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ARB

DEPARTMENT OF LABOR

CITY OF MADISON HEIGHTS,

and

MICHIGAN FRATERNAL ORDER OF POLICE

MERC Act 312 Case
No. D84-E-1565



Both parties agree that all economic and non-economic issues have been agreed upon under the collective bargaining agreement which became effective on July 1, 1984, the exception being one issue regarding the selection and promotion of the chief and assistant chief. The union and the city have stipulated that the issue of promotions and layoffs of the police chief and the assistant police chief are non-economic in nature.

The City of Madison Heights executed a contract with the Fraternal Order of Police (FOP) which contains Article VIII--promotions and layoffs:

> "promotions and layoffs shall be in accordance with the state civil service act 78"

The City of Madison Heights also executed a contract with the Department Heads Union--AFSCME counsel 25 which contains Article XIV--Promotions:

> "promotions will be granted on the basis of ability to perform..."

The charter of the City of Madison Heights contains Section 36, Administrative Service. Said provision authorizes the City Manager to appoint all department heads. The charter further provides in Chapter XVIII that act 78 is incorporated by reference.

The city and the union agree that the chief and assistant chief are not included in the contract with the FOP, but are included in the Department Heads Contract which is the American Federation of State, County and Municipal employees known as AFSCME. The union maintains that it should have the right to

Madison Heights, City of

Keidan, Herbert S.

require the chief and assistant chief to be promoted pursuant to act 78. The city insists that the city manager shall appoint the chief and assistant chief pursuant to the department heads contract (AFSCME).

In his opening statement of Mr. Sudnick, the attorney for the union, clearly stated that the union position is that the promotions of the two positions involved are governed by act 78. Further that act 78 is incorporated in the collective bargaining agreement by reference and act 78 is also contained in the city charter.

Since 1977, the position of chief and assistant chief of police has been appointed by the city manager under the terms of AFSCME. Subsequently, two members of the FOP, Sloan and Siebert, brought suit in the Circuit Court of Oakland challenging the method of promotion. On November 26, 1979, Judge Gene Schnelz of the Oakland Circuit Court issued his opinion backing the city's position and indicated that the city had properly acted pursuant to the provisions of AFSCME. This agreement between the city and AFSCME provided that promotions would be granted on the basis of "ability to perform". Sloan and Siebert had applied for both positions. Neither officer pursued any legal remedy according to the city's testimony in objection to the city's method of selection. However, sometime later, both officers appealed to the Civil Service Commission on May 17, 1978 to consider the plaintiffs' claims at which time both plaintiffs appeared and presented arguments and the Civil Service Commission issued a finding that the collective bargaining agreement between the City of Madison Heights and the Department Heads Agreement, AFSCME superceded the provisions of Act 78.

In 1982, Judge O'Brien of the Oakland County Circuit Court indicated that the chief's position in the police department

was covered by AFSCME and that the assistant chief was controlled by act 78. An appeal was filed. The appellate court affirmed with regard to the assistant chief in that act 78 controlled his appointment but reversed with regard to the position of chief indicating that the chief was also controlled by act 78. As of this date, the Supreme Court has not acted upon the appeal filed of the aforesaid appellate decision.

The city has pointed out on several occasions that after the first decision of Judge Schnelz and the subsequent one of Judge O'Brien, the union did not file any objections by way of appeal of Judge Schnelz's opinion, which opinion gave the City the right to appoint. However, I don't feel that the delay by the union in exercising its legal remedies of appeal on this issue in any way constitute a waiver of any of the union's rights. I also am of the opinion that in the court decision cited by the parties, the court dealt adequately with the argument of "res adjudicata" and made the proper finding that res adjudicata did not preclude further legal proceeding.

The union agrees that the FOP does not bargain for the working conditions, salary and so on of the assistant chief or the chief of police but has taken the position that the appointment and/or promotion is controlled by Act 78 and not by the department heads contract. It would appear that an integral part of the working conditions, responsibilities, functions, salary and etc. of both of these offices would be the selection of assistant chief and chief. The case of DPOA v City of Detroit 61 Mich App 487:

> "a bargaining unit is generally forbidden from bargaining about another unit's terms and conditions of employment, however, in limited circumstances an employer will be required to bargain with a unit representative about a subject which concerns non union employees where the concern of the non-union employees vitally effects the terms and conditions of the employment of the unit members. Standards and criteria for promotion of members

of the Detroit Police Officers Association are a mandatory subject of bargaining between the association and the City of Detroit because the subject vitally effects the association members employment, even though the association does not represent the sergeants and other supervisory officers whose qualifications would be the subject of discussion"

In Federal law, seniority, promotions and promotional criteria are among the "other terms and conditions of employment" under the National Labor Relations Act.

"It is clear that promotional standards annd criteria are literally "terms, conditions" of employment."

The union's brief states the following language is the essence of the union's position: "the command officers unit has the right to bargain over the promotional standards utilized by the city for the positions of the assistant chief and chief notwithstanding the fact that the assistant chief and chief belong to another bargaining unit.

The testimony by union witnesses that act 78 came about as a result of political undue influence and/or actual corruption in the appointment of chiefs of police would seem to indicate that one of the basic functions of Act 78 was to minimize political influence in the appointment of heads of police departments. Obviously the city has taken the strong position that the working conditions, terms of employment, wages and so on of the assistant chief and chief of police are determined by the department heads contract and not by act 78.

The union has made a strong issue of the fact that when patrolmen were hired for the department, that they were offered the incentive of the promotion of patrolmen to the top of the ladder, namely the chief of police. This of necessity must stimulate the best performance possible on the part of the police officer and his responsibility to the community. If such an incentive were removed and the patrolmen and/or sergeant and/or lieutenant, knew that the position of chief and assistant chief were appointed at the sole whim and caprice of

the city manager, the adverse effect upon the morale of the department would be undesirable and may be irreparable.

Sudnick maintains that the main incentive of patrolmen when they join the force is that the expectation of command officers to be able to compete for the position of assistant chief and assistant chief. Sudnick further states that act 78 is a system of merit promotions based on merit, efficiency and competitive examination, both written and oral and interviews and further that the examination and the procedure are controlled by the civil service commission. One of the main incentives being that the expectation of patrolmen to become command officers and command officers to be able to compete for the position of assistant chief and chief is so great that the elimination of that incentive would destroy the morale of the department. Sudnick further alleges that whereas act 78 provides for a regulated system of promotion based upon merit; that the city uses a haphazard system of promotion based on political largess at the sole discretion of the city manager without using any of the criteria of act 78. One of the witnesses for the union testified "you know that act 78 was passed in reaction to a kind of a mess that had taken place in police departments because of political appointments". This testimony was not contradicted by the city.

The city further argues (A) that the qualities of leadership discipline, the ability to work with the public and with the administration are far more important than passing a written and oral test (B) the ability to get along with other department heads and other administrative officials is more important than the mere passing of a written and oral examination. The union comment is that the city manager would then control the police chief and therefore directly or indirectly control the police department. That is not a desirable

result.

The testimony of the city indicated that in the cities opinion, it is ludicrous for the police officers to claim that they had an expectation as command officers to be able to compete by way of a competitive examination for the positions of chief and assistant chief for the police department. The past history, totally contradicting such an expectation for the reason that out of the four police chiefs who have been promoted in the last thirty years in the City of Madison Heights, only one is claimed to have actually taken a test before he was promoted to the position. In addition, out of the three assistant chiefs, none have taken the examination for the position of assistant chief before their promotion. Accordingly, the city argues how could any reasonable individual claim a reasonable expectation at being able to be promoted to the position of either chief or assistant chief under the provisions of act 78, when in fact these provisions have never been utilized in the past. This arbitrator feels that there is no question as to historically the city is correct in its statement but that doesn't indicate that it is the equitable and proper way to select the chief and assistant chief.

Act 78 requires testing procedure to be administered through the civil service commission whereas the department heads contract specifies that the city manager shall have the sole discretion as to the promotion and appointment to the positions of assistant chief and chief. The exam given the officers pursuant to act 78 apparently consists of a partially written, partial oral, an interview, and the work record of the applicant.

The city has made justifiable comments that the examination provided by the civil service commission is really not

adequate for the purpose intended and the scoring procedure leaves a great deal to be desired. Apparently an officer applicant need only score 70% of the 100% on the examination This method of testing leaves much to be desired.

Inasmuch as the civil service act provides for a three member board which has the authority and responsibility to draft the examination procedure, and the city has the right to name one member, the union one member, and the third party being an independent member, then both the city and the union have had the opportunity to improve the examination procedure but for reasons best known to themselves, have not exercised that right.

The union's testimony as to comparables was adequate but weak. The witness was most honest, however his response to the majority of the questions was "I don't know". The critical unanswered question of this witness was whether the cities that he was quoting as comparables had a department heads contract.

Local 1383 International Association of Firefighters v. The City of Warren, 411 Mich 462. The Supreme Court has consistently held that the Public Employment Relations Act (PERA) prevails over conflicting charter, ordinances and conflicting legislation. The PERA must be viewed as the dominant law regulating labor relations and public employment. PERA requires a public employer to bargain about promotions, but does not require the public employer to agree to a proposal about promotions made by its employees. MCL 423.215; MSA 17.455(15). If the employer and the union agreed to a change in the system of promotions, the collective bargaining agreement controls. The PERA is the dominant law governing disputes concerning public employees.

Section 15 of PERA, reads:

> "A public employer shall bargain collectively with the representatives of its employees as

> defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." MCL 423.215; MSA 17.455(15).

The union has stressed that section 9 of Act 312 must be satisfied by this arbitrator. With regard to section 9(a) the lawful authority of the employer; this was consented to by both parties (b) stipulations of the parties--a stipulation has been filed herein whereby all issues have been settled except the single issue of this dispute, and the parties have agreed to the jurisdiction of this arbitrator with regard to said issue; (c) it is obvious in the best interest of the welfare of the public that the best police chief and/or assistant be selected and the parties merely differ as to the method of selection; the financial ability of the union of government to meet these costs is immaterial as it is not an issue in these proceedings; (d) both parties have agreed and given testimony as to the provisions of section d inasmuch as the Supreme Court has ruled and cited in its opinion that the conditions of employment include the method of selection and promotion; i) (testimony has been given with regard to comparables ii) private employment comparables have not been introduced into evidence nor are they relevant; (e) the cost of living issue is not an issue in this proceeding; (f) methods of compensation and other benefits are not an issue in this proceeding; (g) not applicable to this proceeding; (h) the basic issue is which document controls the promotion of assistant chief and chief of police.

It is therefore the decision of this arbitrator that for the reasons stated above that all future promotions and/or layoffs of the assistant chief or chief of police of the City of Madison Heights should be made in compliance with act 78.

HERBERT S. KEIDAN
Impartial Chairman

6/24/85

Bernard Friedman Dissenting
BERNARD A. FRIEDMAN
City Representative

Gerald T. Sloan
GERALD T. SLOAN
Union Representative