

72-97-017, 1147-104

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
CASE: IA 97-017; M 97-104

* * * *

In The Matter of Interest Arbitration

AWARD

- between -

OF

CITY OF NIAGARA FALLS

ARBITRATION

- and -

AND

NIAGARA FALLS FIRE DEPARTMENT
COMMAND OFFICERS ASSOCIATION.

OPINION

* * * *

APPEARANCES

For the City

Peter M. Gulisano, Esq., Spokesman
Peter Filocamo, City Controller, Witness
David Frabizio, Director of Human Resources, Witness
Donald Laurie, Director of Human Resources, Globe Metallurgical Co., Witness
James Perry, Director of Human Resources, Goodyear Rubber Co., Witness
Paul Shanks, Fire Chief, Witness

For the Officers Association

W. James Schwan, Esq., Spokesman
Glenn Andrews, Fire Captain, Witness

For the Panel

Samuel Cugali, Chairman and Public Panel Member
Stefan Kundl, Employee Organization Panel Member
Nicholas Sargent, Public Employer Panel Member

NYC PUBLIC EMPLOYMENT RELATIONS BOARD
RECEIVED

DEC 21 1998

CONCILIATION

BACKGROUND

The City of Niagara Falls (hereafter "CITY"), located in Western New York state, has a estimated population of sixty-five thousand (65,000) people, and covers an area of approximately seventeen (17) square miles. It has a paid fire department, and the Niagara Falls Fire Department Command Officers Association (hereafter "COA") represents all officers in the department, approximately forty-one (41), with the exception of the Fire Chief and Deputy Fire Chief.

Their three (3) year Collective Bargaining Agreement expired on December 31, 1996. On January 1, 1997, the CITY eliminated five (5) relief Captain positions and returned the incumbents to the rank of firefighters. The parties conducted formal impact negotiations regarding the CITY's decision to eliminate these positions. In September/October 1997, the CITY restored two (2) relief Captain positions. After these Hearings closed, the Panel understands three (3) additional relief Captain positions were restored approximately one (1) year later.

On or about May 22, 1997, the COA filed a Declaration of Impasse with the New York State Public Employment Relations Board (PERB). On July 14, PERB appointed a Mediator to assist the parties but mediation was not successful in resolving the impasse. On July 25, PERB received the COA's request for compulsory interest arbitration, and on November 6, 1997, PERB designated this three (3) member Public Arbitration Panel to resolve the impact negotiations impasse.

Hearings were held relative to this impasse in Niagara Falls, New York on January 16, February 18 and March 20, 1998. A stenographic record of the proceedings was made available to Panel members. At the Hearings, the Panel received extensive material including three (3) Joint Exhibits, twenty (20) CITY and eighteen (18) COA Exhibits. The parties were given full opportunity to present argument in support of their positions on the open items, introduce evidence and witnesses, and to engage in their examination and cross-examination. They were given the opportunity to file Post-Hearing Briefs and both were postmarked by the agreed upon date of June 26.

Panel members reviewed the Exhibits, Transcripts and Briefs extensively, and met in Executive Session on October 15 and November 4. The Panel fully discussed the merits of the parties' arguments, the evidence submitted, and structured this AWARD in view of satisfying Section 209.4 (iii through vi) of the Taylor Law as follows:

"(v) the public arbitration panel shall make a just and reasonable determination the matters in dispute. In arriving at such determination, the panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:

- a. comparison of the wages, hours and conditions of the 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 skills.
- d. terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions of salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off, and job security.

(vi) 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 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. Such determination shall not be subject to the approval of any local legislative body or other municipal authority."

AWARD

ISSUE 1 - ARTICLE 7 (WAGE CHANGE)

- A) A 3% ONE-TIME WAGE PAYMENT TO BARGAINING UNIT MEMBERS BASED ON THEIR 1-1-97 SALARY, AND PRO-RATED FROM 1-1-97 TO THE RECALL DATE OF TWO (2) CAPTAINS IN LATE 1997. ALL LAID OFF RELIEF CAPTAINS ARE EXCLUDED.
- B) A 1% ONE-TIME WAGE PAYMENT TO BARGAINING UNIT MEMBERS BASED ON THEIR 1-1-97 SALARY, AND PRO-RATED FROM OCTOBER 1, 1997 TO THE RECALL DATE OF 3 CAPTAINS IN LATE 1998. THE LAST 3 LAID OFF RELIEF CAPTAINS ARE EXCLUDED.
- C) THESE WAGE PAYMENTS DO NOT CHANGE THE 1-1-97 BASE SALARY.
- D) THESE WAGE PAYMENTS SHALL BE PAID WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS AWARD.

ISSUE 2 - ARTICLE 5 (ADD NFPA 1500)

THIS DEMAND OF THE COA IS DENIED.

ISSUE 3 - ARTICLE 6 (WORK DAY AND WORK WEEK)

THIS DEMAND OF THE CITY IS DENIED.

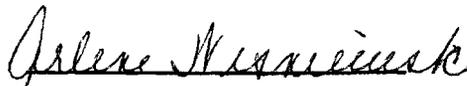
STATE OF NEW YORK }
COUNTY OF ERIE } ss:

On this 17 day of December 1998, before me personally came and appeared Samuel Cugalj, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged to me that he executed the same.



SAMUEL CUGALJ

Public Panel Member and Chairman
Concurs

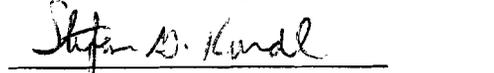


ARLENE WISNIEWSKI

Notary Public, State of New York
Qualified in Erie County
My Commission Expires 12/31/99

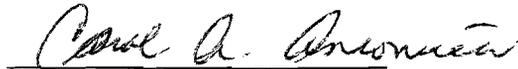
STATE OF NEW YORK }
COUNTY OF NIAGARA } ss:

On this 7th day of December 1998, before me personally came and appeared Stefan Kundl, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged to me that he executed the same.



STEFAN KUNDL
Employee Organization Panel Member
Concurs

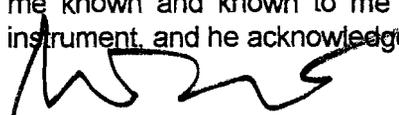
CAROL A. ANTONUCCI
Notary Public, State of New York
No. 01AN5050344
Qualified in Niagara County
Commission Expires October 10, 1999



CAROL A. ANTONUCCI

STATE OF NEW YORK }
COUNTY OF ERIE } ss:

On this _____ day of December 1998, before me personally came and appeared Nicholas J. Sargent, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged to me that he executed the same.



NICHOLAS J. SARGENT
Public Employer Panel Member
Dissents on Issues 1 and 3

DAVID A. FABRIZIO
Commissioner of Deeds
Niagara County
Commission Expires 7/30/2000

CHAIRMAN'S OPINION

[The Chair summarizes the respective positions of the parties, and provides rationale for the AWARD by the Panel majority.]

ISSUE 1 - ARTICLE 7 (WAGE CHANGE)

COA POSITION They seek a 10% wage change to offset the loss of 5 relief Captains positions on January 1, 1997. The second part of their demand is that as each relief Captain position is restored, the 10% increase will be reduced by 2% as of the date of recall. The CITY restored 2 relief captain positions in September/October 1997. Three additional positions are reported to have been restored in September/October 1998, after these Hearings closed.

Captains in this bargaining unit are working supervisors and, as such, are directly involved in fire fighting, ergo, they are directly affected by staffing, minimum staffing levels and work load. The cutback of relief captains and the reduction in the minimum staffing level had the effect of having less manpower at a fire scene. Where there were 17 at a fire scene prior to the reduction of relief captains, now 10 or 11 arrive. COA exhibits show a pattern of declining minimum staffing levels over the past several years, i.e., a level below which fire fighters are called in to report for duty. Prior to August 24, 1993 the minimum staffing level was 29 firefighters per shift. On August 24, 1993 minimum staffing was reduced to 28; on June 7, 1996 reduced to 27; and on January 1, 1997, minimum staffing was further reduced to 22 per shift. That represents a 24% reduction in minimum staffing since 1993, and

a 19% reduction from January 1, 1997. The COA argues that fire fighting is still the same labor intensive activity it has been, but fewer people are now available for that activity.

COA Exhibits show the effects of reduced manning levels affecting bargaining unit members. Truck 2, which is responsible for "bull work" operations at a fire scene such as raising ladders, ventilating, rescue and extrication, operated with 2 firefighters 82% of the time in 1997. Two are unlikely to be able to raise ground ladders and carry extrication tools, for example. The International City Management Association (ICMA) recommends that "to raise ladders, ventilate, search and rescue simultaneously, takes quick action by at least 4 and often 8 or more firefighters, each under the supervision of an officer" and "search and rescue should never be fewer than 2 and typically at least four (4)" (Exhibit H, at p. 14). They claim additional studies recommend staffing of 5-6 per truck company. The COA shows that the National Fire Protection Association (NFPA) 1500 Standard on Fire Department Occupational Safety and Health Program is similarly supportive, and "recommends that a minimum acceptable fire company staffing level should be 4 members responding on or arriving with each engine and each ladder company responding to any type of fire", "5-6 in high risk areas", and "5 member crews for search, rescue and fire suppression" (ibid, at p. 12, 13).

The COA points out that reduced manning levels caused Engine 6, located in the northern end of the city, to be closed 63% of the time in 1997. This required Engine 8, located more centrally, to respond to calls in Engine 6's territory, increasing travel and response times, delaying fire suppression activity, increasing flashover probability, as well as the probability of increased fire damage. Testimony was heard that with Engine 6 closed 63% of the time, there may not be sufficient manpower in the other fire houses to handle a second working fire in the city. The second effect of Engine 6's closing led to its inability to complete commercial inspections for its regular fire prevention assignment.

The fire chief assigned Engines 3, 4 and Truck 1 the responsibility to complete commercial inspections during September 1997. While this reassignment of duties was carried out, workload was impacted in the latter 3 fire houses.

The COA disputes the CITY's claim of economic despair. They point out the savings enjoyed by the CITY because of the layoffs exceeds the COA's wage demand in this proceeding. Using \$64,000 as the value of a captain's wage and benefits annually, they believe the loss of 5 relief captains has saved the CITY \$320,000, as compared to the cost of the COA's \$240,300 wage demand. The COA further argues the gloomy economic picture painted by the CITY is one-sided. Recently, one new employer has moved into the city, and a private group has announced it anticipated investing \$130 MM in various projects in the city, creating approximately 300 jobs.

CITY POSITION

They argue that there is no impact with the reduction of relief captains because they fill-in for captain vacancies. The CITY had alternatives other than recall, e.g., it either paid overtime to regular captains to cover vacancies, or it paid out-of-title captain's pay to fire fighters to do so. There was no impact on the remaining relief captains.

The estimated cost of COA wage proposal is \$240,325, and this represents a 1.3% increase in property tax each year. This amount is not budgeted, and would have to come from existing funds or an increase in taxes. Either choice is unacceptable for it would put further stress on the CITY's financial situation. The budget already has a reserve of \$1.7MM to \$2.7MM for two 2 pending litigation cases. Its debt burden is 8.4% which is double the tax burden of other comparable cities. The CITY's bond rating has been downgraded to BA1, and is limited to capital bonding only. The State has

threatened to appoint an oversight board if the financial situation is not brought under control. Any award herein would make these matters worse.

The CITY points out that its tax base is limited, and the average home value in the city is \$45,100 vs. \$74,000 nationally. The CITY has been experiencing a shrinking population, showing a decline of 17% since 1970. Residents have an average income level of \$26,800 compared to the national average of \$34,000. Employment opportunities are far from the picture the COA paints, with a relatively high unemployment rate of 9%.

THE PANEL

One key to understanding the position of the Panel majority is to understand that captains and relief captains are, in effect, working supervisors. They are an integral part of the fire suppression team who work alongside firefighters, ergo, they are directly affected by layoffs, staffing and minimum manning levels, just as firefighters are. Memoranda from various fire chiefs outlining minimum staffing support this view. At least as far back as 1993, these memoranda define the CITY's fire fighting team as a single unit including captains, relief captains and firefighters. Because of this side-by-side working relationship, a Panel majority believe it unrealistic to separate the COA from the impact of the combination of layoff and lower minimum manning levels.

The CITY's Panel member made strong arguments in Executive Session against using fire practice standards elsewhere as guides, suggesting they are irrelevant to Niagara Falls where actual local experience is more important. However, the Panel majority believes that it is reasonable to accept the premise that general fire practice basically varies little from area to area. It is a labor

intensive and a very time-sensitive activity. COA Exhibit H, published by the International Association of Fire Fighters (1995), is a balanced work worthy of closer examination. It references material from the National Fire Protection Association - NFPA 1410 and NFPA 1500 Standard on Fire Department Occupational Safety and Health Program, National Fire Academy, National Institute of Standards and Technology (U.S. Dept. of Commerce), U.S. Fire Academy, U.S. Fire Administration, Metropolitan Fire Chiefs Division (IAFC), and the International City Management Association. The Exhibit discusses fire practice research in Columbus, Seattle, Dallas, Austin, Clark County (NV), Ontario, Providence, Johns Hopkins University, among others. The 1982 Seattle study demonstrated a direct relationship between manpower levels and effectiveness, i.e., the ability to accomplish required tasks (ibid, at p. 16). The 1969 and 1984 Dallas studies concluded that "... deficient levels of staffing will result in an inability to cover critical tasks" (ibid, at p. 18). A 1992 Johns Hopkins study "reflects the fact that fire-fighting injuries are significantly influenced by inadequate staffing" (at p. 26). There is confidence that these are standards that can and should be used as guidelines herein. For the most part, their conclusions are applicable here. One might even argue that the local situation is a greater risk because of the concentration of chemical and power plants.

The record of "irregular runs" and the frequency of Engine 6's (located in northern sector of city) closing 63% of the time have particular meaning. Additional travel time to a fire increases risk, because the fire burns longer before being treated. This increases the risk of "flashover", acknowledged as life threatening to both the occupants and firefighters (ibid, at p. 5). A Dallas Fire Department study concluded that "a variance of only 2-3 minutes in the speed with which rescue

operations could be completed can increase fire victim survivability eightfold" (ibid, at p. 6). Flashback avoidance is an optimum fire practice.

While the Chair understands the role relief captains play, it is a fact that after the layoffs, COA members were affected by fewer overall fire fighting personnel responding to calls. Prior to the January 1, 1997 layoffs, 17 fire fighting personnel responded to a fire alarm compared to the 10 or 11 who responded after the layoff. That is a 35% reduction. Truck 2, doing the "bull work", reported with 2 personnel 82% of the time. The reduced numbers of the fire suppression team (including this bargaining unit) reporting to fires translates into a greater effort from fewer numbers. As Exhibit H states, "fire suppression has always been labor intensive ... some advances have been made in technology ... none of these advances have eliminated the critical tasks that must be performed at the scene of a structural fire." (ibid, at p. 8). Clearly there is a greater risk for victims, fire fighter's physical and physiological stress, exertion, fatigue, less margin for error, leading to a greater tendency for accidents and injuries... The NEPA's says that minimum level of safety staffing "... is empirically grounded in results from study after study showing the casual relationship of deficient fire ground staffing and increased fire fighter injuries" (ibid at p. 9). Additionally, a National Fire Academy research project summarizes this effect best: "The implication is that when a smaller work force, using the same heavy equipment, has to do the job that was done in the past by a larger workforce, injuries of this nature will continue to increase. Injuries to back and knees are injuries that take a long time to correct. The cost to the city and department are heavy" (ibid at p. 19).

The record reflects the impact of the layoff on remaining bargaining unit members, i.e., minimum staffing is reduced by 19%, while total call-outs increased by 15% in 1997. So called "incorrect runs", or runs out of a fire house's normal territory, increased by 16% in 1997. Both

contribute to increased risk. Department fire fighting injuries rose from 26 in 1995, to 44 in 1996, and 58 in 1997, an increase of 32% from 1996 alone. Adequate manning should, in the very first instance, reflect the concern for firefighter and public safety, consistent with a U.S. Fire Administration survey of fire chiefs and city managers (ibid, at p. 15). The COA asserts that the testimony of both Captain Andrews and Chief Shanks are not dissimilar that when Engine 6 is closed (82% in 1997), and a second working fire occurs, the remaining fire companies do not have sufficient manpower to handle the latter." The CITY argues there is a slight likelihood of that situation occurring. A Panel majority believes the public good is better served by preventative and not reactive fire practice.

The CITY Panel member argued against the tie-in of layoffs to subsequent pay increases, pointing to other layoffs. The Chair agrees there can be no automatic link to pay in every layoff situation. However, the Chair believes that in the instant case, the staffing level after this layoff placed sufficient workload and risk (outlined above) on remaining bargaining unit members to justify the AWARD. Secondly, the Chair believes fire fighting is unique public safety work, and with all due respect to other employees, differs from non-public safety layoffs. In its deliberations, this Panel reviewed an Impact Arbitration Award in the city of Batavia in 1985, wherein firefighters were granted wage increases after a 13% reduction in staffing levels. Many of the issues and concerns in the Batavia case could be found herein.

Relative to the CITY's ability to pay, the Panel majority finds that although its financial situation is challenging, the CITY has the ability to fund the AWARD from the layoff alone. The Chair accepts the estimated annual captain's wage/benefits package to be \$64,000. For the 5 captains laid off from January 1, 1997 through September 1997, the savings to the CITY was

approximately \$240,000; and an additional \$176,000 was saved from the continuing layoff of 3 captains from October 1997 through August 1998. If 36 members remained in the bargaining unit after the layoff, the estimated cost of this AWARD is approximately \$52,840 (Jan. 1997 through Sept. 1997), and an additional \$23,290 (Oct. 1997 through Aug. 1998). The COA cannot be expected to shoulder more than its share of the financial tightening in the municipality. The 1997 fire department's budget was less than in 1996; the 1997 police budget was increased vis-à-vis 1996. The Chair was not impressed with the statewide and national economic comparisons used by the CITY. More relevant comparisons would have been with municipalities in the general Western New York area. The business climate, while not ideal, is far from bleak. A new employer recently settled in the city and established operations with 350 jobs or so. A private investment group has expressed interest in redevelopment, and that speaks of an even more promising tomorrow.

The Chair believes the AWARD should be in the neighborhood of the general 3% cost of living. The single wage payment in the AWARD was not added to their 1-1-97 base salary because all 5 laid off captains were returned to active duty.

Battalion chiefs are included in the AWARD despite objections from the CITY. Although battalion chiefs do not fight fires, the reduced staffing impacted their workload by having to temporarily close fire houses, deploy remaining manpower, establish back-up positions for the rest of the city, are a few examples of their increased work load.

ISSUE 2 – ARTICLE 5 (ADD NFPA 1500)

COA POSITION

The ASSOCIATION is concerned about the impact on safety with of the reduced number of relief Captains and firefighters. They propose to

expressly reference NFPA 1500, Standard on Fire Department Occupational Safety and Health Program in their Agreement. These standards and guidelines were adopted for states on January 1, 1997. The CITY Panel member argues this issue centered on staffing as a management prerogative.

THE PANEL: The Panel reviewed this demand and agreed that in view of other issues presented, it was not appropriate to include an award for this demand at this time. The Chair believed there was insufficient showing as to how common this reference is in other municipal fire suppression collective bargaining agreements, its effectiveness where implemented, data on safety and cost matters, are among other areas of interest.

ISSUE 3 - ARTICLE 6 (WORK DAY AND WORK WEEK)

CITY POSITION: The CITY seeks to change from its traditional 10-14 hour work day to a four (4) platoon, eight (8) hour day, continuous rotating shift schedule. It is commonly referred to as the "industrial schedule". The CITY claims the new schedule will have operating and financial advantages that are, in fact, being currently realized by manufacturing companies in the private sector. Representatives from two such companies in the city testified to the efficiencies of this schedule in their manufacturing operations.

THE PANEL

The Panel majority believe there are too many unanswered questions pertaining to the schedule's applicability to fire fighting. These questions may be fueled by the fact that the "industrial schedule" is operating in only 1 or 2 paid fire department in New York state and in the United States, despite proposals to introduce it. This lack of commonality of experience in the use of the industrial schedule for fire fighting departments hinders its evaluation. Work rules and practices in manufacturing operations in the private sector may or may not have sufficient similarity to fire fighting to warrant the use of the schedule, but this has not yet been established. The Panel majority has no basis to justify being the pacesetter in imposing such a major change in department operations. The proposed work schedule is so all-encompassing would affect almost the entire bargaining unit. Given the COA's stated apprehension over its applicability, the disruption and impact on morale if the Panel were to impose the schedule would certainly not be in the public or even the CITY's interest. This cannot be minimized.

Finally, the Chair expresses his appreciation to both parties, their spokesmen, and Panel members for their efforts in attempting to reach as impartial a decision as possible.

December 7, 1998
Buffalo, New York



SAMUEL CUGALJ, CHAIRMAN AND
PUBLIC PANEL MEMBER

cc: Richard A. Curren, Director of Conciliation, PERB
Charles Leonard, Supervising Mediator, Buffalo PERB