STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of Compulsory Interest Arbitration between COUNTY OF ROCKLAND Respondent -and- ROCKLAND COUNTY DISTRICT ATTORNEY'S CRIMINAL INVESTIGATOR'S ASSOCIATION, INC. Petitioner	Opinion and Award PERB Case No.: IA99-016; M99-100 MAY 20 2002 CONCILIATION

As a result of a letter of September 15, 1999 from the Petitioner to the New York State Public Employment Relations Board, in which a request was made to the Board to submit a list from which a chairperson and two members be chosen by the Petitioner and Respondent, the following panel was created:

For the Respondent:
Robert Winzinger
Deputy Commissioner of Personnel

For the Petitioner:
Anthony V. Solfaro, President
New York State Union of Police Associations, Inc.

Chairperson:
Linda Robins Franklin, Neutral Arbitrator

When the parties negotiated, but were unable to reach agreement on all the open issues of a contract which would have been a successor to the January 1, 1996 through December 31, 1998 Agreement, John K. Grant, Esquire, representing the

Rockland County District Attorney's Criminal Investigator's Association, prepared a final version of a Memorandum of Agreement reached during their negotiations. Thus, the majority of the parties' open issues were resolved, and were approved for the January 1, 1999 through December 31, 2002 Contract. (Association's Memorandum of Agreement, page 1)

Along with this Memorandum of Agreement, a side letter agreement made by the parties evidenced agreement that the parties would submit two (2) issues to be considered by the Interest Arbitration Panel.

1. The County's proposal was:

> Employees hired on or after January 1, 1998 shall contribute under the following net COBRA formula twenty percent (20%) for family coverage and eighteen percent (18%) for individual coverage during such new employees' first twelve (12) years of employment. Such employees shall not be required to make any further contributions. State net COBRA rates set forth above shall be determined on January 1, 1998.
>
> The Association's proposal was:
> Upon retirement, the Employer shall pay one hundred percent (100%) of the cost or premium for individual or dependent health insurance coverage.

In its correspondence of May 18, 2000, Counsel for the County announced that it decided to "withdraw its request for the change in health insurance contribution rate for new employees." Further, this letter from the County made specific note of the one remaining issue for the Panel to consider, that

of the retiree health insurance benefit. The Association characterized this issue as "New Article XV, Section 1F: Upon retirement, the Employer shall pay one hundred percent (100%) of the cost or premium for individual or dependent health insurance coverage." (Presentation on behalf of the Rockland County District Attorney's Criminal Investigator's Association, Inc. page 4)

Currently, retirees and their dependents are receiving health insurance benefits voluntarily as a consequence of provisions of Rockland County, Resolution 95, which states:

> "Effective January 1, 1974, any employee of the County of Rockland who meets the requirements set forth in § 245 and Section 256 of the New York State Government Employees Health Insurance Program Manual for Participating Subdivisions and who has had at least five (5) years of combined service with the County of Rockland and one or more participating subdivisions of New York State or with a combination of both, shall be entitled to continued health insurance coverage in retirement in accordance with the said provisions of Section 245 and 256, and be it further, that at least three (3) of the five (5) years of combined service must have been with the County of Rockland."

The New York State Civil Service Law § 209(4)(c)(v) puts forth a definition of Interest Arbitration as "a process in which the terms and conditions of an employment contract are established by a final and binding decision of the

arbitration panel." The statute offers the following criteria for review by the panel:

> "... 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 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;
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> (b) the interests and welfare of the public and the financial ability of the public employer to pay;
>
> (c) comparison of the peculiarities in regard other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; job training and skills.
>
> (d) the terms of collective bargaining agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security."

The proposal advanced by the Association, "upon retirement, the Employer shall pay one hundred percent (100%) of the cost or premium for individual or dependent health insurance coverage," *would supplement the existing clause (Article XV, Section 1.F.) which states, "Employees hired on or after January 1, 1998 shall contribute under the above net (COBRA) formula eighteen percent (18%) for family coverage and sixteen

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* Following my having sent a copy of the Opinion and Award to the parties, I informed them that I made a change on page 4, the 4th line down of the last paragraph, which now reads "would supplement the existing clause" instead of the original phrase "would be substituted for the existing clause."

This change has not altered the Award and the substance of the Award. The original was an error in word usage, and did not change the actual Award, nor was it meant to change the actual Award.

percent (16%) for individual coverage during such new employees' first twelve (12) years of employment. Thereafter, such employees shall not be required to make any further contributions. State net COBRA rates set forth above shall be determined on January 1, 1996; January 1, 1997 and January 1, 1998."

Under the [1]Aeneas McDonald Case, a retiree health benefit was not an enforceable past practice; was temporary in nature. The Association at one time believed that the resolution was a past practice and was "written in stone." In other words, it was a past practice which was enforceable. However, the Aeneas McDonald Case made it clear that "the resolution is not an enforceable past practice." Under certain circumstances, the County Legislature could terminate those benefits or, as the County panel Arbitrator put it, "could call for some level of contribution by employees."

The position of the County is that this benefit has always been temporary, and could have been reversed, or it could have imposed a contribution on employees for the benefit. Thus, the County points out, the possibility of this issue being a cost factor is real, whenever a benefit, capable of being changed, becomes a contractual obligation. Therefore, although unknown at the moment, the possibility of an increase in costs to the County should not be overlooked.

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[1]Aenas McDonald Police Benevolent Association, Inc. v. Gevera 680 NYS 2nd 887 (1998)

It should be pointed out that the members of the panel were not present at any of the negotiating sessions, and did not have the benefit of the discussion regarding cost, comparisons with other like employers, and a myriad of other factors or criteria by which the interest arbitration panel must base its award as set forth in Civil Service Law 209.4 (c)(v) a-d.

Based on the written presentation on behalf of the Rockland County's District Attorney's Criminal Investigator's Association, Inc., the County of Rockland's Position Statement, and the oral and written statements by the two panel members during the Executive Session, I make the following

A W A R D

The request of the Association to include the new proposed clause "upon retirement, the employer shall pay one hundred percent (100%) of the cost or premium for individual or dependent coverage" into the January 1, 1999 through December 31, 2002 is denied.

March 8, 2002
Date

Linda Robins Franklin
Neutral Arbitrator

NEW YORK, NEW YORK
March 8, 2002
STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

On this 8th day of March, 2002, before me personally came and appeared LINDA ROBINS FRANKLIN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.

MARY PAGÁN
Notary Public, State of New York
No. 01PA5024181
Qualified in Kings County
Commission Expires Feb. 28, 2006

Mary Pagán
NOTARY PUBLIC

Anthony V. Solfaro, President
New York State Union of Police
Associations, Inc.

I agree

4/3/02
Date

I disagree

Robert J. Winzinger, Sr.
Deputy Commissioner, County of Rockland

I agree

March 13, 2002
Date

I disagree

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of Compulsory Interest Arbitration

- between -

ROCKLAND COUNTY DISTRICT ATTORNEY'S CRIMINAL INVESTIGATOR'S ASSOCIATION, INC.,

Employee Organization/Petitioner,

PERB Case No.: IA99-016; M99-100

- and -

COUNTY OF ROCKLAND,

Employer.

----------X

ANTHONY V. SOLFARO

EMPLOYEE ORGANIZATION PANEL MEMBER

DISSENTING OPINION

I dissent because it is impossible to discern from the majority opinion and award whether, and if so, how the panel majority applied any of the statutory criteria to reach a determination that police officers should not have any assurance that they and their dependents will have health insurance on retirement. Indeed, the panel majority has disregarded its statutory obligations and it has failed completely, and in every relevant respect, to make a just and reasonable determination of the retirement health insurance issue that was submitted to the panel.

There are major mistakes throughout the majority's brief opinion, but the mistakes begin with a misunderstanding of the issue before the panel. It appears from the opinion that the Chairwoman believed, incorrectly, that the Association's demand for health insurance on retirement also called for an elimination of the health insurance premium contribution required of employees who were hired on and after January 1, 1998. That contribution is made for so long as the individual is working. Although elimination of that contribution was one of the Association's demands during bargaining, it was always separate from the demand for confirmation of the County's practice of providing health insurance for the individual and/or dependant coverage upon retirement from County employment without cost. As a result of the parties' collective negotiations, which culminated in a new collective bargaining agreement for 1999 through 2002, all of the parties' bargaining demands were withdrawn except the Association's demand for a continuation of health insurance on retirement.

The issue before the panel was as follows:

> *Upon retirement, the Employer shall pay one hundred percent (100%) of the cost or premium for individual or dependent health insurance coverage.*

The panel majority was apparently persuaded to deny the Association's retirement health insurance demand based upon unknown costs to the County, costs which included those derived from an elimination of the health insurance premium contribution required of certain unit employees while they are employed. But the retirement health insurance demand never had and

does not now have any relationship to or effect upon the separate issue of what a working employee's health insurance benefits are or should be. In that regard, the parties agreed to continue the health insurance contributions required of employees hired in 1998 and after at 16% for individual coverage and 18% for family coverage, as had been required under the 1996-1998 contract. The limited nature of the Association's demand was apparent from its text and was clearly announced to the panel in its written submission dated October 1, 2001 and in my letter to the panel Chairwoman dated November 26, 2001. The demand for health insurance on retirement obviously cannot effect an elimination of premium contributions made during employment when the continuation of the contribution required of certain unit employees was agreed upon during negotiations. Health insurance while working and health insurance after employment has ended are patently separate issues. This error by the majority as to the nature and scope of the issue before the panel will, by itself, require that this award be vacated on appeal.

The panel majority's award is no less flawed even if it is assumed that the Chairwoman understood correctly that the Association's demand before the panel would not at all change the health insurance premium contribution required of the unit employees who were hired on and after January 1, 1998. Even if the majority members of the panel understood that the Association's demand was limited to health insurance on retirement, they have failed to render an award which rationally and reasonably disposes of that issue.

Since 1977, interest arbitration panels have been required to consider all of the criteria in Civil Service Law § 209.4(c)(v) and those panels must specify and explain clearly how they applied those criteria in making their awards. This specification is required so that the parties who are bound by the award understand clearly why the award was made as it was and to ensure that a court on appeal will have the opportunity to conduct an intelligent and meaningful review to guard against arbitrary awards. When an interest arbitration panel fails for any reason to make findings upon each and every of the statutory criteria and fails to explain how it applied those

criteria to the issue(s) before it, the panel's award is incomplete and it must be vacated on appeal[1] for noncompliance with statutory mandate.

Even when the award is read most favorably to the panel majority, the majority has only considered one factor in making its award. The majority rests its award entirely on a concern about the "possibility" of an "unknown" "increase in costs" were the Association's demand to be awarded in some form. There are several problems with the majority's observations about this cost factor.

First, the costs of a demand are not synonymous with "the financial ability of the public employer to pay", one of the statutory criteria the panel is required to apply. (CSL § 209.4(c)(v)(b)) Depending upon its financial condition, a public employer may have an unfettered ability to pay a very expensive demand. Conversely, a public employer may have limited or no ability to pay a very inexpensive demand. Despite this, there is no explanation by the majority as to how and to what degree these unknown costs relate to the County's ability to pay. The absence of any explanation makes the award fatally defective for this reason alone. But this is far from the end of the majority's errors both factual and legal.

The panel majority does not discuss at all in relation to these alleged potential, unknown future costs the fact that the County has provided one hundred percent (100%) health insurance coverage to all retirees and eligible dependents from the County for more than twenty-eight (28) years under a practice memorialized by County Resolution. Nor does the award discuss the significance of the County's repeated assertion that it has no intent to withdraw or modify this practice. An award upon the Association's demand exposes the County to no costs greater than those it has historically absorbed, yet nowhere does the panel majority discuss the significance of this as a counter to the articulated concern about potential costs in the future.

[1] *Buffalo Police Benevolent Association v. City of Buffalo*, 82 A.D.2d 635 (4th Dep't 1981); *City of Yonkers v. Mutual Aid Association of the Paid Free Department of the City of Yonkers*, 80 A.D.2d 597 (2d Dep't 1981); *PBA of Pelham Manor, Inc. v. Village of Pelham Manor*, 22 PERB ¶ 7522 (Sup. Ct. Westchester Co. 1989); *Greenwald v. County of Nassau*, 14 PERB ¶ 7529 (Sup. Ct. Nassau Co. 1981); Hollenbeck v. Village of Owego, 25 PERB ¶ 7540 (Sup. Ct. Tioga Co. 1992).

Even if the costs of a demand have some relationship to an employer's ability to pay, the majority's discussion of this one criterion is superficial at best for it merely observes that these costs should not be "overlooked". Other than this one criterion, the panel majority has admittedly not considered any other of the statutory criteria. As best as can be determined from the majority's award, its admitted failure to discuss the other criteria stems from an alleged absence in the record of any facts relevant to those other criteria. The majority of the panel is, first of all, incorrect. Moreover, even were the majority correct, the absence of record facts does not permit the panel to disregard its statutory obligations.

In this latter regard, an interest arbitration panel must ensure that the record before it is sufficient to permit for a full discussion of all of the criteria the panel is to apply in making its award. To ensure the adequacy of the record, a panel is vested with the specific authority "to require the production of such additional evidence, either oral or written as it may desire from the parties..." (CSL § 209.4(c)(iii)). An interest arbitration panel is more than a group of arbitrators constrained to make determinations only upon whatever record the parties choose to give it. The panel, under the direction of its chair, is required to develop the facts necessary to permit for "a just and reasonable determination of the matters in dispute" (CSL § 209.4(c)(iv)).

Speaking directly to this issue, the courts have observed that:

> *...the arbitration panel has some obligation to explore each criterion, not simply as an arbiter, but also as a quasi-legislative body delegated with a similar fact-finding mission...*
>
> (*City of Batavia v. Pratt*, 19 PERB ¶ 7510 at p. 7522 (Sup. Ct. Genessee Co. 1986)

Therefore, even if it were correct that the record before the panel contained no evidence relevant to any of the other statutory criteria that it was required to specify, discuss and apply, that would not be a justification for the award it rendered. But what the panel majority stated is not correct. The record does contain facts relevant to an application of other of the statutory criteria. The panel majority's misrepresentations as to the content of the record is as serious as its misunderstanding of the issue before it.

The terms and conditions of employment historically enjoyed by employees is one of the criteria the panel is required to consider. (CSL § 209.4(c)(v)(d)) Their retirement benefits are one of those terms and conditions of employment which are specifically listed in the law. The parties' 1996-1998 agreement and the successor agreement for 1999-2002 were before the panel, but the panel majority in this regard merely observes that the County has for many years extended fully paid health insurance upon an employee's retirement. Moreover, omitted from the majority's award is any discussion about the affidavit submitted by John F. Casey, Jr., a long-time employee of the County and former President, for many years, of the Association. Casey's unrebutted attestation that the continuation of fully funded health insurance was both the County's promise and the employees' expectancy, which served as the basis for the agreements reached in negotiations over the years, is ignored by the panel majority, as are Casey's representations regarding the critical importance of this issue to the employees who comprise this unit, police officers.

Ignored also by the panel majority is the information pertaining to the employees' retirement plan under which unit employees may retire after twenty (20) years of service regardless of age, unlike most employees in public and private sector employment. An exhibit in the record showed the dates of birth and hire, revealing that many unit employees are now or will soon be eligible to retire at a point when Medicare coverage would be many years away. These facts, unquestionably relevant to the criteria the panel must apply, find no discussion at all by the panel majority who denied the benefit solely because of unknown, potential costs.

Excluded from the panel majority's award is any discussion about comparability (CSL § 209.4(c)(v)(a)), the interests and welfare of the public, (CSL § 209.4(c)(v)(b)), the uniqueness of these police officers' employment (CSL § 209.4(c)(v)(c)) or the terms of the parties' agreements (CSL § 209.4(c)(v)(d)). Even if the record did not contain enough information about these issues, the panel majority was not free to simply disregard these statutory criteria. It was the Chairwoman's responsibility to request additional information from the parties. The majority's award, which issues in disregard of these statutory criteria, cannot be justified.

Central to the Association's argument was a decision by the New York Court of Appeals in *Aeneas McDonald Police Benevolent Association, Inc. v. City of Geneva*[2]. In that case, the Court held that retirement health insurance benefits extended under a legislative resolution were not guaranteed, such that the benefits were subject to an employer's unilateral change. According to the Court, the enforceability of retirement health insurance benefits required a benefit source which itself was binding, such as a collective bargaining agreement or an interest arbitration award. When the County refused to agree to do what it had been doing for many years, the Association was left with no viable option but to submit the issue for determination by an interest arbitration panel. Other than acknowledging the Court of Appeals' decision, the majority opinion award does not discuss the implications of that decision in light of the record before it, particularly Casey's affidavit and the other exhibits.

The significance of *Aeneas McDonald* is that it changed the fundamental assumption upon which both parties had historically bargained. Notwithstanding the County's argument to the contrary that the retirement benefits were always "temporary", it was not until *Aeneas McDonald* that the parties knew that the County Resolution was not a binding source of health insurance rights upon retirement. The significance of that case can not be relegated, as it is by the panel majority, to a one paragraph description of what the case holds. What was required and is missing is an explanation as to how that fundamental change in bargained for contractual terms is to be weighed and balanced, along with all other mandated criteria, against an articulated concern by the County about unknown, potential costs of the benefit.

The Association has never argued that the costs of a bargaining demand are an irrelevancy, only that speculation about what costs may be in the future cannot be the sole basis for an award. If and as cost relates to ability to pay, it is but one factor to be weighed and balanced against all other relevant factors, including the several which the panel must specify and discuss. But the Association was deprived by the majority award of the benefit of that discussion and its rights under the law.

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[2] 92 N.Y.2d 326 (1997).

As the Casey affidavit attests, health insurance continuation upon a police officer's retirement is an issue of vital importance to them given the nature of their work and their unique retirement options. So fundamental an issue as this requires very careful and thoughtful disposition by the panel. Instead, the Association has been handed an award of six (6) pages, almost all of which do nothing more than recite the history of the parties' dispute and the background facts related thereto, including a restatement of the County Resolution regarding retirement benefits, the interest arbitration award criteria, and a short summary of the holding in *Aeneas McDonald*.

The majority's "analysis" is just this. Cost, albeit speculative and unknown, is a factor which "should not be overlooked" and missing from the record is information about the "myriad of other factors or criteria by which the interest arbitration panel must base its award as set forth in CSL § 209.4(c)(v) a-d" because "members of the panel were not present at any of the negotiating sessions", itself an incorrect statement because I was present at bargaining sessions and mediation. Indeed, I was the lead negotiator for the Association up to and including mediation.

In my more than twenty-five (25) years of service on interest arbitration panels across the State of New York, I have never received an award that so completely disregards the legal standards that govern an interest arbitration proceeding. The evidence and arguments before this panel warranted an award consistent with the Association's demand or one that fully explained the rejection of the Association's demand. An award simply denying the Association's demand in its entirety without specification of the reasons for that award and without a full discussion about all of the statutory criteria that must be applied is wholly arbitrary. The very result the Legislature intended to prevent has been effected by a panel majority which did not understand the issue before it and which ignored its obligations under the law.

For all of the reasons set forth herein, I dissent.

Anthony V. Solfaro

4/3/02
Dated

Sworn to before this
3rd day of April 2002

NOTARY PUBLIC

ANN M. ELLIOTT
Notary Public, State of New York
Qualified in Orange County
Reg. No. 01EL6031699
Commission Expires October 12, 2005