

NYSP PUBLIC EMPLOYMENT RELATIONS BOARD
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CONCILIATION

In the Matter of Arbitration

between

Opinion and

City of Cortland

Award of Interest

and

Arbitration Panel

Cortland Police
Benevolent Association

(PERB case no. IA84-~~34~~
m84-428

A hearing in this matter was held on June 17, 1985, at City Hall in Cortland, New York, before an arbitration panel consisting of Matthew R. Fletcher, Esq. (employee member), Dr. Garth C. Lax (employee organization member), and Dr. Howard G. Foster (public member). The City was represented by Dennis G. O'Hara, Esq., and the Union by John E. Ferris, Esq. The parties were given full opportunity to present material and testimony in support of their positions. After the hearing, the parties submitted additional material as requested by the panel. Final briefs were submitted on August 9, 1985, upon which the record was closed.

Background

In July, 1984, the parties began bargaining a successor to their 1983-1984 Collective Bargaining Agreement. Negotiations proceeded through the summer and fall. In late November, a management offer was rejected by the PBA membership, and impasse was declared. Mediation by the New York State Public Employment Relations Board (PERB) failed to resolve the dispute, and on January 23, 1985, the PBA petitioned PERB for interest arbitration pursuant to the terms of the Taylor Law. The panel was appointed on March 15, 1985.

The petition for arbitration listed four unresolved issues: salary, shift differential, health insurance, and, on-call pay for detectives. In its response, the City denied that the last issue was unresolved, and it

also claimed that both its position and the PBA's were in certain respects misrepresented in the petition. It filed an improper practice charge with PERB, which was rejected as untimely.

The bargaining unit includes 37 members of the Cortland Police Department, 27 of whom are patrolmen and the rest sergeants and lieutenants.

Discussion and Opinion

The award to be outlined below reflects the unanimous judgment of this panel as to a just and reasonable determination of the matters in dispute. For the sake of convenience, we shall discuss the issues separately, but it should be understood that we construe the "just and reasonable" standard to apply to the settlement package as a whole. Thus in considering individual issues, we tried to take into account how we would resolve other issues, as well as how the parties themselves had resolved issues in bargaining prior to our appointment.

We will attempt in this section to explain the basis for our determinations. We will not, however, attempt to address all of the arguments and counter-arguments contained in (or implied by) the prodigious volume of material furnished to the panel. In the appropriate places, we will indicate the nature of our consideration of the statutory criteria.

On-Call Pay

This issue involves pay for detectives for being available while off-duty to respond to calls. Detectives work from 8:00 a.m. to 4:00 p.m. Monday through Friday. Historically, one detective has been designated on a voluntary basis to be on call during evenings and weekends in the event the services of a detective were needed. If the detective was actually called in, he received overtime pay, but otherwise there was no compensation for simply being available.

Some time in 1983, the City decided to establish a rotating system of on call status, with all detectives required to participate. The issue of compensation arose, and when it was not resolved, the parties agreed to defer it to the 1984 negotiations. The record is not clear on how the matter has been handled in the interim.

The PBA's position is that the issue is covered by Article V (4) of the 1983-1984 contract, which reads: "An employee ordered to standby duty or held on alert shall be entitled to one-half (1/2) hour of overtime for each hour that he remains in such status." The PBA argues that being on call is functionally indistinguishable from being on standby status. The City argues that the two statuses are readily distinguishable, but more important the parties in fact agreed on a resolution of this issue in their negotiations (payment of \$2500 a year divided among the five detectives). The City also contends that if the Union is simply seeking enforcement of Article V (4), the proper forum for that is the grievance procedure, not interest arbitration.

The panel, first of all, is unpersuaded by the City's contention that an agreement on this issue was reached and any substantive award would undermine the integrity of the bargaining process. There is nothing solid in the record, including the material on bargaining history submitted by the City, reflecting such an agreement. To the contrary, all the documents submitted talk about proposals, not agreements. A PBA summary of negotiations (City Ex. 16) notes that on November 21 the PBA "advised City that PBA Committee did not feel that the offer was sufficient and detectives would probably reject offer." The panel cannot conclude that a meeting of the minds was reached on this issue. Thus it is still an open issue, and our considering it on its merits should not, in our judgment, damage the bargaining process. We also stress that we are treating the

matter as an unresolved bargaining issue and not as an interpretation of the contract. In other words, we are not asking whether on call status is covered by Article V (4), but rather what is appropriate compensation for this service.

We next come to the PBA's contention that half-time pay is appropriate, since it has long been appropriate for standby and on call is essentially the same thing. We are unpersuaded by this argument; we find enough difference between on call and standby to suggest different pay arrangements. More specifically, we see on call as less onerous than standby. On call status is established by prior arrangement, not simply in situations of exigency. The detective has notice and can plan for it. His movement is not as restricted. He is not required to stay at the station; he need only be within reach of his electronic pager. On call status is more regular and lasts for longer periods than standby; during a non-trivial portion of a detective's on-call duty he will be sleeping. In sum, the burden of on-call status is not such as to justify a 32 percent premium in detectives' pay.* Indeed, it is not without relevance that in the past on-call duty has been handled with volunteers, doubtless reflecting a judgment that being available for work during off-duty hours is, to a degree, part of a detective's job. If the burden were so great, it is unlikely that the system could have survived for any significant period of time.

At the same time, we are not insensitive to the fact that a detective's movements and behavior are somewhat restricted by on-call status, and such restriction warrants some compensation.

*There are 168 hours in a week, 40 of which have detectives on duty. If the remaining 128 hours are divided equally among the five detectives, each would be on call for 25.6 hours. At half pay, the compensation would be for 12.8 hours, or 32 percent of a normal workweek.

The record does not contain information on which to anchor a determination of just what such compensation should be. We are thus obliged to apply our collective sense of what the service is worth. We think the amount should be more than nominal but not so much as to make a dramatic change in the pay status of detectives. An average of \$1000 per year seems to us to fit those standards.* We will award the increase effective October 1, 1985, primarily because of a necessary delay in implementing the change in health insurance we will be discussing presently.

Finally, the City has expressed concern about the standing of the \$2500 agreement it thought it made. The petition for arbitration makes no mention of any such agreement, and counsel for the PBA argued at the hearing that there was no such agreement. Let us be clear on our understanding: the award below is intended by the panel as the exclusive resolution of the PBA's demand for on call pay (City Ex. 13, p. 3, reference to "Standby duty - on call compensation").

Night Shift Differential

Shift assignments are rotated. At present work between 3:00 p.m. and 7:00 a.m. is paid an extra 25 cents an hour. The PBA first demanded an increase to 50 cents, but in its petition indicated it would have accepted 35 cents.

*Although other issues regarding on-call status are not before us, the panel wishes to note that the Supreme Court's Garcia decision regarding application of the Fair Labor Standards Act to municipalities raises questions here that the parties will need to address. The rules governing on call status will determine whether the overtime requirements of the FLSA are waived.

The panel finds a differential of 35 cents to be reasonable. Although other police departments vary considerably in their policies, we find it significant that several other bargaining units in Cortland have differentials in excess of the 25 cents now received by the police. We will award the increase effective October 1, 1985, for the same reason given in regard to the on-call pay.

Health Insurance

At present PBA members receive at no direct cost to them a package of health benefits. The City, without contradiction, characterizes these benefits as generous. The City proposes that PBA members pay a share of the premium cost of this insurance, either through a five percent contribution by all members or a freeze on the City's share at 1984 levels for all employees hired after January 1, 1985.

The panel is inclined to endorse the City's proposal for a five percent employee contribution for at least four major reasons. First, we are persuaded that with the escalating cost of health insurance, it is important for employees to appreciate the value of this benefit. Without a contribution, it is too easy to look upon the benefit as a gratuity. Second, the five percent contribution is relatively modest, amounting to about two dollars a week for a family plan. Third, it is not unusual for police to contribute to their health insurance (although it is admittedly not unusual to find 100 percent employer contributions either). But, fourth, most bargaining units in Cortland have agreed to such a contribution.

Finally, the panel stresses that none of this reasoning is meant to contradict the PBA's contention that cost savings should be sought elsewhere. A five percent contribution by employees in no way diminishes the desirability, for both sides, of obtaining health insurance at the

lowest possible cost.

We shall therefore award a five percent contribution by employees. Since we do not wish to impose this new cost on employees abruptly, we will delay its implementation until January, 1986.

Salary

Let us note at the outset that we will disregard the issue of whether the PBA bargained in bad faith when it asked in arbitration for more than it did in negotiations. This panel does not sit as a collective hearing officer on an IP charge. While the PBA may have violated protocol by its strategy, the fact is that we consider the original eight percent demand unsupported by the record, and so no higher figure entered seriously into our deliberations.

It will be useful to begin our analysis of the salary issue with some general reflections on the criteria we are obliged by statute to consider, and in particular on the extent of their applicability to this impasse.

1. We deem comparisons with "employees performing similar services or requiring similar skills under similar working conditions" [section 209.4(v)(a)] to be paramount in weighing alternative outcomes. Salary determination is not a science, and it is impossible to avoid subjectivity in determining the "worth" of a job. However, the collective judgments of many employers and unions speak persuasively to the question of what constitutes just and reasonable pay. The weight of these collective judgments, moreover, is greater when they are applied to people doing essentially the same work. Once we know what police officers elsewhere tend to be paid, the compensation of "other employees generally in public and private employment in comparable communities" (id.) pales in significance. (We leave for later consideration of the pay of certain

employees in the same community.) Absent compelling reasons to do otherwise, we believe that Cortland police should be paid what police in similar municipalities are paid. We do not presume to know a criterion that better fits the description of "just and reasonable".

2. Although the record contains much discussion and argument about "the financial ability of the public employer to pay"[section 209.4(v)(b)], we believe its relevance is greatly diminished by the City's acknowledgement that it "makes no claim of an inability to pay" (brief, p.92). We take this to mean that the City can afford to implement any award within the range of discussion in the negotiations. An ability to pay, of course, does not mean that the union is necessarily entitled to anything within that range, but it does mean that the panel need not be restrained from awarding a salary increase suggested by other criteria simply on the grounds of an inability to pay.

3. Since we are comparing police with police, we give little weight to "comparisons of peculiarities in regard to other trades or professions [Section 209.4 (v) (c)]. These peculiarities should apply equally to police in communities similar to Cortland. Furthermore, since the peculiarities are not new, they may be presumed to be already reflected in the salary to which any increase will be applied. Finally, to the extent that comparisons of peculiarities with firefighters are relevant, we have read the lengthy discourses offered by the parties and conclude that these peculiarities do not significantly distinguish the two occupations from each other. In other words, these data do not persuade us that either police offices or firefighters, because of these peculiarities, should be paid more than the other.

4. We have, of course, reviewed the terms of past collective bargaining agreements between these parties [Section 209.4 (v)(d)]. We

again note that the history of bargaining, particularly where it has usually culminated in consensual settlements, may be presumed already to reflect past determinants of salaries. Thus the party arguing for an unusual outcome bears the burden of demonstrating a change in conditions.

5. We are obliged by virtue of the City's arguments also to consider a related factor: the alleged historical correspondence between police and firefighters in Cortland. On this point we are persuaded by the PBA's argument that to give definitive weight to a "parity" criterion requires that there have been prior mutual acceptance of a parity as a standard. Where one union has regularly led the parade, or negotiated settlements more generous than earlier ones by other unions (as the PBA claims is the case here), this mutuality is missing. This is not to say that the firefighters' settlement does not matter at all, but it is to say that the City has not shown that that settlement should ipso facto determine the salary of police.

The panel has carefully considered the arguments offered by the parties on comparability, and particularly the question of which other municipalities are most germane to help inform a just and reasonable determination of salaries in Cortland. Our task was made more difficult by the obvious selectivity used by the parties in identifying their "comparables" and by the fact that their respective lists of comparables contained virtually no overlap. To us, the relevant comparisons are with other small cities in largely rural counties in upstate New York. While certain features of individual cities may serve to distinguish them from Cortland, we feel that it is their basic character - size and environment - that determines the essence of the police officer's job. We are not persuaded by the PBA's invocation of the labor market area as a conclusive

standard, in part because some of its own comparables are by no stretch in the same labor market, and in part because if salaries are to be determined by the labor market there is no real part for collective bargaining to play (at least bargaining over wages).

We find the City's list of comparables generally more germane, but we are puzzled by certain omissions. First of all, the City applies three criteria (unit size, population, and income) to 17 municipalities (why those 17 specifically is unclear) and by somewhat arbitrarily fixing cutoff points derives a list of five "truly comparable entities". Within the City's own cut off points on all three criteria, however, are three more municipalities: Batavia, Olean, and Oswego. Why they in particular are omitted from the "truly comparable entities" is unclear. But beyond these mysterious omissions, we find the City's comparison base uncomfortably narrow. By the standard of small upstate cities in rural counties, we would not have excluded municipalities like Ithaca, Auburn, and Geneva, cities that are not only like Cortland but relatively near Cortland.

Rather than engage in this kind of selectivity, the panel chose to look at all small upstate cities in rural counties on which data were provided. Our objective was not to construct a formula, for such an exercise would necessarily imply a decision that this issue simply does not permit, but rather to develop a general picture of police pay in Cortland and elsewhere in 1984. We started with the City's original 17 municipalities, subtracted the suburban municipalities, and added certain of the comparables offered by the PBA (Ithaca and Auburn, but not large cities like Syracuse and Binghamton). Since we did not have salary schedules in most cases, we focused on maximums including longevity. The conclusion we reached was that Cortland police pay is in the mid-range of salaries in comparable places, slightly below the median and somewhat

further below the mean. (While we considered Ithaca as one of the comparable places, we did not give it the disproportionate weight suggested by the PBA.) This, to us, argued for a salary settlement within the range of those established elsewhere for 1985 and 1986, perhaps a little toward the high end of that range in reflection of the fact that in 1984 Cortland was toward the low end of the range. Settlements (or arbitration awards) for 1985 and 1986 have generally been between five and seven percent, with six percent a modal figure.

On the basis of these considerations, we conclude that a 6.25 percent increase for each year is just and reasonable.

Award

1. The City shall pay a total of \$5,000 per year to detectives for on-call duty, effective October 1, 1985. For calendar 1985, then, the pool shall be \$1,250. Division of this pool among the detectives shall be made by mutual agreement between the parties. Failure to agree shall be resolved through the grievance procedure.
2. The night shift differential shall be increased to \$0.35 per hour effective October 1, 1985.
3. Effective January 1, 1986, employees shall pay five (5) percent of the premium cost of health insurance benefits now provided.
4. The 1984 salary schedule shall be increased by 6.25 percent across the board retroactive to January 1, 1985.
5. The 1985 salary schedule shall be increased by 6.25 percent across the board effective January 1, 1986.

Amherst, New York
August 20, 1985

Howard G. Foster
Howard G. Foster

State of

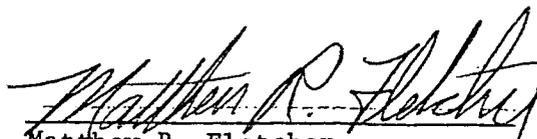
County of

On this 29th day of August, 1985, before me personally came and appeared Howard G. Foster, to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Laurie Foster

Laurie Foster
NOTARY PUBLIC, State of New York
Qualified in Erie County
My Commission Expires March 30, 1986

Auburn, New York
August 20, 1985

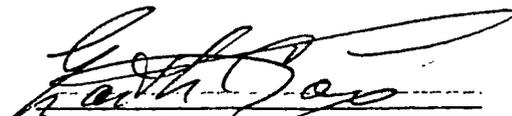

Matthew R. Fletcher

State of New York
County of Cayuga

On this 5th day of September, 1985 before me personally came and appeared Matthew R. Fletcher to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

HENRY C. SAFNAUER
Notary Public in the State of New York
Qualified in Cayuga County No. 4645037
My Commission Expires March 30, 1987

Liverpool, New York
August 20, 1985


Garth C. Lax
Employee Organization Member

State of *NEW YORK*

County of *ONONDAGA*

On this *26* day of *AUGUST*, 1985 before me
personally came and appeared *GARTH C. LAX* to me known and
known to me to be the individual described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same.

8/26/85

Ruth A White

RUTH A. WHITE
Notary Public in the State of New York
Qualified in Onon. Co. No. 4812328
My Commission Expires March 30, 1987