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INTERIM DECISION OF THE ARBITRATION PANEL

Michigan Employment Relations Commission

Case No. 01B-0202 ~~L 99 A-7012~~

In the Matter of the Act 312 Arbitration between

City of Detroit

- and -

Detroit Police Lieutenants and Sergeants Association

DATE OF MEDIATION: August 23, 2001

DATE OF ACT 312 PETITION: August 23, 2001

DATE OF IMPARTIAL ARBITRATOR APPOINTMENT: May 16, 2002

ARBITRATION PANEL:

Richard N. Block, Chair and Impartial Arbitrator
Mr. Brian S. Ahearn, Lacey & Jones, City of Detroit Delegate
Mr. John A. Lyons, John A. Lyons and Associates, Detroit Police Lieutenants and Sergeants Association Delegate

APPEARANCES:

For City of Detroit

Mr. Kenneth S. Wilson, Abbott, Nicholson, Quilter, Esshaki & Youngblood
Mr. Dallas G. Moon, Lacey & Jones
Ms. Pamela O. Evans, Deputy Chief for Risk Management, Detroit Police Department

For Detroit Police Lieutenants and Sergeants Association

Mr. J. Douglas Korney, Korney & Heldt.

BACKGROUND

The most recent master agreement between the City of Detroit (hereinafter the City) and the Detroit Police Lieutenants and Sergeants Association (hereinafter the Association) expired on June 30, 2001 (Assoc. Ex. 23). On August 23, 2001, following negotiations and mediation, the Association filed a petition for Act 312 arbitration. The City filed an answer on August 31, 2001. Neither the Association's petition nor the City's answer stated that any matter related to discipline was an open issue.

On May 16, 2002, the Michigan Employment Relations Commission appointed Richard N. Block as impartial arbitrator and chair of the arbitration panel. By letter dated June 21, 2002, a pre-hearing conference was scheduled for July 9, 2002.

On July 2, 2002, the City filed with the panel a motion to remand for mediation five proposals regarding discipline that the City first presented to the Association on June 10, 2002, subsequent to the filing of the petition for arbitration. The motion to remand was based on three events that occurred subsequent to the filing of the Act 312 petition: (1) the inauguration of a new mayor in January 2002; (2) the appointment of a new Chief of Police effective February, 2002; and (3) the receipt of a March 6, 2002 letter from the United States Department of Justice (DOJ) issued pursuant to a DOJ investigation of the Detroit Police Department currently being carried out pursuant to the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter the DOJ letter). The City argued that these events constituted changed circumstances under Act 312, Section 9, which would warrant the panel taking jurisdiction over these issues and remanding these proposals for mediation. Pursuant to an agreement at the July 9, 2002 pre-hearing conference and as later modified by the parties, the Association on August 14, 2002 filed a

response to the City's motion to remand. On August 19, 2002, the City filed a reply to the Association's response.

On September 10, 2002, via U.S. mail, the City submitted to the panel and the Association's attorney argument and supporting documentation from the Act 312 proceedings in MERC Case D01-0568, City of Detroit and Detroit Police Officers Association (DPOA) (hereinafter referred to as the September 10, 2002 submission) (Tr. 117). Included with the September 10, 2002 submission was the City's August, 2001 response to a DPOA motion to strike from the City of Detroit-DPOA Act 312 proceedings certain proposals by the City. Also included with the September 10, 2002 submission were various proposals made by the City to the DPOA (Tabs A-C), a copy of the DPOA's petition for Act 312 arbitration in the City of Detroit-DPOA case, dated June 15, 2001 (Tab D), the City's response, dated June 25, 2001, to the DPOA petition (Tab E), an affidavit by Deputy Chief of Police for Risk Management Pamela Evans in support of the City's motion to add additional issues as a result of the DOJ letter (Tab F), a copy of the DOJ letter (Tab F1), nine proposals made by the City in the DPOA proceedings that the City contends were in response to the DOJ letter (Tab G), a copy of the Association response to the City's motion to add additional proposals in the Association case (Tab H), a copy of an Interim Award by Arbitrator Benjamin Wolkinson dated October 28, 1999 in MERC Case No. D-0644, City of Detroit and Detroit Firefighters Association, Local 344 (hereinafter the Wolkinson decision), plus briefs, and a copy of an Interim Order by Arbitrator Mark Glazer dated May 28, 1999 in MERC Case No. D98-0944, City of Detroit and DPOA.

Hearings in the City of Detroit-DPLSA case commenced on September 23, 2002. At that hearing, the City requested the panel consider the documents in its September 10, 2002

submission and that it be permitted to offer additional testimony and documentary evidence in support of its motion to remand for mediation the five proposals related to discipline (Tr. 123-125). After a response by the Association and an additional response by the City (Tr. 125-131), the panel granted the City's request to offer additional evidence in the form of testimony by Deputy Chief Evans on October 14, 2002, subject to specified limitations on the scope of examination and to the City complying with specified procedural requirements (Tr. 131-35), all of which were met.

Deputy Chief Evans testified in support of the City's motion on October 14, 2002 (Tr. 159-281). Additional documentary evidence was also offered by the City on October 14, 2002 (City Exs. 26-36). Briefs on the motion were filed on December 9, 2002, and the record on this matter was closed on December 12, 2002.

MAY THE CITY RAISE ISSUES DURING ACT 312 PROCEEDINGS THAT WERE NOT RAISED IN NEGOTIATIONS?

The City points out that it is currently involved in simultaneous Act 312 proceedings with the DPLSA and DPOA. The same proposals on discipline were presented to the DPLSA and the DPOA on June 10, 2002. The City notes that on September 6, 2002, the panel in the DPOA case chaired by Arbitrator William Long, remanded all five proposals for mediation (hereinafter the Long decision), thereby taking jurisdiction of these issues for the purposes of the Act 312

arbitration.[1] The City argues that it would be anomalous and cause unnecessary litigation to remand these proposals in the DPOA case but not in the DPLSA case.

The City also argues that to remand all five proposals to mediation would not be inconsistent with the Wolkinson decision and is supported by the Long decision. While the panel majority agrees that a full remand is consistent with the Long decision, in disagreement with the City, a majority of the panel finds that such a remand would be inconsistent with the Wolkinson decision. The Wolkinson decision stands for the proposition that the Act 312 arbitration process is a part of the broader collective bargaining process under the Public Employee Relations Act (PERA). Under the Wolkinson decision rationale, the purpose of arbitration is to resolve differences that arose during previous negotiations, not to create a separate process. Thus, as a general rule, under the Wolkinson decision, a party could not raise during the arbitration process an issue or issues it did not raise during negotiations.

The Wolkinson decision, therefore, stands for the proposition that if a party could have raised an issue during the negotiations and mediation stage it must do so if it wishes an arbitration panel to assert jurisdiction over the issue. The Long decision seems to permit a party to raise an issue at the arbitration stage even if it was not raised, but could have been raised, at the negotiation or mediation stage. The rationale for this seems to be a broad view of the negotiations process. The Long decision notes

> "(i)t would . . . be impractical and inconsistent with the purposes of PERA and Act 312 to conclude that the parties cannot continue to negotiate a settlement of contract issues following the initiation of and during an Act 312 proceeding. It would also be impractical

[1]The Long decision in the DPOA case was provided by the City to the panel and the Association on September 23, 2002 (Tr. 121-22).

to limit the parties' discussions during negotiations to only those specified in the Act 312 petition and answer."

While it is axiomatic that parties to an Act 312 proceeding may and generally do continue to negotiate a settlement of contract issues at the arbitration stage, the matter in dispute turns on the contact issues which may be addressed by the panel at the arbitration stage. In essence, the Long rationale would permit a party to continue to raise issues during the Act 312 proceeding regardless of whether those issues had been the subjects of negotiations prior to the Act 312 petition. The Wolkinson decision would not.

As the two decisions are inconsistent, one must be chosen as a guide for making a decision on the instant motion. The majority of the panel finds that the Wolkinson decision is the more persuasive. The Wolkinson decision is strongly grounded in principles of labor relations and gives meaning to both PERA and Act 312. It gives life to the negotiations and mediation process by creating an incentive for the parties to at least raise issues during the negotiation and mediation stage. Moreover, the Wolkinson rationale is supported by the decisions of other arbitrators (see Wolkinson Decision, p. 7).

On the other hand, the Long rationale is supported by no other decision and does not state why it would be "impractical" to decline to limit the jurisdiction of an Act 312 arbitration panel to issues raised during the negotiations and mediation stage. Even if one assumes that it would be "impractical" to permit the parties to raise at the arbitration stage issues that were not raised, but could have been raised, at the negotiation or mediation stage, the Long decision does not provide an analysis of the benefits of the "practicality" of permitting new issues to be raised at the arbitration stage vis-à-vis the cost to the negotiation process of permitting such issues to be raised at the arbitration stage.

Although the City claims that it would be anomalous and cause unnecessary litigation for this (the DPLSA) panel to rule differently on these issues than did the DPOA panel, the City has not shown how it would be harmed by different rulings. In addition, the City has not claimed that it is unlawful to have the DPOA consider issues that are not considered by the DPLSA panel. Finally, it must be observed that the DPOA proceedings and the DPLSA proceedings are separate; the panel in one case is not bound by the decisions of the panel in the other case.

For these reasons, the majority of the panel finds that, as a general principle, the panel will not take jurisdiction over an issue during the Act 312 proceeding unless that issue was raised during negotiations or mediation stage.

DOES THE MARCH 6, 2002 DOJ LETTER CONSTITUTE CHANGED CIRCUMSTANCES WITHIN THE MEANING OF ACT 312, SECTION 9, THAT WARRANT THE CITY RAISING ISSUES RELATED TO THE DOJ LETTER DURING THE ACT 312 PROCEEDINGS THAT WERE NOT RAISED DURING NEGOTIATIONS?

Although the City may, as a general rule, not raise issues during the Act 312 proceedings that were not raised during the negotiations and mediation stage, the City argues that the "changed circumstances" criterion in Section 9 of Act 312 requires that the five post-petition City proposals be remanded for mediation. In its July 2, 2002 argument, the City contended that the inauguration of a new mayor, the assumption of office of a new chief of police, and the issuance of the DOJ report, all subsequent to the filing of the petition for Act 312 arbitration, constitute "changed circumstances" within the meaning of Section 9 of Act 312. In its December 5, 2002

argument, the City abandons the arguments regarding the inauguration of a new mayor and the appointment of a new Chief of Police, and asserts a general contention that it should be permitted to raise issues during the Act 312 proceeding that it did not raise during collective bargaining negotiations and mediation. The panel's majority decision on that contention was discussed above.

In the alternative, the City maintains its contention that the issuance of the DOJ letter constitutes changed circumstances with the meaning of Act 312, Section 9 such that it should be permitted to raise in bargaining matters that were addressed in the DOJ letter. The City argues that it did not act in bad faith by faith and attempt to evade its obligation to bargain by withholding these proposals. Rather, the City argues that it developed these proposals in response to the DOJ letter, which was not issued until March 6, 2002. The City points out that it began to develop these proposals after the issuance of the DOJ letter, and presented them to the DOJ representatives at meetings on June 5, 2002 and June 6, 2002, prior to submitting them to the Association and the panel (Tr. 243; City Ex. 32). The City contends that, once these changed circumstances came into existence, it diligently and expeditiously developed new proposals and provided them to the Association. The City claims that it could not have developed these proposals absent the changed circumstances, and that it bargained in good faith by bringing these proposals to the table.

A majority of the panel finds merit in this City contention. If circumstances change during the arbitration stage such that it was impossible for a party to reasonably foresee a situation that would cause an issue to be raised during the negotiation stage, it would be inconsistent with good labor relations to prevent a party from raising that issue in a timely manner, albeit during the

arbitration stage. The DOJ letter was issued on March 6, 2002, subsequent to the August 23, 2001 petition for arbitration. Thus, the City could not have known of its contents during negotiations in 2001. The City is obligated to respond to the recommendations in the DOJ letter. Thus, a majority of the panel finds that the issuance of the DOJ letter on March 6, 2002 constitutes "changed circumstances" under Section 9 of Act 312.

To the extent the DOJ letter has implications for terms and conditions of employment of the employees represented by the Association, these implications should be addressed through the bargaining process under PERA and Act 312, and it is appropriate for such matters to be brought to the negotiating table by the City. As such matters could not have been addressed in negotiations prior to the petition for arbitration, it is appropriate that they now be addressed so that, if the parties are unable to agree on these proposals, they can be ripe for arbitration. Accordingly, the City's motion to remand the proposals on discipline for mediation is granted to the extent these proposals address matters raised in the DOJ letter.

THE CITY PROPOSALS

CITY PROPOSALS 4-5

City Proposal 4 is as follows: "(t)he Trial Board shall serve an investigatory role, it will not issue a penalty, but will make a recommendation to the Chief of Police" (City Ex. 31). City Proposal 5 is as follows: "(t)he discipline decision rendered in the Chief's Hearing shall be the final ruling by Senior Management of the Department" (City Ex. 31).

Positions of the Parties

Position of the City. The City contends that the purpose of both of these proposals is to respond to what the City contends is a DOJ concern that the Chief of Police be held accountable for discipline. The City notes that under the discipline procedure in the 1998-2001 agreement, the discipline imposed by the Chief may be modified by the Trial Board, a body composed of entirely of the Chief's subordinates. The City points out that the DOJ letter, on page 8, refers to the necessity of the Chief answering directly to the Board of Police Commissioners (BPC). The City points out that the Chief cannot so answer to BPC, because the agreement places the Trial Board between the Chief and BPC, and it is the Trial Board's decision on the discipline, not the Chief's decision, that goes to the BPC. (Tr. 190-93, 195-96).

The City also argues that adding to the authority of the Chief is consistent with memoranda of agreement or consent decrees with which the DOJ has entered with other cities. The City also argues that Paragraphs 75 and 76 of the City of Cincinnati Memorandum of Agreement (City Ex. 34) and Paragraph 67 of the City of Pittsburgh Consent Decree (City Ex. 35) support its view that the DOJ prefers that discipline be determined by a single authority within the Department. The City argues that the Chief must exercise that authority.

Position of the Association. The Association, for its part, argues that Section 7-1107(3) of the Detroit City Charter states that a decision by the Chief to discharge or indefinitely suspend an employee may be referred to a public trial board if the employee contests the discharge or indefinite suspension. The decision of the trial board may be appealed to the BPC. The Association argues that the City Charter provides for civilian control of the police department through the BPC and public trial boards. (Assoc. Ex. 33)

The Association also points out that the DOJ letter on pages 7-8 recommends increased communication between the Chief and BPC through a written explanation by the Chief if the Chief decides not to impose discipline. The Association argues that there is no relationship between the DOJ letter and the proposals made by the City.

Discussion

A majority of the panel finds meritorious the Association position with respect to the relationship between Proposals 4 and 5 and the DOJ letter, and a majority of the panel finds the City's position without merit. There is nothing on page 8 of the DOJ letter that suggests that the DOJ has any concern that the Chief lacks authority to impose discipline, or that the Trial Board may overturn discipline imposed by the Chief. Item II.C of the DOJ letter, on pages 7-8, expresses a concern not about the Chief's authority, but rather about the potential lack of an explanation as to why the Chief would not impose discipline recommended by the BPC. Thus, the DOJ states "(w)e recommend that the Chief of Police be required to provide a written explanation to the BPC when he or she chooses not to impose discipline on an officer who is the subject of a sustained complaint" (City Ex. 28). The letter then goes on to recommend that the Office of the Chief Investigator notify the complainant of the disposition of the complaint, and the reasons for that disposition. Thus, it is clear that the DOJ, in the letter, was concerned not about the distribution of authority in the Department, but about the failure of the Department and/or the Chief to appropriately communicate decisions made under those lines of authority.

A majority of the panel also does not find that the Cincinnati Memorandum and the Pittsburgh Consent Decree support the City's contention that the DOJ has concerns about the

Chief's authority to impose discipline. Paragraph 75 of the Cincinnati Memorandum discusses the level of discipline imposed for offenses of different rules and for various enumerated infractions in order to give the Cincinnati Police Department the discretion to impose appropriate punishment (City Ex. 34). Paragraph 76 in the Cincinnati Memorandum discusses circumstances when the department must not take non-disciplinary corrective action against officers (City Ex. 34). Neither paragraph says anything about the distribution of authority within the Cincinnati Police Department.

Paragraph 67 of the Pittsburgh Consent Decree also does not support a contention that the DOJ has concerns about the lack of authority of the Chief. Paragraph 67 states that the Pittsburgh Office of Municipal Investigations shall have final authority to disposition of a complaint. While this paragraph may support the view that DOJ has concerns about the absence of centralized discipline authority in Pittsburgh, any DOJ concerns in Pittsburgh cannot simply be applied to Detroit in the absence of evidence that there are similar DOJ concerns about Detroit. No such evidence can be found on the record.

For the reasons discussed above, the City's request to remand for mediation Proposals 4 and 5 is denied.

CITY PROPOSAL 6

City Proposal 6 is as follows:

> (a)ppeals from the Chief's Hearing by either the Board of Police Commissioner or Arbitrator must be set for hearing within thirty (30) days and the decision must be rendered no later than thirty (30) days after the hearing closes. For good cause shown by either party and/or mutual consent these time limits may be modified (City Ex. 31).

Positions of the Parties

Position of the City. The City points out that this proposal would place time limits on appeals from the Chief's Hearing to the Board of Police Commissioners (BPC) or to arbitration, and an additional time limit on the issuance of the decisions. The City notes that Page 15 of the DOJ letter directly addresses the backlog of disciplinary cases resulting from the time it takes to complete Trial Board hearings and BPC hearings. The City notes that this proposal specifically addresses the concerns of the DOJ and should be remanded for mediation. (Tr. 225-26).

Position of the Association. The Association points out that while the DOJ disapproves of the disciplinary backlog, this proposal will not address the reasons for the backlog. The Association notes that the backlog is due to upper management of the Department and the BPC. The DOJ letter notes that the BPC meets only one hour per week, and schedules only two appellate hearings per month. Moreover, Trial Boards are scheduled for only one day.

Discussion

A majority of the panel finds the City's position with respect to Proposal 6 meritorious, and the Association's position unmeritorious. The City proposal would, if adopted, directly place time limits on appeals from the Chief's Hearing to the Board of Police Commissioners (BPC) or to arbitration. Item V of the DOJ letter directly addresses the backlog of disciplinary cases resulting from the time it takes to complete Trial Board hearings and BPC hearings. This backlog, in turn, is related to the time necessary to complete BPC proceedings. This proposal is clearly within the scope of matters raised in the DOJ letter.

It may be true, as the Association contends, that the backlog about which the DOJ is concerned is due to matters involving Police Department management and the BPC, and would not be solved by this proposal. This contention, however, goes to the merits of the proposal and can be addressed by the parties in negotiations and mediation, and through the Act 312 process, if necessary. The proposal is clearly within the scope of the DOJ letter, and that is all that is required to support a remand.

Accordingly, for the reasons discussed above, the City's request to remand for mediation Proposal 6 is granted. This remand shall not preclude the Association from raising during negotiations and/or mediation additional proposals to address the backlog.

CITY PROPOSAL 7

Proposal 7 is as follows: "(a)t any stage of the Appellate process where there is a de novo hearing of the discipline matter, the deciding authority has the ability to raise, lower, or not modify the penalty" (City Ex. 31; Tr. 226-28).

Positions of the Parties

Position of the City. The City contends that the rationale for this proposal is also related to the DOJ's concern about the backlog of cases. The City argues that because the current collective agreement prohibits the City from imposing a more severe penalty on appeal than was imposed in the original hearing, there is an incentive for disciplined employees to file frivolous or unnecessary appeals because disciplined employees know they have nothing to lose; the discipline

cannot be raised on appeal, but it may be lowered. As a result the disciplinary backlog is increased. The City argues that if the appellate hearings are de novo, disciplined employees will run the risk of imposition of a greater penalty on appeal. Thus, they are more likely to accept the initial penalty if that penalty is warranted.

Position of the Association. The Association argues that there is no relationship between this proposal and the DOJ letter. As the Association argued with respect to City Proposal 6, the backlog is due to the infrequent meetings of the BPC and small number of hearings scheduled per month. This proposal has nothing to do with the BPC scheduling problems.

Discussion

Although Proposal 7 has less of a relationship to the backlog than Proposal 6, it is plausible that a discipline system that permits discipline imposed at lower levels to be reduced, by not increased, on appeal, could encourage frivolous appeals. Frivolous appeals, in turn, could increase the number of discipline cases being appealed. Clearly, the greater the number of cases appealed to the BPC, the greater the potential for delay and case backlog. Thus, a majority of the panel finds some merit in the City's position that this proposal may address the backlog that was the subject of page 15 of the DOJ. The remand of Proposal 7, however, is limited to the relationship between relationship between this proposal and the backlog of discipline cases.

As with Proposal 6, the Association's concerns go to the merits of the proposal rather than the subject matter or purpose of the proposal. These may be addressed in negotiations and/or mediation, and arbitration, if necessary.

Accordingly, for the reasons discussed above, the City's request to remand for mediation Proposal 7 is granted. This remand shall not preclude the Association from raising during negotiations additional proposals to address the backlog.

CITY PROPOSAL 8

Proposal 8 is as follows: "(a)ll discipline penalties may be immediately imposed at any stage of the grievance process at the discretion of Chief of Police (City Ex. 31).

Positions of the Parties

Position of the City. The City argues that this proposal is also an attempt to reduce the case backlog addressed in the DOJ letter. The City argues that because the current agreement does not permit a penalty to be imposed until a disciplined employee has exhausted his administrative remedies, employees have an incentive to continue appeals in order to delay the discipline. Moreover, the discipline can be delayed up to two years, given the length of the appellate process. The City argues that page 15 of the DOJ letter continually expresses concern about the pace of the disciplinary process. The City also points to the Cincinnati Memorandum of Agreement and the Pittsburgh Consent Decree, wherein it is stated the discipline should be imposed as soon as possible after the alleged infraction. (Tr. 200-10, 223-25)

Position of the Association. As with Proposals 6 and 7, the Association notes that there is no relationship between this proposal and the concerns expressed in the DOJ letter. Those concerns go no farther than the frequency of BPC meetings and the scheduling of hearings.

Discussion

As with the issue of changing the penalty on appeal, it is not inconceivable that the possibility of delaying an otherwise justifiable penalty through appeal could lead to frivolous appeals and an increase in the number of cases being appealed, thus contributing to the backlog about the DOJ expressed concern. Therefore, as with Proposal 7, a majority of the panel finds some merit in the City's position. Proposal 8 will be remanded for mediation for the purpose of addressing the issue of the relationship between the comparable provision in the current collective agreement (Assoc. Ex. 23, Sec 10.A.5) and the backlog of discipline cases.

Accordingly, for the reasons discussed above, the City's request to remand for mediation Proposal 7 is granted. This remand shall not preclude the Association from raising during negotiations and/or mediation additional proposals to address the backlog.

DECISIONS ON THE MOTIONS

The City's motion to remand for mediation Proposals 4 (City Ex. 31) is denied.

January 29, 2003
Date

Richard N. Block, Chair

January 29, 2003
Date

John A. Lyons, Association Delegate

DISSENT

January 29, 2003
Date

Brian S. Ahearn, City Delegate

The City's motion to remand for mediation Proposal 5 (City Ex. 31) is denied.

January 29, 2003
Date

Richard N. Block, Chair

January 29, 2003
Date

John F. Lyons, Association Delegate

DISSENT

January 29, 2003
Date

Brian S. Ahearn, City Delegate

The City's motion to remand for mediation Proposal 6 (City Ex. 31) is granted for the purpose of addressing the backlog of discipline cases as referenced on page 15 of the DOJ letter.

January 29, 2003
Date

Richard N. Block, Chair

January 29, 2003
Date

Brian S. Ahearn, City Delegate

DISSENT

January 29, 2003
Date

John F. Lyons, Association Delegate

The City's motion to remand for mediation Proposal 7 (City Ex. 31) is granted for the purpose of addressing the backlog of discipline cases as referenced on page 15 of the DOJ letter.

January 29, 2003
Date

Richard N. Block, Chair

January 29, 2003
Date

Brian Ahearn, City Delegate

DISSENT

January 29, 2003
Date

John A. Lyons, Association Delegate

The City's motion to remand for mediation Proposal 8 (City Ex. 31) is granted for the purpose of addressing the backlog of discipline cases as referenced on page 15 of the DOJ letter.

January 29, 2003
Date

Richard N. Block, Chair

January 29, 2003
Date

Brian S. Ahearn, City Delegate

DISSENT

January 29, 2003
Date

John A. Lyons, Association Delegate