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

ANN ARBOR FIRE FIGHTERS UNION,
LOCAL 1733, IAFF, AFL-CIO,

-and-

CITY OF ANN ARBOR

Chairperson:	George T. Roumell, Jr.
Union Delegate:	Ronald R. Helveston
City Delegate:	Alex Little
MERC Case No:	D97 D-0736

OPINION AND AWARD OF THE PANEL

Introduction

The Ann Arbor Fire Fighters Union, Local 1733, has been the recognized bargaining representative of all uniformed personnel of the Ann Arbor Fire Department, excluding the Fire Chief, pursuant to the provisions of Michigan law. The City of Ann Arbor and the Fire Fighters have had a collective bargaining relationship for some time. The Fire Fighters and the City entered into a collective bargaining agreement commencing July 1, 1995 and expiring June 30, 1998. This Agreement was entered into on the 17th day of July, 1995. Article 67 provided that the Agreement would "remain in full force and effect until the 30th day of June, 1998."

The wage schedule provided for salaries effective July 1, 1995, salaries effective January 1, 1996 and salaries schedule effective July 1, 1996. The parties are not in dispute that for the salary schedule following June 30, 1997, there was a wage re-opener covering that period of time.

In addition, Article 56, "retroactivity," provided "the salary rates as specified in salary schedule appendix A shall be retroactive to the date indicated therein." The indication was that the salary schedule was effective July 1, 1995, even though the contract was not signed until July

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17, 1995. This indicates that the parties have agreed to retroactivity for current employees.

The parties engaged in bargaining over the wage re-opener but were unable to reach agreement. As a result, the Union initiated binding arbitration proceedings by its Petition for Act 312 Arbitration dated February 27, 1998 pursuant to Act 312, Public Acts of 1969, as amended (MCLA 423.231 et seq), to resolve the issue of wages for the contract year beginning July 1, 1997 and ending June 30, 1998. The Michigan Employment Relations Commission selected and appointed Arbitrator George T. Roumell, Jr. as Chairperson of the Act 312 Arbitration Panel. The Union is represented by Ronald R. Helveston, its attorney, and as Panel Delegate. The City is represented by Stacey Washington, its attorney, and Alex Little, Assistant to the Administrator for Labor Relations as City Delegate.

Issues

The only issue submitted with the Petition for Act 312 was "wages beginning effective 7-1-97." However, as the case was presented to the Panel, the issue became not one of wages, because the parties agreed as to wages, but the retroactivity of the wages as well as the impact of the retroactivity of wages on pensions for those employees who retired during the pendency of this Act 312 Proceeding and, particularly, the impact upon their final average compensation.

The Last Best Offers

The Union submitted as its last best offer the following: a 0% wage increase for the period of July 1, 1997 to December 31, 1997 and a 4% retroactive wage increase from January 1, 1998 to June 30, 1998. Any bargaining unit member who received any pay from January 1, 1998 to June 30, 1998, is entitled to this increase, including retirees. Retirees final average compensation shall be recalculated and their pension benefits adjusted to reflect this increase.

The City submitted as its last best offer, a 4% increase beginning January 1, 1998, retroactive for all active employees and retirees after January 1, 1998 but maintained that pensions would not be recalculated for those who retired after January 1, 1998, based upon the wage increase.

Discussion

As indicated, the parties agreed, for the final year of the contract, July 1, 1997 to June 30, 1998, there would be a 4% wage increase to take effect January 1, 1998 to June 30, 1998. The City agreed that the wage rate would be retroactive to January 1, 1998 for active employees and wages only for post-January 1, 1998 retirees. If there is any doubt about this, the Award will so provide.

The dividing issue between the parties was the impact of the payment of this wage increase of 4% upon the pensions of employees who retired after January 1, 1998 and the date of this Award, and the applicable final average compensation computation.

The record indicates that three employees are known to have retired out of the bargaining unit since January 1, 1998. While the City agreed to the payment of the 4% wage increase to these retirees, the City did not agree to recalculate their pensions in determining their final average compensation. This would also include recalculation of any overtime, sick time and vacation time that those employees may have received at the time of their retirement.

Alex Little, Assistant City Administrator for Labor Relations, testified for the City. Mr. Little had discussions with Dean Moore, the City's Finance Director, and Judy Refalo, Payroll Coordinator, who indicated that there would be no problem if said retirees received the 4% but, there would be difficulty in recalculating the pensions based on those wage increases retroactive

to January 1, 1998 because of the necessity of engaging in numerous calculations addressing previously earned overtime, sick time and vacation payoffs, and factoring in the increases into the employee's final average compensation.

The Chairman appreciates this concern because, in the operation of a modern city, there are many calculations to be performed in the Finance Department with regard to payroll. Making adjustments after the fact, particularly in dealing with pensions, is, indeed, tedious and takes time away from the other activities of the Finance Department which must be performed.

Mr. Little introduced into evidence a letter dated May 13, 1994 signed by the then-City Administrator, Alfred A. Gatta, addressing the City's practice on retroactive payments to retirees as an indication of when the City stopped making such payments and performing retroactive pensions calculation. The letter read:

> This is in regard to your inquiry to Council Member Nicolas in which you expressed concern that you were not paid a retroactive salary increase for the period starting July 1, 1993 until your date of retirement (July 17, 1993). You apparently indicated to him that such payments have been made in the past except for those who retired this year.
>
> While it appears to be true that such payments have been made in the past, our Finance Department indicates that a decision was made approximately three years ago to restrict retroactive payments to active employees only.

In response to this testimony, Michael Vogel, a driver-operator with the Fire Department and President of the Union, who has been employed by the Fire Department for 21 years, testified. Mr. Vogel indicated that following the December 9, 1988 Act 312 Award issued by Panel Chairman Elaine Frost, payments were retroactive. This is consistent with Mr. Gatta's letter. He also indicated that, so far as the Fire Fighters were aware, if there had been retroactive

wage payments, this retroactivity had been applied to retirees and reflected in their pensions and payouts.

Although the Chairman appreciates the testimony of Mr. Vogel, there is the letter of Mr. Gatta which may indicate that, at least since 1991, the City was modifying its practice.

Act 312 of Public Acts of 1969, as amended, sets forth in Section 9 the criteria which should be the basis for any findings. Among the criteria stated in Section 9 is found in subsection (h), which reads:

> Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

These referenced "other factors" include the bargaining history of the parties as well as the art of the possible, namely, what the parties would have agreed to if the Fire Fighters had the right to strike and there was no binding arbitration.

As to the bargaining history, the Chairman makes two observations: Article 56 of the 1995-98 agreement recognizes the concept of retroactivity. Though that contract was signed on July 17, 1995, the first year wage increase was made retroactive to July 1, 1995. This is convincing evidence that the parties have recognized retroactivity in wages.

It follows that any employee who was working during the period the wages were made retroactive should get the benefit of that agreement, even if the employee had retired prior to the consummation of the agreement as to retroactivity. Furthermore, at least prior to 1991, retirees apparently obtained the benefit of retroactivity if the individual worked during the period the

retroactivity covered. After 1991, the City claims it changed its policy, although the Fire Fighters maintain they had no knowledge of this change.

Even in the 1995-98 contract, the concept of retroactivity has been recognized, along with the fact that at least prior to 1991, the concept was recognized. The City agreed by letter that employees who retired during the period January 1, 1998 forward should get the benefit of that wage increase of 4%; in that the benefit should be utilized in computing all payouts and in calculating final average compensation.

The Chairman, though recognizing, as Mr. Little testified, that there will be a need for utilizing scarce resources in the Finance Department to make the recalculations, the Department does use computers and calculators. There is no reason why this cannot be done. If this is burdensome, then a reasonable future solution is for the parties to attempt to expedite negotiations in the future and perhaps, if necessary, initiate Act 312 procedures in such a way that agreements can be reached timely to avoid the extra burden on the Finance Department. But until this is done in the context of labor relations, the bargaining history and the art of the possible, retroactivity is appropriate. Otherwise, both parties will not be receiving the benefit of Act 312 as that Act is intended to be applied when the parties cannot reach a resolution of their dispute voluntarily.

The reason the firefighters will be receiving the benefit of the contract and the Act 312 award would be that the firefighters who worked after January 1, 1998, though retiring before the date of this award, had they not retired, would get the benefit of pension calculations and payouts based upon the 4% increase. There is no logical reason to penalize firefighters who chose to retire prior to the date of this award, as it was their right to do so. Retirees are entitled to receive

the benefit of the wage increases applicable for the period they did work, as are active employees, in the calculation of pensions and payouts. Otherwise, if the law would allow, if a contract was not reached at the conclusion of the expiration of the previous contract or at the beginning of the reopener, as in some industries, if permitted by law, the fire fighters' recourse could be to strike. Act 312 is designed to be a substitute for a strike. Thus, the art of the possible would suggest that to avoid a strike, if it was possible, the City would agree to retroactive calculations.

Though the City Delegate in his dissent makes reference to the Frost decision, the fact is Arbitrator Frost, if she did not address the issue, did not need to because Mr. Gatta's letter acknowledges at the time of her award the City made retroactive payments and presumably retroactive calculations. Furthermore, the reference to Article 10.F as to the power of the arbitrator fails to recognize that this is an Act 312 interest arbitration. This is not a contract grievance dispute. The issue was a wage reopener. But the wage reopener drives other benefits which are based upon the wages. This is the reason why the wage reopener impacts pension calculations and the calculation of payouts. The decision here is consistent with Act 312 and its purposes and falls, certainly, within the art of the possible criteria.

These views are not unique to this Arbitrator, for in a recent opinion dated July 1, 1998, in the City of Livonia, Chairman Theodore J. St. Antoine made certain provisions concerning retroactivity of pensions. See Case No. D96-I-2157.

It is for these reasons that a majority of the Panel, namely, George T. Roumell, Jr., as Chairman and Union Delegate Ronald R. Helveston, will sign an award making the 4% retroactive to January 1, 1998 and applying that retroactivity for the benefit of any member of the bargaining unit who retired from the Department from January 1, 1998 including using the

increase to recalculate their final average compensation and applying the results to all elements of the final average compensation and all payouts made at the time of retirement and adjusting their pensions and payouts accordingly retroactively.

The City Delegate, Alex Little, dissents. His dissent is noted below.

MAJORITY AWARD

The majority of the Panel makes the following award:

1. The wage increase of 4% across-the-board is retroactive to January 1, 1998 and members of the bargaining unit on the payroll as of January 1, 1998 and thereafter should be paid accordingly.

2. Any member of the bargaining unit who worked from January 1, 1998 and thereafter or who retired or separated after January 1, 1998 should be paid the retroactive 4% wage increase to January 1, 1998; that all payouts made to said retirees shall be recalculated to include the 4% wage increase; that the final average compensation for the purposes of pension should be recalculated based upon the retroactivity of the 4% to January 1, 1998; that the recalculated pension should be made retroactive to January 1, 1998; and, any amount of pension that has already been paid shall be paid based upon said recalculations; and future pension payments shall include said recalculations.

Dated: November 25, 1998

GEORGE T. ROUMELL, JR., Chairman

Dated: November 25, 1998

RONALD R. HELVESTON, Union Delegate

Dissent of City Delegate Alex Little

I hereby dissent from the above award. The Chairman of the Panel did not understand (or recognize) the fact that the award of the 4% payment of wages to the persons who retired after January 1, 1998 had already been agreed to as indicated in my letter of January, 1998. The only issue was that the City rejected the Union's proposal specifically regarding both retirees who retired between July 1, 1997 and January 1, 1998, as well as recomputing final average compensation on retirees both before and after January 1, 1998. Further, the Chairman of the Panel did not verify that there was any such retroactive provision in the Frost decision regarding retirees or any other employees. City Delegate Little believes that it did not.

Further, the Firefighters' contract with the City of Ann Arbor specifically states in Article 10(f):

> f. Power of Arbitrator. An arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this agreement, nor shall the arbitrator's discretion be substituted for that of responsibility or function of the Employer or the Union.

The contract is expressly silent on the issue of retroactivity for retirees or any issue of recomputing final average compensation, or prior benefits. The City offered that only one contract existed that touched on any part of this subject, that contract being the Teamsters Civilian Supervisors.

ALEX LITTLE, City Delegate

Dated: ~~November~~ Dec. 9, 1998