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Saginaw, City of

In The Matter Of The Statutory Arbitration Between:

CITY OF SAGINAW

and

SAGINAW FIRE FIGHTERS ASSOCIATION,
LOCAL 422, AFL-CIO

February 7, 1972

STATE OF MICHIGAN

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

STATUTORY ARBITRATION

In The Matter Of:

CITY OF SAGINAW

and

SAGINAW FIRE FIGHTERS ASSOCIATION LOCAL 422,
INTERNATIONAL FIRE FIGHTERS ASSOCIATION

February 7, 1972

Panel of Arbitrators:

Richard I. Bloch (Chairman, Appointed by Michigan Employment Relations Commission);
Henry G. Marsh (City-Appointed Member); and
Joseph A. Malenfant (Union-Appointed Member)

Appearances:

For the City:

Keller, Thoma, McManus, Toppin and Schwarze

By: Charles E. Keller, Esquire

For the Union:

Rothe, Marston, Mazey, Sachs, O'Connell, Nunn and Fried

By: Barry P. Waldman, Esquire

SUMMARY DECISION

Union Demands

1. Wages - $10,600 for four-year pipe man; retroactive.

2. Holiday Pay - $400 across the board, holidays worked to be compensated at straight time.

3. Pension - Union demand denied.

4. Medical Insurance -

   (a) Existing medical insurance to be extended to cover retiree from time of retirement until age 65. Coverage for those 65 to remain as presently constituted. This provision to be retroactive to July 1, 1971.

   (b) City to assume full cost of MVF-1 Plan.

5. Vacation -

   (a) Fire fighter with one to five years employment: seven 24-hour vacation days.

   (b) Fire fighter with six to ten years employment: eight 24-hour vacation days.

   (c) Fire fighter with eleven or more years employment: ten 24-hour vacation days.

6. Sick Leave -

   (a) 85-day maximum accumulation.

   (b) 50 per cent payment at retirement, death, or termination.

   (c) Union demand as to further sick days per year. Six-day allotment to continue.

7. Union Security -

   (a) Agency Shop granted; parties to provide language for Agency Shop which shall condition its existence on legality.

8. Food Allowance - Union demand denied.

9. Grievance Procedure - Arbitration Clause to be included as final step of grievance procedure. Parties shall draft provision, this Panel shall retain jurisdiction in case of dispute.

10. Maintenance of Conditions Clause - as to Union's demand for inclusion of specific clause - denied. Parties to bargain over wording of such clause, Panel to retain continuing jurisdiction in case of dispute.

11. Contract and Its Duration -

    (a) All provisions to be reduced to writing.

    (b) One-year duration.

12. Minimum Manpower - Union demand denied.

City Demands

1. Management Rights Clause - City demand for inclusion of specific language denied. Parties to bargain over construction of clause, Panel to retain continuing jurisdiction in case of dispute.

2. Property Responsibility Clause - City demand denied.

3. Sick Leave Penalty Clause - City demand denied.

Preliminary Statement

The following decision is unanimous. On Friday, January 21, 1972, the Chairman of the Arbitration Panel, Professor Richard I. Bloch, met with the representative of the City, Henry G. Marsh, Esq., and the Union representative, Mr. Joseph Malenfant. The meetings commenced at 10:30 a.m. At 1:30 p.m. on the 22nd of January, agreement was reached among the parties as to each provision in dispute. The parties signified their approval by initialing the Chairman's notes. In response to requests from both parties that a final opinion be issued as quickly as possible, such request being made at the time of the January hearing and by later telephone calls, a conference call was held among the parties on the night of Saturday, February 5, 1972. At that time, the Chairman read the contents of the "Summary Decision"

to be issued in advance of analysis supporting that decision so that the parties might expedite any further negotiations. The unanimous Summary Decision was issued by the Chairman on February 7, 1972 and was, of course, effective as of that date. On February 9th, the Chairman received word from Mr. Marsh's office that, after speaking to the City, Arbitrator Marsh had reconsidered his previous position and now wished not to sign the supporting document. In a later personal call, Arbitrator Marsh affirmed the fact that he did, indeed, wish to change his mind and would send a letter containing his rationale. At that time, Mr. Marsh declined to attend a scheduled meeting among the Panel to review the supporting rationale. His signature, therefore, does not appear on this document, as per his request.

Arbitrator Marsh's post facto palinode cannot, of course, affect the unanimity of a prior award.

Opinion, Findings and Conclusions

This arbitration has been conducted pursuant to Act 312, Michigan Public Acts of 1969, and upon the initiation of the Saginaw Fire Fighters Association, which, on June 21, 1971, requested binding arbitration as empowered by the Act. The statutory conditions precedent to arbitration, collective bargaining and mediation, have been fulfilled.

The City of Saginaw, Michigan, is a substantial manufacturing and business center with a population of approximately 91,000. Major corporations in the area include the General Motors complex as well as the Baker-Perkins Company,

the Wickes Corporation, and a variety of small companies. The Saginaw Fire Fighters Association, Local 422, IAFF, hereinafter referred to as the Union, is the collective bargaining representative, under Michigan law, of all employees of the Fire Department of the City of Saginaw with the exception of the Chief of the Department.

Background

In April, 1971, negotiations began between the City and the Fire Fighters Association. Collective negotiations being to no avail, the State Mediator was called in and met with the parties during the month of June. No further progress being made, the Fire Fighters requested arbitration on June 21, 1971, as provided for by Act 312.

The contract between the City and the International Association of Fire Fighters expired on June 30, 1971. Panel Chairman, Richard I. Bloch, was appointed by the Michigan Employment Relations Commission on July 30; hearings on the dispute were held in Saginaw on September 24, October 20, and October 21, 1971.

Hearings

At a 'pre-trial' hearing, attorneys for the parties met with the Panel Chairman to discuss the conduct of hearings as well as the dates.

Demands were presented to the Arbitration Panel by both the Union and the City. The Union demands were presented as follows:

1. Wages - $3,109 increase across the board for all ranks of Union members.

2. Holiday Pay - $500 per year per man.

3. Pension Demand -

   (a) Option to leave with full retirement pension benefits after 25 years of service.

   (b) Increased pension increments after 25 years of service to two per cent per year.

   (c) Minimum pension allowance of $2,500 to all existing pensioners.

4. Medical Insurance -

   (a) Increased medical insurance coverage to MVF-2, Master Medical with $2 drug rider for all retirees and their families upon reaching retirement.

   (b) Medical insurance benefits, MVF-2, Master Medical with $2 drug rider for all existing employees and their families--to be fully paid by the City.

5. Vacation -

   (a) Ten 24-hour duty days vacation for employees with one to ten years seniority.

   (b) Twelve 24-hour duty days vacation for employees with over ten years seniority.

   (c) Same pro-rated increase in vacation benefits for all employees not working 24-hour shifts.

6. Sick Leave -

   (a) Twelve days accumulated sick leave per year.

   (b) One-half pay regarding total accumulated sick days upon death, retirement, etc.

7. Food Allowance - $300 per man.

8. All existing conditions, practices, benefits, and wages in which no demands for changes are made, to be maintained with no losses to employees.

9. Grievance Procedure - Contractual grievance machinery ending with impartial arbitration of all contractual disputes.

10. Agency Shop union security agreement.

11. Written one-year contract.

12. Increased minimum manpower requirements pursuant to recommended guidelines.

13. Union officers time-off for Union business.

On its part, the City submitted several demands stated in rather general language and which at times reflected tentative agreements on the issues.[1] Insofar as these demands reflect agreement, the Panel hereby underwrites them and will refer to them later in this opinion. Other portions of the City's demands which reflect areas of dispute are, for the most part, settled by decisions on issues set forth by the fire fighters.

At the initial pre-trial meeting, and again at the first hearing, the City raised issues regarding the fire fighters' failure to bargain in good faith and the timeliness of the Union's request for arbitration. However, the City's claim as regards timeliness was subsequently withdrawn and, moreover, this Panel finds the evidence presented does not warrant a conclusion of failure to bargain in good faith. Thus, it is our decision that these hearings were properly convened and conducted. A substantial amount of

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[1] An example is the "Selection and Promotion Process" wherein the City states that "the fire fighters have tentatively agreed to assist the City in upgrading the selection and promotion of fire fighters by working with the City to reach this goal and by asking the Civil Service Commission to try new methods in examining and promoting fire fighters. The IAFF will also encourage more attendance at schools, classes, and courses and will work to make attendance at such classes a part of the promotion requirements."

testimony and numerous exhibits were presented for the Panel's consideration, such attention being guided by Section 9 of Act 312 which provides that a decision shall be based, among other things, upon:

> "a. The lawful authority of the employer.
>
> b. Stipulations of the parties.
>
> c. The 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 hours and conditions of employment of other employees performing similar services and with other employees generally.
>
> i. In public employment in comparable communities.
>
> ii. In private employment in comparable communities.
>
> e. The average consumer prices for the 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 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."

Testimony and exhibits were submitted covering all the above-mentioned areas, and the Arbitration Panel has considered the evidence carefully and at great length. The award which follows is the result of that consideration.

Economic Controls[2]

This exercise in contract arbitration was initiated and completed during the pendency of Presidential Executive Orders 11615 and 11627, wherein general standards and machinery are established for stabilization of wages and salaries. Thus, the immediate issue arises as to what stance this Panel will assume toward such economic restraints.

The issue of federal guidelines raises once more the long-debated issue of arbitral authority; specifically, the question of When Arbitrators Should Follow Federal Law.[3] Dean Michael Sovern commented on precisely this question[4] and observed that no consensus has emerged. Bernard Meltzer concluded that arbitrators should respect:

> ...the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise,

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[2]In both its opening and closing brief, the City has suggested that the Panel's determination should be controlled by the federal guidelines. Naturally, the Union expresses its dissent to such course. Beyond these general indications of position, however, no testimony or arguments have been submitted by the parties as to the legal issue involved, nor has the Chairman requested such arguments.

[3]Discussion on this topic has, for the most part, been conducted in reference to situations involving rights, rather than interest, disputes. Faced as it is, however, with the question of applying statutory standards in constructing a new contract as well as considering the continuing equity and vitality of a prior agreement, the Panel sees this as a relevant question.

[4]Sovern, "When Should Arbitrators Follow Federal Law?", in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators (Washington) BNA Books, 1970.

> arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence. (emphasis added)[5]

It should be noted that Robert Howlett took an opposing view, stating that, "[E]ach contract includes all applicable laws."[6] Dean Sovern, for his part, opined that an arbitrator should follow federal law instead of the contract when the following conditions are met:

1. The arbitrator is qualified.
2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.
4. The courts lack primary jurisdiction to adjudicate the question of law.[7]

Referring for the moment to these conditions, (and in respectful dissent to the position taken by Chairman Howlett of the Michigan Employment Relations Commission), it is clear that this Panel should here confine itself to the facts presented at hearing and employ that jurisdiction conferred by Act 312. First, as mentioned above, this Panel does not purport to assume the expertise or qualifications of a board established to consider wage guideline issues. Secondly,

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[5]Meltzer, "Ruminations About Ideology, Law and Labor Arbitration," in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed., Dallas L. Jones (Washington) BNA Books, 1967.

[6]Id., at 83.

[7]At 38.

regarding implication of the federal law issue, it may be argued (although it was not) that federal guidelines are included in Section 9 of the Act, which requires arbitrators to examine: "(a) The lawful authority of the employer." To accept such interpretation would immediately remove all other Section 9 factors from before the Panel in those cases where, as here, the parties agree that wage increases above federal guidelines are merited. This Panel does not believe that such approach best serves the interests of the parties or the public or fulfills the requirements of Act 312. The third condition is inapplicable to this situation, where, as here, outside (federal) law would arguably prevent formation according to the intent of the parties rather than requiring execution of an agreement.

Finally, there is no lack of jurisdiction either in the Circuit Courts[8] of this State or before federal agencies established for review purposes. It is not clear that a decision by this Panel to incorporate federal law would terminate this dispute, and there exist adequate fora wherein the legal question may be finally resolved. Indeed, while an Agency exists to impose ready-made standards upon an award of so-called 'binding' arbitration, it is doubtful that any decision at this stage could have the ring of finality. Considering, then, the benefits of setting forth

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[8]Section 12 of the Act provides that "Orders of the arbitration panel shall be reviewable by the circuit court for the county in which the dispute arose on in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceedings for review shall not automatically stay the order of the arbitration panel."

a unanimous decision based on thorough examination of the issues in this case as opposed to the disbenefits of merely imposing one compulsory process upon another, the Panel unites in proceeding to act according to the mandates of Michigan's Act 312, Public Acts of 1969, including Section 10 of that statute, providing, in relevant part that:

> "Increases in rates of compensation by the Arbitration Panel...may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since the initiation of arbitration procedures under this Act, the foregoing limitation shall be inapplicable, and such awarded increases may be retroactive to the commencement of such fiscal year any other statute or charter provisions to the contrary notwithstanding. At any time the parties, by stipulation, may amend or modify an award of arbitration." (emphasis added)[9]

On the one hand, it would ill serve the citizens of Saginaw for representatives of both its duly-elected public officials and its public employees to proceed in disregard of such executive fiat. Yet, the arbitrators believe it similarly capricious to attempt to usurp the expertise, authority, jurisdiction and machinery of a federal agency established for the purpose of ruling on the national economic impact of individual wage increases. This Panel does not wish, nor will it attempt, to function as a mini-pay board. To the contrary, the Panel realizes its highest service to both the parties and the public in its ability to examine the facts first-hand and render a decision on

[9]Act 312, Public Acts of 1969, Section 10.

the merits. These efforts may produce but an interim step in the final contract between these parties. Yet, in the belief that the interests and welfare of the public and the continuing labor-management relationship of the parties will be best served by setting forth the merits, this Board opts to render judgment on what the decision should be, as opposed to what a supervening authority may decide it shall be.

This award is the product of compulsory hearings. As such, it is a product of failure. That is, both bipartite and mediatory efforts were unsuccessful in seeking resolution of the issues contained herein. However, the virtue of tripartite arbitration is that, when functioning effectively, it can be an extension of the collective bargaining process. At its best, this process yields an opinion which, in the judgment of the two partisan representatives and a neutral, molds a mutually agreeable settlement. This award is such a product. Thus, while the City's appointed representative to this Panel expresses his disagreement with the departure from wage-price guidelines, he nevertheless underscores the fact that this is, indeed, a decision on the merits, and that the Panel has, in effect, called it as it saw it.

Understandably, the parties devote a substantial number of exhibits to the wage issue[10]. The Union directs the Panel's attention to Section 9 of the Act, stating as it does

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[10]Arguments presented, as authorized by the Act, included comparisons of wages, hours and conditions of employment with other public and private sector employees, overall compensation including fringe benefits, and other factors traditionally considered such as the skill and training of the employees. It should be noted, however, that no evidence or arguments were brought before the Panel regarding, in terms of Section 9 (c) of the Act, "...the financial ability of the unit of government to meet these costs."

that the Panel may consider "factors...which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment... ." Referring to the intense physical demands upon a fire fighter as well as the rapidly advancing technology with which he must familiarize himself, the Union submits comparison data showing the relationship between other skilled trades in private industry as well as other city employees. The City does not question the hazardous nature of the job, but maintains that the Saginaw fire fighter faces hazards not distinctly different from that same profession in other cities and submits further that its offer of eight per cent across the board is a sufficient increase to place the fire fighters in a favorable position within the framework of "comparable" environs as defined by the City. Each party has submitted comparison data to demonstrate the strength of respective positions. Each sets forth lists of cities it feels are relevant to the Panel's consideration. Thus, the Union submits in Exhibit 12 a list of cities with a population of 25,000 or over; and in Exhibit 13 those cities with more than 50,000 population. The former tends to show that Saginaw fire fighters are approximately $1800 under the average and, with cities over 50,000, approximately $2000 beneath the average. Insofar as those surveys compare Saginaw to many "bedroom" communities, adjacent to large cities like Detroit, the Panel notes and takes into consideration the cities objections insofar as Public Act requires that comparison be made to "comparable" communities. The City submits its Exhibits C-3, C-4, and C-5, which, comparing its choice of cities over 25,000, show the average maximum salary for fire

fighters in 1971 to be approximately $10,230.[11] In its supplemental brief, the City refers the arbitrators to A-9, A-10, and A-11, which compare Saginaw to the cities traditionally used by Saginaw for purposes of collective bargaining. According to City Exhibit 9, which includes Bay City, Midland, Flint, Pontiac, Lansing, Kalamazoo, Grand Rapids, Muskegon, Jackson, Ann Arbor, Dearborn, and Battle Creek, the average maximum wage for a fire fighter is $10,662 as of August 1, 1971. Union Exhibits 15 and 16 employ fire departments used by the City of Saginaw for comparison purposes in a 1968 fact finding with the fire fighters. This chart compares Flint, Lansing, Grand Rapids, Jackson, Kalamazoo, Saginaw and Bay City and shows an average of approximately $10,400. Comparison data can be extraordinarily difficult to assess. This is no revelation to anyone who acts as neutral in public employment situations.[12] At best, it can provide an overview and a framework within which the Panel may proceed to consider the other factors as dictated by the Michigan statute and submissions of the parties.

The Panel has considered at length the various comparisons concerning both private and public sector. Moreover, in arriving at the wage figure to be applied to the four-year

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[11] Here, City Exhibit C-3 and Union Exhibit 11 correlate well and reflect, within a few dollars of each other, the same average; this in spite of the fact that several of the figures for the same departments do not correspond.

[12] See, for example, the comments of Professors Ryder and Smith of the University of Michigan, two of Michigan's outstanding arbitrators, who remarked recently: "Some problems arise as to what should be the proper wage and benefits comparison group for a given city. We have the Michigan Municipal League groupings that cities, when bargaining or in arbitration, will present in support of a wage offer they have made. Generally it is my impress-

pipeman, it has considered the relationship between the salary figure and all other elements of the compensation package, and their respective comparative status. The Panel is unanimous in the opinion that a wage increase which brings the four-year pipeman from his present level of $9391 to $10,600 is an equitable award, fully reflective of the data presented at hearing. This $1209 increase shall be applied to bargaining unit members on an across-the-board basis.

Holiday Pay

Saginaw fire fighters now receive double-time for work performed on any of eight designated holidays. The Union submits that, on the average, a fire fighter works 2.5 holiday days each year and therefore, a full-paid fire fighter receives approximately $194 per year as holiday pay. In requesting an across-the-board stipend of $500 holiday pay to its members, the Union maintains that this will bring Saginaw fire fighters in line with average holiday pays of other benchmark cities chosen by the Union.

In response, the City submits that the Union's request is merely another form of wage increase, and states further that granting double-time pay to personnel who actually work on a given holiday insures adequate compensation for the inconvenience. As such, the City requests that the Arbitration Panel deny the Union's demand for holiday pay and continue the present holiday pay program.

The Panel recognizes that there is a basic inequity insofar as other Saginaw city workers receive holiday pay whether the holiday is worked or not, and that other adjust-

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ion that unions will not accept or abide by the same groupings." "Discussion of Michigan Police and Fire Fighter Compulsory Arbitration Act," by Meyer S. Ryder and Russell A. Smith, April 1971.

ments are made, such as providing for a day off on Monday should the holiday fall on Saturday, for example. In order to compensate for this disparity, the Panel orders that a $400 payment be granted the fire fighters, but with the proviso that henceforth, holidays worked shall be compensated at single-time only. The City representative, while agreeing to this award, notes the City's concern that such grant will destroy the incentive to work holidays, but relies on the professionalism of the fire fighters to avoid such results.[13]

Pension

It is the considered opinion of this Panel that the evidence presented does not warrant a change in the existing pension plan. Thus, the Union's demand in this area is denied.

Medical Insurance

Presently, the medical insurance plan provides that the City pay a certain portion of the fire fighter's medical insurance until retirement, at which time the City's portion ceases until the individual reaches 65 years of age. At that time, payments resume. The testimony indicates that the monthly cost of medical insurance is approximately $50. The Union submits this is a substantial burden for the retired fire fighter to bear and that this cost item may well be an inducement for a retiree to seek other gainful employment. Thus, the Union requests not only an increase in medical in-

[13]Assumedly, an abuse situation can be dealt with under the Sick Leave provisions.

surance coverage to the expanded MVF-2 Master Medical Plan with $2 Drug Rider[14] but also requests that coverage be expanded to include all retirees upon reaching retirement age.

The Panel recognizes that imposition of a $50 per month insurance charge may well be burdensome for an individual who is to truly retire. At the same time, we acknowledge the inequity in requiring the City to provide blanket payments for all retirees, even if they have found subsequent employment. Moreover, the Panel has considered the merits of expanding the present coverage and, on the basis of evidence presented (with particular emphasis on comparisons to other departments in the City as opposed to surrounding cities), concludes that existing medical insurance shall be extended to cover the unemployed retiree, thus eliminating a potentially burdensome hiatus. Further, the Panel finds the present MVF-1 plan sufficient in its coverage, with the exception that the City shall, in the future, provide full payment of the premium, thus eliminating the $4.39 monthly contribution by the fire fighters. This order, like the rest of this opinion, shall be deemed retroactive to July 1, 1971, and shall cover those employees retiring since that date.

The Union has further demanded that any adjustments be applicable to all retirees. In Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company,[15] it was held by

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[14] The present medical plan provides for MVF-1 only with $4.39 being contributed by the employee.

[15] 404 U.S. _____, 30 L. ed. 2d 341, 92 S. Ct. 383, 40 Law Week 4043.

the Supreme Court that retired employees were not members of the union that was collective bargaining agent for the employees of the company that formerly hired them. Moreover, their retirement benefits were held not to be a mandatory subject of bargaining under the National Labor Relations Act.

In reversing an NLRB ruling that retired employees were "employees" within the meaning of the Act so as to require bargaining on the subject of benefits, the Sixth Circuit found that:

> ...retired employees are not within the bargaining unit, and that under the plain meaning of the Act, employers have no statutory duty to re-negotiate with their union's improvements in retired employees' pension plans.[16]

If one were to hold that benefits for present retirees could be re-negotiated, those individuals would be peculiarly vulnerable to an on-going labor-management bargaining process in which they have no part. In the private sector, Section 301 of the Labor-Management Relations Act[17] provides, among other things, that an employer must sustain his contractual obligation to pay those benefits bargained for and earned under collective agreements to which they were a party. Similarly, the retirees may not demand increases in such provisions. The fact that such bargaining may at times occur, (and it does not appear that it did so here), while laudable, is not mandatory.

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[16] 74 LRRM 2425 at 2432.

[17] 29 U.S.C. Section 185(a) (1964).

The City submits that since the issue is not bargainable, and since it has not bargained, this issue should not be before this Panel. We agree.[18]

Vacation

Presently, a fire fighter with less than ten years' service receives six 24-hour vacation days. The individual with more than ten years' service receives eight vacation days. The comparison data submitted by both parties indicates that an adjustment is warranted in this area. Thus, it is ordered that a fire fighter with one to five years' experience shall receive seven 24-hour vacation days; six to ten years will warrant eight vacation days; and an individual with eleven or more years' experience shall receive ten days' vacation.

The evidence submitted, however, does not support adjustment of vacation days for 40-hour employees, and the Union's demand as to this factor is denied.

Sick Leave

Presently, fire fighters receive six 24-hour sick days per year. These days can be accumulated over the employment tenure to reach a maximum of 85. The Union requests that the fire fighters be awarded twelve sick days per year with the further proviso that such days may accumulate without limit and that all unused sick days shall be paid on death or retirement. For its part, the City submits that the

[18] See also NLRB v. North Arkansas Electric Cooperative, Inc. 446 F. 2d 602 (1970).

present plan is adequate for the needs of sick and disabled employees. Further, the City proposes a "sick leave penalty clause" which provides a penalty to employees who abuse sick leave.[19]

The Panel herein refuses to adopt the City's suggested clause, but, due to the differing philosophies reflected by the respective demands, feels that a statement of clarification of the purpose of sick leave is in order. Sick days are not vacation days. They are provided the employee who is ready and willing but unable to work. The concept of accumulation of these days is justifiable in recognition of the fact that an individual may, as time goes on, incur an illness requiring extended absence from work. Days not utilized earlier should rightfully be available to the employee at that time. The employee who remains healthy during his tenure, may well have a number of days 'banked' as he approaches retirement. Recognizing that there should be some incentive to work up until retirement, as opposed to 'cashing in' the sick days, the Panel hereby orders payment to the extent of 50 per cent of the accumulated days. This payment shall be based on a maximum of 85 accumulated days

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[19] In Exhibit B, Item 6, the City states: "By penalizing employees that use of sick leave, the cost of sick leave is reduced and the benefit is protected for the proper use of sick leave. When an employee has lost three separate illnesses with pay, the first day of the fourth period of illness is not paid. Such a penalty does not affect the legitimately ill who are off for longer periods of time nor for an occasional absence because of a short illness. It will affect the employee that continually takes one day of sick leave as soon as he accumulates it. The accrued rate is not affected, but merely the means of paying on one-day absences. The policing of sick leave will be done by the employee himself at no cost for a visiting nurse or supervisor checking up on employee. Sick leave will be for the employee that is really sick and needs to remain at home or hospitalized."

and shall be paid on the occasion of either retirement or death or termination. The evidence presented does not indicate the necessity of additional days per year; computer records demonstrate that fire fighters are successfully accumulating banks of sick days and not finding the need to draw heavily on them at the present rate of accrual. Thus, the employee will continue to receive six 24-hour sick days yearly.

Union Security

The IAFF argues articulately that a Union cannot be a viable entity and fairly represent all the people in any unit of which it is the exclusive bargaining agent, unless all the people in the unit share the costs of representation equally. The Union maintains that any other arrangement serves to discourage Union membership. Thus, it requests that this Panel award an "Agency Shop" clause to be incorporated in the resultant collective bargaining agreement.

The City rejects the concept of an Agency Shop and sets forth as its rationale the following:

1. Under present state law (PERA 1965), fire fighters bargaining unit is defined as everyone below the rank of Fire Chief (Section 423.213 Appropriate Bargaining Unit). Therefore, under the statute, the bargaining unit is clearly defined and protected.

2. Fire fighters are under Act 78 and tenure is maintained by the independent Civil Service Commission without any control by the City. ...No greater protection than this Act can be given fire fighters.

3. Employees should still have the right to decide if membership in a Union is for them. It is still a personal decision. It should not be for the Union to make the decision for future public employees.

4. The City now provides payroll deduction for dues for members of Saginaw fire fighters.

5. Nothing is gained by creating an Agency Shop when all except five employees are dues-paying members. The non-paying members are the five Assistant Chiefs.

6. In addition to Act 78, fire fighters have security through the Veterans Preference Act, and through the Public Employees Relations Act.[20]

This Panel concludes the IAFF should, according to the arguments and testimony presented, be entitled to a carefully drafted Agency Shop clause. In so deciding, the Panel notes the decision of Theodore St. Antoine in a recent case involving public employees. In Reese Teachers Education Association and Reese Public Schools Board of Education,[21] Dean St. Antoine stated that:

> In private industry the ethical and labor relations questions have largely been resolved in favor of some form of union security: union security fairly distributes the expense of collective bargaining; it helps avoid divisiveness among the work force; and the encroachment on individual rights, essentially a financial obligation, is minimal.

The Union demand regarding Agency Shop is granted with the proviso that the resultant language in the contract shall condition the existence of the shop upon legality.[22]

[20]City Exhibit A, Item 10.

[21]Award dated February 8, 1971.

[22]In making this award, the Panel wishes to express cognizance of the fact that the law in Michigan is not entirely settled on the question of the validity of an Agency Shop clause in connection with the Michigan Public Employment Relations Act. In Smigel v. Southgate Community School District, 24 Mich. App. 179, 186, 180 N.W. 2d 215, 74 LRRM 3080 (1970), the Michigan Court of Appeals held that the validity of an

Another facet of union security is a provision for granting union officers time off for union business. The fire fighters are on 24-hour schedules and, of necessity, require time off during scheduled work days for union business including mediation, fact-finding, arbitration and negotiation. The Panel orders that if one of the above situations arise, three employees shall be excused to perform these functions.

Agency Shop clause "hinges on the relationship between payment of a sum equivalent to the dues of...[the Union] and a non-member's proportionate share of the cost of negotiating and administering the contract involved." The Court held further that if the "payment is greater than or less than a proportionate share, the Agency Shop provision is in violation of" the Michigan Public Employment Relations Act. This case is presently on appeal to the Michigan Supreme Court, and the general impact of the decision is to cast doubt on the validity of the Agency Shop. However, scholars have tended to question the Smigel decision itself. See, for example, Arbitrator Harry T. Edwards' decision in In Re Ferris State College and Michigan State Employees Union, Local 1609, dated August 31, 1971, wherein Professor Edwards stated, "there is...noteworthy precedent which casts a shadow of doubt about the wisdom of the judicial expression in Smigel. For one, the United States Supreme Court, in 1963, upheld the validity of the 'Agency Shop' form of union security under the proviso to Section 8(a)(3) of the National Labor Relations Act. NLRB vs. General Motors Corp., 373 U.S. 734, 53 LRRM 2313 (1963). For another, the MERC, both before and after the decision in Smigel has consistently upheld full 'Agency Shop' provisions (requiring payment of a fee which is the equivalent of union dues) as a valid form of union security under PERA." (Citing Southgate Community School District, 1970 MERC LAB. OP. 161: Oakland County Sheriff's Dept., 1968 MERC, OP. 1: Swartz Creek Community School, Case No. C-69 G-80, GERR #414, at E-1 (1971).) In the Reese Teachers case cited supra, Professor St. Antoine upheld the validity of the Agency Shop clause arising under the Public Employment Relations Act and Act 312, Public Acts of 1969. See also Police Officers Association of Dearborn and the City of Dearborn. (Arbitration proceeding pursuant to Act 312, Chairman Russell C. Smith, award dated June 22, 1971.) This Panel has stated earlier in this opinion its unwillingness to superimpose the federal law on the grant of jurisdiction of Act 312. Similarly, this Panel does not regard its function as that of interpreting the validity of the Smigel case or predicting its eventual resolution. On the evidence presented, the Panel has determined that an Agency Shop provision in the collective bargaining agreement of the parties is justified and it is thus so ordered.

Moreover, the President of the Local shall be granted two 24-hour days off for State and International Fire Fighters Conventions. That is, the President may allot a total of two days as he sees fit. It should be noted that this grant of time off applies only if the employee is otherwise scheduled for those days and no compensation shall be granted if such functions are performed during off-duty time.

Finally, the President of the Union may request time off from the Chief to attend to such matters as employee grievances and Union meetings. Permission so requested shall not be unreasonably withheld.

Food Allowance

While the testimony indicates that several fire departments grant cash allowances to fire fighters who must, of necessity, eat their meals at the station, the evidence does not persuade the Panel that the food allowance should be granted at this time. While it is true that certain fire fighters remain on duty during a 24-hour duty day and thus prepare three meals, it is also the case that this employee receives meals at home that other city employees do not. The fact that lunch and dinner time is considered paid time and that no other city employees are furnished meals lead the Panel to believe the food allowance is unwarranted. The Union's demand herein is denied.

Grievance Procedure

Presently, complaints and grievances other than suspension, reductions or removals (these coming under the aegis of

Act 78) are handled in accordance with a grievance procedure that provides for the City Manager rendering the final decision. The Union submits its arbitration clause and requests that binding arbitration be the final step for those matters outside Act 78.[23]

The City maintains that past experience with the Fire Fighters Association indicates that grievances have been resolved by the Fire Chief and have not needed to go further. Hopefully, this state of affairs will continue and the lower steps of the internal dispute settlement machinery will function smoothly. However, the arbitrators feel that bind-

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[23]The present grievance structure for city employees is as follows:

Section 6-2.1 Any employee having a grievance shall discuss the matter with his immediate supervisor to effect a settlement. He may be assisted in such discussions by a representative of his own selection.

Section 6-2.11 Grievances not so settled shall be presented in writing on appropriate forms to the supervisor. The employee may appear before the supervisor in his own behalf.

Section 6-2.12 The supervisor shall write his disposition of the case on all copies of the form and return them to the employee or his designated representative within 48 hours (or the next working day thereafter).

Section 6-2.13 If not adjusted at previous step (6-2.12), the grievance forms shall be directed to the superintendent or division head who shall have three working days in which to write his disposition of the matter with reasons therefor. The persons selected by the employee may be delegated to appear as his representatives, but any employee may appear on his own behalf before the superintendent.

Section 6-2.3 Within five (5) days after registering of a complaint, the Personnel Officer shall call a meeting which will include the department head, the complainant and any other person or persons involved in the complaint. The Personnel Officer will preside at the meeting and hear the entire case and obtain all the facts.

Section 6-2.3 The Personnel Officer will make a complete report of his findings and submit these to the City Manager. The decision of the City Manager shall be in writing and shall be final.

ing arbitration is a reasonable last step in the grievance procedure and serves to dissipate any discontent that may otherwise arise through attempted settlement by a representative of one of the disputing parties. Thus, it is ordered that the parties establish binding arbitration as the final step. However, the Panel does not wish to substitute its judgment for that of the parties in the matter of drafting the specific language of the agreement. Thus, this matter is remanded to the parties and the Panel will retain jurisdiction of this portion of the award in the event that an impasse is reached over the language. In that event, however, the Panel will render its decision on an "either/or" basis. That is, in the event of a dispute over this language, each party will submit its version of the language and the Panel shall decide on the basis of which appears most reasonable under the circumstances.

Maintenance of Conditions Clause

Union Exhibit 35 sets forth a clause, commonly known as "Maintenance of Conditions," which attempts to insure the fact that neither the award of this Panel nor the written collective bargaining agreement which shall codify the provisions of this award as well as the areas of dispute previously resolved will unintentionally decrease any benefits or practices received by Saginaw fire fighters prior to this arbitration under Act 312.

For its part, the City submits a Management Rights Clause, which in the tradition of such clauses, attempts to retain for management its proprietary rights. Here again, as indicated

supra, this Panel will not attempt to construct the language of the prospective collective bargaining agreement. As such, it issues no order at this time regarding construction of either the Maintenance of Conditions or Management Rights Clause, but instead agrees to retain continuing jurisdiction should a dispute arise in this area. Again, as above, the dispute will be decided through a choice of the most reasonable submission of language.

The Contract and Its Duration

It is the decision of this Panel that the interest of the parties can be best served by committing their voluntary agreements and the awards of this Panel to writing. Moreover, it is ordered that the duration of the resultant contract shall be one year, commencing from the date of July 1, 1971.

Minimum Manpower

The fire fighters introduce testimony and exhibits which purport to show that the present three man crew on the engine and ladder companies is insufficient. The IAFF requests that the City increase the size of the companies in accordance with "recognized minimum standards so that the apparatus can be safely and effectively utilized."[24]

The City responds that a decision on Minimum Manpower Requirements by this Panel would be beyond its authority at

[24] In evidence is a 1963 report to Saginaw by the National Board of Fire Underwriters that recommends that "at least 5 men, including an officer, be on duty at all times with each high-valve engine and ladder company, and 4 men, including an officer, with other companies."

this time; that such a decision is strictly within the Management Rights powers of an employer.

The issue at hearing was not simply one of undermanning, but more clearly one of arbitrability. The Panel decides that in this case, the issue is not arbitrable. Cases in both public and private sector employment have dealt with issues similar to this. In Brooklyn Union Gas Co., 47 LA 425, for example, Arbitrator Wolf found that a union's grievance protesting the employer's assignment of only one employee to install a number of meters is not arbitrable insofar as it questions the employer's right to determine how many people are needed to perform a job, since the contract specifically reserved to the employer "sole responsibility" to "maintain discipline and efficiency of employees," and excludes such matters from arbitration. However, the arbitrator found the grievance arbitrable insofar as it challenged the safety of the work assignment under the contractual provisions relating to safety.

The Union refers this Panel to the decision of George Roumell in Southgate Fire Fighters Union and City of Southgate, Michigan, 54 LA 901. There, the panel found that in spite of the city's claim, Minimum Manpower was not a proper subject for collective bargaining, "the City's argument has been undermined by its own actions." Referring to a 1968-69 police contract, the arbitrators found that the city had, "in free negotiations without an arbitration panel," agreed to contract provisions providing for Minimum Manpower requirements at all times in a clause entitled, "Safety, Health, Welfare and Education." The 1970-71 contract provided similarly. Thus, the panel concluded that "The City by its own actions

has recognized that minimum manpower requirements are a subject of collective bargaining."[25]

There is no similar evidence in this case, and this Panel would be remiss to proceed on the substantive issue of undermanning in the absence of any evidence concerning prior contract provisions or past practice which would guide the Panel as to procedural requisites. We do not hold here that the issue is not a proper subject of collective bargaining, insofar as it may concern the safety of work conditions.

On the basis of the evidence before this Panel, and in the absence of any established contract provisions regarding Management Rights, Scope of Bargaining, Health and Safety, or Minimum Manpower, the Panel finds the issue not to be arbitrable at this time, and thus cannot, of course, decide further as to the merits. The Union's demand is denied.

Award

The award is made in accordance with the above provisions of this opinion.

Dated: February 7, 1972

Richard I. Bloch

Richard I. Bloch, Esq.
Chairman Appointed by the Michigan
Employment Relations Commission

Joseph A Malenfant

Joseph Malenfant,
Arbitrator Appointed by the IAFF

Henry Marsh, Esq.
Arbitrator Appointed by the
City of Saginaw

[25] At 916.