10/9/70 ARB

77.

Birmingham, City of

IN THE MATTER OF THE ARBITRATION

between

THE CITY OF BIRMINGHAM, MICHIGAN
and BIRMINGHAM FIREFIGHTERS ASSOCIATION

Under Act No. 312, Michigan
Public Acts of 1969

10/9/70

PANEL OF ARBITRATORS

Thomas J. Brennan, Member; D.C. Egbert, Member; Theodore J. St. Antoine, Chairman

APPEARANCES

For the City of Birmingham: Earl R. Boonstra, Attorney

For the Birmingham Firefighters Association: Brian K. Millington, Attorney

OPINION, FINDINGS, AND CONCLUSIONS

This arbitration has been conducted pursuant to Act No. 312, Michigan Public Acts of 1969, and upon the initiation of the City of Birmingham (hereinafter "the City") following negotiations with the Birmingham Firefighters Association (hereinafter "the Association" or "the Union") for a new labor agreement to replace the one which expired on June 30, 1970. The statutory conditions precedent to arbitration, collective bargaining and mediation, have been fulfilled.

The members of the Arbitration Panel are: D.C. Egbert, Delegate of the City; Thomas J. Brennan, Delegate of the Association; and Theodore J. St.Antoine, Chairman, appointed by Chairman Robert G. Howlett of the Michigan Employment Relations

Commission on August 10, 1970, pursuant to a request submitted by counsel for the City on August 5, 1970. A hearing was conducted by the Arbitration Panel at the office of the Michigan Employment Relations Commission, 1400 Cadillac Square Building, Detroit, Michigan, on August 25, 1970. The time for issuing an award was extended by agreement of the parties to and including October 9, 1970.

The Association is the collective bargaining representative, under Michigan law, of all employees in the Fire Department of the City of Birmingham, excluding the Fire Chief, Assistant Chief, Fire Marshal, and parttime and temporary employees, if any. The bargaining unit includes approximately 30 firefighters, six lieutenants, and three captains, or a total of about 40 employees.

In the course of the hearing on August 25, 1970, the parties agreed to withdraw certain items from arbitration; agreed, upon the recommendation of the Chairman of the Arbitration Panel, to the entry of a consent award covering (1) salaries, (2) holiday pay, (3) vacations, and (4) insurance contributions; and submitted for determination by the Arbitration Panel the Association's requests for (1) an agency shop and (2) binding arbitration as the last step in the grievance procedure.

Item 1 -- Agency Shop

Under an "agency shop," as traditionally defined, any employee in the bargaining unit who is not a member of the union must, as a condition of continued employment, pay to the union an amount equal to the customary initiation fee and periodic

dues demanded of members. The Association contends that fees from all members of the bargaining unit are necessary to meet the increasing costs of collective bargaining (including, presumably, the costs of arbitration under Public Act 312), and that any uncertainty about the legal status of the agency shop should not be a basis for denying it. The City argues, to the contrary, that the agency shop would be both unnecessary and undesirable in Birmingham. The City's position is that an agency shop clause is legally questionable in Michigan at this time; that the City is agreeable to a "checkoff" of the dues of those employees authorizing it; that only about two employees in the bargaining unit are not currently members of the Association; that few municipalities now have an agency shop; and that the City does not believe in coercion by contract in any form.

Section 9 of Public Act 312 provides that an arbitration panel in a dispute like that before us shall base its order upon a number of specified factors, including the following:

> "(a) The lawful authority of the employer....
>
> (c) The interests and welfare of the public....
>
> (d) Comparison of the ... conditions of employment of the employees involved in the arbitration proceeding with the ... conditions of employment of other employees ...:
> (i) In public employment in comparable communities.
> (ii) In private employment in comparable communities."

The Michigan Employment Relations Commission, in a divided decision, has sustained the validity of the agency shop under the Public Employment Relations Act. Oakland County Sheriff's Dep't, 3 Mich. Emp. Rel. Comm. 1(a)(1968). Just over two months

ago, however, the Court of Appeals held that an agency shop provision would violate the PERA if the required payment was "greater than or less than" a "nonmember's proportionate share of the cost of negotiating and administering the contract involved." Smigel v. Southgate Community School District, GERR No. 363, G-1 (Mich. App. Aug. 3, 1970). Since we have no basis for determining a nonmember's proportionate cost of administering the contract to be executed between the City and the Association, any agency shop clause we might order would be of dubious legality under the Southgate decision.

The Arbitration Panel has not been supplied detailed information on the extent of the agency shop in public employee contracts in Michigan communities comparable to Birmingham. Independent research into a few police and firefighter contracts suggests that most negotiated agreements do not contain an agency shop clause. We note, however, that on April 24, 1970, an arbitration panel ordered the inclusion of an agency shop in the contract of the City of Southgate and the Southgate Firefighters Association. In private employment in the United States, the union shop, the agency shop, or some other form of union security arrangement is found, after many years of bargaining, in only about two-thirds of all collective bargaining agreements.

Despite its long history, union security continues to provoke strong feelings among many persons who find forced union adherence offensive. We can assume the sincerity of the City's opposition to "coercion by contract." At the same time, we do

not think the Association has demonstrated any marked need for the special protections of union security. It already enjoys the voluntary allegiance of almost every member of the bargaining unit. In light of all these circumstances, therefore, we do not consider it appropriate to order the inclusion of an agency shop in the City-Association agreement at this time.

Item 2 -- Binding Arbitration

The City strongly opposes binding arbitration as the terminal step in the grievance procedure. At the present time, the Association has the right to carry a grievance unresolved at the City Manager level to the City Commission for final determination. The Commission is a three-man elective body responsive to the entire citizenry, and the City is jealous of the Commission's prerogatives. During the period of the last contract, the Association actually had no need to pursue a grievance beyond the City Manager. But the Commission is no "rubber stamp" for the City Manager, the City argues, as the police have recently demonstrated; they took a case to the Commission and won.

The Association insists that binding arbitration is necessary because otherwise the City, an interested party, remains the interpreter of its own contract and the judge of its own cause. Firefighter agreements in such comparable communities as Pontiac, Madison Heights, and Royal Oak contain arbitration clauses. Moreover, it is argued that the previous lack of appeals to the City Commission does not prove there is no need

for arbitration. Perhaps the Association felt that the City Manager's ruling was likely to be as good as the Commission's. But in any event, the Association contends, the right to resort to an impartial outsider is so important that it should be available even if it does not have to be utilized.

We essentially agree with the Association's position. Binding arbitration by a disinterested third party has become accepted as the capstone of the American system for resolving grievances in the work place. Approximately 95 percent of the major labor agreements in private industry in this country provide for grievance arbitration. More pertinent for our purposes, arbitration provisions appear in three of the five Firefighter contracts agreed upon for '70-'71 in the "Woodward Corridor" cities, and in four of the eight agreed upon for '70-'71 in cities having between 25,000 and 50,000 population, all of which are comparable to Birmingham. Binding grievance arbitration was also included in the award of an arbitration panel issued on March 26, 1970, dealing with the City of Marquette and the Marquette Police.

However well intentioned, the City Commission is no substitute for arbitration as the final step in the grievance process. Quite properly, it is the responsibility of the Commission to look out for the best interests of the City as such, but in a dispute between the City and the Association this will inevitably tend to impair the capacity of the Commission to deal with the parties evenhandedly. At best, a determination by the Commission

is likely to be eyed with suspicion by the employees. It will thus lack the acceptability and finality that should characterize an arbitral award.

The Arbitration Panel will therefore order inclusion of a provision for final and binding arbitration as the last step of the grievance procedure spelled out in the City-Association agreement. Generally, we shall follow the approach suggested by the Association, except that we shall delete the present City Commission step as unnecessary. Obviously, the parties can retain that step by mutual agreement, if they wish.

CONSENT AWARD AND AWARD

For the foregoing reasons, the Panel of Arbitration makes the following awards:

1. The base salary of the employees covered by the City-Association agreement shall be increased $1,000 to $11,300, retroactive to and including July 4, 1970, with all other increments to be applied in accordance with past practice in the employees' schedule.

2. Unit men shall receive one additional day of holiday pay, from two and one-half days to three and one-half days, with a corresponding adjustment for day men.

3. (a) The employees' vacation schedule shall be as follows:

More than 1 year but less than 5 years' seniority prior to January 1 of any vacation year ----- 5 work days

5 or more years' seniority but less than 10 years' seniority prior to January 1 of any vacation year - 6 work days

10 or more years' seniority but less than 20 years' seniority prior to January 1 of any vacation year -- 8 work days

20 or more years' seniority prior to January 1 of any vacation year ---------- 10 work days.

(b) Employees shall not be permitted to take more than five work days vacation from and including June 1 through and including August 31 in any vacation year.

4. The City will increase its insurance contribution by $1.10 per pay period.

5. There shall be no agency shop provision in the City-Association agreement.

6. The present Step 6 of the grievance procedure, providing for referral to the City Commission, shall be deleted, and in its place shall be substituted the following (or such other arbitration provision as the parties may mutually agree upon):

> Step 6. In the event the grievance is not satisfactorily settled in Step 5, the Union may, within thirty (30) days after date of the decision at Step 5, submit the grievance to final and binding arbitration to be conducted by the American Arbitration Association in accordance with its rules.

7. The Panel reserves jurisdiction to settle any dispute which may arise concerning the interpretation or implementation

of this decision.

* Thomas J. Brennan, Member

** D.C. Egbert, Member

Theodore J. St. Antoine, Chairman

October 9, 1970

*Member Brennan dissents from paragraph 5 of the Award and the discussion under "Item 1" of the Opinion.

**Member Egbert dissents from paragraph 6 of the Award and the discussion under "Item 2" of the Opinion.