

NYS PUBLIC EMPLOYMENT RELATIONS BOARD
RECEIVED
MAR 17 1988
CONCILIATION

STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD
CASE NUMBER: IA87-18: M87-164

In The Matter Of The Interest Arbitration Between
CITY OF BATAVIA

-and-

UNIFORMED OFFICERS ASSOCIATION

In accord with a notice from the Chairman of the New York State Public Employment Relations Board dated October 26, 1987, the undersigned Public Arbitration Panel was designated for the purpose of making a just and reasonable determination of the dispute existing in negotiations between the City of Batavia and Uniformed Officers Association arising out of a dispute as to an impact of manning issue. Following the designation of the Public Arbitration Panel, a hearing was held on January 29, 1988 in Batavia, New York, at which both sides were represented by counsel and submitted to the undersigned, duly designated Public Arbitration Panel the Issue hereinafter set forth. It should be noted that although this is an Interest Arbitration under Section 209.4 of the Civil Service Law, yet it is on a single issue, or question if you will, relating to the impact of the increase in manning of the members of the Batavia Fire Department. Thus, the parties stipulated that the Issue shall be as hereinafter set forth. At the hearing both sides were permitted to conduct direct

and cross examination of all witnesses, they were permitted to introduce whatever relevant evidence they saw fit, and they were otherwise granted all rights usually permitted in matters of this type.

In reaching its determination hereinafter set forth, the Public Arbitration Panel considered the following statutory provisions as well as other relevant factors:

"a. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities;

"b. The interest and welfare of the public and the financial ability of the public employer to pay;

"c. Comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;

"d. The terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance or retirement benefits, medical and hospitalization benefits, paid time off and job security."

Although, as noted, the Public Arbitration Panel considered as it must the statutory criteria set forth hereinabove, the major factor, as can be seen from the statement of the stipulated Issue here, was the Award of the so-called Newhouse Panel of April 10, 1987 in Interest Arbitration. The Panel read and considered such Award as well as other ancillary and relevant material prior to reaching its decision.

A complete record was made of the proceedings by a Certified Shorthand Reporter in accord with the parties' requests and such was considered as well by the Panel prior to making its determination.

ISSUE AS STIPULATED BY THE PARTIES

Should the three percent Salary Increase to the members of the bargaining unit awarded by the Newhouse Award of April 10, 1987 be rolled back? If so, at what point should such occur?

BACKGROUND AND DISCUSSION

For all relevant purposes, there have been two bargaining units in the Fire Department of the City of Batavia, they are the Firefighters, and the Officers, including Lieutenants and Captains. Although now apparently both units are represented by a single agent, that is a recent change.* For some years prior to 1984, there were 32 Firefighters in the City manning table. There then was a reduction to 28 Firefighters. The Firefighters' bargaining unit, represented by the International Association of Firefighters, negotiated with the City to impasse on the impact of the manning reductions. Eventually, the question was presented to a Public Arbitration Panel which had as the Public Member Arbitrator Donald P. Goodman. This Panel met back in 1985 and issued an Award on the question of the impact of the manning reduction. The relevant language of the Award is as follows:

"The Panel AWARDS a five percent salary increase effective September 1, 1985. This five percent increase will be reduced by one and one-quarter percent for each additional staffing level above 28 until a level of 32 is reached.

* As noted the Units have a single bargaining agent now, but at the time this action began there were two and the Panel will discuss the circumstances of this case on that basis solely for ease of discussion.

For example, if staffing is increased to 30 the five percent would be reduced to two and one-half percent. At a level of 32 the five percent would be reduced to zero."

So, the members of the bargaining unit represented by the International Association of Firefighters then received a five percent salary increase because of the Goodman Panel Award with a strong dissent by the Employer Member of the Panel.

Later, the labor organization here, the Uniformed Officers Association, hereinafter referred to as the UOA, which represents the Lieutenants and Captains of the Fire Department also attempted to negotiate the question of the impact of the manning reduction on their bargaining unit. Eventually a Public Arbitration Panel, the Newhouse Panel, was designated and they held a hearing on February 20, 1987 and after such hearing and briefs issued an Award on or about April 10, 1987. After a lengthy discussion and opining, the Panel issued the following 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 three percent across-the-board salary increase for a two-year period beginning April 1, 1986 and ending March 30, 1988."

It is clear from a reading of the Newhouse Panel Award that the basis for the three percent increase was the finding of an adverse effect on the safety of the Officers and that such impact of the reduction of manpower on the safety of the members of the UOA was more than nominal and warranted some increase in salary but that the evidence apparently offered to the Newhouse Panel was not sufficient for it to decide that the same increase given to the Firefighters represented by the IAFF was called for.

That is, the IAFF unit was awarded by the Goodman Panel a five percent salary increase whereas the Newhouse Panel only awarded a three percent salary increase. The Newhouse Panel did not find the Award justified by an increase in workload but rather solely on the question of the hazard factor for Officers as a result of the reduction in the total number of Firefighters being more than nominal, but as the Newhouse Panel commented, ". . . not extreme in terms of degree of frequency, . . ." The Newhouse Award also commented on the question of what would happen if the City restored the four Firefighters of the earlier reduction on or after April 1st of 1987. The Newhouse Award commented as follows:

"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, 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 or conditions. After that response, if terms or 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 4 positions, it could demand impact negotiations to eliminate the salary adjustment based on the reduction."

In fact, the City did restore four Firefighters to the manning schedule. This can be seen by a letter dated April 22, 1987 from the City to the IAFF, reading as follows:

"Fire Chief Hyde has informed me that he will be appointing four new Firefighters in the near future to fill the four vacancies in the Fire Department. Two of the appointees will begin working on Tuesday, April 28, 1987 on each of the two shifts and the other two appointees will begin working on Saturday, May 2, 1987 on each of those two shifts.

"As you are aware, the 'Impact of Manning' arbitration award (PERB IA85-4, M84-522) has provisions permitting the City to roll back 1.25 percent of the awarded salary increase for

each of the four Firefighter vacancies the City fills. Because making four salary adjustments within a single pay period is very cumbersome and because the appointments are being made within a very short time frame, the City will make only one salary adjustment which will be effective on May 3, 1987 with an 5 percent roll back of the 'Impact of Manning Award'. This is not a waiver of the City's right to make incremental wage adjustments at the time each of the four vacancies are filled. The single adjustment is being made for the City's convenience.

"I have attached a copy of the salary schedule that will become effective May 3, 1987."

After some going back and forth, the salary schedule of the Firefighters was, in fact, reduced by the total of five percent. This was in accord with the specific language of the Award of the Goodman Panel.

The City also attempted to act in regard to the three percent increase awarded by the Newhouse Panel, as witness a May 5, 1987 letter to the UOA reading:

"I have made numerous unsuccessful attempts to contact you by telephone over the past week. As I informed you by way of an earlier letter, we want to begin to negotiate the impact of the recent increase in Fire Department manning.

"Because of the difficulty I am having in contacting you, I am asking you to telephone me as soon as possible after receipt of this letter. I would like to begin negotiations early in the week of May 4, 1987. Please be prepared to schedule our first meeting when you telephone.

"Thank you for your cooperation."

There appeared to be limited negotiations and as a result, the City requested PERB to appoint a mediator, as can be seen by a letter dated July 6, 1987 to PERB from the City reading:

"The City of Batavia has been negotiating an impact of manning issue with the Uniformed Officers Association but to no avail. We are now requesting the services of a State appointed mediator to intercede and provide assistance with negotiations. Accordingly, we are transmitting with this letter a Declaration of Impasse."

Apparently, the UOA did not participate in the mediation process and the City therefore petitioned for Compulsory Interest Arbitration by a letter dated August 24, 1987 to PERB saying:

"We are transmitting with this letter the City of Batavia's petition for Compulsory Interest Arbitration for resolution of the impasse captioned above. Also enclosed is an affidavit of service confirming service of the petition on an officer of the Uniformed Officers Association.

"Thank you for your prompt attention to this matter."

The City noted on its petition the basis for its claim then and at the hearing before this Panel. This was contained in the petition as follows:

"Terms and conditions raised during negotiations:

- "A. One issue was raised during negotiations, i.e., the roll back of wages for bargaining unit members to the level that existed prior to an impact of manning arbitration proceeding that resulted in a 3 percent wage increase being awarded to the bargaining unit members.
- "B. The PETITIONER'S position is that the City of Batavia should be permitted to roll back a wage increase the Uniformed Officers Association members obtained through an impact of manning arbitration award. The arbitration panel, as a basis for making the award, cited a degradation of working conditions resulting from staff reductions the City of Batavia had made. On May 3, 1987 the City of Batavia restored and filled all of the vacancies that had given rise to that impact of manning arbitration. This action of the City restored the working conditions to their original status thereby eliminating any basis for continuation of the impact of manning award. Therefore, the City seeks to roll back the 3 percent wage adjustment retroactively to May 3, 1987."

Thereafter, the matter wended its tortuous way to the actual hearing despite an improper practice charge being filed by the UOA and being dismissed and the reluctance of the UOA to participate in the earlier stages of the arbitration here. This can be noted by a letter dated October 20, 1987 from the City of Batavia to PERB reading:

"As you are aware, the City of Batavia has been attempting to negotiate a roll back of a wage increase members of the City's Uniformed Officers Association (UOA) received through an Interest Arbitration Award issued by the Newhouse Panel on April 10, 1987. The Arbitration Panel originally made the Award to compensate Fire Officers for the adverse impact of a staffing reduction. Subsequent to the Award the City restored the Firefighter positions that had given rise to the Newhouse arbitration hearing and Award. The Award stated that if the Firefighter positions were restored, the City could negotiate a roll back of the wage increase and, if unsuccessful through negotiations, pursue the matter through the Interest Arbitration process established under the Taylor Law.

"After having restored the Firefighter positions and after unsuccessful negotiations with the UOA to roll back Fire Officers' wages the City declared impasse on July 6, 1987. Charles Leonard, from the Buffalo office of PERB, was assigned as the mediator. On August 21, 1987 at the first scheduled mediation session the UOA representative, Nicholas Sargent, informed the mediator and the City representative that the UOA would not participate in the mediation process. Subsequently, the City petitioned PERB for Compulsory Interest Arbitration in accordance with Section 205.4 of PERB's 'Rules and Procedures'.

"After receiving the list of potential public arbitrators from PERB, I telephone Mr. Sargent during the week of October 4, 1987 to make arrangements for the striking procedure so that a neutral arbitrator could be selected before the October 15, 1987 deadline established by PERB for the selection to be completed. Mr. Sargent informed me at that time that he was not certain that the UOA would participate in the selection of a public panel member. Mr. Sargent told me that he would telephone me at the beginning of the following week to inform me what the UOA had decided to do. On Friday, October 16, 1987, after not hearing from Mr. Sargent, I telephoned him at which time he informed me that the UOA would not participate in selection of the public panel member. He further informed me that the UOA was going to file an improper practice charge against the City the basis of which he did not state.

"The UOA has refused to abide by Section 205.7 of PERB's 'Rules and Procedures' for the selection of the public member of the arbitration panel. The deadline of October 15, 1987 that PERB had established for the selection of the public panel member has passed. Section 205.7(b) of the 'Rules of Procedure' in relevant part states:

'Upon the failure of one party to participate in the selection process, all names on the list shall be deemed acceptable to it.'

"Based on the foregoing the UOA's inaction is tantamount to a waiver of its right to participate in this selection process. We can only assume that all names appearing on the list that PERB provided are acceptable to the UOA. Consequently, the City of Batavia, at this time, requests that the PERB Board appoint Mr. Jonas Aarons, the City's choice as the public member to serve as the Chairman of the Arbitration Panel.

"Furthermore, the UOA has also failed to appoint a member to the Arbitration Panel to represent the UOA. Section 209(4)(c)(ii) of the Taylor Law states in relevant part

'If either party fails to designate its member to the public arbitration panel, the Board shall promptly, upon receipt of a request by either party, designate a member associated in interest with the public employer or employee association he is to represent.'

"Consequently, the City of Batavia, at this time, requests the PERB Board to appoint an Arbitration Panel member to represent the interests of the UOA.

"Finally, please be advised that the City appoints Mr. Vilas S. Gamble, City Administrator to serve as the City's representative on the Arbitration Panel. All relevant correspondence and communication should be addressed to Mr. Gamble at the City Hall address, 10 West Main Street, Batavia, NY 14020. The telephone number is 716-343-8180.

"Thank you for your prompt attention to this matter."

By a letter dated October 26, 1987, PERB appointed a person to represent the UOA as a member of the Panel. The letter was to the President of the UOA and reads as follows:

"We are required under the Statute to establish a compulsory interest arbitration panel to resolve the continuing impasse between the City of Batavia and the Uniformed Officers Association. The representative of the Uniformed Officers Association has declined to appoint a member to the panel.

"Inasmuch as you are President of the Association, and therefore, closely associated in interest with the Employee Organization, we in accordance with the Statute, are appointing you to be the representative of the Uniformed Officers Association. The Chairman of the Panel is Jonas Aarons; the other member is Vilas Gamble.

"Enclosed herewith is a notice of designation of the Panel."

As noted hereinabove, a hearing was held on January 29, 1988 in Batavia, New York, at which both sides were present and represented, and the full Public Arbitration Panel was also present, that is, representatives of the City and the Employee Organization as well as the Chairman. At this hearing the City presented its essential position as it had in the petition for Compulsory Interest Arbitration, that because of the increase of the four Firefighters in the Fire Department manning, the three percent salary increase awarded by the Newhouse Panel should be rolled back to May 3, 1987.

The position of the UOA was that although there was in fact an increase in manning of four Firefighters, bringing the complement of Firefighters to 32, as before the Awards of both the Goodman and Newhouse Panels, yet the hiring of such did not obviate the need for the salary increase awarded to the UOA by the Newhouse Panel. The basis of the UOA position was because these were novice Firefighters without training, they did not ameliorate the hazard to the Fire Officers. Thus, there was no positive impact, if you will, by the employment of these four brand new Firefighters. The UOA pointed out that the Award of the Newhouse Panel did not set forth, as the Goodman Panel Award did, there be an automatic reduction in the salary increase based on the employment or increase in Firefighters to the Batavia Fire Department. Therefore, according to the UOA, there was no change or positive impact flowing from the increase in manning of the four Firefighters and there should be no roll back of the three percent increase awarded by the Newhouse Panel by its Award of April 10, 1987.

The UOA also asserts that even assuming there should be a roll back at some juncture, yet it should not be as of the actual hiring of the four Firefighters, or back in May of 1987, but rather at some point when it could be demonstrated that these Firefighters actually reduced the impact of the prior manning reduction on the safety of the Officers here.

The above generally sets forth the arguments and evidence offered by the parties in this proceeding; suffice it to say the Panel has considered all of the evidence and arguments offered by the parties, although such may not be set forth in detail herein.

The matter is properly before the Panel for determination.

OPINION

Although this Panel was constituted to make a just and reasonable determination of a dispute continuing to exist in negotiations between the parties, yet the real question here is as to the interpretation of the Newhouse Panel Award of April 10, 1987. Clearly, if the Award of the Newhouse Panel were written as the Award of the Goodman Panel had been, then the determination here would be easily reached. For the Goodman Panel Award sets forth explicitly that there be a reduction in the salary increase awarded by it in accord with increase in manning of Firefighters. So, as four Firefighters were hired, in accord with the Goodman Panel Award, the five percent salary increase was reduced to zero. It is clear to a majority of the Panel at least

that the Newhouse Panel award clearly contemplates, at the very least, some roll back of the three percent salary increase it awarded if there were to be an increase in manning after the date of the Newhouse Award. A reading of the Newhouse Award makes that patent. Really, the sole question before this panel is the effect of the employment of the type of Firefighters actually hired by the City of Batavia to increase its manning. They were four tyro Firefighters without any background in firefighting. The UOA argues that in accord with the Newhouse Award the mere hiring of such persons should not act to reduce the salary increase awarded by the Newhouse Panel. This is so according to the UOA because the Newhouse Award was premised on the increase in hazard to the UOA unit members by the reduction of experienced Firefighters and thus the mere employment of four nonexperienced Firefighters does not act to reduce the hazard, but in some instances may increase the hazard.

A majority of the Panel does not find the argument of the UOA to be persuasive under all the circumstances. A majority of the Panel believes after reading the Newhouse Panel Award that it did consider the nature or type of Firefighter reduced and the impact of such reduction; the Newhouse Panel also did consider the type of background and experience any future Firefighter would have as an impact on the bargaining unit members involved in this case. It seems to a majority of this Panel that the Newhouse Panel had to consider that if there were to be future employment of Firefighters, such would be of relatively inexperienced individuals. Certainly it could not have

been contemplated that the City would have been able to hire Firefighters of the types described as having been involved in the proceedings before the Goodman and the Newhouse Panels as to whose departure led to the impact on the hazard or safety of both the IAFF and UOA units. These four persons were described as having considerable experience, averaging somewhere about twenty years or so. It is doubtful that persons of such experience would have been available to the City for hiring to the Fire Department. A majority of the Panel believes here that the Newhouse Panel had to have contemplated the future Firefighters who would have reduced the impact on the Officers involved here would have been pretty much what in fact the persons were who were hired by the City in April or May of 1987. Therefore, a majority of the Panel believes a just and reasonable determination of this dispute is that there be a roll back of the three percent salary increase awarded by the Newhouse Panel on April 10, 1987. The next question before the Panel is to what degree should such roll back be made--that is, as we view it at what point in time should the roll back be retroactive to? Obviously, if the Newhouse Award were phrased as the Goodman Award was, then the roll back would have been automatic to the point in time of the hiring of the four Firefighters. However, the Newhouse Award was not phrased as the Goodman Award. In fact, it was phrased in terms of negotiation of the impact of the hiring for increase in manning of Firefighters. Thus, we must look to the Newhouse Award for guidance as to when the roll back should go. The Panel is mindful of the injunction of the Statute that it render a just and reasonable determination

and in accord with such, it believes a just and reasonable determination regarding the effective date of the roll back should be at a point in time when the parties would reasonably have reached agreement on the impact of the increase in manpower of the Firefighters. Here, there is no exact date when such occurred, as there was no agreement. The negotiations never really were fruitful for obvious reasons. A majority of the Panel believes that given the nature of the circumstances, it would have been a reasonable expectation that at the time when the City requested mediation there would have been an agreement on the effect of the roll back due to the impact of the increase in manning. Thus, the Panel will Award that the date of July 6, 1987 be the date to which the roll back should be retroactive.

The Panel believes that an Award determining that the roll back be effective as of July 6, 1987 is a just and reasonable one and in accord with the criteria set forth by the relevant Statutes governing this Panel as well as in accord with the agreement of the parties that the Panel be guided by its reading of the Newhouse Panel Award of April 10, 1987.

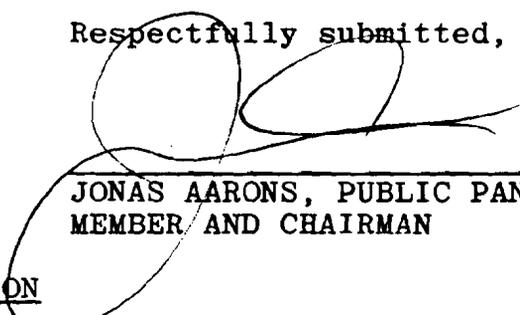
In light of the conclusions reached hereinabove, the Panel sees no reason to discuss any other evidence or arguments submitted herein by the parties; suffice it to say all relevant, competent and material evidence and arguments submitted by the parties has been considered although perhaps not set forth or discussed herein at length.

AWARD

The three percent Salary Increase to the members of the bargaining unit awarded by the Newhouse Award of April 10, 1987 shall be rolled back to July 6, 1987. The reimbursement to the City of Batavia shall be by deduction from unit members salary over a six month period following this Award in equal installments.

DATED: *March*, 1988

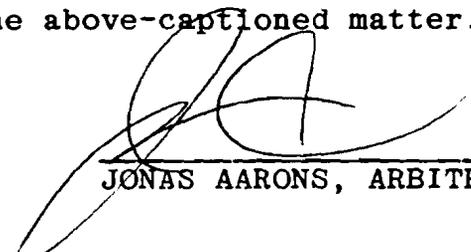
Respectfully submitted,



 JONAS AARONS, PUBLIC PANEL
 MEMBER AND CHAIRMAN

AFFIRMATION

In accordance with Section 7505 of the Civil Practice Laws and Rules, I hereby affirm that I have executed the foregoing as my Opinion and Award in the above-captioned matter.



 JONAS AARONS, ARBITRATOR

DATED: *March 4*, 1988

Respectfully submitted,



 VILAS S. GAMBLE, EMPLOYER
 PANEL MEMBER

