaining unit personnel until April 30. 2015
> - 20 bargaining unit personnel from May 1, 2015 to October 31, 2015
> - 19 bargaining unit personnel from November 1, 2015 to April 29, 2016
> - 18 bargaining unit personnel beginning on April 30, 2016
>
> The Village shall exercise its best efforts to maintain the following apparatus minimum manning requirements:
>
> | | |
> |---|---|
> | On each engine: | ~~four (4)~~ three (3) employees |
> | On each ALS ambulance: | two (2) paramedics (EMTP) |
> | On each BLS ambulance: | two (2) employees (EMTA or EMTP) |
> | On each squad: | ~~three (3)~~ two (2) employees |
>
> The Village shall exercise its best efforts to maintain at a minimum the following employees in the described ranks:
>
> twelve (12) Lieutenants
> eighteen (18) Engineers
> twenty-four (24) Firefighter/Paramedics
> three (3) Battalion Chiefs
> three (3) Captains

The minimum manning portion of the Respondent's second package proposals provide the following in relevant part:

(a) The parties recognize that for purposes of efficient response to emergency situations and for reasons of employee safety, sufficient personnel and apparatus need to be maintained in a state of readiness at all times. If the number of on duty personnel falls below the daily minimums, employees shall be hired back pursuant to Section 6.4. "Overtime Distribution."

(b) The parties agree that the daily minimums shall be:

- 21 bargaining unit personnel until April 30, 2015
- 20 bargaining unit personnel from May 1, 2015 to October 31, 2015
- 19 bargaining unit personnel from November 1, 2015 to April 29, 2016
- 18 bargaining unit personnel beginning on April 30, 2016

(c) Apparatus Staffing will reflect the current Firefighter Agreement, except that the Chief may in his discretion staff an engine with three (3) personnel and a squad with two (2) personnel.

(d) Overtime shift minimum staffing will ~~reflect the current Firefighter Agreement~~ be determined by the Chief, consistent with paragraphs b and c above.

3. Detailed Procedural History of the Unfair Labor Practice Charge

On July 28, 2008, the Union filed an unfair labor practice charge with the Board alleging that the Respondent violated Sections 10(a)(4) and (1) of the Act by refusing to bargain over minimum shift manning during the parties' negotiations over their 2007-2010 contract. The basis for the alleged refusal to bargain was the Respondent's objection to the inclusion of the topic of minimum manning in any interest arbitration award. The charge was investigated in accordance with Section 11 of the Act.

On March 11, 2009, the Board's Executive Director issued a Complaint for Hearing. The case was assigned to Administrative Law Judge (ALJ) Sylvia Rios. The parties waived their right to a hearing and proceeded on a stipulated record.

On October 23, 2009, ALJ Rios issued a Recommended Decision and Order (RDO). She stated that there was no dispute that the Respondent failed to bargain with the Union over the subject of minimum manning and therefore limited her discussion to whether minimum shift

manning was a mandatory subject of bargaining. In finding that it was, the ALJ held that the Respondent violated Sections 10(a)(4) and (1) of the Act when it refused to bargain over a provision of the parties' collective bargaining agreement concerning minimum manning. Accordingly, the ALJ directed the Respondent to (1) bargain in good faith with the Union over minimum manning; (2) rescind any unilateral changes to minimum manning made on or after September 2008; (3) make the Union whole for all losses incurred as a result of any changes to minimum manning it made in or after September 2008; and (4) post a notice.

The Respondent filed exceptions to the ALJ's decision. On October 29, 2010, the Board rejected the Respondent's exceptions and adopted the ALJ's RDO as a decision of the Board. On November 22, 2010, the Respondent appealed the Board's Order to the Illinois Appellate Court.

On August 18, 2011, the Union filed a Petition for Enforcement before the Board. The Board assigned the case to a Compliance Officer.

On September 7, 2011, the Appellate Court affirmed the Board's Order of October 29, 2010. The Respondent filed a Petition for Leave to Appeal to the Illinois Supreme Court. On November 30, 2011, the Illinois Supreme Court denied the Respondent's request for an Appeal.

II. COMPLIANCE OFFICER'S DECISION

On February 5, 2015, the Board's Compliance Officer issued a Compliance Order. The Compliance Officer held that the Respondent had not complied with the Board's Order. He stated that under the Kravit Arbitration Award (Kravit Award), the Respondent was required to man a shift with a total of 22 employees. According to the Compliance Officer, this total included those employees assigned to the required pieces of equipment set forth below and the shift commander (Battalion Chief). He made his calculation in the following manner:

3 engines	4 employees per engine	12 employees
3 ambulances	2 employees per ambulance	6 employees
1 squad	3 employees	3 employees
1 shift commander	1 employee	1 employee
		22 employees

The Compliance Officer rejected the Respondent's contention that minimum shift manning under the Award was a total of 21 employees per shift. He reasoned that the

Arbitrator's reference to 21 employees did not reflect the total number of employees per shift because it did not include the shift commander. Further, he found that the Kravit Award required the squad to be manned by three employees, instead of just two.

The Compliance Officer further reasoned that the Respondent's reading of the Award would allow the Respondent to perpetuate the conduct that triggered the grievance and the unfair labor practice charge. Similarly, he claimed that the Respondent's interpretation of the contract (and the Award) were the same ones rejected by the Arbitrator, the ALJ, and the Courts. He explained that the Respondent's arguments in the parties' later interest arbitration over a successor contract demonstrated that the Respondent's interpretation of the Award was incorrect. At interest arbitration, the Respondent sought to change the manning clause by setting minimum manning at a total of 21 employees per shift and by setting minimum squad manning to two (2) employees on a squad. The Compliance Officer reasoned that the Respondent's proposals would have no purpose if the status quo already required what the Respondent proposed as a change.

The Compliance Officer stated that the backpay period covered January 1, 2009 through to the present. He directed the Respondent to provide a backpay report identifying those individuals the Respondent would have called back to perform overtime on the days that the Respondent allowed shift manning to dropped below 22 employees per shift. Based on this backpay report, the Compliance Officer found that the Respondent owed the Union a total of **$3,163,801.73** in backpay.

III. RESPONDENT'S OBJECTIONS, THE UNION'S MOTION TO STRIKE, AND THE RESPONDENT'S REPLY

On March 3, 2015, the Respondent filed objections to the Compliance Order. It argues that the Compliance Officer erred when he determined that the status quo under the Kravit Award required the Respondent to staff a squad with three employees and a shift with a total 22 employees (including the shift commander). In turn, it objects to the Compliance Officer's award of backpay to cover those instances in which the Respondent failed to adhere to that staffing number. The Respondent claims it was only required to staff a squad with two employees and a shift with a total of 21 employees. It asserts that it did so at all relevant times and that it therefore owes no backpay. Finally, the Respondent requests oral argument before the

Board.[4]

On March 9, 2015, the Union filed a Motion to Strike the Respondent's Objections to Compliance Order or in the Alternative to Narrow the Issue for Hearing. The Union seeks to strike the Respondent's objections to the Compliance Order because they allegedly attempt to relitigate the merits of the underlying unfair labor practice and grievance arbitration proceedings, fail to comply with the Board's rules, and contain "gross misrepresentations of fact."

On the merits, the Union supports the Compliance Officer's decision and his reading of the Kravit Award, which required three employees on a squad and a total of 22 employees on a shift. To that end it offers a December 26, 2008 letter from the Union to the Respondent asserting that it intends to enforce the contract as written, which required 22 employees per shift. Further, it asserts the Respondent failed to comply with the Board's Order by failing to pay the seven percent interest on the backpay issued on June 14, 2012, covering the months of September through October 2008;[5] and by failing to make employees whole for any backpay due and owing thereafter with seven percent interest. The Union also requests an order directing the Respondent to pay the Union's attorney's fees and costs on the grounds that the Respondent made false denials without reasonable cause and engaged in frivolous litigation for the purposes of the delay and needless increase in costs.

On March 18, 2015, the Respondent filed a timely brief in opposition to the Union's motion to strike, arguing that its objections were procedurally appropriate and factually accurate. The Respondent also observes that the Union failed to address several of the Respondent's own arguments it its motion and that the motion to strike must be denied on that basis.

IV. ALJ's REQUEST FOR INFORMATION, THE RESPONDENT'S RESPONSE, AND THE UNION'S REPLY

On April 20, 2015, I sent an email to the parties asking them to send me a modified backpay compliance report, covering the period of time between September 1, 2008[6] and April

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[4] The Respondent also raises a number of other points that are not integral to the outcome of this case and are therefore not summarized.

[5] The Compliance Order does not mandate payment of interest for this period of time and instead calculates the backpay period from January 1, 2009.

[6] The ALJ's Order, adopted by the Board, stated that Respondent was required to "[m]ake whole any employees...for all losses incurred as a result of any changes regarding minimum manning it made in or after September 2008." Vill. of Oak Lawn, 26 PERI ¶ 118 (IL LRB-SP 2010).

20, 2015. My email required the parties to identify those employees who should have been called in to cover a shift when shift and apparatus manning fell below the following numbers, during the specified timeframe:

3 engines	4 members per engine	12 members
3 ambulances	2 members per ambulance	6 members
1 squad	2 members	2 members
1 shift commander		1 member
		21 members

The Respondent provided the backpay report on May 13, 2015 and summarized it in a cover letter. The Respondent concedes that it did not staff each shift with a minimum of 21 employees between September 1, 2008 and October 15, 2008. However, it asserts that it made employees whole for that period of time, pursuant to the Kravit Award, by paying them an amount of $82,256.[7] The Respondent admits that it did not pay interest on that sum, as required by the Board's Order. However, it also notes that the Compliance Order did not require the Respondent to pay interest on backpay covering that period and that the Union waived the right to collect that interest by failing to object to the Compliance Order. In the alternative, the Respondent asserts that the Board should decline to require the payment of interest and instead should defer to the Kravit Award, which remedied any unilateral changes and did not require the Respondent to pay interest. Finally, the Respondent asserts that it did staff each shift with a minimum of 21 employees (including the shift commander) from October 16, 2008 to the present and that there are no employees who are entitled to backpay for that period, pursuant to the terms of the modified backpay report.

On May 19, 2015, the Union replied to the Respondent's backpay report and cover letter. It agrees that the Respondent paid employees backpay for the period between September 1, 2008 and October 15, 2008. However, it claims that the Respondent still owes interest on that sum. The Union argues that the Board should not defer to the Arbitration Award with respect to the remedy because the Board's Order and the Kravit Award provide separate and distinct remedies.

[7] The total sum paid by the Respondent to employees pursuant to the Kravit Award was $285,866.72. It covered a period from January 1, 2008 to October 15, 2008.

With respect to the remaining backpay period, the Union maintains its claim that the Respondent was required to staff each shift with three (3) employees on a squad and a total of 22 employees (including the shift commander). Without waiving this argument, the Union stipulates that since approximately October 16, 2008 the Respondent has staffed the fire department with two (2) employees on a squad and a total of twenty-one (21) employees per shift.

An oral hearing is rendered unnecessary by the parties' stipulation as to the Respondent's actual shift manning practices during the backpay period and the parties' agreement as to the sum that the Respondent already paid. Dep't of Cent. Mgmt. Serv. (Ill. Commerce Commission) v. Illinois Labor Relations Bd., State Panel, 406 Ill. App. 3d 766, 769-70 (4th Dist. 2010)(submission of written documents may suffice as a hearing); see also Fraternal Order of Police, Lodge 7 (Harej), 31 PERI ¶ 137 (IL LRB-SP 2015)(applying principle to compliance proceedings).

V. ISSUES AND CONTENTIONS

There are five main issues in this case. The threshold issue is whether it is proper to grant the Union's motion to strike the Respondent's objections. The second issue is whether it is proper to grant the Respondent's motion for oral argument. The third issue is whether the Compliance Officer correctly determined that the Respondent owes the Union approximately $3.1 million in backpay. Central to this determination is whether the Kravit Award required the Respondent to man a squad with two employees or three, and whether it required the Respondent to man a shift with a total of 21 employees or a total of 22. The fourth issue is whether the Union is entitled to interest on the backpay covering the period between September 1, 2008 and October 15, 2008. The final issue is whether the Union is entitled to sanctions.

VI. DISCUSSION AND ANALYSIS

1. The Union's Motion to Strike The Respondent's Objections

The Union's motion to strike the Respondent's objections is denied.

First, the Respondent did not attempt to relitigate the merits of the unfair labor practice proceeding by arguing that it was required to man a shift with a total of only 21 employees. The only issue litigated before the Board was whether minimum manning was a mandatory subject of bargaining and, in turn, whether the Respondent refused to bargain in good faith by objecting to

that topic's inclusion in an interest arbitration award. Vill. of Oak Lawn, 26 PERI ¶ 118 (IL LRB-SP 2010). The Board never determined the number of employees that satisfied the minimum and simply directed the Respondent to rescind any changes it may have made. Id.

Second, the Respondent did not attempt to relitigate the merits of the grievance by arguing that it was required to man a shift with a total of only 21 employees. The issue litigated before the grievance arbitrator was whether the parties' contract incorporated a static, minimum shift manning requirement that barred the Respondent from unilaterally reducing shift manning by removing equipment from service. The Respondent here has simply relied on the static minimum shift manning number articulated by the grievance arbitrator and has not argued, as it did during arbitration, that it could reduce manning below 21.

The remaining grounds presented by the Union for striking the Respondent's objections likewise lack merit. First, the Respondent's allegedly improper request for oral argument before the Board does not logically warrant striking the entirety of the Respondent's objections, and the Union has cited no precedent to support such an outcome. Second, the Respondent's failure to file its objections within the seven-day deadline does not provide grounds to strike the objections because the General Counsel granted the Respondent an extension and the Respondent filed within the extended time period. Notably, it is not within my authority to review, let alone override, the General Counsel's decision. Third, the Respondent's certificate of service on the objections was not faulty, as claimed by the Union, because the Respondent did list the other parties to the case in its certificate of service as required by the Board's rules. The only other party in this case, aside from the Respondent, is the Union. The Union's attorney is Lisa Moss and the Respondent's certificate of service properly states that the Respondent served her.[8]

Thus, the Union's motion to strike the Respondent's objections to the Compliance Order is denied.

2. The Respondent's Motion For Oral Argument

The Respondent's Motion for Oral Argument is denied. The Board's Rules do not allow

[8] Although the certificate of service does not include the names of the attorneys from another firm that likewise represents the Respondent, those attorneys do not represent an "other party" to this case, such that service upon them was required. Furthermore, there is certainly no prejudice to the Union from the Respondents' failure to serve their own co-counsel. Indeed, these attorneys actually received the Respondent's objections via email.

an ALJ to grant a party's request for oral argument before the Board while the case is pending before the ALJ. Rather, only the Board may grant oral argument and only when the case is pending before it.[9] 80 Ill. Admin. Code 1200.135(a)(3)("Parties desiring oral argument before the Board shall request oral argument and state the reasons for the requests in their appeals and responses"; addressing appeals from Executive Director Orders). Although compliance proceedings do fairly include the opportunity for oral argument, that opportunity arises only after the ALJ's Compliance Decision and Order issues when the case is brought before the Board. 80 Ill. Admin. Code 1220.80(g)("Parties may appeal the Administrative Law Judge's recommended compliance decision and order in accordance with 80 Ill. Adm. Code 1200.135"); 80 Ill. Admin. Code 1200.135(a)(allowing parties to request oral argument).

3. The Merits of the Compliance Order

The Compliance Officer's award must be reversed in its entirety. Consequently, the Respondent owes none of the $3,163,801.73 required under the Compliance Order.

i. The Status Quo

The Compliance Officer erred when he determined that the status quo under the Kravit Award required the Respondent to man a squad with three (3) employees and a shift with a total of 22 employees, including the shift commander.

The plain language of the Kravit Award requires the Respondent to staff a shift with a total of only 21 employees per shift and not 22, as stated by the Compliance Officer. The Compliance Officer correctly observes that a calculation of shift manning using the apparatus manning requirements set forth in the contract yields a total of 22 employees per shift, when applied to the number and kinds of equipment historically used by the Respondent. However, Kravit did not base his calculation solely on apparatus manning numbers listed in the contract. He also considered the parties' bargaining history and past practice, most notably, their long-standing agreement to change apparatus manning by reducing the number of employees on a squad from three (3) to two (2). He then applied these modified numbers to the actual types and

[9] The General Counsel may grant a motion for oral argument in Declaratory Ruling cases, but those oral arguments are before the General Counsel, not the Board. 80 Ill. Admin. Code. 1200.143(a)(4).

numbers of equipment used by the Respondent, which were themselves modified from the types and numbers spelled out in the parties' agreement. Based on these considerations, he concluded that the "parties intended and maintained for 15 years under five contracts a mutual commitment to assign 21 employees per shift."

Any confusion concerning the Award's manning requirements is erased by the Arbitrator's own description of the parties' actual practices, on which the Arbitrator relied in fashioning the award. He stated that "each shift had three engines – requiring 12 employees; 3 ambulances – requiring 6 employees; and one squad manned by two employees...[t]hese 20 are supplemented by the Battalion Chief as Shift Commander." Notably, the Arbitrator further clarified that he used the number 21 to refer to the total number of employees on the shift under these apparatus manning conditions because that was the number used by the parties to reflect their established state of affairs.

The Union's own understanding of the Award comports with this reading, as demonstrated by the Union's submissions to the circuit court. In seeking to confirm the Kravit Award, the Union asserted that its grievance concerned the Respondent's decision to operate with less than a total of 21 personnel. The Union specified that its calculation of 21 employees per shift was based on the assignment of two employees per squad and that the figure of 21 employees per shift included the shift commander. The Union then emphasized the Arbitrator's observation that the Respondent "did not deny the existence of a practice of assigning 21 firefighters per shift (after the parties had agreed to reduce the number from 22)." The Union concluded that the Arbitrator relied on this past practice in finding that the parties had intended and maintained a mutual commitment to assign, first 22, and then 21 employees per shift. Accordingly, by the Union's own admission in a related proceeding, there is no basis for finding that the Award required the Respondent to staff a shift with a total of 22 employees, including three employees on a squad.

Moreover, the Union's ultimate success before the Appellate Court on those facts precludes the Union from advancing a description of the Award in this forum that is inconsistent with the one it presented to the court. Under the doctrine of judicial estoppel, "a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding." Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi, 342 Ill. App. 3d 453, 460 (1st Dist. 2003) (internal quotes omitted). The purpose of the

doctrine is "to promote the truth and to protect the integrity of the court system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment." Loffredi, 342 Ill. App. 3d at 460. The five elements necessary for the application of judicial estoppel include the following: the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) intended for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. Gambino v. Boulevard Mortg. Corp., 398 Ill. App. 3d 21, 60 (1st Dist. 2009).[10]

As noted by the Respondent, all elements are met here. Before the circuit court, the Union stated that the Arbitrator required the Respondent to man a shift with a total of 21 employees and that the Arbitrator acted within his authority in reaching that figure because he relied on the parties' past practices. The circuit court relied on these undisputed facts and confirmed the Award. On appeal, the Appellate Court similarly acknowledged the parties' past practice of reducing the 22-personnel manning requirement to 21 and affirmed the circuit court's finding that the Arbitrator acted within his authority in holding that the contract required 21 employees per shift. Vill. of Oak Lawn v. Oak Lawn Professional Firefighters Ass'n Local IAFF, 2011 WL 10068742 at 9 and 19 (1st Dist. 2011). Now, in a separate proceeding before the Board, the Union attempts to disavow the past practice upon which the Arbitrator relied and tries to reframe the Award as requiring the Respondent to man a shift with a minimum of 22 employees. This is precisely what equity bars because the Union cannot tailor its presentation of the facts to suit the current circumstances when it has already reaped the benefits of an inconsistent factual presentation in a different forum.[11]

Contrary to the assertions made by the Compliance Officer and the Union, a reading of the Award that requires the Respondent to staff each shift with a total of 21 employees does not perpetuate the conduct that triggered the unfair labor practice charge. The impetus for the charge was not the Respondent's decision to unilaterally reduce shift staffing below a specified minimum number, as the Union suggests. Rather, it was the Respondent's general objection to

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[10] Judicial estoppel applies to statements of fact and not to legal opinions or conclusions. Maniez v. Citibank, 404 Ill. App. 3d 941, 949 (2010).

[11] In light of the forgoing analysis, the Union's 2008 letter to the Respondent announcing that it intended to enforce a purported contractual requirement of 22 employees per shift has no bearing on the outcome of this case.

an interest arbitrator's consideration of minimum manning proposals on the grounds that they covered a permissive subject of bargaining. Although the Board ordered the Respondent to rescind any changes to minimum manning it may have made during the course of this unlawful conduct, these presumed changes were not the subject of the litigation and the Board accordingly did not describe the terms of the status quo ante. Thus, a status quo of 21 employees per shift is consistent with the Board's generally-worded remedy and its resolution of the charge.

Likewise, a reading of the Award that requires the Respondent to staff each shift with 21 employees does not perpetuate the conduct that triggered the grievance. Rather, it preserves the Arbitrator's remedy. The grievance was triggered by the Respondent's decision to reduce minimum shift manning below 21 employees per shift by removing equipment from service. The Arbitrator found that the Respondent's conduct violated the contract and he ordered the Respondent to return minimum shift staffing to 21—the same minimum manning level applied here.

Next, the Respondent's later bargaining proposals on shift manning, offered during negotiations in 2014 and 2015, do not mandate a different interpretation of the 2008 Kravit Award because they do not suggest that the Respondent's interpretation is disingenuous. The Respondent's 2014 interest arbitration proposal did not seek the very shift manning conditions that it now claims to be the status quo. Instead, the Respondent's proposal conferred flexibility to reduce manning below 21, which the Kravit Award expressly prohibited. The proposal's concomitant call for 21 employees per shift and two (2) employees per squad does not indicate that the status quo required the Respondent to man a shift with any more employees than that. Rather, the Respondent's inclusion of these numbers was necessary to provide an accurate baseline for the Respondent's discretionary reductions, where the expired contract language did not: It failed to provide a total number of employees per shift and instead expressed shift manning only in terms of employees per apparatus. Moreover, the apparatus manning it did set forth failed to accurately describe the parties' practices.

Similarly, the Respondent's two contract proposals from 2015 do not mirror the Respondent's understanding of the status quo and instead articulate manning requirements that are considerably lower than those set forth by Kravit. Both proposals call for an incremental reduction in manning over two years from 21 employees per shift to 18 and both allow a reduction in engine manning from four (4) employees to three (3). Contrary to the Union's

contention, the first proposal's reference to two (2) employees per squad does not show that the status quo required a greater number because the proposal deviates from Kravit's requirements in other respects. Furthermore, the second proposal's use of the "current Firefighter Agreement" as the benchmark for discretionary changes does not show that the status quo required the Respondent to use three (3) employees on a squad. Although the plain language of the "current Firefighter Agreement" articulates such a requirement, Kravit already determined that its stated figures did not reflect the parties' actual agreement.[12]

Contrary to the Union's suggestion, the Respondent did not admit at interest arbitration that the status quo required the Respondent to man a squad with three (3) employees. The Respondent merely offered an accurate description of the prior contract's express language,[13] which did not in fact describe the parties' obligations regarding squad manning. Those obligations actually deviated from the express contract language because Kravit fashioned his Award in consideration of the parties' 10-year agreed-upon practice of manning a squad with two (2) employees.

Finally, a status quo that requires 21 employees per shift, with two (2) employees on a squad, conforms to the parties' agreement even though it deviates from the contract's plain language. The Union correctly observes that the contract's plain language states that a squad must be manned with three (3) employees, and that a calculation of minimum shift manning using that number equals 22 employees per shift. However, Kravit interpreted the contractual numbers differently in consideration of the parties' past practices and found that the Respondent was required to man a squad with only two (2) employees, for a total of 21 employees per shift. His interpretation became part of the agreement and is binding on the parties. Elkouri and Elkouri, *How Arbitration Works*, Fifth Edition, p 613. Thus, there is no merit to the Union's claim that the Board must rewrite the parties' agreement to find that the status quo requires the Respondent to man a shift with a total of 21 employees, including two (2) on a squad.

In sum, contrary to the Compliance Officer's assertions, the status quo required the Respondent to man a squad with two (2) employees and a shift with a total of 21 employees,

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[12] Kravit interpreted an earlier collective bargaining agreement, but the language he interpreted survived in the parties' two subsequent contracts and his interpretation is therefore equally applicable to those agreements.

[13] Respondent's counsel stated that "[u]nder the current language...a squad has three employees."

including the shift commander.

ii. The Respondent's Obligations

The Respondent does not owe the Union $3,163,801.73, as stated by the Compliance Officer, because the Respondent maintained the status quo during the period of time covered by the Compliance Order—January 1, 2009 to the present. The parties agree that by January 1, 2009, the Respondent had returned to staffing each squad with two (2) employees and a shift with a total of 21 employees (including the shift commander). In fact, the Respondent had staffed its shifts at that level since approximately October 16, 2008. As discussed above, the status quo required the Respondent to maintain staffing at precisely that level. Thus, contrary to the Compliance Officer's contention, the Respondent owes no backpay for the period of January 1, 2009 to the present because the Respondent maintained the status quo during that time.

4. Interest on Backpay Covering the Period Between September 1, 2008 and October 15, 2008

The Union waived its right to object to the Compliance Officer's failure to find that the Respondent owed the Union interest on the backpay covering the period of September 1, 2008 to October 15, 2008.

The Board's Rules provide that "parties may file objections" to the Compliance Order "[n]o later than 7 days after service" of that Order. 80 Ill. Admin. Code 1220.80(e). Under this rule, any extension of the filing deadline granted to one party reasonably extends to the other because the underlying regulatory deadline applies to both parties and the Rule includes no provision that allows parties to make objections in a responsive document. Compare, 80 Ill. Admin. Code 1200.135(b)(1) (allowing parties who have not yet filed exceptions to an ALJ decision to file them in their response to the opposing party's exceptions within a new timeframe) with 80 Ill. Admin. Code 1220.80(e)(requiring both parties to file objections within seven days). The Rules further state that "[a]ny objection to a finding, order or omission not specifically urged shall be deemed waived." 80 Ill. Admin. Code 1220.80(f).

Here, the Union did not file any objections to the Compliance Order within the extended deadline to file objections granted by the General Counsel to the Respondent and only filed a

response to the Respondent's objections a week later. Although the Union's response contained objections to the underlying Order, these objections are untimely because the Union did not filed them by the extended deadline granted to the Respondent. Thus, under the Board's Rules, the Union waived the right to object to the Compliance Officer's failure to find that the Respondent owed interest on the backpay paid to employees covering the period between September 1, 2008 and October 15, 2008. Notably, the Union did not request an extension to file objections and did not even acknowledge its failure to comply with the Board's deadline.

However, if the Board determines the Union's objections should be deemed timely filed, I recommend that Board require the Respondent to pay the interest it owes on the backpay sum paid to employees for work they would have performed between September 1, 2008 and October 15, 2008. That interest equals **$21,939.06**.[14]

First, there is no question that the Respondent is required to pay interest on this sum under the Board's Order because the Order expressly states that backpay is calculated from September 2008 and that the sum includes interest at 7% per annum. The Respondent should not blame the Board for the additional interest that accrued while it waited to pay what it knew to have owed.

Second, there is no merit to the Respondent's argument that the Compliance Officer's delay in issuing his order removes the Board's jurisdiction. Finding that it does would injure the very right the statute was intended to protect by denying the Union its long-awaited remedy, through no fault of the Union's. Sec'y of State v. Ill. Labor Rel. Bd., State Panel, 2012 IL App (4th) 111075, ¶ 62-64 (finding that Board's statutory time limit of 120 days to process representation petitions was discretionary where a mandatory deadline would cause substantial delay by requiring the union to refile, starting from scratch each time the deadline passed).

Third, deferral to the Kravit Award's remedy should not be granted at this stage of proceedings. First, the Board is not authorized to defer a compliance matter arising from an established violation; it may only defer an "unfair labor practice charge," not at issue here. 5 ILCS 315/11(i)(Board may defer resolution of an unfair labor practice charge that involves the

[14] The interest owed by the Respondent is equal to the Board's daily interest rate factor (.0001944) multiplied by the number of days between the start of the backpay period and the date on which the Respondent paid the principal (1372 days [September 1, 2008 to June 4, 2012]) multiplied by the backpay principal owed under the Board's Order ($82,256 [covering September 1, 2008 to October 15, 2008]) = **$21,939.06**.

interpretation or application of a collective bargaining agreement).[15] Moreover, the administrative efficiency sought by the Board in deferring cases to arbitration awards is not served in this case where the parties, over a span of seven years, presented their case to an ALJ, the Board, and the Appellate Court, and then proceeded to compliance. Compare City of Alton, 22 PERI ¶ 102 (IL LRB-SP 2006) (deferring charge to award instead of issuing complaint, even though award did not provide as full a remedy as that available before the Board) and Vill. of Oak Park, 18 PERI ¶ 2019 (IL LRB-SP 2002) (finding no benefit in deferring to award where parties had already had a Board hearing on the merits).

Finally, the Respondent's primary arguments on the matter of interest are irrelevant to the outcome of this compliance proceeding because they fail to address the question at issue and instead make untimely attacks on the Board's underlying decision.[16] The inquiry during compliance is whether the Respondent in fact complied with the Board's Order. Yet the Respondent's sole assertion here is that it need not comply with the Order because it is inequitable and unlawful.[17] These arguments must be rejected because the Respondent cannot revive exceptions to the Board's underlying Order under the guise of objecting to the Compliance Officer's findings. Fraternal Order of Police, Lodge 7 (Harej), 31 PERI ¶ 137 (respondent could not modify the Board's notice posting requirement in compliance proceedings by arguing for an alternate remedy).

Thus, the Union waived its objections to the Compliance Officer's failure to find that the Respondent still owed the Union interest. However, if the Board determines that the Union did not waive its objections to the Compliance Order, the Respondent must pay **$21,939.06** in interest on the backpay covering the period between September 1, 2008 and October 15, 2008.

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[15] The Act provides the following in relevant part: "If an unfair labor practice charge involves the interpretation or application of a collective bargaining agreement and said agreement contains a grievance procedure with binding arbitration as its terminal step, the Board may defer the resolution of such dispute to the grievance and arbitration procedure contained in said agreement." 5 ILCS 315/11(i).

[16] The Respondent likewise applies these arguments to the remainder of the Compliance Officer's Order. However, since that Order contained errors, the Respondent's arguments are addressed only with respect to the obligation to pay interest.

[17] In support, the Respondent cites to the State Mandates Act and the Illinois Constitution and claims that it should not be required to pay employees backpay for work they never performed. This decision makes no findings as to the constitutionality of the Illinois Public Labor Relations Act or the Board's remedy. Metro. Alliance of Police, Coal City Police Chapter No. 186, No. 6 v. Ill. State Labor Rel. Bd., 299 Ill. App. 3d 377, 379 (3rd Dist. 1998) (noting that administrative agencies lack the authority to invalidate a statute on constitutional grounds or even to question its validity).

4. Sanctions

The Union's motion for sanctions is denied because the Respondent did not make any false statements of fact that warrant the imposition of sanctions did and not engage in frivolous litigation.[18]

Section 11 (c) of the Act provides that the Board has discretion to include an appropriate sanction in its order if a party has made allegations or denials without reasonable cause and found to be untrue, or has engaged in frivolous litigation for the purposes of delay or needless increase in the cost of litigation. The test for determining whether a party has made factual assertions that were untrue and made without reasonable cause is an objective one of reasonableness under the circumstances. Chicago Transit Auth., 16 PERI ¶ 3021 (IL LLRB 1999); Chicago Transit Auth., 15 PERI ¶ 3018 (IL LLRB 1999); Cnty. of Rock Island, 14 PERI ¶ 2029 (IL SLRB 1998), aff'd, 315 Ill. App. 3d 459 (3rd Dist. 2000). The test for determining whether a party has engaged in frivolous litigation is whether the party's defenses to the charge were not made in good faith or did not represent a "debatable" position. Chicago Transit Auth., 16 PERI ¶ 3021; Cnty. of Cook, 15 PERI ¶ 3001 (IL LLRB 1998); Cnty. of Cook and Sheriff of Cook Cnty., 12 PERI ¶ 3008 (IL LLRB 1996); City of Markham, 11 PERI ¶ 2019 (IL SLRB 1995). The courts view a party's legal arguments in the context of all its submissions. Wood Dale Fire Protection Dist. v. Ill. Labor Rel. Bd., State Panel, 395 Ill. App. 3d 523, 535-36. They have held the imposition of sanctions to be inappropriate, even where the Respondent has taken a legal position that is incorrect in the face of non-debatable black letter law, as long as the Respondent's remaining arguments and submissions to the Board are supportable. Wood Dale Fire Protection Dist., 395 Ill. App. 3d at 535-36.

First, the Respondent did not misrepresent the facts when it claimed that the Kravit Award required the Respondent to staff a shift with a total of 21 employees and a squad with 2 employees.

[18] Only the statements specifically identified by the Union as allegedly false are considered here.

Second, the Respondent timely withdrew its untrue assertion that the Union never asked Arbitrator Kravit to retain jurisdiction over the grievance and that withdrawal precludes the imposition of sanctions. 80 Ill. Admin. Code 1220.90(d).[19]

Finally, the Respondent's objections to the Compliance Order were not frivolous and instead presented the debatable and ultimately meritorious position that the Compliance Order was based on an unfortunate misinterpretation of the parties' obligations under the status quo.

In sum, the Union's motion for sanctions is denied.

VII. CONCLUSIONS OF LAW

1. The Compliance Officer erred when he determined that the status quo required the Respondent to staff a shift with 22 employees, including three (3) employees on a squad.
2. The Compliance Officer erred when he determined that the Respondent had not maintained the status quo from January 1, 2009 to the present.
3. The Compliance Officer erred when he awarded backpay with interest for the period of January 1, 2009 to the present.
4. The Union waived the right to object to the Compliance Officer's failure to find that the Respondent owed the Union interest on the backpay covering the period of September 1, 2008 to October 15, 2008.

VIII. RECOMMENDED ORDER

The Compliance Order is vacated.

IX. 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

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[19] Moreover, that misstatement was also immaterial to a determination as to the Respondent's compliance with the Board's Order and therefore would not support an award of sanctions in any event. Black Hawk College, 9 PERI ¶ 1092 (IELRB 1993) (considering the materiality of the untrue fact in determining whether sanctions are appropriate).

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 at Chicago, Illinois this 12th day of June, 2015

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/S/ Anna Hamburg-Gal

Anna Hamburg-Gal
Administrative Law Judge