

NEW YORK STATE EMPLOYMENT RELATIONS BOARD

MAR 05 1997

**CONCILIATION**

In the matter of the Interest  
Arbitration between,

THE CITY OF BUFFALO,  
Employer,

-and-

THE BUFFALO PROFESSIONAL FIREFIGHTERS  
ASSOCIATION,

Union.

OPINION AND AWARD

PERB CASE NO.

IA96-020

M96-127

Before the following Public Arbitration Panel:

Chairperson: Michael S. Lewandowski  
Public Panel Member and Chair

Member: Melinda G. Disare, Esq.  
Employer Panel Member

Member: David Donnelly  
Employee Organization Panel Member

Appearances:

For the City: James Jarvis, Esq.  
Gregory Joos, Director of Employment and  
Labor Relations, City of Buffalo  
Kenneth Snyder, Consultant  
Cornelius J. Keane, Commissioner of Fire  
James Milroy, Director of Budget and  
Management

For the Union: W. James Schwan, Esq.  
Duncan MacRae, Consultant  
Michael Lombardo, Fire Captain  
Anthony Hynes, Consultant

On September 20, 1996, the Buffalo Professional Firefighters Association ("Union") filed a petition for compulsory interest arbitration with the New York State Public Employment Relations Board ("PERB"). The City of Buffalo ("City") and the Union had failed to reach agreement in their negotiations for a successor Agreement to the Collective Bargaining Agreement between the parties that expired on June 30, 1986. The period from July 1, 1986 until June 30, 1995 is covered by a series of Interest Arbitration awards.

In accordance with Section 209.4 of the Civil Service Law, the undersigned were designated as the Public Arbitration Panel members in the instant dispute by letter dated November 4, 1996 from PERB. The panel met and conducted hearings in the City of Buffalo on December 9, 1996, January 3, 1997 and January 13, 1997. The parties were afforded a full opportunity to present relevant evidence in support of their positions. Each presented witnesses for examination and cross-examination and documentary evidence including data collected concerning fire departments that they considered to be comparable to that of the City. The Public Arbitration Panel met in executive session on February 20, 1997.

The content of this opinion and award reflects the results

of consideration of the evidence presented against the criteria contained in the Fair Employment Act. The final disposition of the issues is the result of the deliberations of the panel. The award reflects the position of the majority of the panel.

The evidence presented by the parties was considered against the criteria set forth in the Law including but not limited to a comparison of wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions; the interests and welfare of the public and the financial ability of the public employer to pay; the peculiarities in regard to other professions such as hazard, educational qualifications, training and skills and the terms of collective agreements negotiated between the parties in the past providing the compensation and fringe benefit package that currently exists for the bargaining unit members.

The duties performed and the responsibilities assumed by the members of the Union are consistent with those performed by employees who hold Firefighting and associated titles in the jurisdictions offered by the parties for consideration for comparison by the panel.

**ISSUES**

The Union advanced the following proposals during the arbitration.

1. Duration: A one (1) year collective bargaining agreement covering the period July 1, 1995 thru June 30, 1996.
2. Salaries: Effective July 1, 1995, the existing wage schedule shall be increased by two (2%). Effective January 1, 1996, the wage schedule then in effect shall be increased by one (1%) percent.
3. Group Life Insurance:
  - A. A \$25,000 payment upon the death of the insured.
  - B. An accidental \$25,000 payment if the cause of death is accidental.
  - C. A maximum payment of \$10,000 for limb dismemberment according to a schedule of payments in the current policy providing this coverage.
  - D. A \$5,000 payment upon the death of the current spouse.
  - E. A \$2,500 payment upon the death of each dependant child from age fourteen (14) days to age nineteen (19) years, or to age twenty-three (23) for a full time student.
  - F. A waiver of premium and conversion privilege.

These changes to be effective May 1, 1996 if this insurance coverage is not put out for competitive bid, or June 1, 1996 if the coverage is put out for bid.
4. Longevity: Effective July 1, 1995, each permanent employee who has completed one (1) year of service shall receive annually, in addition to their salary, seventy-five (\$75) longevity payment for each completed year of service, to a maximum of twenty-five (25) years.

5. Overtime Rate: The overtime rate be based on 1948 hours.
6. Shift Differential: Shift differential at \$.50 per hour to be paid on all time worked between 5:00 p.m. and 8:00 a.m.

The City advanced the following proposals.

1. Allow Fire Prevention Personnel the Option of Working the 4 Day, 10 Hour Work Schedule.

Add a new paragraph to Article 3.2 to read as follows:

"Officers assigned to the Fire Prevention Bureau shall have, at their option, the choice of working the four (4) day, ten (10) hour schedule during the five (5) day period, Monday through Friday, or they may continue to work the five (5) day, eight (8) hour schedule, Monday through Friday."

2. Flexible Work Schedules for Employees of the Bureau of Fire Training.

Add a new paragraph to Article 3.2 to read as follows:

"Nothing in this Agreement shall prohibit the Commissioner, with the permission of the affected Training Bureau officer, from altering the officer's hours or days of work for the purpose of facilitating departmental training activities."

4. Telephone Requirement: Add a new sentence to Article 3.2 (I) to read as follows: "All Fire Department personnel are required to have an inservice telephone in his or her place of residence."

5. Mayor's proposal Concerning Medical and Dental Insurance Plans for Employees: Amend the medical and dental insurance plans to the proposal presented by the Mayor on April 11, 1994.

6. Require Co-Pay for Payment of Premiums for Medical Insurance Coverage for Retirees: Amend the medical insurance coverage provided (Article 6.1) upon retirement to provide for a 50% co-pay of premiums, and mandatory requirement of Medicare Part B when eligible.
7. Elimination of Uniform Allowance; Department to Provide Required Uniforms with a Maintenance Allowance: Delete the current language of Article 7 and replace with the following: "The Department shall issue required uniforms, and replacement as necessary. An annual maintenance allowance, in the amount of \$100, shall be paid each Unit member who is on the active payroll on June 30 of each year. The maintenance allowance shall be prorated if the Unit member, on the active payroll on June 30, did not complete a full year of service since the last payment date."
12. Additional Disciplinary Penalty Options. Amend the disciplinary penalty options to include the following: Working a Call-In Without Pay and Forfeiting Earned Leave Time Entitlement.
13. Eliminate Maintenance of Benefits Clause; Significant Practices Should be Set Forth in the Agreement. Delete the language in Article 27, Maintenance of Benefits and replace with the following:

"This Agreement, upon ratification, supersedes all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties, and concludes collective bargaining for its terms unless otherwise expressly provided herein.

The City and the Union, for the duration of this Agreement, each voluntarily and unqualifiedly waives the right, and agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, including the impact of the City's exercise of its rights as set forth herein on wages, hours and terms and conditions of employment. This paragraph does not waive the right to bargain over any subject or matter not referred to or covered in this Agreement which is a mandatory subject of bargaining and concerning which the City is considering changing during the term of this Agreement."

15. Assignment of Work-Related Illnesses or Injuries to Worker's Compensation; Elimination of the Memorandum of Agreement Signed 3/31/93 Concerning I.O.D./207A Claims.

Add a new Article to read as follows: "A Fire officer, who is entitled to receive Workers' Compensation Benefits, shall be paid full pay and benefits under Workers' Compensation, to which he is entitled, shall be assigned to the City. Absence from duty in this event will not be chargeable against sick leave and no other benefits, provided by this Agreement, will be lost during that period of time. Absence from duty for work-related disability will not be chargeable against sick leave and no other benefits, provided by this Agreement, will be lost during such absence.

In the event of a third-party claim, payment of medical expenses and wages will be made pursuant to General Municipal Law, Section 207A and not pursuant to Workers' Compensation Law, thereby reserving the right of the City to pursue reimbursement for sums paid to or on behalf of the affected officer, directly from the third-party and not from the officer."

#### **DISCUSSION AND ANALYSIS**

The Union argues that it has a long history of parity of salary and benefits awarded to members of the Buffalo Police Benevolent Association (PBA). It thus argues that its proposals on salary, duration of the agreement, life insurance and longevity should be accepted because the Union's proposals on these issues are exactly the same as that which was awarded by a public Interest Arbitration panel to the Buffalo PBA for its 1995-1996 contract year. The Union asserts that the data it presented concerning wages and benefits paid comparable

firefighters show that the Unions' members lag behind comparable cities. The Union additionally argues that the City has not demonstrated an inability to pay for any of the proposals the Union advances.

The Union seeks a one year agreement so that the parties may deal with the issues in bargaining as opposed to arbitration.

The City argues that it does not have the money to pay the wages and benefits sought by the Union. The City of Buffalo is a financially poor city with a declining population. The City also faces reductions in State aid revenues and the prospect of having to pay the Buffalo Teachers Federation a settlement of between 150-200 million dollars in resolution of their contract dispute with the City. Additionally, the City asserts that the Union's members currently receive benefits and wages in excess of those paid firefighters in comparable cities.

The City further asserts that it seeks a two year agreement because granting a one year agreement would have the result of placing the parties in the position of again engaging in retroactive bargaining and would deprive the City of the ability to make fiscal judgements that would come from having a current agreement in place.

The majority of the panel concluded that the best criteria to use in determining the outcome of this dispute is that of parity with the PBA. The parties have a long history of using parity to set wage and benefit salaries for this unit and the PBA. The employees of this unit and those in the police unit are alike in terms of the dangers they face on the job. They have historically been treated different from the balance of the City's workforce.

The City advanced an argument that parity between this unit and the police does not mean that each must receive identical settlements. The City asserted that temporal parity is achieved over a period of time thus the settlements reached in any given dispute do not have to be the same. The panel noted this argument but also noted that the City made no proposal for a salary increase and sought a two year settlement of the dispute. The City's position, if accepted, would make even temporal parity difficult to achieve and thus it was rejected.

The panel also noted that the City made no proposal with regard to the duration of an agreement. The City advanced argument that the award should be for two years but the record shows that the City made no duration of agreement proposal.

Considering the evidence and the arguments made above, the

majority of the panel accepts the argument that this unit should receive the wages and benefits settlement given the Buffalo PBA for its 1995-1996 contract year. The evidence strongly compels us to do so. The evidence shows that parity has been used or heavily relied upon to fashion settlements for this unit going back many years. The evidence also shows that the City does have the ability to pay for wages and benefits given the PBA. The panel makes particular note of the evidence presented by the Union that shows that the City has budgeted the money for these wages and benefits. Documentary evidence in the form of a City Bond proposal clearly states that the City has done so. Testimonial evidence in support of this contention is found in the City's Director of Budget Management's testimony that the monies for an award to the firefighters that was equivalent to that of the PBA have been set aside in the budget.

The City is faced with the potential of having to pay a retroactive settlement to the Buffalo Teachers Federation members however, at this time it is uncertain as to what the final outcome of that dispute will be and whether the City will be assisted in resolving the dispute. The impact of this matter will, no doubt, have impact on future bargaining or dispute resolution between the parties.

Finally, the panel recognizes that parity and ability to pay may be set aside if the resulting salaries and benefits produced

by application of those criteria are excessive. In the instant matter, using the Cities of Rochester and Syracuse<sup>1</sup> as cities comparable for these purposes to Buffalo, the panel finds that the resulting salaries and benefits do not place the members of this unit above their counterparts when total compensation is considered.

The panel's decision to award a one-year agreement is founded on an acceptance of the Union's parity argument and an acceptance of the principle that matters are best resolved in bargaining as opposed to being imposed by an arbitration panel. The panel chose simply not to visit a number of proposals. Many of them are the subject of an improper practice charge made by the Union<sup>2</sup>. These proposals, in part are expected to be among the issues discussed in bargaining after the instant dispute is deemed closed.

Based on the above, the majority of the panel finds it appropriate to support the following Union proposals. The term of this award shall be for a period of one year. Effective July

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<sup>1</sup> The majority of the panel rejected the City of Yonkers as a comparable city. Yonkers is in close geographic proximity to New York City and as such is closely aligned with the New York metropolitan economy.

<sup>2</sup> A decision of Administrative Law Judge, dated January 29, 1997 found City proposals 4,5, and 6 not a mandatory subject of bargaining. City proposal 13, paragraph two, not properly before the interest arbitration panel. City proposal 15, paragraph two was found nonmandatory. City proposal 21 was found not properly before the interest arbitration panel.

1, 1995, the existing wage schedule shall be increased by two (2%) percent. Effective January 1, 1996, the wage schedule then in effect shall be increased by one (1%) percent. The Union's demand for increased life insurance shall be granted effective June 1, 1996 and its longevity proposal shall be effective retroactive to July 1, 1995.

The majority of the panel also found it appropriate to support the following City proposals. City proposal 1 which permits Fire Prevention Personnel, at their option, the choice of working the four (4) day ten (10) hour schedule is accepted as proposed. City proposal two is accepted in modified form. The award shall call for adding new language to Article 3.2 that reads: "With the agreement of the Union and the affected Training Bureau Officer, an officer's hours or days of work may be altered for the purpose of facilitating departmental training activities. City proposal 12 is accepted in modified form. The existing language of Article 24.1, Disciplinary Action shall be amended to add a penalty option as proposed by the City. The Article (Article XXIV, B.) will now permit the imposition of forfeiting earned leave time entitlement. The intent of this change is to add a penalty to the list in Section B. of the Article. No other aspect of the Disciplinary Article is changed.

The majority of the panel decided to reject the remaining City and Union proposals. These matters are in essence referred

to the collective bargaining that is sure to take place after the conclusion of this dispute. In essence, the panel deemed the proposals as those that are the subject of dispute concerning propriety before the panel<sup>3</sup> and/or would impose significant changes in cost and on the terms and conditions of employment of the members of this unit. To agree to changes in the remaining areas would be to further detract from the panel's expressed intent to use parity as the guiding criteria in determining the content of this award.

Any items other than those specifically modified by this award remain "status quo" as they existed in the 1984-86 collective bargaining agreement and the subsequent Interest Arbitration Awards.

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<sup>3</sup> DECISION OF ADMINISTRATIVE LAW JUDGE, Jean Doerr, PERB, dated January 29, 1997.

AWARD

1. This award covers the period July 1, 1995 thru June 30, 1996.
2. Effective July 1, 1995, the existing wage schedule shall be increased by two (2%) percent. Effective January 1, 1996, the wage schedule then in effect shall be increased by one (1%) percent.
3. Group Life Insurance:
  - A. A \$25,000 payment upon the death of the insured.
  - B. An additional \$25,000 payment if the cause of death is accidental.
  - C. A maximum payment of \$10,000 for limb dismemberment according to a schedule of payments in the current policy providing this coverage.
  - D. A \$5,000 payment upon the death of the current spouse.
  - E. A \$2,500 payment upon the death of each dependant child from age fourteen (14) days to age nineteen (19) years, or to age twenty-three (23) for a full time student.
  - F. A waiver of premium and conversion privilege.

These changes are effective June 1, 1996.
4. Effective July 1, 1995, each permanent employee who has completed one (1) year of service shall receive annually, in addition to their salary, seventy-five (\$75) longevity payment for each completed year of service, to a maximum of twenty-five (25) years.
5. Effective July 1, 1995, Article 3.2, Hours of Work of the Agreement shall have a new paragraph to read as follows.

"Officers assigned to the Fire Prevention Bureau shall

have, at their option, the choice of working the four (4) day, ten (10) hour schedule during the five (5) day period, Monday through Friday, or they may continue to work the five (5) day, eight (8) hour schedule, Monday through Friday."

6. Effective July 1, 1995, Article 3.2, Hours of Work of the Agreement shall have a new paragraph to read as follows:

"With the agreement of the Union and the affected Training Bureau Officer, an officer's hours or days of work may be altered for the purpose of facilitating departmental training activities.

7. Effective July 1, 1995, Article 24.1 B., Discipline and Discharge shall have an additional penalty added to the list of penalties contained therein. The additional penalty shall be forfeiture of earned leave time entitlements.

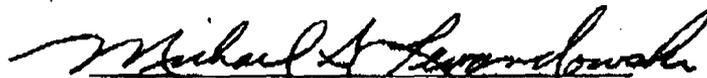
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AFFIRMATION

STATE OF NEW YORK )  
                          ) ss.:  
COUNTY OF SARATOGA )

We, the public arbitration panel identified above, do hereby affirm upon our oath as Arbitrators that we are the individuals described in and who executed this instrument, which is our award. The award may also contain concurring or dissenting opinions from panel members. Any such concurring or dissenting opinions are attached and made part of this award.

Date: 2/28/97

  
MICHAEL S. LEWANDOWSKI  
Public Panel Member and Chair

Dissent

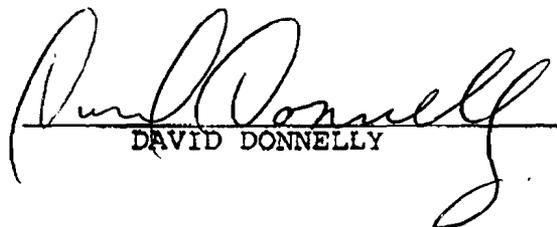
Date: 3/3/97

  
MELINDA DISARE

OPINION ATTACHED.

Concur

Date: 3/3/97

  
DAVID DONNELLY

OPINION ATTACHED.

### DISSENT

I dissent from the majority panel opinion and one year award in this matter. In my opinion, the award is unprecedented, fiscally irresponsible, and punitive under the facts and circumstances presented.

The primary justification advanced for this award is that it is grounded in "parity" with the Buffalo police. In the recent history of four (now 5) succeeding interest arbitration awards between the parties, the term "parity" has had a chameleon type quality. Its definition has changed based upon its proponent, opponent, purpose, or context. Among other things, at different times it has meant that percentage rate increases for police and fire should be the same, that base salary rates should be the same, that one unit's compensation should eventually catch up to the other unit's or that some benefit should be awarded. The end result has been an escalation of salary and benefits for police and fire that has significantly outstripped the cost of living and the gains of other city unions. In this case, parity appears to be a convenient scapegoat for not rendering a two year award.

This one year award puts the parties in the unprecedented place of proceeding immediately to the bargaining table to negotiate for the eight (8) months that have passed. No firefighters' award and no PBA award introduced in evidence at the hearing has had a similar effect. All the awards have allowed the parties to return to the table to negotiate about what will happen prospectively. This unique award places the parties in the position of immediately negotiating the past, not looking to the future; it causes them to attempt to rewrite history and

unduly delays the possible implementation of reforms recommended for the future financial stability and health of the City.

The City presented a compelling case for holding the line on salaries in the second year of an award, particularly if there was to be no prospective, meaningful reform for structural cost savings in the areas of health insurance, retiree health insurance, or workers' compensation system benefits. The City's State revenues are decreasing, its tax base is decreasing, and its remaining taxpayers are bearing an ever greater burden. Additionally, the City is faced with the refuse collection and school district dilemmas. Other than police and fire, all city bargaining units<sup>1</sup> have recently made health care concessions and taken zero pay raises. Through this award, this Union and panel have conveniently avoided dealing with these harsh realities. They have exacerbated the City's financial instability and uncertainty by leaving the past eight months unresolved as the parties begin negotiations.

The award also punishes the City for a tag team of sharp practices engaged in by the police and fire unions. The recent one year PBA interest arbitration award resulted after that union served its bargaining proposals on the City while the City was without a Director of Labor Relations. The PBA contract required responsive proposals within 30 days. Although the City's Director of Labor Relations, on his first day on the job, notified the union that proposals would be forthcoming, an arbitrator found that the City was precluded from submitting any proposals in its negotiations with the PBA. Without any City proposals, true negotiations could not take place. The City sought and received a one year award, reflecting only union proposals. That set

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<sup>1</sup> One is currently subject to a factfinder's award in this regard.

of extraordinary circumstances has now placed the City in double jeopardy as this panel uses that one-sided, one year award as a justification for its own - a truly bizarre result. That award was, however, rendered prior to the expiration of the time period to which it applied. The parties were, therefore, permitted to start negotiating for prospective reform. No similar saving grace applies in this circumstance.

Apparently emboldened (or challenged) by the police union's success, this Union filed the Declaration of Impasse resulting in the appointment of this panel after a single "negotiating" session with the City. The City filed an improper practice (IP) charge claiming that the Union failed to bargain in good faith and has questioned the validity of the impasse. The City's IP is unresolved, while a subsequently filed Union IP against the City regarding subjects properly before this panel is already the subject of an ALJ decision (which the City believes largely incorrect, but an appeal of which is rendered irrelevant by this award). Yet, the panel seems to fault the City for not having placed more concrete proposals on the table at its first, and as it turned out, only "negotiating" session. This is amazing.

Finally, with regard to life insurance, the panel's award is particularly inappropriate. The PBA award called for the City to ensure certain life and disability risks at increased levels prospectively. Insurance, by its very nature, calls for payment of a premium to ensure a future risk. This award turns that concept on its ear. Retroactive insurance is an oxymoron. What is, in reality, being awarded is an out of pocket liability for intervening events, without any record as to what they are (or, if insurance is found, costly "premiums" to compensate for the intervening events). This is a far cry from henceforward paying some limited additional insurance

premiums, and not consistent with my notion of parity or fairness. My only hope is that this award may be seen as establishing a precedent for the imposition of retroactive health insurance concessions on unit members by future panels.

For all of the above reasons, I dissent from the award in this case.

  
Melinda G. Disare

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