STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
COMPULSORY ARBITRATION

CITY OF COOPERSVILLE

-and-

Case No. G98 K-0508
under Act 312, P.A. 1969

POLICE OFFICERS LABOR COUNCIL

SUBJECT

Union proposal for new contract language providing for broader arbitral review of "just cause" in discipline and discharge grievances.

CHRONOLOGY

Petition filed: October 12, 1992
Impartial arbitrator appointed: April 27, 1993
Pre-hearing conference: waived
Hearing: October 29, 1993
Union's final offer received: November 6, 1993
Transcript received: November 10, 1993

ARBITRATION PANEL

Impartial Arbitrator/Chairman: Paul E. Glendon
City Delegate: John H. Gretzinger, Attorney
Union Delegate: Fred LaMaire, Business Representative

APPEARANCES

For the City: John H. Gretzinger, Attorney
For the Union: Kenneth W. Zatkoff, Attorney

BACKGROUND

The only issue before this panel is whether, as proposed by the Union, Section 6.4 of the parties' agreement should be amended by the addition of language providing for broader arbitral review of "just cause" issues in discipline and discharge cases. The parties settled all other issues in bargaining and implemented the resulting agreement, which took effect on July 1, 1992 and will expire June 30, 1994, leaving only this issue to be decided in compulsory arbitration under Act 312, P. A. 1969. Although the Union's proposal seeks to amend only Section 6.4, it also would have an impact on Section 4.0(b), which reads as follows (affected language in italics):

> (b) The Employer shall also have the right to establish job descriptions and work standards; to make judgments as to the skill and ability of the employees; to determine work loads; to promote, demote, discipline and discharge for just cause, layoff or recall personnel; to establish and revise work rules and safety rules from time to time; *to determine penalties for violations of work and safety rules and other improper employee actions or inactions*; to establish and change work schedules; to provide and assign relief personnel; and in all respects to carry out the ordinary and customary functions of management; provided, however, these rights shall not be exercised in violation of any specific provision of this Agreement, and as such, they shall be subject to the grievance and arbitration procedures to the extent provided herein.

Section 6.4 now reads as follows:

> Section 6.4. Arbitrator's Powers and Jurisdiction. The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written. The arbitrator shall at all times be governed wholly by the terms of this Agreement and shall have no power or authority to amend, alter or modify this Agreement either directly or indirectly, to rule on the proper amount of the Union's service fee, to rule on the discipline, layoff, recall or termination of any probationary employee or to rule upon any grievances considered settled. If the grievance concerns the exercise of these rights which are not otherwise limited by the expressed terms of this Agreement, the grievance shall not be arbitrable. If the issue of arbitrability is raised, the arbitrator shall not determine the merits of any grievance unless arbitrability has been affirmatively decided, and the Employer may require a bifurcated hearing in any proceeding in which the arbitrability of the grievance is at issue. Any award of the arbitrator shall not be retroactive more than five (5) working days prior to the time the grievance was first submitted in writing. All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any unemployment compensation or compensation for personal services that the employee may have received from any source during the period in question.

The Union's final offer of settlement proposes to amend Section 6.4 to read this way (most significant changes in italics):

> Section 6.4. Arbitrator's Powers and Jurisdiction. The power of an Arbitrator shall be limited to the application and interpretation of this Agreement as written. The Arbitra-

> tor shall have no power or authority to amend, alter, or modify the terms of this Agreement as written. The Arbitrator shall have no power or authority to rule on the discipline, layoff, recall or termination of any probationary employee or to rule upon any grievances considered settled. *Nothing contained herein shall be construed to limit an Arbitrator's authority to rule upon, alter, modify, or amend the discipline, layoff, recall or termination of any non-probationary employee.* If the issue of arbitrability is raised, the Arbitrator shall not determine the merits of any grievance unless arbitrability has been affirmatively decided, and the Employer may require a bifurcated hearing in any proceeding in which the arbitrability of the grievance is at issue. Any award of the Arbitrator shall not be retroactive more than five (5) working days prior to the time the grievance was first submitted in writing. All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned less any unemployment compensation or compensation for personal services that the employee may have received from any source during the period in question.

In a stipulation signed in May 1993, the parties waived all time limits applicable to this proceeding, both statutory and administrative, and agreed that the "only unresolved issue remaining to be determined by the Panel is whether their new agreement shall contain a 'just cause' provision." At the hearing the parties' representatives agreed that since the agreement already contained a "just cause" provision, the issue was somewhat broader than originally stipulated and related to the scope of a grievance arbitrator's powers and jurisdiction with respect to just cause issues in discipline and discharge cases. They did not agree to expand the issue any further than that, however, so to the extent that the Union's proposed amendment to Section 6.4 would give grievance arbitrators powers or jurisdiction not already found in the agreement in cases involving layoff or recall of non-probationary employees, it exceeds the scope of these proceedings and may not and will not be considered by the panel.

With respect to arbitral review of just cause issues in discipline and discharge cases involving nonprobationary employees, the Union's proposal seeks to eliminate restrictions on arbitral review arising under Section 4.0(b) as interpreted in an unpublished decision of the Michigan Court of Appeals in *City of Coopersville v Police Officers Association of Michigan*, Docket No. 107983 (1989). In that case the City had discharged a member of this bargaining unit (then represented by POAM) for alleged harassment of and unlawful conduct toward citizens. The union filed a grievance, it went to arbitration, the arbitrator found that the officer had engaged in misconduct, but not of such a serious nature as to justify discharge, and ordered him reinstated with back pay but subject to a thirty-day unpaid suspension. The City filed a complaint to vacate the award, the circuit court ruled in the City's favor, and the union appealed. The Court of Appeals upheld the lower court's decision, finding that:

> The collective bargaining agreement clearly retained to management the right to determine the appropriate penalty for the violation of a work or safety rule or for improper employee actions. Accordingly, it is outside the scope of the arbitrator's authority to modify the penalty imposed by plaintiff where the arbitrator concludes that employee misconduct did occur. . . .
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> . . . . Once having concluded that the employee had engaged in misconduct, the arbitrator was obliged to affirm the employer's imposition of the penalty, whatever that penalty was. That is, the arbitrator had no authority to make an independent conclusion as to the appropriate penalty to be applied.

The Union presented evidence that it had surveyed the collective bargaining agreements for police officers in all communities within a fifty-mile radius of the City of Coopersville and found that every one contained "a provision requiring just cause for discipline and/or discharge." However, it presented no evidence regarding the scope of grievance arbitrators' powers and jurisdiction with respect to the review of just cause issues arising under those agreements. Additionally, the Union argued that the limitations on arbitrators' authority in this agreement, as interpreted by the Court of Appeals, leave officers potentially subject to arbitrary, capricious and discriminatory discipline for even the most petty offenses, without effective recourse. It contends such limitations are inconsistent with the fundamental concept of just cause and should be eliminated.

The City presented no evidence regarding just cause provisions in police contracts in comparable communities, but established that similar limitations are included in contracts covering other City employees and argued that it considers itself an "at will" employer, subject only to limited arbitral "just cause" review permitted under the existing language of Section 4.0(b) City Manager Thomas O'Malley testified that there are practical as well as philosophical reasons for this position. He said that due to budgetary limitations and the small size of the police department, it would be impossible to find productive work for an officer who might be reinstated after discharge for misconduct which, in management's view, would make it unsafe or unduly risky to return him/her to full law enforcement responsibilities with attendant citizen contact. O'Malley also testified that neither the citizenry nor current members of the Police Department have expressed any dissatisfaction with the current contractual system or any desire to change it, and that there have been a plethora of applicants for any openings in the department. For those reasons, the City contends there should be no change in Section 4.0(b) or 6.4.

DISCUSSION AND FINDINGS

The panel's decision in this case must be governed, of course, by the evidence before it and the statutory factors set forth in Section 9 of Act 312, MCLA 423.239.

Factor (a), the "lawful authority of the employer," does not influence the panel's decision either way, it being undisputed that the City has the lawful authority to discipline and discharge employees, but also the legal obligation to bargain with their representative regarding conditions of employment, including discipline and discharge.

Factor (b), "Stipulations of the parties," is applicable only to the extent noted above. Namely, the stipulation that only "just cause" is at issue in this proceeding precludes the panel from deciding or issuing orders regarding matters beyond the scope of that issue, such as arbitral review of layoff and recall of nonprobationary employees.

Factor (c), the "interests and welfare of the public and the financial ability of the unit of government to meet these costs," is relevant to the panel's decision to the extent that the panel finds merit in the City's argument that continued limitation on arbitral review of discipline and discharge cases is necessary to protect the public against police officers known to be abusive or otherwise guilty of misconduct adversely reflecting on their ability to faithfully carry out full law enforcement duties, and to protect the City finances against excess costs to carry such an officer in an unnecessary, limited duty position. In the chairman's view, that argument and the testimony of City Manager O'Malley in support of it do have merit. Therefore this factor favors the City's position.

Factor (d) calls for "comparison of . . . conditions of employment" between employees in this unit and those "performing similar services and . . . other employees generally" in public and private employment in comparable communities. This factor favors each party, to a limited extent. In the City's favor is the fact that other employees of the City of Coopersville are subject to the same limitations regarding arbitral review of discipline and discharge cases as members of this unit. In the Union's favor is the uncontested evidence that every other police contract in a fifty-mile radius has "a provision requiring just cause for discipline and/or discharge," but the significance of this fact is limited by the absence of any evidence regarding the scope of arbitral review in the contracts in any of the purportedly comparable communities.

Factors (e), (f) and (g), relating to consumer prices, overall compensation and changes in relevant circumstances during the pendency of the arbitration proceedings, are not applicable to the panel's decision in this case.

Section 9(h) requires the panel to consider "Other factors . . . normally or traditionally taken into consideration in the determination of . . . conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment." The panel certainly can and should take arbitral notice that broad arbitral review of employers' disciplinary and discharge actions -- including comparing the severity of the discipline with the gravity of the

offense and consideration of other relevant circumstances such as the employee's length of service, prior record and propensity for repeated misconduct -- is a common feature of collective bargaining agreements in both the public and private sectors. It also may take notice that the reasons for such review include protecting employees against arbitrary, discriminatory or draconian disciplinary responses to petty and/or correctable misconduct and a general preference for corrective rather than punitive discipline.

To this extent, factor (h) favors the Union's position, but it does not completely offset the factors favoring the City. In particular, it does not offset the City's legitimate concerns regarding potential reinstatement of employees reasonably judged to be unsuited for continuing law enforcement employment or guilty of offenses generally considered to be grounds for discharge. In those areas, it is entirely reasonable for the City to insist upon continued limits on the scope of arbitral review, just as it is not unusual for parties to collective bargaining agreements in both the public and private sectors to freely negotiate such limitations, in the form of contract language explicitly defining certain offenses as grounds for discharge but also providing for broader arbitral review in cases involving other, unspecified offenses.

Thus it is appropriate for this panel to order an amendment to Section 6.4 that will protect the interests of both management and the employees and will reflect the factors favoring each party's position, to the extent that they are compatible with the legitimate interests of and evidence supporting the other's. The following order, with the new language presented in italics, will achieve that objective.

Paul E. Glendon
Impartial Arbitrator/Chairman
December 16, 1993

ORDER

The arbitration panel orders that Section 6.4 of the parties' 1992-94 agreement shall be and hereby is amended to read as follows:

Section 6.4. Arbitrator's Powers and Jurisdiction. The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written. The arbitrator shall at all times be governed wholly by the terms of this Agreement and shall have no power or authority to amend, alter or modify this Agreement either directly or indirectly, to rule on the proper amount of the Union's service fee, to rule on the discipline, layoff, recall or termination of any probationary employee or to rule upon any grievances considered settled. If the grievance concerns the exercise of these rights which are not otherwise limited by the expressed terms of this Agreement, the grievance shall not be arbitrable. If the issue of arbitrability is raised, the arbitrator shall not determine the merits of any grievance unless arbitrability has been affirmatively decided, and the Employer may require a bifurcated hearing in any proceeding in which the arbitrability of the grievance is at issue. *Nothing contained herein shall be construed to limit an arbitrator's authority to rule upon, alter, modify, or amend the discipline or discharge of any nonprobationary employee pursuant to a finding that there was not just cause for discharge or for the particular disciplinary action imposed, except on the following charges, with respect to which, if the arbitrator finds that the employee committed the charged misconduct, the Employer's determination of penalty, in the exercise of its management rights under Section 4.0(b) of this Agreement, shall not be subject to arbitral review: physical attack on any person while on duty; violation of criminal law; violation of departmental firearms policy; insubordination; use, possession, sale or being under the influence of intoxicating beverages, marijuana, narcotics or any controlled substance other than prescription drugs taken under doctor's order while on duty; theft of City property or property of other employees; harassment of member(s) of the public or other City employees while on duty or under color of authority as police officer; or other abuse of authority as law enforcement officer.* Any award of the arbitrator shall not be retroactive more than five (5) working days prior to the time the grievance was first submitted in writing. All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any unemployment compensation or compensation for personal services that the employee may have received from any source during the period in question.

December 16, 1993

Paul E. Glendon, Chairman

John H. Gretzinger, City Delegate

Fred LaMaire, Union Delegate