

DEC 28 1978

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF NEW YORK

CONCILIATION

In the Matter of the	X	
Compulsory Interest Arbitration	X	CASE NO.
between	X	IA-18; M77-96
The City of Rye	X	OPINION AND AWARD
and	X	OF
Rye Police Association of the City of Rye, Inc.	X	THE PUBLIC ARBITRATION
	X	PANEL

Before the Public Arbitration Panel:

Josef P. Sirefman, Chairman
Edward Lecci, Employee Organization Panel Member
Guy Carlson, Comptroller City of Rye,
Public Employer Panel Member

Appearances:

For the Union: Jack B. Solerwitz, Esq.
Salvatore A. Lecci, Esq. of counsel

For the Employer: Leaf, Kurzman, Deull & Drogin
By: Ira Drogin, Esq.

Pursuant to Section 209.4 of the New York State Civil Service Law, Robert D. Helsby, Chairman of the Public Employment Relations Board, on December 27, 1977 designated a Public Arbitration Panel to make a just and reasonable determination of issues resulting from collective bargaining negotiations between the parties (hereinafter referred to as the "City" and the "PBA" respectively). Hearings were conducted by the Panel at Rye City Hall on March 24, April 28, May 5, June 1,

June 6, June 7, June 16, July 5, July 16, and July 20, 1978, at which the parties were afforded full opportunity to present oral and written evidence, examine and cross-examine witnesses, provide oral argument and otherwise support their respective positions. A transcript of the proceedings was made and extensive exhibits were introduced by both sides. Subsequently the City of Rye submitted a post hearing brief. Thereafter the panel met in executive session on August 4, August 11, and October 14, 1978, and conferred on the sizeable record before it.

The most recent collective bargaining agreement (referred to as the "current" contract) covering the unit, which consists of a Lieutenant, 5 Sergeants, 3 Detectives, a Youth Officer and 24 Patrolmen--with the Chief it is a 35 man department--expired December 31, 1976. As nearly two years have passed without a contract the issues have been considered in a two year context, the maximum period over which this Panel has authority.

Issues placed before the Panel by the Amended Petition and Response are:

1. Salary
2. Longevity
3. Accumulated Sick Leave at Retirement
4. Cleaning Allowance
5. Personal Leave Days
6. Modification of Sick Leave
7. Affirmative Action
8. Term of Contract

A majority of the Panel permitted the PBA to further amend its Petition by adding the following items for the

Panel's determination:

9. Dental and Welfare Plan
10. Educational Benefits
11. Work Week
12. Night Differential
13. Plainclothes Duty Pay

In arriving at this award the extensive transcript (1296 pages) and numerous exhibits have been carefully reviewed. Full consideration has been given to the following statutory criteria:

- a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities.
- b. the interests and welfare of the public and the financial ability of the public employer to pay;
- c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;
- d. the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

as well as other relevant factors.

DISCUSSION

Term of the Contract

As 1978 is drawing to a close the contract term shall be two years, January 1, 1977 through December 31, 1978.

Salary

The PBA proposes a salary increase of \$1700 for 1977 and \$1200 for 1978 for all members of the unit. The City proposes a \$700 increase in each year (coupled with a longevity modification to be discussed below) and the addition of two further steps at lower pay levels than the present starting salary for employees hired after January 1, 1977, with progression through steps 1 through 5 based upon a positive work-evaluation only, rather than automatically.

With candidates for police work in the cities, towns and villages of Westchester County being appointed from a Westchester County Civil Service List after examination by the County, the basis of comparability of the members of this unit is with other police officers in Westchester County. The standard comparison between Departments in the County is that of top grade officer, i.e. "Police Officer--First Class" (the comparison standard utilized in City Exhibit #21). As the current longevity payment is an outstanding one for the County, the City would couple the base salary and longevity payments into an "average total salary" for purposes of comparison. This coupling is inappropriate for two reasons: a) due to varying lengths of actual service the

figures for any department would be sharply skewed either by a rather young force or by a highly senior group of employees; therefore, the traditional selection of top grade officer's pay provides a neutral focus of attention. b) longevity is an additional payment for length of service, separate and distinct from base salary.

For 1976 the first class salary was \$15,284. This placed the City's top grade officer 34th out of 38 municipalities listed for that year in City Exhibit 21. In comparison with the contiguous Westchester municipalities, the City's 1976 salary ranked behind the Town of Rye (\$15,400), the Town of Harrison (\$15,930), the Village of Portchester (\$16,181) and the Village of Mamaroneck (\$16,773).

An increase of \$1,400 in 1977 (\$16,684) would place the City 26th out of 31 municipalities in the County that reported in City Ex.21. When compared with the four contiguous Westchester municipalities for 1977, such an increase would still leave the City's first grade officer behind Portchester (\$16,989), Mamaroneck Village (\$17,654) and the Town of Rye (\$16,987). A further increase in 1978 of \$1,200 to \$17,884 would still leave the City's first grade officer behind Harrison Town (\$18,709) and Rye Town (\$18,346), the two contiguous Westchester Towns with 1978 salaries at the time the hearings were closed.

The \$2,600 increase over two years (retroactive to January

1, 1977 and January 1, 1978, respectively) averaging 8.17 per cent per year (9.15 and 7.19), is just and reasonable and is warranted for the following reasons:

A. As already noted, it represents some movement in the nature of some "catch up" to other Westchester departments. That it is reasonable is borne out by the modest increase in the "footings" it would provide vis-a-vis the rest of the County, while keeping the City's top grade officer behind some contiguous Westchester areas.

B. It includes an element of "buy-back" related to the longevity changes discussed below.

C. Judicial notice is taken that increases in the Metropolitan New York Consumer Price Index were 5.1 percent in 1977 and are 6.2 percent annualized for 1978 (based on January through September, 1978). In other words some 11.3 percent of the increase is accounted for by the decrease in purchasing power over the two years in issue.

D. In comparing salaries of first grade officers there is considerable variation among Westchester County communities as to when an officer achieves the top grade salary (from three to five years, City Ex.21, PBA Ex.20). In the City of Rye the top pay is achieved in the fifth year so that the pay disparity with other departments that achieve the top pay earlier is understated by looking at top grade salary alone.

E. The force has been reduced by attrition from 45 a few years ago to the current 35. Due to the thin current table of organization the senior patrolman on duty may be called upon at times to perform sergeants work (see testimony of Officer J. Banahan and Chief W. Hegele). While no attempt to "quantify" this activity was made during the hearings, it nevertheless suggests that the members of the unit are working at full capacity in carrying out their assigned duties.

No bases was provided in the record to support the City's proposal to add two lower pay steps to the salary schedule for new employees, and that employees hired after January 1, 1977 will progress through new steps 1 and 2 and former steps 1 through 5 based upon a positive work evaluation rather than automatically. These proposals are denied.

Longevity

Currently there are three longevity steps, namely five percent of the highest salary paid to the individual at the completion of ten years, fifteen years and twenty years of service. For the purpose of calculating longevity, "salary", in this context, includes the base salary plus the prior longevity payments when applicable. As a result the current extra pay for length of service is in the forefront of such payments Westchester County-wide. (PBA Ex. 24). In 1976 terms it provided payments of \$764, \$803 and \$843 or an additional \$2,410 over the \$15,284

base salary for the twenty year top grade Patrolman (with increased amounts for the Sergeants and Lieutenant who have a higher base salary). The PBA would have this "5 percent" system remain in the contract.

The City would eliminate the 5 percent provision at each of the three longevity steps, replacing them with fixed dollar amounts of \$600, \$630 and \$660 respectively. Employees who have attained longevity under the old plan would continue to receive those payments, but as they progress up the time ladder the additional payments would be in fixed dollar amounts rather than percentages.

Whatever the rationale when the current longevity payments were introduced some years ago, the present effect is to inhibit salary negotiations. The PBA focuses on the relatively low top grade salary level while the City focuses on the high longevity payments. Perhaps there was a time when base salaries warranted use of a high percentage compounded. That is no longer the case, and the City is entitled to relief in this costly area, i.e., the elimination of the percentages under the current contract and their replacement with three longevity steps, based upon the current terms of service in the City, expressed solely in terms of fixed dollar amounts.

Specific fixed dollar amounts (basically \$600, \$630, \$660) now sought by the City have already been obtained in

negotiations with the Firefighters, Clerical and Public Works employees. Admittedly uniformity of contract provisions may be administratively attractive, but the nature of the work performed by each unit may differ substantially. Clearly the work of Clerical, DFW, and Police are not the same, and it appears that the primary duty of the Firefighters is to drive the apparatus. Nor does it appear that these units have always been treated alike or have been in any "lock step" through the years.

Eliminating the fixed percentages and replacing them with fixed dollar amounts represents the source of long term savings for the City, as the almost universal expectation is that salaries will tend to increase. In short this is a classic "buy-back" situation. When considered in the perspective of the catch-up and cost of living aspects of the salary increase, it is equitable at this time to eliminate the current percentages and freeze the current (1976) dollar amounts of the longevity step payments and apply the same 1976 dollar amounts these percentages represented in 1976 in 1977 and again in 1978 to those members eligible through length of service.

Accumulated Sick Leave at Retirement

The PBA seeks to have the value of all accumulated unused sick leave paid as a lump sum upon retirement. This

would be a new benefit. It is opposed by the City as a significant cost item. Currently there are fifteen sick days per year provided. No persuasive reason to grant this proposal was presented in view of the potential for significant accumulations and therefore the high cost that could be incurred by the City, and it is denied.

Night Differential

The PBA proposes an additional ten percent of hourly compensation for each hour actually worked when assigned to working hours between 4 PM and 8 AM. This would affect two-thirds of the rotational hours; the City opposes it as a high cost item. Night differential has had only minimal acceptance in Westchester County, and its introduction in a 1977-78 contract is not indicated. This proposal is denied.

Welfare Fund and Dental Insurance

The PBA would have the City contribute \$200 per year per member for a Welfare Fund to be used for dental insurance, eyeglasses or corrective footwear, i.e., expenditures not now covered by present hospitalization or medical insurance. This proposal is resisted by the City on the basis that it already pays the entire premium for a State Medical Plan covering the members and their families.

Contributions by Westchester County communities to

Police Union Welfare Funds as such has been limited (PBA Ex.32). However, a significant number of municipalities do contribute towards Dental Plans in varying extent (PBA Ex. 32, City Ex.20). That this benefit is becoming more widespread is evidenced by the City itself having negotiated a Dental Plan with its Clerical and Public Works Units (Par. XVI, City Ex.23, Par. XXI, City Ex. 24) effective January 1, 1978 providing that "the employer shall pay up to \$100 per participating employee, pro-rated from the employee's effective date of coverage, for the purpose of purchasing a dental insurance program covering bargaining unit employees and/or their dependents."

In view of these circumstances the City's police are entitled to the City's contribution for a Dental plan effective January 1, 1978. As there is no compulsion requiring all units within the City to be treated equally (cp. the 1978 Firefighters contract which does not provide for any payment towards dental insurance, City Ex.22), and the generally rising costs of medical and dental care, a full \$100 contribution per year for each unit member is just and reasonable.

Cleaning Allowance

Uniforms are furnished by the City to unit members. The PBA proposes a \$250 allowance per year to the members for cleaning and maintenance of this issue. As with other benefits, there is a wide range of practices in Westchester County on

uniforms and their maintenance. The City opposes this proposal on the theory that it is a cost which once introduced will remain and be built upon in subsequent negotiations.

To be effective a police force must not only be competent, but give to the community the appearance of competency. A factor in such appearance is the neatness and cleanliness of the forces' apparel, be it uniform or "civies". Thus a mutual benefit is derived from the allowance by the parties. A \$200 a year allowance per member of the unit effective January 1, 1977 and again effective January 1, 1978 would fall within the range of such allowances where provided in the County (City Ex. 17).

Personal Leave

In the current contract there is no provision for personal leave. Under a Council Resolution the Chief of Police may in his discretion grant two personal days a year. The PBA seeks two non-discretionary days a year on prior notice, with accumulation, as well as to retain the two days available under the Resolution. Here again there is no uniform practice among the City's different units. The Clerical and Public Works employees have two non-discretionary days in their 1977-78 contracts (City Ex. 23,24), but the Firefighters' contract for the period in issue in this arbitration is silent on personal leave days,

(City Ex.22). Presumably the members of that unit are still eligible for two discretionary days under the aforesaid Resolution. There is concern that if the PBA's proposal is granted it will create pressure to provide the same benefit for all units at substantial cost to the City.

From the testimony of Officer J. Banahan and Chief of Police W. Hegele it can be concluded that requests for personal days under the Resolution have not been granted to the members. Arguably the denial of such a request might have been challenged through the available grievance procedure. Nevertheless, whether or not such a challenge has been made cannot be dispositive of the issue. Many diverse considerations can be involved in making a determination to challenge a Chief's exercise of discretion, under an act of the City Council which it could repeal. In any event, as no personal days have been granted in the past, and the Resolution can be unilaterally changed by the City Council, the starting point for evaluating this proposal is the conclusion that for all intents and purposes the police currently have no provision for personal days.

Once again the practice varies considerably throughout the County with a majority of communities providing anywhere from two to seven days, some in a combination of discretionary and non-discretionary days (City Ex.19). When viewed against

this background the PBA's proposal for two non-discretionary days per year with prior notice is reasonable and is granted for 1977 and 1978. As this will introduce a new benefit into the contractual relationship no persuasive reason to also build upon it with accumulations has been presented. That other units may seek to obtain a similar provision is an inevitability in collective bargaining, and is outweighed by the consideration that contractual provisions for non-discretionary personal leave days is a well established benefit enjoyed for some time by many other police officers in the County.

A final note. As only a fractional part of calendar 1978 remains and the small police force would be decimated if all four personal days were available during the rest of 1978, this benefit is to be realized by the members only in the form of payment for these four days (two days at the 1977 rate and two days at the 1978 rate).

The Work (Week) Schedule

Under the current work schedule which has been in place for many years, officers on patrol work a rotating shift known as the "5-5-5", i.e., five tours at 8 AM--4 PM with a 56 hour swing, five tours at 4 PM--12 midnight with a 56 hour swing, and five tours at 12 midnight to 8 AM with an 80 hour swing before the cycle recommences. As a result of this "chart"

the patrolmen on rotation pull a Saturday-Sunday days off combination a minimum of once a year. To improve this days off situation the PBA proposes a "5-5-4" based upon a 20 patrolmen chart (PBA Ex. 28). A schedule proposal on behalf of Sergeants was also mentioned by the PBA at the hearings.

The proposal for patrolmen was explored at length through the testimony of Patrolman William Capaccio (for the PBA) and Chief of Police Hegele (for the City). The central issue is over potential cost, with the PBA contending that some 17 patrolmen would be working three extra days a year (because of a shortened swing period between two tours) and that two extra relief men would be available for two tours (A and B) to cover for those on vacation or out due to illness and the like. From the City's point of view the thinner coverage on the chart for tour C, the possible shortage of personnel to cover a tour (e.g. at a turnover every few weeks, the need for coverage, the effect of personal days, and the possible unavailability of a relief man) raises the possibility of greater use of overtime and even the need for additional personnel. As to the latter point, while the possibility of more than one additional officer was suggested generally by the Chief in his testimony, his detailed written analysis of the "5-5-4" proposal (City Ex.9) concluded that:

I must say, the proposed schedule is a good one. During 3 week cycle would be off 56-80-56, same as present except they are giving up 8 hours off at end of 180 cycle on present schedule. Would grant members 4 day work week C tour, but again working 15 8 hour tours in a 21 day period, i.e., 40 hours per week, but will still require an additional man bringing total to 36 personnel.

On numerous occasions the New York State Public Employment Relations Board has held that scheduling is a mandatory subject of bargaining because it deals with the fundamental issue of hours of work. Due to the nature of rotating tours the work schedule for police involves an especially sensitive dimension. The chart should represent a delicate balance between the need to maintain police service on a daily round the clock basis and the need for reasonable periods of time off for the family and personal lives of police officers. Even if it is assumed arguendo that the "5-5-4" will require additional costs, as the Chief indicated in City Exhibit 9, the balance is in favor of its implementation.

In an era when loss of family cohesiveness is frequently cited as a reason for societal problems, and precise chronology has been manipulated by Federal and State Governments to provide not merely weekends but "long weekends", a schedule which has remained unchanged over the years, one that provides a Saturday-Sunday weekend at best once a year, places an unreasonable

burden on the family and private lives of the patrolmen. Switching is but a makeshift, haphazard way of dealing with the problem, and the small size of the force presents constraints on that technique. This is not to say that the Arbitrator is unmindful that additional costs could be involved, but to deny the proposal on that ground, given the estimate of that cost, is to rule that a change in the ancient chart could never take place. Clearly such a position is too limiting in view of the need for change and the extra days per year to be worked by the men on the chart.

Given the number of men involved the 5-5-4 chart for patrolmen (PBA Ex.28) should be implemented three weeks after receipt of this award by the City.

No sergeants work schedule was presented by the PBA for the Panel's consideration and this proposal is denied.

Plainclothes Duty Pay

Under a Council Resolution the five employees involved have been paid \$500 for 1977 and \$800 for 1978 (with \$1000 for the Youth Officer). The PBA would raise all stipends to \$1000. The City has no objection to the incorporation of the amounts being paid into the contract, which is currently silent on this subject (City's Brief, p.20).

The translation of a resolution into contract language

is a gain for the PBA, and the sums involved are reasonable. Therefore the PBA proposal is granted to the extent that the policy effectuated during 1977 and 1978 shall be incorporated into the agreement.

Modification of Sick Leave Regulations

No basis was provided in the record for considering this City proposal and it is denied.

Affirmative Action

No basis was provided in the record for considering this City proposal and it is denied.

Education Benefits

Article 13 of the current agreement (PBA Ex.1) provides that:

Educational Courses

The Employer will pay the tuition and instructional material costs for courses relating to law enforcement taken by police officers if prior approval is given by the Chief of Police. The Employer will pay such costs on successful completion of a course and the officer must sign an agreement with the Employer whereby he agrees to remain with the Employer's police department for a least three years or reimburse the Employer for the costs unless he leaves the department because of disability or dismissal. The Employer does not agree to guarantee annual appropriations for this program.

This language was a repetition of a provision in the prior agreement (Article 13, PBA ex.2). According to the testimony of Patrolman Banahan, an application for the

benefit was turned down by the prior Chief of Police and as a result there were no further applications although a number of members continued their education at their own expense. In any event, the City has never paid tuition or expenses for the educational advancement of the police force. Therefore, the PBA seeks to receive a payment of \$10 per credit hour for each credit earned at an accredited college for a maximum of up to 120 credits or \$1,200 per year per member retroactive to January 1, 1977.

In support of this \$10 per credit payment the PBA cites the failure of the City over the years to honor its contractual commitment while officers pursued their education. Additionally the PBA proposes that commencing Fall, 1978 the United States Law Enforcement Assistance Administration program (LEAA) pay tuitions for law enforcement courses. However if it fails to do so the City of Rye shall pay the entire unpaid tuition. This two part education proposal is opposed as an additional cost item at a time when municipalities are trying to hold costs down. It is estimated that some 1,200 credits have been accumulated among force members.

In general it is well accepted that a police officer who is educated in police related subject matter is of benefit to the municipality and its citizens. Thus, encouraging

the furthering of a member's related education by some method is an expenditure supported by many communities in the County. Nonetheless, it does not follow that the PBA's \$10 per credit proposal is persuasive.

In effect the PBA seeks to "make-up" for the "turn-down" on Article 13 in prior years. To give consideration to the proposal on that basis is to determine implicitly that Article 13 was binding upon the City from 1972 through 1976, and that the City had violated its provisions. In the Arbitrator's opinion this is more the stuff of grievance dispute settlement than interest arbitration, yet there is no evidence that the Banahan turn-down (from which the PBA apparently concluded that all other applications would be similarly treated and therefore no further applications of this nature were made to the Chief) was pursued beyond the Chief of Police via the available grievance procedure. Granted, as observed in the discussion of personal leave there can be many complex reasons why "grievances" are not fully pursued, there still remains a qualitative difference between rejection on a resolution repealable by the City Council and rejection under contract language.

Even assuming arguendo that the issue was foursquare in front of this Panel in the implicit form described above,

there is a fundamental difficulty with the proposal. Article 13 appears to contain an inherent contradiction on its own terms. It says that "The Employer will pay" while at the same time "The Employer does not agree to guarantee annual appropriations for this program". Either it means that the matter of payment was totally discretionary with the City and it chose not to pay (an interpretation consistent with the lack of pursuit by the PBA after the Banahan turn down), or "the giving and taking away" all in the same provision renders it so contradictory as to be meaningless (also consistent with non-pursuit). All in all too slender a reed upon which to base the \$10 per credit proposal and it is denied.

However, in keeping with the encouragement of further police work related education, it is reasonable for the City to reimburse a member for tuition at the Westchester County Community College rate for completed courses, taken commencing Fall Semester 1978, leading to a two year degree in police science or law enforcement to the extent not covered by a Federal program for which the member would be eligible.

Ability To Pay

The cost of this two year "package" is estimated as follows:

- | | |
|--|----------|
| 1. Salary in 1977 | \$47,600 |
| Salary in 1978 | 40,800 |
| 2. Dental in 1978 | 3,400 |
| 3. Cleaning allowance 1977 | 6,800 |
| Cleaning allowance 1978 | 6,800 |
| 4. Personal leave 1977 | 4,760 |
| Personal leave 1978 | 4,760 |
| 5. Plainclothes pay affecting five employees has already been placed in effect with an incremental cost in 1978 of | 1,600 |
| 6. Longevity dollar amounts in the 1976 contract are frozen in 1977 and 1978. The elimination of percentages represents a source of savings to the City with the passage of time. | |
| 7. There is no way to estimate how many members would be eligible for tuition reimbursement. However, only one semester is involved and only to the extent tuition reimbursement is not available from a prior source. | |
| 8. Any net cost related to the 5-5-4 would be limited to a fractional part of 1978. | |

These costs together with additional pension and social security cost on payroll items are within the City of Rye's ability to pay, considering that some four or so years ago it supported a 45 man police force. In addition, the testimony of Messrs. E.R. Kerman, Edward Fennell, and Acting City Manager Philip J. McGovern establishes that the City has an Aa Moody's Bond Rating, it has very low debt outstanding which is a small

fraction of its debt limit, and its tax levy still leaves a substantial amount of Constitutional Tax Margin. Although its taxes have been stable for the past three years the City has been able to finance major capital improvements (e.g., a new Police Station) out of current revenues and still manage to generate surpluses. In sum, a community in sound financial shape, carefully and conservatively run, and well able to afford the just and reasonable increases in salary and benefits granted by this Award. The Arbitrator is mindful that the City's residents pay other taxes than those levied by the City. This does not however render them unique as similar overlapping obligations face citizens throughout the County.

AWARD OF THE PUBLIC ARBITRATION PANEL

1. Contract Term The term of the contract covered by the Award shall be January 1, 1977 through December 31, 1978.
2. Salary The City's salary proposals are denied. The PBA proposal is granted to the extent that the members of the unit shall receive an increase of \$1,400.00 effective and retroactive to January 1, 1977, and an increase of \$1,200.00 effective and retroactive to January 1, 1978.
3. Longevity The PBA's proposal is denied. The City's proposal is granted to the extent that the 1976 percentages provisions are eliminated. However, in its place for 1977

and again for 1978 the three longevity steps (10, 15, 20 yrs.) shall be set in fixed dollar amounts equal to the dollar amounts effective in 1976, with full retroactivity for each year.

4. Accumulated Sick Leave at Retirement The PBA proposal is denied.

5. Night Differential The PBA proposal is denied.

6. Dental Insurance and Welfare Plan The PBA's proposal is granted to the extent that effective January 1, 1978 the City shall contribute \$100 a year for each unit member towards the purchase of dental insurance.

7. Cleaning Allowance The PBA proposal is granted to the extent that effective January 1, 1977 the cleaning allowance shall be \$200 per member of the unit, and effective January 1, 1978 the cleaning allowance shall again be \$200 per member of the unit.

8. Personal Leave The PBA proposal is granted to the extent that the contract for 1977 (effective January 1 1977) shall provide for two non-discretionary personal leave days with prior notice, and for 1978 (effective January 1, 1978) shall provide for two non-discretionary personal leave days with prior notice. However, due to the late date, this benefit will be available for 1977 and 1978 only in the form of payment for the

four days involved; pay for two days at the 1977 salary rate and pay for two days at the 1978 rate.

9. Work Schedule Three weeks after receipt of a copy of this Award the work schedule for patrolmen on rotation and rotation relief shall be the "5-5-4" in accordance with PBA Ex. 28. The PBA proposal on behalf of Sergeants is denied.

10. Plainclothes Duty Pay The PBA proposal is granted to the extent that the City Council Resolution effective during 1977 and 1978 shall be incorporated into the agreement.

11. Modification of Sick Leave Regulations The City's proposal is denied.

12. Affirmative Action The City's proposal is denied.

13. Educational Benefits The \$10 per credit proposal is denied. The tuition reimbursement proposal is granted to the extent that the City shall reimburse a member for tuition, at the Westchester Community College rate, for completed courses taken commencing Fall 1978 leading to a two year degree in police science or law enforcement to the extent not covered by a Federal program for which the member would be eligible.

Dated: November 22, 1978


Josef P. Sirefman
Chairman

I concur with the Chairman's conclusions as to the following paragraphs in the Award: 1,2,3,6,7,8,9,10,11,12,13 but dissent as to paragraphs: 4 and 5 .

Dated: 11/22/78



Edward Lecci
Employee Appointed Panel Member

I concur with the Chairman's conclusions as to the following paragraphs in the Award:

but dissent as to paragraphs:

Dated:

Guy Carlson
Employer Appointed Panel Membe

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF NEW YORK

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In the Matter of the :
Compulsory Interest Arbitration :
between :
The City of Rye :
and :
Rye Police Association of the City of :
Rye, Inc. :

Dissenting Opinion

Case No.
IA-18; M77-96

N.Y.S. PUBLIC EMPLOYMENT
RELATIONS BOARD
RECEIVED
DEC 21 1978
CONCILIATION

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OPINION

I respectfully dissent from the Opinion and Award of my fellow Panel Arbitrators for the reasons hereinafter set forth.

At the outset, I wish to reiterate, that the majority of the Panel has erred by exceeding its authority ruling upon issues not submitted to them.

It became apparent early in the Hearings that the Police Benevolent Association ("PBA") was attempting to place before the Public Arbitration Panel ("Panel") issues that is had not specified as being unresolved in either its Compulsory Interest Arbitration Petition or its Amended Compulsory Interest Arbitration Petition, or by the City of Rye in its Response or Amended Response. The improper

issues ruled upon by the majority of the Panel in their
Opinion and Award were:

Dental and Welfare Plan

Educational Benefits

Work Week

Night Differential

Plainclothes Duty Pay

My fellow Arbitrators have stated in their Opinion and Award that they "permitted the PBA to further amend its Petition by adding the following items (those above mentioned) for the Panel's determination" and the record clearly reflects that was done, and over the objection of the City's attorney and myself. Implicit in the majority's statement is the clear understanding that those issues had not been properly submitted up until that time and were not before the Panel. Indeed a panel majority had previously rejected the PBA's contention, made at the Hearings, that the statement in paragraph 5 of the Petition and the first Amended Petition dated August 24, 1977: "If these (sic) issues can be resolved, all non-cash items will fall into place..." allows them to add further issues not specifically identified in their Petition or first Amended Petition Dated August 24, 1977.

Each of the parties had designated their Panel Arbitrator by November 28, 1977. The statutory designation process was completed on December 27, 1977, by Robert D. Helsby, Chairman of the Public Employment Relations Board,

who designated Josef P. Sirefman, Chairman and public member of the Panel. Rule 205.7(c) of the Board, dealing with the selection of the compulsory interest arbitration panel states that:

"Upon notification of the identity of the public member of the Panel, the Board shall immediately designate such public arbitration panel and refer the dispute to such panel."

The dispute that was referred to the Panel was the issues specified and identified by the PBA in its Amended Petition dated August 24, 1977 as supplemented by the City's "Amended Response", dated September 21, 1977. The Panel had no authority to enlarge the "dispute" referred to it by the Board Chairman on its own initiative, or to entertain an application by one party to enlarge the dispute. Clearly, any such application should have been directed to the Chairman of the State Public Employment Relations Board ("PERB") who, by statute, had sole authority under Rule 205.7 to act. The PBA undoubtedly understood this jurisdictional procedure as it utilized it by filing an Amended Petition with the Board, prior to the designation of the Panel and the reference of the "dispute" to that Panel.

At no time after the "dispute" was referred to the Panel did the PBA request permission from the State Board Chairman to further amend its Amended Petition, nor did the PBA notify PERB of its desire to add new issues to the already referred dispute.

This Arbitration Panel is not free to fashion new substantive law as it sees fit, nor is it statutorily empowered to enlarge its own authority. Board Rule 205.8 entitled "Conduct of the Arbitration Proceeding" requires that "the conduct of the Arbitration Panel shall conform to the applicable laws". The New York Civil Practice Law and Rules ("NYCPL") which governs arbitration proceedings does not allow an arbitration panel to rule upon issues not initially presented to them (see §7511 (b) (iii) in particular) when one of the parties, in this case, the City, strenuously objects to the addition of those items.

"Taylor Law" public employee arbitration differs from private sector labor arbitration or commercial arbitration in that it is mandatorily imposed upon the Public employer and is not based upon the consent of the parties. It is not a substitute for collective bargaining in good faith and may not be resorted to until a bona fide impasse has occurred. At that point only may the Public Employer be deprived of its sovereign rights and be required to accept the decision of an arbitration panel. Impasse bargaining in the public sectors is purely a creature of statute and has no common law counterpart. Its procedures must be strictly observed and strictly construed lest an arbitration panel improperly reduce a public employer's sovereign authority. This has been recognized in numerous judicial decisions in this area dealing with the scope of arbitration awards, arbitrability of issues themselves, and procedural aspects of arbitration.

In all cases, the requirements imposed upon a Municipal employer to arbitrate and the issues it has been required to submit to arbitration have been strictly construed.

The rules of procedure adopted by PERB, pursuant to statutory authority, clearly reflect that the issues to be arbitrated must be clearly defined and fixed before the Hearings commence and that there is no discretion or authority given to a Panel to modify and enlarge its own jurisdiction. Official notice can be taken of the "Declaration of Impasse" form supplied by the Board and utilized by the PBA'S attorney in this case, dated July 11, 1977. That form on its face states:

"DETAILS OF DECLARATION

On a separate sheet of paper which should be attached hereto, write a clear and concise history of negotiations leading to this Declaration of Impasse. Include the number and dates of negotiation sessions and specifically list any presently unresolved issues." (emphasis added)

From the very commencement of the statutory involuntary arbitration proceeding, it is clear that the Impasse Petitioner was required to identify specifically each issue in dispute. Rule 205.4 (b) sets forth the contents required in a Compulsory Interest Arbitration Petition. Most important of those requisites are:

"A statement of each of the terms and conditions of employment raised during negotiations, as follows:

- i. terms and conditions of employment that have been agreed upon;
- ii. petitioner's position regarding terms and conditions of employment not agreed upon."

Section 205.5 (b) of the Board's Rules also specifies the contents of a respondent's response to a Compulsory Arbitration Petition. Those contents are:

- (1) Such response shall contain respondent's position regarding terms and conditions of employment not agreed upon. Proposed contract language may be attached.
- (2) The response may also raise objections to the arbitrability of any of the matters raised in the petition and to any statement in the petition alleging agreement as to terms and conditions of employment."

It is obviously impossible for respondent to formulate a Response to an issue that has neither been identified by petitioner nor where petitioner's position on that term or condition of employment has not been set forth.

Likewise, unless Respondent is apprised of a petitioner's contention that a particular term or condition of employment is being placed in issue, it becomes impossible for Respondent to raise an objection to the arbitrability of that issue.

Failure of a petitioner to specify each issue at impasse then, can become a trap to any respondent and prevent respondent from having the opportunity to challenge the arbitrability of improper issues.

It is clear to me and to the Panel majority that respondent never claimed that:

Dental and Welfare Plan

Educational Benefits

Work Week

Night Differential

Plainclothes Duty Pay

were issues at impasse, for which mandatory arbitration was being requested, until these Hearings were convened to determine the unresolved "dispute" previously presented to PERB.

It matters not that these items may have been part of the bargaining demands that PBA raised during the course of collective bargaining. Demands are often abandoned or modified or traded away during the course of bargaining between parties. This Panel has no statutory right to resurrect any such PBA demands from their resting place and to breath vitality into them by designating them additional issues, or an "amendment", particularly over the prompt objection of the City.

The interjection of these five additional issues into the proceedings taints the Panel's entire Opinion and Award. Each improper item considered by the majority of the

Panel has a prospective cost, not only over the two year term of the contract, but, as a practical matter indefinitely into the future, for it is well known that to recapture in the future any of the monetary or other items awarded by an arbitration Panel, same must be "bought back" by the City in future negotiations*. Since this Panel is required by statute to consider the financial ability of the public employer to pay, as well as other statutory criteria, these costs of necessity and the effect of non-cost items, must influence the Panel and relate to other items they have awarded on, including items both rejected or approved.

Allowing consideration of the five improper issues also sets the mental stage in the majority's mind for allowing certain PBA demands by way of compromise. For example, by rejecting the PBA's demand of \$10 credit for educational benefits, which proposal would have cost an estimated \$12,200 according to PBA testimony, the Panel becomes mentally disposed to grant less expensive PBA items since a larger dollar item has been denied.

Consideration of these five improper items also encourages the creating of a mental attitude whereby the majority in effect "bargains" for the City and engages in certain "trade off" or "buy backs" of demands and benefits. Evidence of this effect is found in the majority's treatment of the salary increases it awarded and its relation to

*The majority of this Panel is well aware of this, as indicated at page 9 of their opinion.

longevity changes, expressly noted at Page 6, 8 and 9 of the majority's Opinion. City's Exhibits 13 and 14 show that the savings to it of freezing the longevity pay at \$600, \$630 and \$660 (at 10, 15 and 20 year levels) would amount to \$1,542 for two years for the work force under consideration with hypothetical wage increases of \$1,000 per year.

The Panel majority's balancing of costs of the various items in the package is clearly evident at page 22. The items awarded were of necessity affected by the items rejected and their costs.

In my opinion this award is thoroughly and irreparably tainted by consideration of improper items and their costs. These considerations have penetrated the Award as a whole, and I, therefore, cannot subscribe to it.

Even if the Panel majority had not considered and awarded upon five improper items, I would not have agreed to their award on salary and certain other issues.

The Panel majority awarded a \$1,400 increase for the year 1977 and a \$1,200 increase for 1978. These increases amount to .0915 percent in 1977 and .0719 percent for 1978. Cumulatively, they amount to a two year increase of .1701 percent. I would have awarded increases of awarded \$700 per year.

The awarded increases are in my opinion based on a faulty rationale. The majority penalized the City for seeking and obtaining productivity from municipal employees. The majority notes that the police force has, over a "few years", been reduced by attrition from 45 to 35. This is not entirely correct. Although one of the two walking posts in the small business section was eliminated, part of the reduction was due to the reassignment of policemen from non-police to police work. A policeman, acting as a department automotive mechanic, was reassigned to patrol duties. A policeman, assigned as a sign maker and road stripe painter, was reassigned to patrol duties. The functions performed by these men were transferred to the Department of Public Works. A Parking Enforcement Officer was hired, allowing for reassignment of a policeman to more productive duty. These economies and good management of personnel should not be utilized as justification for increasing policemen's pay. I see nothing wrong with a police department working at full capacity in carrying out their assigned duties. I see no reason for the City of Rye to apologize for good management or to be financially punished for it.

Similarly, I disagree with the majority's reasoning that the magnitude of these increases justify the freezing of the longevity amounts and is a "buy back" of part of the longevity pay.

I fundamentally disagree with the Panel's avowed disregard of the basis of comparison to be used in comparing the compensation of the Rye Police Force with the compensation of other police officers in Westchester County.

The Panel has refused to couple the base salary and longevity payments into an "average total salary" for purposes of comparison. Instead, they use the base pay of top grade patrolmen, completely disregarding any longevity payments.

The two reasons given by the majority for their rejection are not convincing. They reason that considering the longevity payments, and averaging them with base salary, would "skew" the figures by either a rather young or highly senior group of employees. This reasoning distorts reality. It disregards the actual total and average compensation received by Rye police men. It completely disregards a longevity pay system that the majority itself characterized as "outstanding". That system is the most generous in the County of Westchester. This was demonstrated by City Exhibits 12,13,14 and 16 which showed the actual present compensation in Rye, base salary plus longevity, on a man by man basis. Those Exhibits also demonstrated the number of years each man had on the force, his present longevity step and longevity compensation and where he would move to in 1977 and 1978 automatically. These built in automatic increases, regardless of anything further the Panel might award, have not been properly evaluated and considered by the majority.

The second reason given by the majority for not averaging the longevity pay into the statistical comparison utilized by the majority of the Panel is, in my opinion, an exaltation

of form over substance. To say, as the majority has, that "longevity is an additional payment for length of service, separate and distinct from the salary" might cause an unknowing reader to conclude that the City doesn't pay out hard cash to its policemen as longevity pay.

Had the majority considered longevity pay as part of its statistical comparison, Rye's ranking would have been considerably higher, as demonstrated by City's Exhibit 21.

For Example, City Exhibit 12 showed that the average Rye police officer had 12.8 years of service as at the end of 1976. Under the longevity schedule, longevity pay was due each man after the conclusion of his tenth year of service. Only 12 men out of 34 were not receiving longevity pay.

The majority analysis does not mention also that as of the end of 1976, 9 men had already achieved and were receiving top longevity pay, a total of 15 percent above their annual base salary, and that 6 others were on the step below, receiving a total of 10 percent above their base pay.

The majority analysis also fails to mention, or in my opinion, to take into account that the 5 sergeants who also were awarded \$1,400 and \$1,200 increases were receiving

between \$17,693 and \$19,507 per annum. No rationale was expressed by the majority for granting identical increases to sergeants other than that statistics are most readily available for 1st grade officers.

Had the Panel used the combined average for police officers first class (\$15,749 rather than \$15,284 as of the end of 1976) Rye would have stood 26th out of 38 municipality. The figures are so closely bunched between municipalities that an increase of \$700 per year to an average of \$16,449 would increase Rye's rank to 10th of 38 and increase of only \$100 would move Rye three places upward, and an increase of \$200 would move Rye 5 places upward.

The City of Rye has offered wage increases of \$700 per year for the years 1977 and 1978, coupled with modified longevity payments of \$600, \$630 and \$660 to those employees who reached pay plan steps 6,7 and 8 during 1977 or 1978. City Exhibit 12 showed that if the City's proposal was effectuated, the average salary for a patrolman would rise to \$16,627 in 1977 and \$17,576 in 1978. During that period, 6 patrolmen would have their salaries increased to \$19,093; 6 would receive \$18,251, and 1 would receive 18,078. In other words, 13 of 20 patrolmen would be earning in excess of \$18,000 or \$19,000. Under the City's proposal, the average pay for sergeants in 1977 and 1978 would rise to \$19,019 for 1977 and \$19,809 for 1978. One sergeant would receive as much as \$20,907; 2 would receive \$19,977, and 2 would receive \$19,093.

I believe that these increases would have been appropriate.

City Exhibit 13 projected what might happen if this Panel awarded annual increases of \$1,000 per year, coupled with a modified pay and longevity plan, which would pay employees who reached the former 6th, 7th, and 8th steps, the sum of \$600, \$630, and \$660. The effect of those increases would be to raise the average for patrolmen to \$16,914 in 1977, and \$18,178 in 1978. The average for sergeants would rise to \$19,409 in 1977 and \$20,409 in 1978. At this level of increases, 4 patrolmen would be receiving \$19,693 by 1978, 2 others would be receiving \$19,511; 5 others would be receiving \$18,851; 1 would receive \$18,678, and 1 would be receiving \$18,043 by 1978. I believe that increases of this magnitude would be excessive.

In estimating the cost of wage increases to the City, the majority has simply ignored the hidden costs of any increases due to factors such as the employers "contribution" for social security, "contributions" for a very generous twenty year retirement program and other like costs. Uncontroverted testimony set these costs at between 38 percent and 39 percent of payroll for retirement alone.

I also take exception to the manner in which the majority has considered the City's ability to pay. Once again, the Panel seems to extol prolific spending and to punish a municipal administration that has maintained low debt, good bond ratings, and has even been able to generate a small surplus.

I do not believe such a set of facts justifies any increases. Good management and small surpluses do not justify dipping into the municipal treasury, which is funded by the taxpayers of Rye. Their tax rate is high enough. For the Panel to reason that Rye's populace is not taxed to its limit, is in my opinion, unconscionable!

The City seeks to pay fair and reasonable pay to its employees. No evidence was introduced that the City abuses its employees or that there have been resignations because of supposed underpayment. Quite the contrary. The evidence showed the City had no difficulty in filling positions that opened up.

I feel the \$700 and \$700 increases offering of the City were reasonable, and the \$1,400 and \$1,200 increases awarded by the majority are both unreasonable and are likely to set off a round of demands for similarly large increases by other municipal employees.

AWARD

I have considered only the issues referred to this Panel by the Chairman of the State Board. Based on the evidence, I would award as follows:

1. Contract Term

I agree that the term of the contract shall be January 1, 1977 through December 31, 1978.

2. Salary

I would grant the City's salary proposal for increases of \$700 to each member of the unit retroactive to January 1, 1977 and January 1, 1978.

3. Longevity

I would deny the PBA's proposal. I agree with the majority's granting of the City's proposal regarding longevity steps as far as the majority has gone. I would, however, also grant the City's proposal to add two new lower steps for any employees hired after January 1, 1977.

4. Accumulated Sick Leave at Retirement

I agree with the Panel Chairman that the PBA's proposal should be denied.

5. Night Differential

I agree with the Panel Chairman that the PBA proposal is denied as this issue is not before this Panel. If it were, I would deny it on the merits.

6. Dental Insurance and Welfare Plan

I would deny the PBA's proposal because this issue is not before this Panel.

7. Cleaning Allowance

I disagree and would deny the PBA's proposal.

8. Personal Leave

I would deny the PBA's proposal.

9. Work Schedule

I disagree and would deny the PBA's proposal in its entirety because this issue is not before this Panel.

10. Plainclothes Duty Pay

I would deny the PBA's proposal because this issue is not before this Panel.

11. Modification of Sick Leave Regulations

I disagree and would grant the City's proposal.

12. Affirmative Action

I disagree and would grant the City's proposal.

13. Educational Benefits

I disagree and would deny the PBA's proposal in its entirety because this issue is not before the Panel.

Dated: December 19, 1978.

Guy F. Carlsen

Guy Carlsen
Employer Appointed
Panel Member

STATE OF NEW YORK)
)
COUNTY OF Westchester)

On this 10th day of December, 1978 before me personally appeared Guy Carlsen, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

David W. Adams
Notary Public

DAVID W. ADAMS
Notary Public, State of New York
No. 60-5013665
Qualified in Westchester County
Term Expires March 30, 1980