

STATE OF NEW YORK

STATE PUBLIC EMPLOYMENT RELATIONS BOARD  
ALBANY, NEW YORK  
1980

PUBLIC EMPLOYMENT RELATIONS BOARD

\*\*\*\*\*

In the Matter of the Arbitration between

CITY OF ELMIRA

and

CITY OF ELMIRA PBA

PEER CASE NUMBER: 14-80-19  
M80-351

\*\*\*\*\*

OPINION AND

AWARD OF

PUBLIC

ARBITRATION

PANEL

**PUBLIC ARBITRATION PANEL:**

- Peter J. Hally, Employee  
Organization Panel Member
- Cyril J. Kuttankuler, Employer  
Panel Member
- Robert F. Korets, Public Panel  
Member and Chairman

**APPEARANCES:**

For the PBA:

Gerald F. Washburn, Second  
Vice President, Police Conference  
of New York, Inc.

For the City:

James L. Burke, Esq.

**OPINION**

In accordance with the provisions of the Civil Service Law, Section 209.4, as amended, the New York State Public Employment Relations Board (PERB) designated the above Public Arbitration Panel for the purpose of making a just and reasonable determination of the dispute between the City of Elmira PBA, herein called the PBA, and the City of Elmira, herein called the City.

Pursuant to the statutory provisions applicable to interest arbitration under Civil Service Law, Section 209.6, as amended July 1, 1977, a hearing was held on December 2 and 15, 1980, at Elmira, New York. At the hearing the parties were afforded full and complete opportunity to present exhibits, evidence and argument concerning the respective positions on the issues which are in dispute. Following the hearing the parties submitted briefs.

In considering the evidence and argument presented by the parties, the Public Arbitration Panel weighed the relative position of the parties and arrived at its final determination based on the criteria set forth in Section 209.4 of the Civil Service Law as follows:

- 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 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, paid time off and job security.

In addition, the Panel considered other factors that are customarily and customarily considered in arriving at an appropriate award.

The representatives of both parties presented the case with great competency and cogency, and in great detail.

#### Facts; Contentions of the Parties

By way of background, the City points out that for many years before the Public Employees Relations Act and for a few years following, the City paid

and negotiated identical salaries for the police and fire fighters. Later, and a few years before the current Agreement, an additional increase was given the police, and this variant has remained constant. The current Agreement between the City and PBA was completed in December 1978, at which time agreements were signed covering all City employees. There were four such agreements by the City: with CSZA, Firefighters, School Traffic Officers, and the PBA. All agreed to and received the same salary increases for 1979 and 1980. All but the PBA, which represents some 27 percent of the covered employees, agreed to 6.5 percent increases for 1981 and 1982.

The Agreement between the City and the PBA covers "all full time sworn law enforcement officers . . . employed in the Police Department of the City . . . , with the exception of the Chief of the Department. . . ." The Agreement by its terms "shall take effect January 1, 1979, except as otherwise provided in Article 11 of this Agreement, and shall remain in effect through December 31, 1982." Article 11, entitled Wages, contains the provision that:

The wages which shall apply during the calendar years of 1981 and 1982 shall be negotiated by the Parties in accordance with Article 11 of this Agreement.

Article 11 in relevant part as follows:

(11) FUTURE NEGOTIATIONS

(a) The Parties agree that, on or about July 15, 1980, the Parties shall commence negotiations to determine what terms and conditions of employment shall apply, during the calendar years of 1981 and 1982 of this Agreement, as regards the following terms and conditions of employment only:

---

WAGES

The Parties shall negotiate concerning the wages to which the members of the bargaining unit shall be entitled, for the calendar years of 1981 and 1982, in accordance with Article 11 of this Agreement.

SICK-LEAVE BENEFITS

\* \* \*

b) In negotiations concerning the foregoing terms and conditions of employment, the Parties shall recognize the following costs, and factors, among others, as meaningful:

\* \* \*

5. Any increase or decrease in the cost of living.

\* \* \*

However, nothing herein shall be deemed to constitute a present agreement by the City to an "escalator clause," that is, an Agreement to automatically negotiate a wage increase equivalent to or greater than the cost of living.

\* \* \*

By letter dated May 3, 1980, PBA gave "written notice of its intent to commence negotiations", further stating that "the only item for negotiations will be Wages." Thereafter, on June 28, 1980, the representatives of the parties executed the following:

MEMORANDUM OF AGREEMENT

CITY OF ELMIRA, NEW YORK

AND

ELMIRA POLICE BENEVOLENT ASSOCIATION, INC.

6 - 24 - 1980

As a result of a series of "off the record" sessions, the Negotiating Committees for the Police Benevolent Association and the City of Elmira mutually place on the table for the official record the following tentative agreement for 1981 and 1982 wages:

1. 1981: 6-3/4% increase in the official Salary Schedule over the 1980 Salary Schedule (Exhibit attached)

2. 1982: 6-1/2% increase in the official salary schedule over the 1981 salary schedule (Exhibit attached)
3. The 1981 salary shall take effect and be paid beginning September 1, 1980.
4. The 1982 salary shall take effect and be paid beginning August 31, 1981.

Both Committees further agree that they will recommend approval of this agreement. (The PBA to its membership; the City to City Council). Action by the City Council will be requested at the first Council meeting following ratification by the PBA membership.

According to the PBA's evidence, however, its representatives informed the City's representatives that they "would not recommend approval to our membership," but "we assured them that we would take this proposal back and present it to our membership in a fair light to the City in the way that they had proposed it to us."

The PBA's membership rejected the tentative agreement by a large majority. Further negotiation failed to resolve the difference between the parties; an impasse was declared; mediation failed to resolve the dispute; and on August 26, 1980, the PBA submitted to PERB its Petition for Compulsory Binding Arbitration. On September 9, 1980, the City submitted a response to the Petition; on September 22, 1980, the PBA submitted a response to the City's response and an Amendment to its Petition in which it stated:

Be advised that the PBA's position is as stated in the minutes of the June 21st meeting: salary increase of 6 1/2% increase in 1981 and 6 1/2% in 1982, across the board.

More specifically, in its post-hearing Memorandum PERB states its position as follows:

The PBA has proposed a salary increase of 6 1/2% in 1981 (retroactive to January 1, 1981) and an increase

of 12% in 1982 exclusive of increments for those who are eligible. The PBA would apply these percentage increases directly to the 1980 salary schedule.

In its post-hearing Memorandum, the PBA stresses the following factors:

As shown in PBA Exhibit 58, the total rise of inflation from 1974 to 1980 is 66.3% as opposed to a 46.3% total raise in pay of an Elmira Police Officer for the same corresponding years. . . .

\* \* \*

The arguments for an increase in salary at the level of the rate of inflation become all the more compelling when one realizes that the current base salaries from which the increases would be computed are very low as compared to other municipalities throughout the State which are similar in population, character of the municipality and number of members of the Police force, as shown in PBA Exhibits 7-17B. . . .

\* \* \*

Immediately surrounding police agencies have all kept pace with the inflation rate and have surpassed the Elmira Police Department in base salary pay. . . .

\* \* \*

The State of New York has seen fit to offer their legislators a 14% raise and the City of Elmira has given substantial raises to their Department heads. . . .

Finally, with respect to ability to pay, the PBA states that the City's "original offer constitutes a raise of 17.9% over two years" and, in conclusion, that:

"We have not heard the City testify that 0.5% - 0.5%, 17.9% or 10% - 10% over two years would put it in an inability to pay situation. The City has not argued at all how an award in excess of its 0.5% - 0.5% could



Business activity in the Elmira area is the lowest of any area in New York State (City Ex. 15).

Using Cost of Living as a measure of business activity, Elmira had the lowest Cost of Living of any city in New York State (City Ex. 10).

Its population is diminishing at an unusual rate (City Ex. 12).

The Elmira area has the second or third, depending on the month, highest unemployment rate in New York State. Rates for the City alone, presumably higher, are not available.

Contrary to trend, it has consistently, for several years, suffered a loss of assessed value.

It has suffered an unusually severe loss of industrial activity. In 8 years it has lost 3000 industrial jobs, almost 10% of the population (City Ex. 15).

In addition, it has suffered an unusual loss of large retail stores, with attendant loss of sales tax revenues and employment.

To show the City's economic distress, recourse is not made to just one factor and emphasizing it. We have here a list of every conceivable economic measuring device and they overwhelmingly show severe economic deterioration.

The statute, by its language, does not presume to limit the arbitration panel to just the listed elements and permits the consideration of any "relevant factors."

The only remaining factor submitted for the panel's attention was the increase in the Consumer Price Index. As mentioned before, regardless how dependable a device it is to prove an increased cost of living in a specific area, no one can doubt that the cost of living in Elmira, of necessity, must have substantially increased. Yet, City

Exhibits 8 and 9 show that salary increases have more than kept pace with the National Consumer Price Index. The comparisons are for the Elmira area; presumably the disparity would be greater if we had figures for the City alone.

#### VI CONCLUSION

Employing the above factors, it would seem there is no objective basis for finding a salary increase justly due the PBA, even without the offer made by the City of Elmira. The City's offer, was, in fact, excessive under all the facts and circumstances.

It is helpful, at this point, to clarify what the City's offer was. As shown by City Ex. 22, p. 2 (B 11-13), the 1980 effective increase would have been 2.2% over the 1980 salary, the 1981 increase - 6½% over the adjusted 1980 salary, and the 1982 increase - 4.2% over the adjusted salary for 1981.

The PBA, in the last period of negotiations, rejected this and asked for 10% effective 1/1/81, and an additional 10% effective 1/1/82.

It is submitted that the only basis for finding any increase properly due would be to anticipate a high degree of future inflation for 1981 and 1982. This becomes conjectural and requires a further finding, contrary to the evidence submitted, that the populace of Elmira has the ability to afford such increases.

#### Discussion and Conclusions

Although, as above stated, PBA has presented its position with great competency and cogency and indeed appears to have advanced every legitimate argument in support of its position, it is the opinion of a majority of the panel that the City's position is persuasive, and accordingly that the tentative agreement for 1981 and 1982 wages set forth in the Memorandum of

Agreement dated June 24, 1980, represents a just and reasonable determination of the matter in dispute.

More particularly, we agree with the City that application of the evidence adduced at the hearing to the factors set forth in Section 209.4 of the Civil Service Law leads to the conclusion that the City's offer is just and reasonable. As to the specific factors set forth, only two are pertinent: comparable salaries in "comparable communities" and the ability of the City to pay. In our opinion, the evidence as to these factors does not warrant a determination of wages beyond those offered by the City. As to inflationary impact, the City's exhibits indicate that salary increases have more than kept pace with the National Consumer Price Index (CPI). In any event, we do not believe that the past rate or any anticipated rate of inflation suffices to justify a different determination.

Determination

The following increases in wages are granted:

1. 1981: 6-1/2% increase in the official Salary Schedule over the 1980 Salary Schedule
2. 1982: 6-1/2% increase in the official Salary Schedule over the 1981 Salary Schedule
3. The 1981 salary shall take effect and be paid beginning September 1, 1980.
4. The 1982 salary shall take effect and be paid beginning August 31, 1981.

WITNESSED:

  
Robert F. Korets, Public Hearing  
and Chairman

STATE OF NEW YORK  
COUNTY OF ONONDAGA }

SS:

On this 27th day of March, 1981, before me personally appeared Robert F. Koretz, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Donna M. Simiele  
Notary Public

DONNA M. SIMIELE  
Notary Public in the State of New York  
Qualified in Onondaga Co. No. 4684878  
My Commission Expires March 30, 1982

SIGNED:

Cyril J. Kuttenkuler  
Cyril J. Kuttenkuler, Employer Member

STATE OF NEW YORK  
COUNTY OF }

SS:

On this 30<sup>th</sup> day of March, 1981, before me personally appeared Cyril J. Kuttenkuler, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Patricia A. Ennis  
Notary Public

PATRICIA A. ENNIS, Notary Public  
New York State, Chemung Co. 4685746  
Commission Expires March 30, 1981

SIGNED:

Peter J. Reilly  
Peter J. Reilly, Employee Organization  
Member /Dissenting

STATE OF NEW YORK  
COUNTY OF (Cattaraugus) }

SS:

On this 1st day of April, 1981, before me personally appeared Peter J. Reilly, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Elizabeth Hallock  
Notary Public

DISSENTING OPINION OF PANEL MEMBER  
PETER J. REILLY

ELMIRA

I vigorously dissent from the Award and the Opinion of the Panel majority in this case.

Collective bargaining within the contract re-opener proviso truly seems to be non-existent in Elmira. The Panel seems to be ignoring this opportunity for the Police Officers and merely giving them a parity award with the other city employees who were content to accept a four-year package and who for all intent and purposes accomplished their goal while members of the PBA achieve early implementation which amounts to a four-month retroactive lump sum per year. This Award is nothing other than an insupportable extension of the claim of parity which deprives the PBA of the right to negotiate a reopener clause for wages provided for in its own written agreement and have the issues decided on the merits.

. . . And what are the facts. The City would have the Panel believe there does not exist an ability to pay. However the City gives some indication of what they understand the arbitration process to be and we quote their own language presented to the Panel.

Memorandum of the City of Elmira  
Page three - lines two through thirteen

"The membership was aware of its opportunities and decided to do what more and more firefighter and police unions are doing throughout the state. This very intelligent practice is to negotiate with the municipality until you extract the best possible offer, then go to arbitration. Why? Nothing to lose.

There are few, if any, arbitration panels that have not awarded the petitioning union more than the final offer of the municipality. Hence, arbitration becomes a very attractive alternative, and as a matter of practice will tend to be the final step in all police and firefighter negotiations. To counteract this practice, municipalities, finding themselves more and more in an economic bind, will have to withhold the highest offer it can afford, pending arbitration."

Furthermore, regarding the ability to pay, PBA fiscal expert Ed Fennell's report clearly indicated the PBA case of the City's ability to pay and provided uncontroverted evidence in this regard. However, the majority concludes "the evidence as to these factors does not warrant a determination of wages beyond those offered by the City." The majority has merely "rubber-stamped" the Memorandum of Agreement as a comparison of determination on Page 10 to this memorandum.

The majority merely gives this predetermined strategy lip service. The City was prepared to offer a minimal monetary percentage increase and consider a "what do we have to lose" attitude. Arbitration would award such an effort or perhaps modify it slightly . . . hardly the good faith collective bargaining effort that is expected from both sides of the negotiating table. . . .

. . . which brings us to what the majority is apparently relying heavily upon . . . Joint Exhibit Number Three . . . reprinted in its entirety on pages four and five of the Award.

The PBA did not ratify this memorandum which the PBA understood was absolutely necessary to reach an agreement during these "series of off-the-record sessions. The City argues its case that this was acceptable by the PBA. No so! The City contradicts its own testimony stating:

"President Ryan stated that the PBA proposal of 10% in 1981 and 10% in 1982 would be the last proposal of the PBA."

AND

"Ryan again informed the City that the membership wants 10 and 10 each year."

AND

"Ryan's testimony verified this ... (in arbitration hearings) "

On the other hand - yes, it is understood that the PBA is negotiating for a minimum of 10% per year (1981 & 1982), yet on the other, the City offers this memorandum as PBA approval. Not so, and the majority has failed to recognize this plain fact.

Regarding comparability, careful examination of all the City exhibits of cities far and wide shows that there are more dissimilarities than there are similarities between these and the City of Elmira. The City chose certain criteria from each while ignoring existing differences and the majority chose to ignore the PBA exhibits detailing comparability of other police jurisdictions.

The City attempted to cite police activity as less when in fact the PBA demonstrated that police activity had dramatically moved upward . . . citing average workload of police activity by those investigations conducted by the limited personnel actually engaged in this activity while the City would have the Panel believe this averaging should be spread by all those in the Department even though this is not in fact the case.

The arguments for an increase in salary at the level of the rate of inflation become all the more compelling when one realizes that the current base salaries from which the increases would be computed are very low as compared to other municipalities throughout the State which are similar in population, character of the municipality and number of members of the Police force, as shown in PBA Exhibits 7-17B. It is also shown that the cities that were submitted in exhibit by the City of Elmira have awarded their Police Departments a salary increase comparable to the present rate of inflation as shown in PBA Exhibits 27, 28, 29 and 30. During the same period of time (1974-1980) the manpower level of the Elmira Police Department has been reduced 20% and in January of 1981, the City has since reduced the Department an additional 5%. At the same time the complaint log, which is the barometer of the Elmira Police Department's workload, has risen 13%. The number of violent and felonious crimes has also risen in proportion.

The City in a number of exhibits and through the direct testimony of Mr. Sartori spoke of the many problems past, present and future during the hearings. This was, of course, its way of arguing for its fair and final offer of 6.5% - 6.5%. It was based on that which they say they offered the Police and to which they settled with other unions. We assume that it was an offer within the City's ability to pay or it would not have offered it.

The Panel does not have to be reminded that the PBA demand is higher than the 6.5 - 6.5% offered. However, it should be reminded that the City offer is higher than it represented

it to be and the City's own exhibit proves the point. The original offer constitutes a raise of 17.9% over two years.

Page 2 of City #22 clearly points this out:

	Column I Base Salary	Column II Raise @ 6.5%/Year Amount	Column III Early Implem. as of 9/1 or Raise for 16 mos.	Column IV (Col. II & III) Total Raise
1980	\$16,543			
1981	17,618	1,075	358	1,433
1982	18,763	1,145	382	<u>1,527</u>
TOTAL RAISE				\$2,960
TOTAL RAISE AS % OF 1980 BASE				17.9%

The cross-examination of Mr. Sartori in the transcript dated 12/15/80 (pages 48-52) indicates that the 6.5% - 6.5% offer is an effective 17.9% offer due to the early implementation.

The City has also argued that its dependence on state and federal aid is causing difficulties. There is not a single city, town or village in the State of New York that does not deal with this situation. Elmira is in this respect comparable to all other municipalities.

The City argued health insurance increases due to costs of participating in the state-wide health plans. Again, it is comparable to every other municipality participating in these plans.

The City argued that it has difficulty in maintaining assessed value. And again it is comparable to all cities, towns and villages - especially cities and villages.

The City argued that it has problems with tax certiorari proceedings wherein people sue for back taxes. Unfortunately, it would not have a case if tax administration was properly done.

The City has not argued that it cannot afford to pay that which it offered. The offer (Exhibit #22) constitutes 17.9% over two years. That is not substantially different from the cash demand of the PBA.

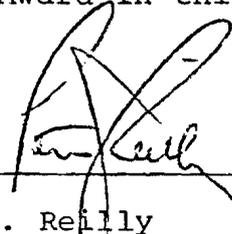
The City has not argued that it cannot afford the PBA demand but has instead sought to disclose a host of problems facing all local governments. We are left to infer that the problems disclosed necessitated less than adequate remuneration.

We have not heard the City testify that 6.5%-6.5%, 17.9% or 10%-10% over two years would put it in an inability to pay situation. The City has not argued at all how an award in excess of its 6.5%-6.5% would jeopardize its financial status. Therefore, based on financial history and the City's testimony with respect to the 17.9% cost of the offer, the Panel should feel free to give weight to the matter of what constitutes an equitable wage without feeling it would jeopardize the financial condition of the City of Elmira.

#### CONCLUSION

Collective bargaining for Police Officers seems to be an extinct species in the City of Elmira. The Award in this case simply imposed percentage increases determined in 1978 and set in effect January 1, 1979, with early implementation. The PBA has been deprived of establishing its own wage negotiation.

I respectfully dissent from the Award in this case.



Peter J. Reilly  
Employee Organization Member  
Dissenting

STATE OF NEW YORK) SS:  
COUNTY OF ALBANY )

On this 1st day of April, 1981, before me personally appeared Peter J. Reilly, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.



Notary Public

**ELIZABETH HOLLNER**  
Notary Public, State of New York  
Qualified in Albany County  
Commission Expires March 30, 1982

April 1, 1981