

In the Matter of the Interest Arbitration

Between

THE CITY OF BATAVIA, NEW YORK

and

UNIFORMED OFFICERS ASSOCIATION

Case Number: NYS PERB IA86-22; M86-318

OPINION

AND

AWARD

RECEIVED

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CONCILIATION

Date of the Award: April 10, 1987

Before: Public Arbitration Panel
Wade J. Newhouse, Public Panel Member and Chairman
Vilas Gamble, Employer Panel Member
Nicholas J. Sargent, Employee Organization Panel Member

Representatives:

For the Union:
Robert Capan, President, UOA

For the City:
Jeffrey Oshlag, Esq., City Attorney

On January 20, 1987, the New York State Public Employment Relations Board (hereafter referred to as PERB), having determined that a dispute continued to exist in negotiations between the City of Batavia and the Uniformed Officers Association (hereafter referred to as the UOA), designated the above Public Arbitration Panel for the purpose of making a just and reasonable determination of the dispute. A hearing was held at City Hall in Batavia, New York, on February 20, 1987. Both parties agreed that a tape recording of the hearing was a sufficient record.

At that hearing both parties were provided opportunity to introduce evidence, present testimony and to summon witnesses and engage in their examination and cross-examination. The hearing concluded on February 20, 1987 and the Panel met in executive session on March 5, 1987 to discuss the record. Thereafter, on the date indicated, this Award and Opinion was issued.

I. BACKGROUND OF THE DISPUTE AND IDENTIFICATION OF THE ISSUES BEFORE THE PANEL.

It is important to begin by noting precisely what issues were before this Arbitration Panel and what question or questions were not before it. Subdivision 4 of Section 209, of the Civil Service Law, is intended to provide a means for resolving

negotiations impasses between public employers in New York State and firefighters and police, as defined and limited. It provides that when PERB determines an impasse exists, it shall appoint a mediator to assist the parties to effect a voluntary resolution of the dispute, and if the mediator is unsuccessful within a stated period, either party may petition PERB to refer the dispute to a Public Arbitration Panel.

After such a referral by PERB, the Panel shall hold hearings on "all matters related to the dispute" (sec. 209.4(c)(iii)), and the Panel shall decide "all matters presented to" it by a majority vote (sec. 209.4(c)(iv)). The Panel is directed to make a just and reasonable determination of "the matters in dispute." (sec. 209.4(c)(v)).

Section 205.4, of PERB's implementing regulations, requires that a petition requesting referral to a Panel contain:

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

(i) terms conditions of employment that have been agreed upon;

(ii) petitioner's position regarding terms and conditions of employment not agreed upon. . . .

The response must also contain references to terms and conditions resolved by agreement and those not agreed upon. (sec. 205.5.)

The reasons for emphasizing the statutory and regulatory purposes and directives will be noted below.

A. SEQUENCE OF EVENTS.

The sequence of events leading to the dispute before this Panel need to be set forth, in order to clarify the precise issue before the Panel. The sequence of events are also important for determining what reductions in manpower the UOA may point to, in demanding impact negotiations.

1982 - summer.

The City of Batavia Fire Department had the following personnel: 1 Fire Chief and 1 Deputy Fire Chief; 3 Captains and 4 Lieutenants; and 32 Firefighters. (City Brief, page 1.) At that time, the officers (Captains and Lieutenants) were in the bargaining unit which included officers and firefighters, and were members of the firefighters union (International Association of Firefighters, hereafter referred to as the IAFF). The IAFF was beginning the bargaining process for a new contract. At the same time, because of dissatisfaction among the officers with the single bargaining unit, the process was initiated and completed for creating a separate bargaining unit for the seven officers.

1982 - fall.

During the late Fall, representatives of the officers initiated discussions with city officials, seeking assurances as to how they would be treated in negotiations, in particular in relation to salary and benefits received by the firefighters. (Union Exh. #12.)

1982 - Dec. 13.

City Administrator Ira Gates (since retired) signed a "Memorandum of Understanding" which was addressed to an officer in the officers' unit. (Union Exh. #13.) The complete text of the Memorandum reads as follows:

It is hereby agreed that at least the benefits or their equivalent enjoyed by IAFF, Local 896 through binding arbitration awards or negotiations will also be given to the officers of the Fire Department.

1983 - March.

One firefighter retired and was not replaced. (City Brief, page 1; Union Exh. #1A.)

1984 - January.

On this date, an interest arbitration award for the firefighters (IAFF), imposed for a two year period (1983 and 1984), was issued by a Public Arbitration Panel. This arbitration award was made pursuant to the Taylor Law and followed an impasse between the City and the IAFF in their negotiations for a new contract. (See the reference above, under 1982-Summer.)

1984 - March 13.

On this date, in a letter jointly signed by the presidents of the UOA and the IAFF, Local 896, a demand was made for impact negotiations. After referring to the reduction of one firefighter "as of April 1983", and the assignment of one officer to light duty as of January 9, 1984, and asserting that this was detrimental to safety based on past practice, the letter stated:

Effective March 13, 1984 both organizations are filing a petition to negotiate the shortage of manning as previous staffing has been maintained.

This issue is to be jointly negotiated because the impact on officers and firefighters jointly effects (sic) the safety of all parties involved in fire suppression efforts.

1984 - summer.

Three fire officers (two captains and one lieutenant) retired in close succession to one another. Thereafter, promotions from the firefighters' ranks were made to the officer positions, but there were no replacements in the firefighter positions. Therefore, this left a total of four vacant firefighter positions because the vacancy which occurred in March

1983 had still not been filled. In sum, the number of filled firefighter positions was reduced from 32 to 28. (The complement of officers remained unchanged during the period in question.) (City Brief, page 1.)

1985 - June 19.

On this date, representatives of the City and the UOA signed a contract for the officers unit. That contract covers the period from January 1, 1985 to March 31, 1988. (Joint Exh. #1.)

1985 - October 22.

On this date a Public Arbitration Panel issued an Award for the firefighters unit following an impasse in the impact negotiations. That Award (NYS PERB IA85-4, M84-522) was submitted as Union Exhibit #2. It states, on page 2:

[T]he number of firefighters was reduced to 28. The parties recognized that manning was not a subject of mandatory bargaining but rather was a matter of management perogatives (sic), however, the impact of manning reductions was another matter. This impact was negotiated to impasse. Thereafter mediation occurred resulting in a tentative agreement. When the mediated settlement was presented to the City Council concurrence or approval by that body did not occur. As a result the matters were presented to the instant arbitration panel [pursuant to sec. 209.4, CSL.]

The parties to that dispute were the City of Batavia and the IAFF. The petition leading to that proceeding were not submitted in evidence in the present proceeding. However, it would seem clear that while the letter of March 13, 1984 (quoted above) was signed by officers of both the UOA and the IAFF, Local 896, and while the letter stated that the issue of impact from manning reduction would be "jointly negotiated", at some point impact negotiations between the City and the IAFF was separated from impact negotiations between the City and the UOA, an impasse in negotiations between the City and the IAFF was reached, and the IAFF petitioned PERB to intervene.

That Award in the matter between the City and the IAFF is still in dispute. In its Brief, the City states (on page 1) that it petitioned Supreme Court for an order to vacate and remand the matter to a different panel, that the Court did not vacate but remanded the award to the same Panel for further hearings, but that, to date, the Panel has not reconvened.

There is also some dispute among the parties to the present matter as to the precise nature and requirements of that Award to the IAFF. To the extent it may be relevant to this matter, that disagreement will be referred to below. However, the precise words of the Award, under the issue "Salary", are (page 9):

The Panel AWARDS a 5% salary increase effective September 1, 1985. This 5% increase will be reduced by 1 1/4% for each additional staffing level above 28 until a level of 32 is reached. For example, if staffing is increased to 30 the 5% would be reduced to 2 1/2%. At a level of 32 the 5% would be reduced to zero.

The Panel also granted the firefighters the privilege of converting to cash up to two weeks of vacation annually, and the privilege of converting to overtime pay up to five weeks of vacation in the final year of service. A demand for improved retirement benefits was rejected.

1985 - December.

On December 6, 1985, the UOA addressed a letter to the Chief of the Fire Department stating (Union Exh. #1B):

Be advised that we are filing a grievance over the recent award given to the members of Local 896 and not given to the members of the Uniformed Officers Association. We feel you are in violation of the memorandum of understanding signed on December 13, 1982.

After a denial of the grievance at Step 1 of the grievance procedure (Union Exh. #1B), the grievance was denied at Step 2 in a letter from the City Administrator, Ira Gates, dated December 12, 1985. (Union Exh. #1D.) The letter refers to the grievance as alleging a violation of the Memorandum of Agreement by failure to provide UOA members with a "5 per cent wage increase that was awarded to the IAFF through compulsory interest arbitration in compensation for a reduction of fire fighter staffing." The basis for denying the grievance was that the Memorandum of Agreement "ceases to be in force since it was not incorporated into the agreement nor added thereto."

In response to a letter from the UOA stating that it was appealing this denial to the Grievance Board (Union Exh. #1E), City Administrator Gates -- in a letter dated December 30, 1985 (Union Exh. #1F) -- referred to the reason already given and then added this paragraph:

As was the case with the IAFF you are entitled, according to the Taylor Law, to negotiate the impact that reduced manning has had on your members. Let me know if this is a matter that you wish to negotiate.

1986 - February.

On February 7, 1986 the UOA filed a petition with PERB seeking a declaration of impasse, attaching a memorandum in which it referred to the reduction in the number of firefighter positions in the summer of 1984, stated that "We have filed to negotiate the impact on manning as a result of the decrease in the department staffing", stated further that there had been two

meetings in January of 1986 at which the UOA requested "a package equal to the award given to Local 896", and concluded that further negotiations would not be useful. (Union Exhs. 1G, 1H.)

Following the filing of the petition, PERB asked for clarification as to how reduction of manpower in another unit impacted on the UOA, and the UOA responded with the reasons submitted at the hearing before this panel. (Union Exhs. 1I, 1J.)

1986 - March, September-November.

In March, PERB notified the UOA that it was taking no action on the petition for a Declaration of Impasse because it had been informed by the City that the City Council was considering filling the four firefighter vacancies and that a decision should be reached by the first of April when the new budget would go into effect. (Union Exh. #1K.)

In September, the UOA informed PERB that the City "has neither filled these positions nor have they changed their position on negotiating the impact with the Fire Officers", and referred to the continuing dispute with respect to the Panel Award concerning the IAFF. (Union Exh. #1L.) Thereafter, PERB assigned a mediator and mediation sessions were held during October 1986. (Union Exhs. #1M-1O.)

On November 12, 1986, the UOA petitioned PERB for interest arbitration, stating (Union Exh. #1P):

The Association is requesting a pay raise and retirement incentives to compensate for the additional duties and hazards placed on the Officers as result of the reduction of four firefighters from the fire department.

In its response, after observing that the UOA had filed the petition "after the parties were unable to reach an agreement over issues and proposals arising out of staff reductions and impact of manning negotiations", the City stated that "At issue are certain wage benefit considerations awarded through compulsory interest arbitration to the members of" Local 896, delineated those issues and rejected each proposal as "unjustifiable and without merit".

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At the risk of creating unneeded confusion, it is useful to get a birdseye view of these separate, though related, and parallel events. The events reviewed above are indicated by key numbers in the Chart on the following page, then identified by summary statements at the bottom of the chart. A single letter designates the months of each of the years.

B. DISCUSSION.

Two questions must be addressed in determining the precise issue or issues before the Panel and the scope of the issue or issues. First, what relation has the Memorandum of Agreement, dated December 13, 1982 (Union Exh. #13), and/or the Award to the IAFF, dated October 22, 1985 (Union Exh. #2), to the dispute before this Panel? Second, what relation has the current contract between the UOA and the City (Jt. Exh. #1) to the scope of the issue before this Panel?

1. The Memorandum of Agreement and the Award to the IAFF.

a. The Memorandum of Agreement.

The City's position is that the Memorandum of Agreement, dated December 13, 1982 (Union Exh. #13) was not incorporated into the contract between the parties which became effective January 1, 1985, and "has no legal effect of any nature" (City Post Hearing Brief, page 1). The City refers to Article V(a) of that contract which states: "This document together with department rules and regulations constitutes the sole and complete Agreement between the parties."

At the executive session of the Panel, the Union Panel Member agreed, in substance, that the Panel had no jurisdiction to enforce the Memorandum of Agreement, whatever its legal status.

Nevertheless, at the Hearing a good part of the substantive argument of the UOA representative was focused on that Memorandum of Agreement. Therefore, there should be at least a brief statement of the reason why the question of whether the City violated the Memorandum is not of direct concern of the Panel.

Discussion. The statutory authority of the Panel is referred to on page 2, above. The purpose of section 209.4 of the Civil Service Law is to resolve negotiations impasses, not to enforce agreements.

Thus, insofar as the UOA is claiming the City violated the Memorandum of agreement, that issue is not within the jurisdiction of the Panel. It simply is not the Panel's business to determine whether the City is correct in arguing that the Memorandum was superseded by the contract. That question is a matter for a court to resolve if the UOA continues to press the grievance it filed. The determination, first, of whether there was a live agreement between the parties and, second, if so, whether it was violated is a contract matter to be resolved by the courts.

However, even if not directly before the Panel, given the UOA's emphasis on the content of the Memorandum and subsequent action, could that Memorandum, its validity and violation be indirectly before the panel? Note that the statute, quoted on

page 2, above, states that the Panel shall hold hearings on "all matters related to the dispute", and shall decide "all matters presented to" it by a majority vote. And the Panel is directed to make a just and reasonable determination of "the matters in dispute."

In brief, the language of the statute ("all matters related to the dispute") is not really broad enough to encompass this dispute about the Memorandum, at least, not broad enough when read after the reminder that the purpose of the Panel is to deal with negotiations impasses. The panel is authorized to impose a solution for the impasse in negotiations, not enforce prior agreements. And in this instance, the negotiations impasse requires only that the Panel determine the impact of the manning reduction.

b. The Award to the IAFF.

But an Award was issued for the IAFF, with respect to the reduction in manning. What is the relation of that Award? It has been contended for the Union that the Award (Union Exh. #2) is res judicata, referring specifically to the conclusions in that Opinion on page 7, concerning the impact on safety and workload of the reduction of four firefighters. The argument is that the same arguments were made in that proceeding as in this proceeding, therefore the conclusion in that Award is binding in this proceeding.

Discussion. With all due respect, that simply is not so. These proceedings, although parallel, are independent proceedings. Although they may concern the same facts, and require an answer for the same question as to the meaning to be attributed to those facts, the first in time is not binding on the other. Analyses and conclusions in the previous Award may be considered, but only for their persuasiveness on the merits of the question. Each Panel was independently constituted and the parties are not identical, even though the City may be a party to both proceedings.

c. Conclusions.

The status of the Memorandum of Agreement, dated December 13, 1982 (Union Exh. #13), and the question of its violation, if it is valid, are not matters within the jurisdiction of this Panel.

The Award issued in the dispute between the IAFF and the City (Union Exh. #2) is not binding in either its analysis or conclusions with respect to the facts involved in the present dispute.

2. What Acts of the City May be Considered for the Impact Issue?

a. The Argument on Behalf of the City.

In March 1983 the number of firefighters was reduced by one, and during the summer 1983 the number was reduced by three more, for a total reduction of four, i.e., from 32 to 28. It is this reduction which led the UOA to demand impact negotiations. At the hearing, and in its Briefs, the City has simply addressed the Union arguments on the merits.

However, the City Panel Member, in a written communication to the Public and Union Panel Members, has raised a "time question" which must be addressed. It is this question which was the primary reason for inserting the chart of events, above. In summary the arguments runs as follows:

The Union bases its impact claim on reductions occurring in March, 1984, as for example, in its statement accompanying the petition for a Declaration of Impasse (Union Exh. #1H). (Note: in fact, the claim is based also on the reduction in 1983.)

In June 1985, the Union and the City negotiated a three year contract effective Jan. 1, 1985. Art. 5(a) of that contract states that the contract, together with Department rules and regulations, constitutes the sole and complete agreement between the parties.

The plain construction of Art. 5(a) is that the parties reached accord on all points in contention between them. "Since the impact of manning issue was known to and complained about by the Union both on March 13, 1984 and in August, 1984, it is only reasonable to conclude that this issue was resolved and put to rest with the signing of the contract."

Therefore, the Union must demonstrate any adverse impact on them as a result of staffing reductions was a result of staffing reductions undertaken by the City subsequent to the effective date of the contract.

Since the Union has not presented any evidence of reductions since Jan. 1, 1985, the claim should be dismissed in its entirety: "the pre-contract claim based on its merger in the Contract and the post contract claim based on a failure of proof."

b. Discussion.

A careful tracking of the sequence of events demonstrates why this argument is not persuasive. The demand for impact negotiations was filed on March 13, 1984. (Union Exh. #1A.) The letter was jointly signed by the UOA and the IAFF and is very specific in stating that the demand is for "joint" negotiations

because the impact of the reduction on officers and firefighters "jointly" affected the safety of all parties.

Clearly the relations with the City on this issue did not proceed on a joint basis. But no evidence or testimony was introduced by either party indicating what happened, leading to negotiations proceeding separately with the two unions.

Note also, that at the time of the March 13th letter the IAFF had a contract with the city imposed by an arbitration Award. The Award itself was issued before the filing of this letter. Indeed, the effective date of the Award was retroactive to before the first reduction. (See items A, 7, 8 and 9 on the chart, above.) Thus, the IAFF demand for impact negotiations was uncomplicated by the issue raised with respect to the UOA claim. It was, in substance, a claim for impact negotiations during a period when a contract was in force, with respect to manning reductions occurring during the period of the contract.

As distinguished from the situation with respect to the IAFF, the City Panel Member is certainly correct in observing that the reductions in question all occurred before negotiations were complete for the UOA-City contract. Indeed, the demand for impact negotiations was made before the parties agreed to a contract. (See items N, 4, 8 and 9 on the chart, above.) If this was the whole of the relevant events, it would be necessary to address the question raised by the City Panel Member and determine the meaning of the contract provision in Art. 5(a). What was the parties' intent with respect to this impact dispute which preceded the agreement?

But it is not necessary to enter that thicket and get into a discussion of zipper clauses, and the like. Two events make it unnecessary. First, consider the response, on December 30, 1985, of (now retired) City Administrator Gates to the UOA appeal of his decision denying the grievance which the UOA had filed claiming a violation of the Memorandum of Agreement. (Union Exh. #1F; and see item 5 on the chart, above.) After repeating the City's position that the Memorandum was superseded by the contract, Mr. Gates stated:

As was the case with the IAFF you are entitled, according to the Taylor Law, to negotiate the impact that reduced manning has had on your members. Let me know if this is a matter that you wish to negotiate.

Second, consider the City's response to the petition for a declaration of impasse and then for arbitration. In filing a petition to PERB, on Feb. 7, 1986, requesting a declaration of impasse, the UOA stated: "We have filed to negotiate the impact on manning as a result of the decrease in the department staffing. We have had two meetings with the City of Batavia, Jan. 24, 1986 and Jan. 29, 1986, and have not been able to satisfactorily reach an agreement." (Union Exh. #1H).

Thereafter, in its response to the UOA's petition for binding arbitration, the City stated:

The [UOA] filed the petition for Compulsory Interest Arbitration after the parties were unable to reach an agreement over issues and proposals arising out of staff reductions and impact of manning negotiations.

Thus, the "plain construction" argument of the City Panel Member is contradicted by the City's action on several occasions after the contract came into effect on Jan. 1, 1985. First, on Dec. 30, 1985 the UOA was asked if they wished to negotiate the impact of the reductions as they were "entitled [to], according to the Taylor Law"; second, there were two impact negotiations meetings between the parties during January, 1986; and, third, in November 1986, in its response to the petition for arbitration, the city acknowledged it had negotiated the impact issue and simply responded on the merits of the matter. (See items 5 and MP on the chart, above.)

c. Conclusion.

It is too late for the City to now raise the argument based on contract interpretation, having consistently treated the UOA's claim on the merits on several critical occasions. It also failed to raise that issue in the papers to PERB. Therefore, the issue before the Panel with respect to the impact negotiation claims of the Union encompasses the reductions in manning which occurred in March 1983 and the summer of 1984.

II. "A JUST AND REASONABLE DETERMINATION OF THE MATTERS IN DISPUTE."

The general issue may be stated as follows: Did the Reduction in staffing of firefighters, from 32 to 28, have an adverse impact upon the UOA members sufficient to warrant relief? That phrasing of the issue is taken substantially from the City's Supplemental Brief (page 1). At the executive session, the Union Panel Member agreed with this statement of the issue before the Panel. More precisely, we may note that in petitioning PERB for arbitration, the UOA stated:

The Association is requesting a pay raise and retirement incentives to compensate for the additional duties and hazards placed on the Officers as a result of the reduction of four firefighters from the fire department.

In its response, the City stated, more specifically, that the UOA request had been for a 5% wage increase for all members, the option to convert up to two weeks of unused vacation time each calendar to wages, and the option to convert up to five weeks of unused vacation time during the final year of service preceding retirement to wages.

Thus, in keeping with the PERB rules implementing section 209.4, quoted above on page 2 (the petition must contain "A statement of each of the terms and conditions of employment raised during negotiations"), the UOA has identified two terms and conditions not agreed upon: salary (i.e., a pay raise) and retirement incentives. The petition is also clear in claiming the impact of the reductions was twofold: on safety, and on workload.

It would seem, then, that the task for the Panel is to, first, determine whether there was an impact on safety and/or workload; and, second, if there was an impact, how serious was it. If the Panel determines there was an adverse impact, then it would have to determine what relief is warranted with respect to salary and retirement incentives. That is the scope of the issue, as framed by the UOA's petition for arbitration.

But that framing of the issue does not adequately address the problems inherent in section 209.4 when a Panel must make a determination as a result of an impasse in impact negotiations during the period of an existing contract.

1. The Scope of the Authority of a Panel in Compulsory Interest Arbitration of an Impasse in Impact Negotiations During the Term of an Existing Contract.

PERB's interpretation of section 209.4 that compulsory interest arbitration is authorized for impasses in impact negotiations during the term of an existing contract has been confirmed by the courts. But in stating the policy underlying that conclusion, neither PERB nor the courts addressed the differentness of impact negotiations for the process established by section 209.4.

In the situation for which 209.4 was designed, the parties are negotiating for a contract to determine what the terms and conditions of employment shall be. Subject to the relative bargaining strength of the two parties, they seek agreement on what those terms and conditions "ought" to be. If the negotiations are unsuccessful, the union petitions for a declaration of impasse; mediation is provided and if it is also unsuccessful, the union petitions for binding interest arbitration.

A Panel is constituted, and using the statutory criteria it makes a "just and reasonable determination of the matters in dispute". In substance, it imposes a contract on the parties for a fixed period. That contract, as shaped by reference to the statutory criteria, is what the terms and conditions of employment "ought" to be. This statutory purpose is emphasized by the period for which the Panel "determination" is imposed, a period fixed by reference to the expired contract if there was a previous contract.

The statutory process assumes that the parties were negotiating for a contract to set the "terms and conditions". And the statutory criteria which guides the Panel "determination" reflect the type of comparative data, concerning other than the parties to the negotiations, which shapes the compromises which must be reached in determining what the terms and conditions "ought" to be.

But note the different context of impact negotiations. It seems to assume the comprises concerning the multitude of "terms and conditions" have been made and the contract is in place and agreed to. Now comes employer unilateral action with respect to a nonmandatory subject, e.g., manpower is reduced. That subject not being covered by the existing agreement, the employer could act unilaterally. But that unilateral action can have an impact on one or more "terms and conditions" covered by the contract, and that impact must be negotiated.

In that situation, what is sought is an adjustment in an existing arrangement in order to compensate for the changed condition, an adjustment necessarily measured by the amount of change in relation to the previously agreed to arrangement. This is not the bargaining for "what ought to be", often determined by how similar terms and conditions are treated by other parties. Therefore, with respect to impact negotiations, the statutory criteria which a Panel is directed to take in consideration, have a distinctly different and more limited application. Presumably the parties have already struck a deal at the bargaining table, and the adjustments resulting from impact negotiations are adjustments to the agreement, not a reopening of the negotiations generally.

An overly simplistic hypothetical illustrates the point. Suppose the claim is that reduction in manning has the impact of increasing workload; and it is determined that the reduction did, in fact, increase the workload of the affected workers by 8%. Would not the Panel determination be limited to deciding whether the previously provided for benefits should be increased by 8%, so that it would not be relevant to consider the usual type of comparative wage data about the wage rate of similar employees in similar jobs? Use of the comparative data would permit the union to seek to get through binding arbitration what it did not get at the bargaining table.

Moreover, the statutory direction with respect to the remedy is also less than clear when the impasse giving rise to compulsory binding interest arbitration results from impact negotiations. Note that the statute provides:

the determination of the [panel] shall be final and binding upon the parties for the period prescribed by the panel, but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement or if there is no previous collective bargaining agreement then for a

period not to exceed two years from the date of determination by the panel. . . .

If impact negotiations rationally assumes the existence of a contract, what is the relation of the determination to that contract? Is it parallel to it, so that there now will be, in effect, two contracts in existence? Or, more likely, should the determination be a modification of the existing contract? If a modification, what is the situation when the parties have an existing three year contract -- that is, what is the effect of the two year limit in the statute on a Panel determination? A response to the statutory ambiguity will be necessary in this proceeding, only if the impact of the reduction in the complement of firefighters had a sufficiently adverse effect on the members of the UOA to warrant relief.

2. Did the Reduction in Staffing of Firefighters, From 32 to 28, Have An Adverse Impact Upon The UOA Members?

It is the claim of the UOA that the reduction in the number of firefighters had an impact on both safety and workload. Thus, there are two separate questions to be addressed.

Certain facts, however, are not disputed. At all times referred to by either party, the Batavia Fire Department had 3 fire trucks (2 engines and 1 truck) and 2 fire stations which had to be manned by the Department personnel (firefighters and officers). At all times relevant, the Department has operated with a 4 platoon system.

It is also undisputed that before the summer of 1984 there were 10 persons to a platoon (8 firefighters and 2 officers); and that since the summer of 1984 there have been 9 persons to a platoon (7 firefighters and 2 officers). The allocations before and after the summer of 1984 are determined by the reduction of firefighters from 32 to 28, effective the summer of 1984.

Finally, it is undisputed that at all time relevant, the minimum staffing for a platoon has been 8 persons.

a. Did the Reduction in the Number of Firefighters Have An Adverse Impact on the Safety of the Officers?

The Union's position. While the number of officers per platoon has remained unchanged by the reduction of the total number of firefighters, the UOA stresses the consequences for the officers on a piece of equipment when the total number manning that equipment is reduced. (Union Exhs. 3 & 4.) It states that before 1984 there were usually 8 or 9 persons in fact on a platoon, and since 1984 there have been 8, more often than not.

It states that with the former 10 person platoon, two persons rode the rear step of the fire apparatus pumper and this permitted two persons to enter a burning building with a hose line and make the critical initial attack. But under the post-

1984 manning levels, the UOA contends that more often than not only one person rides the rear step of the pumper. As a result, only one person is available to make the initial attack with a hose line, which means that the Officer must assist with the hose line. This delays the Officer's ability to evaluate ("size-up") the overall situation.

The union stresses the importance to safety of the "size-up" by the Officer present at the fire, and contends that delay increases danger to personnel and property. With delay, other serious consequences flow, including the likelihood of increasing the size of the fire. Moreover, with reduced staff at a fire, the union argues that the Officer will attempt to overcome the shortage by becoming overextended which will increase the chances of poor decision making as a result of exhaustion and distraction.

With respect to this question, the UOA has argued that statistics about the number of actual fires are irrelevant and contends that the conclusion in the Firefighters' Award (Oct. 1985, Union Exh. #2) is "res judicata". Specifically, this paragraph is referred to (from page 7 of the Award):

Certainly very little of a fireman's time is actually spent fighting structural fires but that is not controlling. If there were not a single structural fire in the City in a given year would this lead to the conclusion that the Fire Department should be abolished? Of course not! Just as a home owner would not cancel house insurance because he had not needed to file a claim. When a fireman enters a burning structure regardless of how infrequent that may be, he should not enter alone. Because of current manning, the officer on duty must assist a fireman thus reducing the amount of time available to evaluate the situation.

In any case, the UOA submits statistics showing that the average number of alarms per week increased by 8% in 1983, by more than 7% in 1984, and by 30% in 1985, although there was a 15% decrease in 1986. (Union Exh. #10.)

In support of their position with respect to increased hazard since 1984, the UOA also refers to the fact that before 1984 there was no overtime, while since 1984 there have been more than 260 days of overtime schedule each year and officers were scheduled for more than 100 days in each year.

The City's position. In sum, the City argues that any increased risk for officers, resulting from the reduction in the total number of firefighters, is nominal. (City Brief, pages 3-7.) It stresses that during the course of a year a fire officer performs many duties, such as maintaining trucks and equipment, conducting building inspections, cleaning the fire stations, painting fire hydrants, providing fire prevention causes, attending training classes and simply standing by during idle

time in addition to performing supervisory and administrative activities. It argues that it is only when actually fighting fires that an officer's exposure to danger may be increased by a manning reduction.

The City submits extensive data from City records for the years 1979-1986 to support its argument that the incidents of actual fires in the City are extremely low and declining. Using a formula constructed from the days typically worked by an officer during the course of a year, the City argues that the average number of actual fires each fire officer attended during the years 1980-1986 decreased from 11.04 to 9.36. (The City's figures show an increase from 7.92 in 1984 to 9.36 in 1986.) Using similar formulae, the City computes the amount of time apparatus spent responding to alarms during 1979-1986. (Again, it should be noted that the numbers for 1984-1986 are all larger than the numbers for any previous years.)

Finally, the City in its Brief stresses that the minimum standard of 8 persons on the platoon has been in force for several years, and that "Because of the City's generous vacation schedule however, numerous shifts over the past several years have been staffed by only eight man platoons without UOA every expressing concern over safety." (Brief, page 7.)

In its Post Hearing Brief (at pages 2-4), the City again submits data which it argues shows how the actual number of structural fires in the City have been declining over recent years. And it submits additional data which is offered to show that even though the number of alarms have been increasing over recent years, the number of alarms for hazardous situations that would place a fire officer's safety in jeopardy is relatively low. The data enumerate categories of alarms which occurred, many of which do not involve an actual fire.

Discussion. We must conclude that there was an adverse impact on the safety of the officers, as a result of the reduction of the total complement of firefighters, and that such impact was more than nominal. However, how much more than nominal is difficult to comfortably determine with any degree of precision.

The City argues that the decline in the number of actual structural fires negates the UOA claim. But if it is true that a lesser number of firefighters on a piece of equipment increases the degree of hazard, as argued by the UOA, then the actual number of fires is initially irrelevant. Presumably, an Officer is hired to perform a job with a component of danger in it and terms and conditions are fixed for the job. If the number of actual structural fires are less than they might have been in the past, presumably the terms and conditions are fixed with that in mind. Then, after terms and conditions are fixed, if the degree of hazard is increased, it is increased in relation to the job conditions for which terms and conditions were fixed, and the comparison is not with what used to be.

The UOA is convincing in its argument that the minimum staffing of 8 per platoon results in an increase in hazard, as compared to when 9 persons are actually on duty. But the UOA did not really indicate how frequently, in fact, the times a platoon had only 8 persons had increased since 1984 and the reduction in the number of firefighters. They acknowledged that even under the 10 person platoon, there were times when only the minimum of 8 were on duty. Here, the testimony of Chief Hyde is important. He was asked about that, on direct examination. He testified that in 1982 for 73.3% of the time there were, in fact, only 8 persons on a platoon. He then testified that in 1986 for 89.6% of the time there were, in fact, only 8 persons on a platoon.

On the basis of the City's evidence, we can conclude that after the reduction in the total number of firefighters there was a 22% increase in the occasions when only 8 persons were, in fact, on duty on a platoon. This was a significant increase.

However, any conclusion about how significant an increase in the hazard factor there was, after 1984, must balance that 22% increase by the actual likelihood of the officer being present at a structural fire, the principal source of hazard. At this point, the City's evidence is relevant.

Conclusion. Unlike the overly simplistic hypothetical describing an increase in workload, which was used above, we cannot conclude that there was some identifiable percentage increase in the hazard factor. We can only conclude that the reduction in the total number of firefighters had more than a nominal adverse impact on the safety of the members of the UOA.

b. Did the Reduction in the Number of Firefighters Have An Adverse Impact on the Workload of the Officers?

The UOA has also argued that the reduction in total number of firefighters increased the workload for the officers on duty with a platoon. In essence, the UOA argues that there is a certain amount of work which must be and a lesser number on duty increases the amount of work for members of the platoon, including the officers. In this regard, they cite statistics showing an increase in the amount of overtime scheduled. (Union Exh. #9.)

The City counters with the argument, among others, that the fire platoons are not on a work quota system. There is no requirement that a specific number of inspections be made daily, etc., and assignments not finished on one day are simply carried over. (City Brief, page 7.) The City concludes that no firefighter or officer on duty is working any harder now than before the reduction.

The City's point is persuasive. There was really no evidence introduced which would sustain the UOA on this position. The data as to overtime is not relevant. Persons called in for

overtime are paid accordingly.

Conclusion. We must conclude that there has been no showing that the reduction in the total number of firefighters had an adverse impact on the workload of the members of the UOA.

3. Was the Adverse Effect on the Safety of the Officers Sufficient to Warrant Relief? If so, What Relief is "Just and Reasonable"?

The UOA has requested "a pay raise and retirement incentives" as appropriate adjustments for the claimed impact of the reduction of the complement of firefighters on safety and workload. (UOA petition to PERB for compulsory interest arbitration, 11/12/86.) PERB's rules require the petition for interest arbitration to contain "A statement of each of the terms and conditions of employment raised during negotiations". (See page 2, above.) Therefore, possible relief is limited to the question of a "pay raise" and/or "retirement benefits".

The finding of an adverse impact was limited to a finding of a more than nominal impact on safety. But that more than nominal increase in hazard must be seen in the context of this particular dispute. And the description of what is at stake and what the possible increment of hazard is, permit us to conclude without extended discussion that "retirement benefits" are too tenuously related to this particular claim to be seriously considered as a form of relief. The only reasonable possibility is a salary increase.

But a determination of what salary increase is warranted is the "just and reasonable determination of the matters in dispute" which, pursuant to section 209.4 of the CSL, requires the Panel to "specify the basis for its findings, taking into consideration, in addition to any other relevant factors" the enumerated statutory criteria.

The fourth criteria is clearly not applicable here. Section 209.4(c)(v)(d) refers to:

the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits. . . .

There have been no "past" collective agreements between the City and the UOA. There is a current agreement, which is the first between the parties.

The remainder of the criteria will be considered, but in light of the warnings set forth above about the limited application of those criteria in the context of compulsory interest arbitration for resolution of an impact with respect to impact negotiations. This is not a situation in which the Panel is determining what "ought" to be the terms and conditions for these employees. Rather, it is a situation in which the demand

is for a change in terms and conditions already fixed, in order to adjust those terms and conditions to an increase in hazards beyond those contemplated when the terms and conditions were fixed.

a. Comparability.

Section 209.4(c)(v)(a) requires the Panel to take into consideration the following:

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.

But as was suggested above, the scope of this factor is limited by the context of an impasse in impact negotiations. The comparison to "other employees performing similar services" etc. should be limited to benefits for such employees when a benefit increment on existing benefits is sought because of an increase in safety through the reduction of manpower.

Therefore, data concerning salary settlements with firefighter unions in other New York State localities (Union Exhs. #21 & #22) is not helpful. The same must be said for a comparison of pay scales of firefighters and police, even in Batavia. (Union Exh. #15.) No evidence was introduced of adjustments in the police salaries of Batavia police as a result of impact negotiations.

The UOA also introduced evidence of recommended national standards for staffing practices of fire departments. (Union Exhs. #6 & #7.) These standards were taken from the NFPA Fire Protection Handbook (15th Edition). At best, this evidence simply reinforces the UOA contention that when the number of persons on a platoon actually on duty is reduced, the hazard factor is increased to some extent.

The most relevant data for this comparability factor is related to the firefighters demand for impact negotiations as a result of the reduction of the total number of firefighters, and the Award which followed. (See the summary of events, on pages 2-7, above.) Not surprisingly, the UOA wants what it thinks the IAFF got in an Award for the same City action. That is, the UOA wants the 5% increase in salary and vacation conversion privileges (see the City Response to the UOA petition for Arbitration.) This would be, it seems, without any condition -- that is, having the salary increase proportionally decreased if manpower is increased.

There are number of difficulties with the UOA reliance on

that Award for the IAFF. (Union Exh. #2.) First, of course, is the fact that Special Term has remanded the Award to the Panel for further hearings, and the Panel has not yet reconvened. (City Brief, page 1.) Second, to what extent is the increased hazard factor the same for officers as for firefighters? Probably the same, but the question was not explicitly addressed in this proceeding. Third, the opinion in that Award was not entirely persuasive in the data it used to reach a conclusion that the increase in hazard warranted a 5% salary increase. Fourth, the opinion in that Award conditioned the salary increase on a continuing manpower level that does not seem appropriate in an arbitration Award resolving an impasse in impact negotiations.

The UOA has also offered data which it claims shows that as a result of the IAFF Award, the firefighters' salary schedule makes the officers' schedule noncompetitive at the top rank. (Union Exh. #11.) This arguments faces the same problems indicated in the previous paragraph as to comparison with the IAFF Award.

However, the IAFF Award (Union Exh. #2) is supportive of the conclusion that the impact of the reduction of manpower on the safety of the members of the UOA is more than nominal and warrants some increase in salary. The precise amount of that increase will be determined after consideration of the several statutory factors.

b. Public Welfare; Ability to Pay.

Section 209.4(c)(v)(b) requires the Panel to take into consideration the following:

the interests and welfare of the public and the financial ability of the public employer to pay. . . .

First, consider the "interests and welfare of the public". Little discussion is needed to support the conclusion that upon a finding of an increase in the hazard factor, the public's interest in adequate and effective fire protection justifies some degree of increase in benefit. We can cite here, the public statement of Chief Hyde, that "10 men are needed on each platoon to maintain the City Fire Department's firefighting capability." (Union Exh. #8.)

Second, consider the ability to pay factor. This is the critical factor to be considered. In both its Brief (pages 9-14) and its post-hearing Brief (page 3), the City has painted "a bleak economic picture", which says it faces. This includes a decline in state and federal revenues, a decline in interest earnings on investments, operating deficits in various funds, the necessity for increased rates in the water and sewer funds, a bond rating decline, above average unemployment rates, and an declining economic base.

The Union counters by observing that the City tax rate has

not increased. (Union Exhs. #16 & #18.) In its post-hearing Brief, the City counters, in turn, by noting that the tax rate did not increase as a result of property revaluation, which does not mean that the actual tax amount will not increase. (City post-hearing Brief, page 3.)

One cannot question the difficult economic situation which the City faces. But the statutory criterion is "financial ability of the public employer to pay", and with all the economic difficulties the City faces, the evidence does not demonstrate that it simply would be unable to make the relatively minor economic adjustments necessary to accommodate some increase in the salary rate for the Officers because of the impact of the reduction in manpower.

c. Comparability of Other Trades or Professions.

Section 209.4(c)(v)(c) requires the Panel to taken into consideration the following:

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. . . .

For the reasons set forth under the first criteria, above, this factor is not relevant in the particular context of arbitration for an impasse in impact negotiations, except to the extent such comparisons concerned adjustments of existing benefits to compensate for a change resulting from reduction in manpower. No such evidence was introduced.

d. Conclusion.

Taking into consideration the several statutorily prescribed factors, as discussed above, and considering the fact that the increase in the hazard factor for officers as a result of the reduction in the total number of firefighters is more than nominal but not extreme in terms of degree or frequency, it is determined that a 3% across the board salary increase for the officers is "just and reasonable".

The effective date and extent of that increase requires separate consideration.

4 The "Period Prescribed" for the Determination.

Both parties have addressed the specific issue of the effective date of an Award, should a salary increase be determined to be "just and reasonable". Both positions reflect the entanglement of this dispute with the firefighters dispute, but neither adequately addresses the special circumstances of applying section 209.4 to impact negotiations.

Indeed, in considering this question the UOA reveals most clearly that its central concern has been to try to get the City to comply with the Memorandum of Agreement, dated Dec. 13, 1982. (Union Exh. #13.) But as stated above, this is not the forum to determine the validity of that agreement and whether the City has breached it. With all due respect, throughout the proceeding, its its demands, the UOA simply has been asking for compliance with that Memorandum. But the remedy here, in the form of a determination by this panel, is not for breach of contract.

Moreover, on this question the IAFF Award (Union Exh. #2) is most vulnerable. That Award, tying the salary increase to staffing level, with proportionate reduction of the increase if staff were rehired, ignores the nature of the process under section 209.4 and the directions to the Panel. Section 209.4(c)(vi) provides (broken into clauses for emphasis):

the determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the panel,

but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement

or if there is no previous collective bargaining agreement then for a period not to exceed two years from the date of determination by the panel. . . .

Note the second clause: there is no previous collective bargaining agreement in this dispute. Then is the alternate in the third clause to govern? That clause seems clearly to assume no existing contract, i.e., a situation in which the parties are negotiating for an initial contract and reach an impasse. That emphasizes the ambiguity of this process in its application where there is an existing contract and the impasse concerns impact negotiations.

It would seem within the spirit of this provision, in such circumstances, to connect the determination (i.e., the imposed "agreement") to the existing contract so as to set the period of the determination to end with the termination of the contract. Otherwise, if the determination ends before the termination of the contract, the consequences for what amounts to a modification of the contract are obvious. Thus, it is a fair interpretation of section 209.4(c)(vi) that the period of the determination in impasses from impact negotiation shall not exceed two years and shall end on the date of termination of the contract.

But, it might be argued, would not this be a windfall in such a situation as we have here? If the City restores the 4 firefighters on or after April 1st, ~~which~~ should the increase continue when the reasons for it no longer exist? Two responses. The purpose of the determination is to respond to the change in

terms and conditions. After that response, if terms and conditions are changed by eliminating the previous change, the City has two options. In negotiating the next contract, it can seek to recover what it "lost" in those negotiations. Or, if that seems too remote, remember that the City may also demand impact negotiations, leading to arbitration. If it restores the four positions, it could demand impact negotiations to eliminate the salary adjustment based on the reduction.

Not
1/25/85
K. (16) F. W.
M. + P. (16) F. W.
I.F.

In this dispute, by this reasoning, the determination should be for a two year period, effective retroactively to April 1, 1986 -- that is, two years before the present contract terminates on March 30, 1988.

But how can we reconcile this with the fact that the UOA filed the demand for impact negotiations on March 13, 1984? Here, we skirt close to the arguments of the City member of the Panel concerning the effect of the contract negotiated between the City and UOA, effective Jan. 1, 1985, on the demand for impact negotiations. To some extent, we treat that demand as preempted by the agreement to the initial contract; but the City agreed to impact negotiations after that contract was in effect, as pointed out above. And since the determination of the Panel is, in substance, a modification of the contract, and since the statutory process is most compatible with a determination that coincides with the termination of the contract, the effective remedying of the impact of the reduction on the safety of the officers can only be effective on April 1, 1986 because the contract between the parties is for three years.

Conclusion. The determination that there shall be a 3% salary increase for officers in the bargaining unit represented by the UOA is imposed for a two year period ending March 30, 1988.

III. AWARD.

For the foregoing reasons, the Panel determines that a just and reasonable determination of the matters in dispute between the City of Batavia and the Uniformed Officers Association, is that the officers in the bargaining unit of the Batavia Fire Department represented by the Uniformed Officers Association shall be awarded a 3% across the board salary increase for a two year period beginning April 1, 1986 and ending March 30, 1988.

State of New York

County of Genesee

We do hereby affirm upon our oaths as Arbitrators that we are the individuals described in and who executed this instrument, which is our award.

Dates 3/20/87

Wade J. Newhouse
Wade J. Newhouse, Public Panel Member and Chairman

Dissenting - Opinion to Follow
Vilas Gamble, Employer Panel Member

Nicholas J. Sargent
Nicholas J. Sargent, Employee Organization Panel Member

DISSENT

PERB CASE NO. IA86-22, M86-318
(City of Batavia and Uniformed Officers' Association)
Impact of Manning Interest Arbitration Award

I submit this dissent in response to the impact of manning interest arbitration award that Wade J. Newhouse, Public Member and Chairman, and Nicholas Sargent, Employee Organization Panel Member recently awarded to the Batavia Uniformed Officers' Association. In reviewing the award I have found the arguments and rationale offered by Messers. Newhouse and Sargent in support of their decision to be faulty and unsubstantiated in law. Furthermore, the wage adjustment awarded has every appearance of being arbitrarily set at 3 percent without any basis or justification. Because neither of the other panel members were willing to consider the issues I raised I have no choice but to dissent. The following are the issues and deficiencies I have identified.

1. THE CITY DID NOT WAIVE ITS RIGHTS BY NEGOTIATING IMPACT OF MANNING WITH THE UOA

The City did not waive its rights to resist impact of manning arbitration by negotiating with the UOA in 1986 over the impact of manning. In March and August of 1984 the UAO raised an impact of manning issue through written communications to the City. During the latter part of 1984 and the early part of 1985 the City and the UOA met several times to negotiate a collective bargaining agreement. The parties finally reached settlement in May 1985 when a collective bargaining agreement was executed which covered the period of time from January 1, 1985 through March 31, 1988.

At no time during the collective bargaining negotiations did the UOA place impact of manning on the negotiating table. Therefore, when the parties executed the agreement in May 1985 the City properly assumed that no more items were at issue. In December 1985 the UOA attempted to file a grievance over the Memorandum of Agreement (Union Exhibit 13) which the UOA claimed the City had violated. In a letter dated December 12, 1985 the City Administrator responded to the UOA grievance by pointing out that the Memorandum of Agreement became null and void upon the execution of the collective bargaining agreement between the parties since the memorandum had not been incorporated or appended to the agreement. The UOA subsequently appealed the City Administrator's initial decision and informed the City Administrator that the UOA wished to pursue the matter through the grievance arbitration process.

The foregoing circumstances led to the City Administrator's issuing his December 30, 1985 letter to the UOA (Union Exhibit 1-F.) The purpose of the December 30, 1985 letter was to make the UOA aware that their alleged grievance over the memorandum of understanding did not meet the definition of a grievance as contained in the collective bargaining agreement and therefore was not grievable. The City Administrator did point out that since what the UOA was really seeking was the same 5 percent wage enhancement that the IAFF had received through an impact of manning arbitration award the UOA would need to pursue this matter through the same negotiation process. Of course when the City Administrator issued his December 30, 1985 letter, no staffing reductions had occurred during the term of the collective bargaining agreement then in effect. When negotiations ensued the UOA was unable to substantiate any adverse effect due to staffing reductions because no staffing reductions had, in fact, occurred during the term of the contract.

The City though willing to negotiate with the UOA never acceded to the UOA's claim that a staff reduction had, in fact, occurred that impacted on UOA members. To the contrary, the City's position has always been and continues to be that no staffing reductions have ever been made that affected the UOA membership. Why should the City resist talking to the UOA over an issue the City perceived as nonexistent? The UOA has never been unable to substantiate any adverse impact of staff reductions on its members because the City had not made any staff reductions during the term of the collective bargaining agreement. Consequently, this matter is not arbitrable since a valid collective bargaining agreement was in place and since the act of reducing staff that the UOA alleges the City to have undertaken never occurred during the term of the collective bargaining agreement. Therefore, the arbitrator has no authority to ignore this point and to estop the City from raising the issue that this matter is not a proper matter for arbitration.

2. MISINTERPRETATION OF TAYLOR LAW SECTION 209.4 (c) (vi)

The panel members have interpreted section 209.4(c) (vi) of the Taylor Law as giving the panel authority to issue an award covering a period of two years. The arguments for this interpretation are excerpted as follows:

Moreover, on this question the IAFF Award (Union Exh. #2) is more vulnerable. That Award, tying the salary increase to staffing level, with proportionate reduction of the increase if staff were rehired, ignores the nature of the process under section 209.4

and the directions to the Panel. Section 209.4(c) (vi) provides (broken into clauses for emphasis):

the determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the panel,

but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement.

or if there is no previous collective bargaining agreement for a period not to exceed two years from the date of determination by the panel . . .

Note the second clause there is not previous collective bargaining agreement in this dispute. Then is the alternate in the third clause to govern? That clause seems clearly to assume no existing contract, i.e., a situation in which the parties are negotiating for an initial contract and reach an impasse. That emphasizes the ambiguity of this process in its application where there is an existing contract and the impasse concerns impact negotiations.

It would seem within the spirit of this provision, in such circumstances, to connect the determination (i.e., the imposed "agreement") to the existing contract so as to set the period of the determination to end with the termination of the contract. Otherwise, if the determination ends before the termination of the contract, the consequences for what amounts to a modification of the contract are obvious. Thus, it is a fair interpretation of section 209.4(c) (vi) that the period of the determination in impasses from impact negotiation shall not exceed two years and shall end on the date of termination of the contract.

Note, however, that the situation involving the UOA is one in which a collective bargaining agreement is, in fact, in place. Furthermore, note that the Section 209.4(c) (vi) is silent with respect to situations in which an arbitration award is made during the term in which a collective bargaining agreement is in force. Consequently, Section 209.4(c) (vi) provides no authority to an arbitration panel for making a two year award when a collective bargaining agreement is in effect.

The presumption that the "spirit" of the Taylor Law provides authority for a two year award in the instant case based on the rationale offered in the panel's arbitration award is without basis. The panel has provided no evidence of legislative intent, case law, or any other evidence, persuasive or otherwise, substantiating what it ascribes to be the "spirit" of this

section of the Taylor Law. Therefore, the panel's interpretation of the "spirit" of the law gives every indication of being arbitrary and unauthoritative, and therefore illegitimate.

3. UNREASONABLE TO FORCE THE CITY TO REARBITRATE IMPACT OF MANNING

At the arbitration hearing and during the panel's deliberations the panel members were made fully aware of the City's intention to fill the four fire fighter vacancies which gave rise to this impact of manning dispute. Consequently, the panel members knew the period of time during which any adverse impact of manning could have occurred was for the 20-month period of time from September 1985 to April 1987 and that with the filling of the fire fighter vacancies whatever adverse impact of manning, if any, had occurred would be reversed. Consequently, the period of dispute was for a discrete period of time, i.e., 20 months. Nevertheless, the panel has made an award for a two year period and has placed the City in a position in which it must either expend additional money to rearbitrate the impact of manning question or try to recover its losses during future contract negotiations. The following excerpt provides the panels justification for its decision.

But it might be argued, would not this be a windfall in such a situation as we have here? If the City restores the 4 fire fighters on or after April 1st, which should the increase continue when the reasons for it no longer exist? Two responses. The purpose of the determination is to respond to the change in terms and conditions. After that reponse, if terms and conditions are changed by eliminating the previous change, the City has two options. In negotiating the next contract, it can seek to recover what it "lost" in those negotiations. Or, if that seems too remote, remember that the City may also demand impact negotiations, leading to arbitration. If it restores the four positions, it could demand impact negotiations to eliminate the salary adjustment based on the reduction.

It seems totally unreasonable to force the City into such a situation and not make the award conditional on the action or inaction of the City with respect to filling the four vacancies.

4. AMOUNT OF THE WAGE ADJUSTMENT ARBITRARILY ESTABLISHED

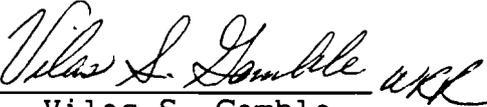
The panel through oversight or whatever other reason failed to provide its rationale for making a 3 percent wage adjustment.

In discussing its authority to hear impact of manning impasse matters the panel did acknowledge its obligation to utilize some rational basis for determining the amount of its award and is quoted as follows:

In that situation, what is sought is an adjustment in an existing arrangement in order to compensate for the changed condition, an adjustment necessarily measured by the amount of change in relation to the previously agreed to arrangement. This is not the bargaining for "what ought to be", often determined by how similar terms and conditions are treated by other parties. Therefore, with respect to impact negotiations, the statutory criteria which a Panel is directed to take in consideration, have a distinctly different and more limited application. Presumably the parties have already struck a deal at the bargaining table, and the adjustments resulting from impact negotiations are adjustments to the agreement, not a reopening of the negotiations generally.

An overly simplistic hypothetical illustrates the point. Suppose the claim is that reduction in manning has the impact of increasing workload; and it is determined that the reduction did, in fact, increase the workload of the affected workers by 8%. Would not the Panel determination be limited to deciding whether the previously provided for benefits should be increased by 8%, so that it would not be relevant to consider the usual type of comparative wage data about the wage rate of similar employees in similar jobs? Use of the comparative data would permit the union to seek to get through binding arbitration what it did not get at the bargaining table.

This obligation to rationally determine an appropriate award notwithstanding, the panel went on to make what it called "a just and reasonable" award of a 3 percent across-the-board wage increase without providing any discussion on how the 3 percent figure was arrived at. Why 3 percent? Why not 1 percent or 2 percent or 6 percent for that matter? A discussion of this determination by the panel is conspicuously absent from the award and implies that either the matter was not deliberated or that no basis for the 3 percent award exists. In either case it appears that the determination of the award was made arbitrarily and without basis.


Vilas S. Gamble
City Administrator

April 20, 1987
Date