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STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of Arbitration
Under Act 312 (Public Acts of 1969):

CITY OF BENTON HARBOR,

Employer,

-and-

MERC Case No. L96 D-7007

BENTON HARBOR FIREFIGHTERS IAFF

Union.

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
EMPLOYMENT RELATIONS COMMISSION
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J. A. ...

OPINION AND AWARD

Chairman of the Arbitration Panel:	Kenneth P. Frankland
City Delegate:	Marcus Watson
Union Delegate:	Thomas Fogarty
Representing City:	Bruce Sucher
Representing Union:	Alison Paton
Pre-Hearing Conference	July 2, 1998
Hearing Held	December 16, 1998, in Benton Harbor
Post-Hearing Briefs Received:	April 30, 1999
Opinion and Award Issued:	May 25, 1999

STATEMENT OF THE CASE

The Benton Harbor Firefighters, IAFF Local 685, filed a petition for arbitration pursuant to Act 312 of Public Acts of 1969 on January 5, 1997. On April 7, 1998, MERC appointed Kenneth P. Frankland as the impartial arbitrator and chairperson of the panel in this matter. A pre-hearing conference was held on July 2, 1998, and a report was generated by the chair on July 7, 1998. During the pre-hearing conference, 9 City issues were identified and 14 Union issues. The parties advised the chair that many of the issues had been tentatively agreed upon on November 25, 1997, or shortly thereafter. It was contemplated by the parties that with an exchange of position statements, the parties might be able to reconcile a considerable amount of issues.

The parties also took under consideration the issue of comparability and agreed to meet and confer with respect to communities that might be comparable, given the fact that a prior award had been issued identifying five comparable communities. At the time of the pretrial conference, the parties stipulated to a waiver of the time limits and a written stipulation was received by the panel on July 20, 1998. Also on that date, the panel received a stipulation that the parties had agreed upon the following comparable communities: Benton Township, Niles, Niles Township, St. Joseph, and Muskegon Heights.

The parties agreed to hold hearings on October 7 and 8, 1998. Shortly before those hearings, the parties advised the chair that all issues had been resolved except residency and asked to have a hearing date scheduled for the issue of residency, leaving time for the parties to receive formal approval from their respective clients relative to the settlement of all other issues. The hearing was held on December 16, 1998, at the City Hall in Benton Harbor, at which time

testimony was taken on the issue of residency. Subsequent to the hearing, last best offers were received from each of the parties and post hearing briefs were received by the panel on April 30, 1999, after the parties had requested extensions. As indicated above, the parties stipulated at the hearing that the sole issue was residency, a City issue. The parties further confirmed at the hearing that the comparable communities of Benton Township, Niles, Niles Township, St. Joseph and Muskegon Heights, and reconfirmed the written stipulation to waive the time limits.

As provided in Act 312, the panel consists of a delegate chosen by each party and an impartial chair appointed by MERC. The chair of the panel is Kenneth P. Frankland, Marcus Watson, Deputy Director for the Department of Public Safety, is the City delegate, and Thomas Fogarty, Local President, is the Firefighters' Association delegate. As required by the Act, the panel is required to adopt the offer of one of the parties that most closely conforms to the requirements of Section 9(a). The parties have stipulated that residency is not an economic issue so the panel does not have to accept per se the final offer by the party, but may do so.

STANDARDS OF THE PANEL

Act 312 of 1969, MCL 423.231, specifically §9, contains eight factors upon which the panel is to base its opinion and award. Those are:

- a. lawful authority of the employer;
- b. stipulation of the parties;
- c. interests and welfare of the public and financial ability of the unit of government to meet those costs;
- d. comparison of 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 and with other communities generally:

- (i) in public employment and comparable communities;
- (ii) in private employment and comparable communities;
- e. the average consumer prices for goods and services commonly known as the cost of living;
- f. the overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received;
- g. changes in any of the foregoing circumstances during the pendency of the arbitration proceedings;
- h. such other factors, not confined to the foregoing which are normally or traditionally taken into consideration in a determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public or in private employment.

In the ensuing discussion, the panel will discuss the Section 9 factors which are most pertinent on this issue.

DISCUSSION OF RESIDENCY ISSUE

Union's Final Proposal

The Union's final proposal on the issue of Residency, a non-economic city issue, is to retain the existing language of Section 11.0(d), to wit:

"Fire Department employees shall be required to live within ten

(10) miles of the Benton Harbor City limits, except for those Firefighters hired prior to July 1, 1984, who have previously been permitted to live outside the ten (10) mile limit. New employees must comply with this Section within six (6) months after successful completion of probation."

In addition, if so desired by the City, the Union proposes to add two new Sections to the contract providing as follows:

"The members of the bargaining unit agree to cooperate with and to participate in a minority recruitment program for the Fire Department to the fullest extent possible during their normal scheduled work hours."

"Persons who have successfully participated as volunteers for the Benton Harbor Fire Department shall enjoy preferential hiring into full-time positions on the Fire Department."

City's Last Best Offer

The City of Benton Harbor proposes the following change in the collective bargaining agreement regarding the issue of Residency.

Section 11(d) Residency.

As of December 1, 1998, all new employees hired by the City to work in the Benton Harbor Fire Department shall be a resident of the City of Benton Harbor during his/her employment with the City. If a new hire is not a current resident of the City at the time of hire, he/she shall become a resident within six (6) months from the date of hire.

Any newly hired employee who requires or is in need of additional time to become a resident of the City shall make such request in writing to the Director of Public Safety no later than thirty (30) days prior to the expiration of the time within which that new hire is to become a resident of the City. All requests for extensions of time for becoming a resident of the City shall be reviewed and approved in writing, signed by the City Manager and the Director of Public Safety. In no event shall any extension of time be for longer than an additional six (6) months.

STATEMENT OF FACTS

Marcus Watson, the Deputy Director of the Department of Public Safety, discussed the comparable communities through City Exhibit 1. Muskegon Heights requires new hires to be residents of the city; the city of Niles requires employees hired after 1976 to reside one mile of the city limits; Benton Township requires all employees to reside within a 20-mile radius of the township border. There is no provision regarding residency in Niles Township or St. Joseph. In response to inquiry as to the reasons for the City's proposal to require new hires to live within the City of Benton Harbor, Watson responded, "to increase the tax base by encouraging new home ownership for all newly hired employees in the fire department." This requirement would not apply to any of the existing firefighters. When asked if there are any other reasons, Mr. Watson replied, "not to my knowledge." (Tr. 11).

Mr. Watson also identified City Exhibit 2, which are handwritten notes of November 10, 1998, indicating a package to settle remaining issues. These apparently were the Union attorney's notes and they include a residency requirement to live within the city limits. Mr. Watson also identified City Exhibit 3, which was a tentative agreement #10 on the residency issue, with signatures of the counsel for each party, the text is that of Section 11 (d) as proposed by the City.

Mr. Watson further commented that the new city manager since March of 1997, Mr. Roberts, has taken the initiative in attempting to provide opportunities for city employees to become city residents by building some new homes in the Morton Hill area. Apparently this is also the position of the City Commission. He further indicated that the two police units within the City do not have a residency requirement, but that the administration will negotiate and propose the

same residency language in the upcoming contracts.

On cross examination, with respect to City Exhibit 2, Mr. Watson agreed that the notes were a comprehensive package proposal. With respect to Exhibit 3, although signed by the counsel as a tentative agreement, the residency issue was not ratified by the Union membership. He further reconfirmed that the sole basis for requesting city residency was to increase the tax base in the city.

With respect to new hires, he was unable to say in the next five years how many might be hired, because there are currently 12 bargaining unit members with only 2 employees who are currently eligible for retirement. Mr. Watson also conceded that new hires might not purchase rehabilitated homes, but might move into existing homes which are already on the tax rolls. Further, employees might choose to rent in a home that is already on the tax rolls. Mr. Watson also testified that no other bargaining unit employees in the city have any kind of residency restriction other than the 10-mile limit amongst the firefighters. He did indicate that department heads are required to be city residents. The interim Public Safety Director, Mr. Agay, does not live within the City of Benton Harbor.

Mr. Watson also indicated that there are 16 new single family homes being rehabilitated under a community development grant, a program initiated by Mr. Roberts.

Mr. Watson also indicated that firefighters when they are off duty have no equipment with them and they have no turnout gear. Mr. Watson ultimately testified he has been a city resident since 1995 and that the current city manger is likewise a city resident.

The only other witness for the City was Mr. Charles Roberts, City Manager. In response to why the City wanted a residency requirement, he stated the City of Benton Harbor has

considered it as a priority as part of a revitalization of the community in terms of increasing tax base and to make employees participating citizens in the community for which they work and for which they earn their pay. He testified that it is a priority for all other bargaining unit members to have a residency requirement. The department heads are required to live in the city, but the current interim Director of Public Safety, Mr. Agay, is not a resident and has been granted a waiver.

During cross examination, Mr. Roberts confirmed the AFSCME contract of other city employees expires June 30, 1999, and two police contracts expire June 30, 2000. Mr. Roberts testified that it is the intent of the City to attempt to negotiate residency for those contracts. He again stated that the reason for the City's proposal was to increase the tax base for people who work in the city and to have a greater sensitivity of service to the community.

The Union called two witnesses. The first, Thomas J. Fogarty, currently the president and member of the bargaining team, has been a firefighter, hired December 21, 1967, and is currently a lieutenant. He has been a Union president for 17 years and vice president for 3 to 5 years. Mr. Fogarty traced the history of residency. In 1967, when he hired on, there was a ten-mile residency requirement. In approximately 1970, there was no residency at all, and in 1977 residency was changed to be within the city of Benton Harbor. In approximately 1984, new hires were again under a 10-mile residency provision. At that time, new firefighters indicated they would not reside in the city, so to ease the possibility of new hires, the change was made.

Mr. Fogarty testified there are often emergency call backs to assist the on-duty firefighters, but that is on a voluntary, not mandatory basis. He thought that, based upon where the officers resided, there was a 4 to 20 minute response time, and there was about 7 minutes from

his residence. He indicated to the best of his knowledge, the City had never complained that this range of response time was inadequate.

Mr. Fogarty further stated that the City's proposal was presented to Union members as a part of a total package. The membership rejected the total package because it included proposal 10 on residency. There are only three minorities in the department while the city is 90 percent minority and the membership wanted the ability to hire more new minorities and that living within the city was a detriment. Mr. Fogarty indicated he was not president during the rejection but became president thereafter. The membership agreed to accept all of the proposals except residency.

Mr. Fogarty testified he did not see any difference in the work effort if the people lived in or out of the city. He thought that the membership was not insensitive to the needs of the city, and thought that the residency requirement would not help with minority new hire. He thought young minority members who might want to change lifestyles shouldn't be constricted by a residency requirement. He suggested several reasons why new hires would not want to move into the city, the first being substandard housing, with 65 percent of the homes being outside code standards. Some 60 percent of the homes are owned by landlords. The second issue would be crime. He indicated that the Michigan State Police were brought into the community to assist in reducing the crime rate within the last two years. It was his impression that Benton Harbor had the highest crime rate per capita in the state.

A third issue was lifestyle, that new hires are constrained as to the housing available with few amenities. A fourth issue was the school system. The school system is poor with many single parent families, with poor discipline within the schools. It was his observation that new hires would be interested in safe schools, discipline and control. Currently there are about six to

eight security guards in the buildings. He testified that he sent his children to parochial schools and then to Coloma High School.

The Union's second witness was Kevin Luhrs. He was hired in 1982 as a firefighter and became a lieutenant and captain. When hired, he did live in the city and moved out in 1985. He could not recall anyone in the department that lived in the city more recently than 1985. He left the city because his home was broken into at least twice, rocks were thrown through windows, and he heard gunshots throughout his neighborhood on multiple occasions. He has grandchildren at the present time and does not feel the city would be any safer an environment for them to live in than it was in 1985 when he moved out. He said the old house that he used to live in is now boarded up so that the windows do not get rocks thrown through them. He testified that he didn't think that changing residency affected at all his service to the City. He was not any less concerned now than he was before about the people residing in the City.

DISCUSSION

As initiator to a change in the contract, it is the City's obligation to present evidence which would more closely accommodate the Section 9 factors to substantiate a change in contractual terms. The record evidences that there have been protracted discussions toward a total settlement of the contract, and it is recognized that each of the parties worked very diligently to resolve the disputes. The bargaining unit members reached a total package with tentative agreement on all issues, but the membership of the Union did not ratify the total package but rather ratified all issues tentatively agreed upon except residency. The fact that a ratification vote was taken and the issue was not approved has no specific probative value as the panel considers the matter. The party proposing change must establish on the record sufficient evidence that their

proposal more likely conforms to the standards of Section 9 of the Act.

In that regard, Section 9(d), comparison of conditions of employment in comparable communities would be of significant importance, as would Section 9(h). In this case, the primary reason articulated by the City was a desire by the administration to require all citizens employed by the City to reside within the City. This policy was based upon Mr. Watson's and Mr. Roberts' testimony that such would increase the City's tax base and that it would provide a more sensitive work force in the fire department. These would be Section 9(h) factors. Although this rationale might be well intentioned, there is no factual basis in this record to allow the panel to consider these reasons as sufficiently compelling to satisfy Section 9. In the first instance, this measure would only be applicable prospectively. Very few new hires will occur in the foreseeable future. Currently there are no minority members in the department that actually live in the City. The City's tax base can only be advantaged if new members actually build a new home to add revenue base or enhance a dilapidated home currently off the rolls. The suggested rehab project supported by the Community Development Office funding does not provide any reasonable assurances that the tax base would be increased. Further, there is no way of knowing whether a new hire would actually buy a residence and be a new taxpayer or would simply rent a home or apartment.

With respect to sensitivity, there was no evidence presented by the City that the current firefighters are insensitive, nor is there clearly probative information that new hires would be more sensitive to community needs than existing firefighters. Individuals may or may not participate in community activities irrespective of whether they live within or without a community.

Typically in residency cases, a community would argue that the response times are inadequate and that a residency requirement would enhance response times. No testimony was offered whatsoever by the City on this factor, and Mr. Fogarty did testify that response to emergency call backs is voluntary and that those who do respond to emergency call backs typically do so within 4 to 20 minutes. There was no testimony to rebut Mr. Fogarty's presentation.

The record suggests that there was a residency requirement during the 1977 to 1984 period, and the reason it was abandoned was because the City was unable to attract new hires, including minorities, and that recent hires had moved to other fire departments.

An explanation for new firefighters moving out of the community to accept jobs elsewhere could be attributed to the Union testimony that there was a perception that the City of Benton Harbor was not a particularly desirable place to reside. Mr. Fogarty's testimony in this regard was certainly not verified by statistical, concrete evidence but his testimony regarding potentially substandard housing and instance of crime and a perception of a troubled school district could well play a role that detracts from attracting new hires to the community.

Examination of the comparable communities does not lend support to the City's position. Only Muskegon Heights actually has a requirement to live within that city. St. Joseph and Niles Township have no residency information in their contracts. Of the other two, the City of Niles has a more restrictive provision than currently in Benton Harbor by requiring a one mile outside the city or further based on need as approved by its city administrator, and St. Joseph has a more liberal policy of requiring all employees to reside within a 20-mile radius of the township border. Thus, examination of the outside comparables does not lend support for the City's proposal, but rather argues more favorably for the Union's proposal. Additionally, the internal

comparables do not support the City's proposal and are more likely to support the Union's position. Currently, no collective bargaining unit other than the firefighters has a residency requirement. There are two police units plus an AFSCME unit for other employees. Although the City testified that one contract expires in 1999 and the others in 2000, and it is the desire of the City to negotiate residency for those units, if we look at the criteria in Section 9(d), this factor relative to internal comparables supports the Union's position.

Additionally, the Union offered Exhibits 3 through 8, which were not objected to by the City and are part of the record. Those exhibits, although not totally directed to the residency issue, do suggest that as compared to the other comparable communities, Benton Harbor has more runs, has a significantly larger percentage of families below the poverty level, and has the highest percentage of total vacant housing units. They also have 63 percent of its housing units as rental units.

The Union has suggested in its brief that all the cited Act 312 decisions support rejection of the City's residency proposal. The cases cited stand for the proposition that as stated previously, the initiating party has the burden of proof and must present sufficient evidence that Section 9 factors particularly 9(d) on comparability and 9(h) support their proposal. In this case, the panel finds that the burden of proof has not been met and that the City's proposal should not be adopted.

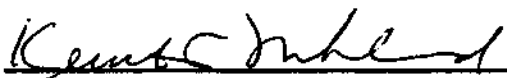
Residency is always a thorny, sensitive and emotional issue, and is as much political as it is contractual. It is noted that the Michigan legislature at the current time is considering the merits of requiring residency and one chamber of the Michigan legislature has voted affirmatively to prohibit residency requirements within a city. Here, the existing residency

requirement of living within a ten-mile limit seems reasonable, given the record developed. Accordingly, it is the panel's view that the current language in the existing contract should be retained.

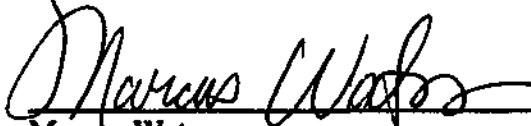
The Union's final proposal also recommends the addition of two sections to the contract. The proposal pledges the bargaining unit's cooperation with the City in a minority recruitment program for the fire department to the fullest extent possible during normal scheduled work hours and also that current volunteers for the fire department should enjoy preferential hiring into full time positions. There is no information in the record regarding volunteers, but the issue of minority recruitment was discussed. To the extent that the two suggestions are conciliatory and were offered under the assumption that the City would not have objection, the panel considers these suggestions to be laudable, but would fall short of mandating that they actually be incorporated into the collective bargaining agreement. Without knowing whether the City in fact had any objections to the volunteers receiving preferential hiring, it would be improvident for the panel to mandate that provision. It would be the panel's recommendation to the parties that if the proposal is mutually acceptable, that the same be incorporated as an addendum to the contract.

Respectfully submitted,

Dated: May 25, 1999

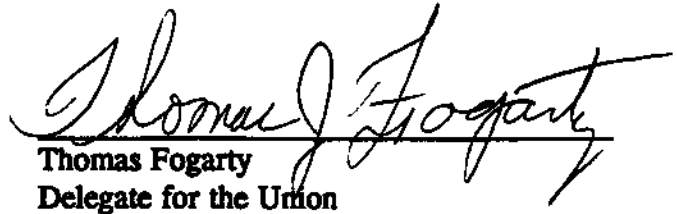

Kenneth P. Frankland
Chairperson

Dated: 6/2/99


Marcus Watson
Delegate for the City

☐ Concur
☒ Dissent

Dated: 6-3-99


Thomas Fogarty
Delegate for the Union

☒ Concur
☐ Dissent