

Public Employment Relations Board
New York State

In the Matter of Interest Arbitration Between

Dewitt Professional Firefighters Association Local 2733 IAFF AFL-CIO

Against

DeWitt Fire District

Arbitration Award

NYS PERB IA2011-001, M2010-260

Before: Dr. Mark D. Karper, Charles E. Blitman Esq, Lynda VanCoske Esq
~~Hearing dates:~~ 10/10/11
~~Briefs due:~~ 10/24/11
~~Decision date:~~ 2/10/12

For the District:
Randy Ray Esq
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For the Association:
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NYS PUBLIC EMPLOYMENT RELATIONS BOARD

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CONCILIATION

Introduction

This is an interest arbitration between the DeWitt Firefighters Association Local 2733 IAFF AFL-CIO, CLC, (hereafter referred to as the Association) and the DeWitt Fire District (hereafter referred to as the District). The Association invoked their right under the Taylor Law to binding interest arbitration to reach a successor collective bargaining agreement for one that expired December 31, 2010. In accordance with the process a tripartite panel was appointed to hear the case consisting of Dr. Mark Karper (neutral), Charles E. Blitman ESQ (Association), and Lynda VanCoske (District). The panel conducted an oral hearing on this matter on October 10, 2011 where District was represented by Randy Ray ESQ and the Association by Nathaniel Lambright ESQ. The advocates submitted briefs on this matter on October 24, 2011 and the matter was closed. The panel met on November 16, 2011 and held a teleconference on December 12, 2011.

The hearing reflected the division of the parties on every issue. The parties were divided on standard economic issues of wages and health care costs. In addition there was a compensation proposal that was really concerned about minimum crew size (hazard pay would occur if there were less than four paid fire fighters on any shift) and the safety issue associated with a shift of less than four professional fire fighters. As a result both the hearing and briefs focused on the safety concerns associated with minimum crew size of four firefighters. Although the Dewitt Fire Department is a combination of full time professional (12) and volunteer part time firefighters (22), the Association wanted a complement of four professional firefighters on every shift, so that they would not have to

rely on the volunteers when the equipment and professional firefighters arrived at the scene of any fire. Since crew size is not a mandatory bargaining subject, it could not be brought to the interest arbitration process because the District did not agree to discuss this subject. Since compensation is a mandatory subject the Association was able to introduce this issue through its "compensation" proposal on hazard pay which would make a three person shift as expensive as four person shift to the District. It was made clear that the Association did not want the extra compensation but truly wanted to provide an economic incentive for the District to have four person shifts. The division on this issue was so great between the parties that it precluded any negotiated settlement. As will be made clear by the dissent, the Panel was also deeply divided by this issue.

This award will discuss the general criteria for interest arbitration awards before making a specific award on each issue as defined by the petition and refined by the parties at the hearing. The rationale for the decision on each issue will follow the award.

General Criteria

The interest arbitration statute envisions a process which absent a fundamental change in the employer's ability to pay preserves the status quo of where the employee's relative standing remain the same with respect to other comparable public employees. Despite recent economic events, we find that there is no fundamental change in the employer's ability to pay. The facts in this case do not document such a change which the employer freely admits. The employer's concerns are based on possible financial issues which extend far beyond the time frame of this award. As a result the employer will have adequate time in the future to make any changes in terms and conditions which will be needed to make to address those possible concerns. The employer has already demonstrated fiscal responsibility

by eliminating fire caretaker positions (3) and leaving unfilled professional fire fighter positions (2), which illustrate the kind of flexibility that the employer has in dealing with financial issues.

The next major criterion is comparability with other public employees. The process envisions that the award will preserve the relative position of the public employees in relation to other public employees in similar positions. These comparisons are the most complex aspect of the interest arbitration process. The first and most difficult question is determining what represents a comparable group of public employees. The simple truth is that no two public employers are exactly alike and both sides can make comparisons which support their respective positions. In addition to possible external comparisons, there are internal comparisons between other groups of public employees where the ability to pay is identical since they are funded by the same employer. Finally, the past history of compensation is usually cited since current compensation has its roots in the past. The panel has looked at all of these types of comparisons in order to determine its award.

The last criterion is the public interest. In this case the tax rate is not the issue but rather there appears to be a perception that since the country at large is suffering from the current economic conditions: primarily high unemployment and slow growth rate that public employees should do the same. Some the most recent public sector settlements are much lower than those negotiated in the past. This fact is reflected in that the DeWitt Fire District is asking the panel to award wage increases lower than its initial offer in negotiations. The panel cannot be oblivious to recent trends in public sector settlements and must factor this recent trend in its decision.

Issue #1 Compensation

Award

2011 Effective 1/1/11 3.0% on base (with full retroactivity)

2011 Effective 1/1/12 3.0% on base (with full retroactivity if appropriate)

Salary differentials remain at 5% for LT (rather proposed 7.5%)

Stipends remain at \$1000 for both DMO & TO

Rationale

General wage increases

The table presented as D-5 shows no projected increase in the tax rates in 2011-12 and that rates have remained almost constant since 2007. The table also shows that the tax base is projected to remain almost constant in 2011-12. Table IX presented in the Association's brief shows no settlement in the table is less than the 3% for 2011 or 2012. The panel takes particular note of the fire departments in both Fayetteville and Manlius which are in the same area and are a mix of professional and volunteer. As a result to grant the Districts request of 0% raise in 2011 and 1.5% 2012 would dramatically change the comparability of DeWitt fire fighters salary relative to other nearby departments. The DeWitt fire district has granted similar wage increases in the past without having to raise taxes or curtail services. This means that the financial situation in the DeWitt Fire District is very different from cities of Syracuse and Oswego that were cited as models of salary restraint. These cities could not afford wage increases without further cuts in services or a large increase in taxes. If all

employers curtailed wages irrespective of the ability to pay without a loss of profitability or maintaining sound fiscal budgets, then the country will go back into recession which would only make matters worse in the long run.

Differentials in Captain/Lieutenant salaries

We have decided to keep the differential at current levels. The Association has not raised compelling arguments that the current differentials are detrimental to the operation of the department in failing to attract strong internal applicants.

Stipends

We have decided to keep stipends constant since there is no compelling evidence that increasing the stipends would enhance the operation of the department.

#2 Health insurance Employees

- A) 2011-12 Contribution remains at 15%
- B) Adopt lower cost plan (PPO) Healthy Blue

Rationale

An increase in co-pay is a moot point with respect to 2011 and adopting a lower cost replacement plan mitigates any need for increasing the co-pay percentage in 2012. All parties benefit if the focus is on controlling costs rather increasing co-pays.

#3 Health Insurance Retirees before 50

No change

Rationale

This type of change must be negotiated by the parties since the parties must place a value of this change in policy in lieu of other possible changes in the collective bargaining agreement.

#4 Shift hours: Conversion to 24 hour shifts

No change

Rationale

The information presented at the hearing indicated that this shift change might be cost neutral. The District (starting with the Fire Chief) seemed open to further discussion about the possibility of such a change although there no specific promise of change. It is clear that other fire departments that mix paid and volunteer have shift schedules that are consistent with the current shift schedule that would compel the panel to implement such a change.

#5 just cause

Adopt the Associations proposal by adding just cause language to language collective bargaining agreement to be consistent with other agreements

Rationale

The District's opposition to this proposal is not based on any past experience since there never has been a disciplinary arbitration. The contract provision gives the arbitrator no guidance which makes it the arbitrator's choice as to what standard of cause should be used in making the decision. In this situation, the logical choice would be just cause although other standards such as reasonable do exist. This ambiguity concerning standards does not benefit either party since arbitration clauses should be as clear as possible to give an individual a clear choice over an Article 75 proceeding. It also gives both advocates a clear definition of the standard which should be used during the hearing. The just cause standard is the norm for most bargaining agreements and the panel feels it should be put into the current agreement.

#6 Hazard Pay

Reject Association proposal

Rationale

This proposal is not about compensation but safety. The Association believes that any shift with less than four paid fire fighters is a safety hazard and presented a wealth of information documenting the need for 4 person shifts based on nationally recognized standards. There is no doubt based on the testimony and the information provided by the Association that paid professional fire fighters consider shifts with less than four professional fire fighters arriving at the scene to be a safety hazard. The hazard pay proposal by the Association would make it the same cost to the District to have three paid fire fighters instead of four paid fire fighters. It accomplishes this goal by giving the three fire fighters on the shift compensation a one third split of the money which would be equivalent to paying the salary of a fourth full time member on that shift. The statute does not make shift size a mandatory subject so the Association could not take this matter to interest arbitration without the agreement of the District which refused to take this matter to interest arbitration. As a result, this proposal by the Association is a legal method of getting this subject to interest arbitration by use of a compensation clause.

We have decided to reject this "compensation" proposal for many reasons. While it is clear that the standard applies to paid professional departments, it is not clear whether this four person shift safety standard applies to fire departments that are a mix of volunteer and paid fire fighters making it a valid comparison. It is clear the Association believes that all shifts in the DeWitt Fire District must have four paid professional firefighters to respond to fire calls making it in reality a fully paid professional

department. The Association also made it clear that volunteers cannot provide the trained manpower, since they believe that only two volunteers have the training to be effective in preventing a safety hazard. The Association feels the District's evidence that 3.95 firefighters respond to most fire calls does not address these concerns since volunteer lack the fire fighting skills. The panel does agree that volunteers should no longer have a role in the Fire District as it has in its long history. Finally, even if we agreed with Associations position, it is clear this compensation proposal does not guarantee four person shifts desired by the Association. The only thing the panel would be doing would to impose unknown compensation cost on the District.

Respectfully submitted

Mark D. Karper 2/5/12

Professor Mark D. Karper Ph.D.

Lynda Van Coske Esq.

Lynda Van Coske Esq.


Charles E. Blitman 2/15/12

Charles E. Blitman Esq. See concurring opinion

Concurring Opinion from Panel Member Charles E. Blitman

This Panel Member concurs and agrees to the Award as written and determined by the Neutral Panel Member (Professor Mark Karper). This Panel Member is aware of the "give and take" relationship of the collective negotiations between the parties and the "give and take" relationship that occurs during the Panel Members' deliberations. However, there was uncontroverted evidence presented to the panel of the DeWitt Fire District's violation of the law regarding its compliance with New York State's Public Employee Safety and Health Act Article 2, Section 27, which adopts all of the United States Department of Labor Occupational Safety and Health Administration (OSHA) safety requirements, with respect to firefighting. It is well established that OSHA requires in Section 1910.134(g)(4) that whenever firefighters engage in internal structural fire fighting, that at least two firefighters will enter the structure and "...at least two employees are located outside." This "two in/two out rule" is not simply a guideline or a recommendation, but rather a legal mandate. It is uncontroverted that when the bargaining unit is present at a burning structure, that the practice and de facto requirement is to enter the burning structure for the suppression of fire and saving of lives regardless of whether there are four firefighters present on the scene. It is uncontroverted that such occurs and is countenanced by the Fire District.

The only option for this professional firefighting bargaining unit, under the current law, is to seek hazard pay for the purpose of providing a disincentive for the Fire District to violate the law while placing firefighters and citizens at grave risk. The bargaining unit consists of approximately 12 fire fighters and it is impractical and unrealistic for the bargaining unit to commence litigation involving these issues. Rather, the Taylor Law is clear that a hazard pay clause is a meaningful, lawful method to address this safety issue. The failure of the panel to provide the requested hazard pay clause or some facsimile of it, merely continues the improper protocol. It is only a matter of time until this violation results in injury or death. The panel was derelict in its duties to remedy this violation by not imposing an appropriate hazard clause.



Charles E. Blitman

DISSENT TO INTEREST ARBITRATION AWARD MADE IN THE MATTER BETWEEN
DEWITT PROFESSIONAL FIREFIGHTERS ASSOCIATION LOCAL 2733 IAFF AFL-CIO
AGAINST THE DEWITT FIRE DISTRICT, NYS PERB IA2011-001, M2010-260

BY: LYNDA M. VANCOSKE, ESQ. FOR THE DISTRICT

I respectfully dissent to the award as written in two areas, to wit, wage increase and a just cause provision.

A wage increase of 3% is out of sync with other current settlements and ignores the economic realities faced by public entities in New York State. Moreover, the argument that the District has the ability to pay a 3% wage increase fails to consider the multitude of other pecuniary responsibilities that it faces. Obligating the District to incur this wage increase through use of its reserve fund would effectively penalize the District for its efforts to be fiscally responsible. Accordingly, I cannot join the panel in awarding a 3% wage increase to the Association members.

Further, I cannot join the Panel in agreeing to the inclusion of a just cause provision. The Association simply did not present a sufficient justification for including a just cause provision. New York State Civil Service Law Section 75 provides procedural due process for Association members. Adding a just cause provision provides an additional layer to prolong and confuse the process given that Section 75 is already a clear process in place.

