CITY OF SWARTZE CREEK -AND- F.O.P. L87 A-29

STATE OF MICHIGAN
DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration Between:

CITY OF SWARTZ CREEK,

Employer

-and- Case No. L87 A-29

FRATERNAL ORDER OF POLICE,
STATE LODGE OF MICHIGAN LABOR COUNCIL

Union

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ARBITRATION PANEL:

Donald F. Sugerman, Impartial Arbitrator and Chairman
Janice M. Sigler, Esq., City Delegate
Ray Harwood, Union Delegate

APPEARANCES:

City: Edward P. Joseph, Esq. and Jerome F. O'Rourke, Esq.
Union: John A. Lyons, Jr., Esq.

CHRONOLOGY:

The 1985-1988 collective bargaining agreement between the parties was reopened in 1987 for negotiations on the subject of promotions only; mediation sessions were held on February 23, and March 13, 1987[1]; the Act 312 Petition was filed by the Union on April 2; the Chairman was appointed by the Commission on July 1; a pre-hearing conference and a hearing were held in Swartz Creek on September 18, and November 10, respectively; last offers of settlement were filed by November 17; briefs were filed by both parties on December 21; because of Mr. Joseph's untimely death just before submission of his brief (but after its preparation), his request therein for additional time to re-examine the City's position was granted on December 28; the City notified the Chairman on January 5, 1988, that its last offer of settlement remained unchanged.

[1] Unless otherwise noted all dates herein refer to 1987.

OPINION AND AWARD

Introduction

Swartz Creek is a small city both in population and geography. As such, it has an equally small police department with a total of seven employees including the five officers who comprise the bargaining unit. The City and the Union bargained a three year Agreement effective for the period July 1, 1985, to June 30, 1988. The dispute giving rise to this case involves a midterm reopening of the Agreement--limited to the subject of promotions.

The parties have agreed on virtually all of the provisions regulating promotions, but have not been able to do so on five items (later reduced tc four when one was resolved at the pre-hearing conference). In addition, the City has raised a threshold question on whether one of the substantive issues is a proper subject of bargaining.

Procedurally, there is a bright side to this case. Counsel avoided some of the pitfalls in Act 312 proceedings: The lengthy examination and cross examination of witnesses and the submission of voluminous exhibits. They did this by calling no witnesses--expert or otherwise, and by submitting the case on agreed upon exhibits (which were only those essential to a disposition of the issues) and on briefs. Counsel are to be commended! The entire hearing took less than one half hour. With this said and done, we turn to the issues in this case.

Issue One: Is the Composition of an Oral Board a Mandatory or Permissive Subject of Bargaining? If Mandatory, How Should the Board be Constituted?

Mandatory or Permissive Subject for Bargaining

The parties agreed that to qualify for promotion, candidates must pass written and oral examinations. They also agreed that the Board giving the oral examination would be composed of three members. They cannot agree on how these members are to be selected. The City wants the unrestricted right to appoint all the persons who will sit on the board. The Union wants each party to appoint one member who will jointly select the third. Before dealing with this problem, it is necessary to consider the City's argument that this matter is a permissive rather than a mandatory subject of bargaining.

A mandatory subject of bargaining is one that vitally affects wages, hours, or other employment terms and conditions, and does not fall within "the core of entrepreneurial control." Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 202, 223 (1964); Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971); Detroit Police Officers Association v. City of Detroit, 61 Mich App 487, 490-494 (1975), lv. app. den. 396 Mich 989 (1976). A permissive subject is one over which the parties may bargain, but cannot be required to do so. The claim is jurisdictional; an Act 312 Panel is required to limit its awards to mandatory subjects of bargaining. Local 1277. AFSCME v City of Center Line, 414 Mich 642 (1982). If the City is

correct, the panel cannot determine how the oral board is constituted.

There is no question but that the general subject of promotions is a mandatory subject of bargaining. Old Line Life Insurance Company, 96 NLRB 499, 501 (1951); DPOA v. Detroit, supra. The City obviously does not contend otherwise.[2] Its position is bottomed on the assertion that an oral board does not fall into the category of "terms and conditions of employment." (Brief, p. 3). It relies on Local 1277, AFSCME v. City of Center Line, 414 Mich 642 (1982) in support of its position.

In Local 1277 the court held that the decision to layoff employees is not a mandatory subject. However, it also found that the impact of the decision was a mandatory subject of bargaining. In other words, the city could decide unilaterally whether layoffs were necessary and the number of employees to be so affected. But the impact of its decision--which employees were to be selected and the benefits, if any, they were to receive--was a subject that required bargaining. The City equates the decision to layoff with the decision to select members of an oral board. I believe its reliance on this case is incorrect.

The decision to layoff is akin to the decision to promote. The City has the right to decide whether there will be promotions and, if so, the number of positions that will be created. As

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[2] All of the disputed issues in this case involve promotions. The City's challenge of a non-mandatory subject is limited to the composition of the oral board.

this is an entrepreneurial decision, it is not required to bargain over the matter. However, once it decides to fill the positions, the impact of its decision--the persons who will be selected for promotion--is a mandatory subject. To the extent that analogies are helpful in resolving these matters, I find that Local 1277 is actually supportive of the Union's position; an oral board is a tool for deciding "impact." Therefore, it is a mandatory subject of bargaining.

The case of City of Detroit v. Michigan Council 25, American Federation of State, County and Municipal Employees, 118 Mich App 211 (1982), lv. app. den. 417 Mich 990 (1983) is more on point. That case involved the composition of a Board of Trustees of the Policemen and Firemen Retirement System. The city passed an ordinance changing the composition of the board; this change would permit it to deadlock the board at any time. The Court sustained a finding by MERC that the city had committed an unfair labor practice by unilaterally making these changes without bargaining. Stated somewhat differently, it (and MERC) held that the composition of the board was a mandatory subject of bargaining.

The test enunciated in Michigan Council 25 for determining if an ancillary subject--such as the composition of a board, or the identity of an insurance carrier--is a mandatory subject is whether "it has a material or significant effect or impact upon the conditions of employment." That a promotion to a higher ranking, higher paying, and more prestigious position within ones

profession has a "profound effect upon the conditions of employment" is so obvious that more need not be said on the subject. And nothing more will be!

For the reasons above, I conclude that the composition of an oral board for evaluating candidates for promotions from within a bargaining unit, has a direct impact on wages, hours and terms and conditions of employment and is a mandatory subject of bargaining. Therefore, the issue concerning how the board is to be selected is properly before this Panel for determination.

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Composition of the Board

The parties stipulated that the four substantive issues in dispute are non-economic. That, of course, means that the panel is not bound to accept one or the other of the last offers, but instead may alter the proposals--using the criteria of Section 9 of the Act. Here, neither of the proposals can be accepted. The City's unfettered choice of members of the board is fraught with problems. The Union's proposal to have each party select one member with those two choosing the third is certainly more democratic, but--as the City notes--is incomplete as it leaves unresolved the possibility of a deadlock by the two members over the choice of a third.

The Chairman believes the better procedure--and one used by most of the comparable communities[3] that have such boards--is to

[3] The parties agreed that the following communities were comparable to Swartz Creek; Alma, Brighton, Clio, Corunna, Davison, Durand, Essexville, Fenton, Flushing, Lapeer, and Mt.

permit the City to choose all of the board members, but to restrict its choices to persons, outside of City government, who are in police work or related fields, and who hold, at least, the functionally equivalent rank to the one being considered for promotion. Thus, if the board was examining candidates for sergeant, it would be composed of persons who hold the rank of sergeant, or a higher rank. The board is to be neutral and may not be composed of members who have any relationship with the candidates or the City.

Issue Two: **What Should the Service Requirements be for Promotion? From What "Universe" Shall Candidates be Drawn?**

Years of Service

The City wants a requirement of one year of service within the department and the right to go outside of the department if less than two candidates are eligible. If it goes outside, the candidate must similarly have one year of police service. The Union wants the requirement to be three years of service and hiring from within the department.

Of the eleven comparable communities, there is no clear consensus on the number of years experience needed for promotion. A chart showing the number of cities and the years of service for promotion follows:

Morris.

2	-	0
1	-	1 year
1	-	18 months
3	-	2 years
2	-	3 years
1	-	4 years
1	-	5 years

The average is 2.136 years and the median is 2 years. The Panel believes that the comparable communities factor of Section 9 is the most important one available for measuring the issues in this case. It should be noted that most of the factors are not applicable to this rather unique dispute. The comparable communities test reveals how other units of government similar to Swartz Creek deal with the matters under consideration here. The Panel will use the average and median times of the comparable communities and set two years of seniority as the length of service a police officer must have within the Department to be considered for promotion.

The Universe for Promotion

The City has no objection to hiring from within the department provided that at least two candidates are eligible. The Union apparently misunderstands this proposal stating that the City wants the right to go outside the department if there are no more than two eligible. (Brief, p. 4). As I read the City's proposal, it wants the right to go outside the department if there are less than two eligible candidates; that means one or none. Obviously if no member of the department is eligible the City may hire from the outside, provided that the candidate has

at least two years of experience and is otherwise qualified.

In order to get the best person for the position, I agree with the City that it is entitled to consider outsiders if only one candidate from within the department is eligible for promotion. That does not mean, of course, that the "outside" person will be hired. It simply means that others will be permitted to qualify. This harmonizes with the way in which the comparable communities handle the matter.[4]

If less than two persons from within the department qualify for promotion, the City may seek additional candidates from outside the department. Otherwise, promotions are to be limited to those who have worked for the City as police officers for at least two consecutive years prior to the date of the written examination.

Issue Three: What Method Shall be Used to Make Promotions?

The Union proposes that the employee with the highest composite score be awarded the position. The City opposes this method which it refers to as "the rule of one." It claims that the rule is archaic, that it prevents affirmative action, and that it unreasonably restricts management from selecting the most qualified candidate. To support its position, the City suggests "a scenario wherein the 'top' scorer has in the past exercised,

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[4] Most of the comparable communities give preference to those in its service. Three of the departments have two tiers: the first favoring those within the department and the second going outside only if eligible employees fail to qualify.

if not bad, at least questionable judgment in regard to a particular incident." (Brief, p.7). Claiming that no clear majority is discernable from the comparable communities, the City proposes that it be permitted to choose from among all eligible candidates.[5]

There are problems inherent in both of the proposals. The Union proposal, while simple in operation may be too simple in its application. It places all weight on the sum of the written and oral examinations.[6] Thus, it forecloses other considerations i.e., the employees' performance on the job. On the other hand, adoption of the City's proposal means that subjective (and even political) considerations might find there way, albeit unintentionally, into the evaluation process. To the extent possible, the goal of both parties should be to insure that only valid, reasonable, and objective criteria are used in the selection process.

While the Chairman would prefer a system that takes past work performance into consideration, the City does not have a

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[5] Among the comparable communities, 5 appoint the person with the highest score, 3 give the chief the option to select, and 3 are silent on the subject. In the latter category, Corunna uses an assessment center with the criteria mutually agreed upon by the city and the union; the Flushing agreement suggests that the person with the highest score is chosen, but seniority, attendance, and prior evaluations are also taken into consideration. Some of the communities that use the highest score have other restrictions. For example, Clio permits the chief to select in case of a tie, and Durand gives the most senior employee first consideration.

[6] The parties have also agreed to factor into this equation points for seniority; one-half point for each year of service to a maximum of five points.

formal, periodic, written evaluation process. Instead, it provides only informal oral job assessments. This informality generally precludes either verification or challenge. As such it makes little sense to permit the use of such evaluations as a factor in choosing from among eligible candidates. A procedure in which the reasons for selecting one candidate over another that cannot be documented invites problems--not to mention employee dissatisfaction.

Given these choices, the Chairman is constrained to hold that the top qualifying candidate be appointed to the open position. The Chief will select the person in the event the top candidates have the same composite score.

Issue Four: How Long Shall the Eligibility List be Effective?

The parties disposed of this issue during the pre-hearing conference. They stipulated at the hearing that the list shall remain in effect for two years from the date that officers are certified as being eligible for promotion. (Tr. pp. 5-6).

Issue Five: Shall Promotions be Conditioned on Residency?

The City wants a hybrid residency rule; a current employee selected for the first promotion need not become a resident, but thereafter, current employees who are promoted must become residents within one year. The Union proposes that current employees be exempted from this requirement. However, it agrees with the City's proposal that employees hired after July 1, 1987,

be required, as a condition of promotion, to become residents within one year.

The City does not have a residency requirement for its police officers. To get one--limited as it may be--it points to certain language in Detroit Police Officers Association v. Detroit, 391 Mich 44 (1974) that allegedly supports its position.

> The job of a policeman does have 'natural distinguishing characteristics; from all other city employees. There is a special relationship between the community policed and a policeman. A policeman;s very presence, whether actually performing a specified duty during assigned hours, or engaged in any other activity during off-duty hours, provides a trained person immediately available for enforcement purposes.
>
> Policemen are required by department order to be armed at all times, and why is this? Simply because by such requirement they are, no matter where they are or what they are doing, immediately prepared to perform their duties. They are charged with law enforcement in the City of Detroit, and obviously must be physically present to perform their duties. The police force is a semi-military organization, which distinguishes this type of employment from every other in the classified service.

This quote is actually from an earlier case between the same parties[7] and is obiter dicta; Justice Swainson's "opinion" as to why the common council may have enacted a residency ordinance. The case stands only for the proposition that residency is a mandatory subject of bargaining--not whether it should be adopted, and certainly not whether it applies to employees who are promoted.

To obtain a residency clause, the City must show by probative evidence that one should be adopted in this case. It

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[7] DPOA v. Detroit, 385 Mich 519, 522-23 (1971).

has not done so, probably because the pivotal criterion of Section 9--comparable communities--does not support its position. Not one of the eleven comparable communities has a provision requiring residency for employment as a rank and file officers[8] yet alone as a condition of promotion! Under the circumstances, the City's proposal cannot be accepted.

Donald F. Sugerman, Chairman

AWARD

1. The City shall choose all of the members of the Oral Board. Its appointees shall be persons not employed by or associated with the City, who are police officers or who work in related fields, who hold, at least, the functionally equivalent rank to the one for which employees are being tested, and who are not all of the same rank or position.

Donald F. Sugerman, Chairman

/s/ Janice M. Sigler Dissent
Janice M. Sigler, City Delegate

/s/ E. Ray Harwood
Ray Harwood, Union Delegate

[8] Lapeer has a residency provision, but it applies only to employees hired after July 1, 1985.

2. To be eligible for promotion, a police officer must have two continuous years of seniority within the Department. If one employee or no employees are eligible, the City may consider candidates from outside the Department, provided they have been certified police officers continuously for two years prior to sitting for the written examination.

Donald F. Sugerman, Chairman

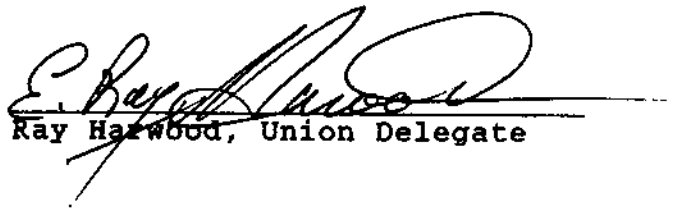
Janice M. Sigler, City Delegate

Ray Hapwood, Union Delegate DISSENT — ON ONE (1) Empl. Eligibility

3. The City shall select for promotion, the individual who has the highest composite score on the written and oral examinations in accordance with the point system agreed upon by the parties. The Chief will appoint the person in those instances where the top candidates have identical scores.

Donald F. Sugerman, Chairman

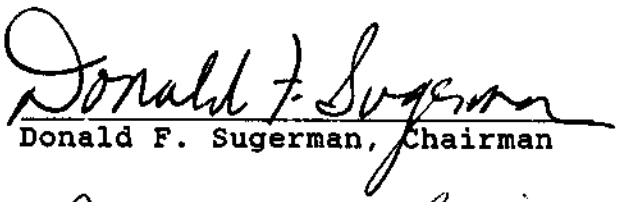
Janice M. Sigler, City Delegate Dissent



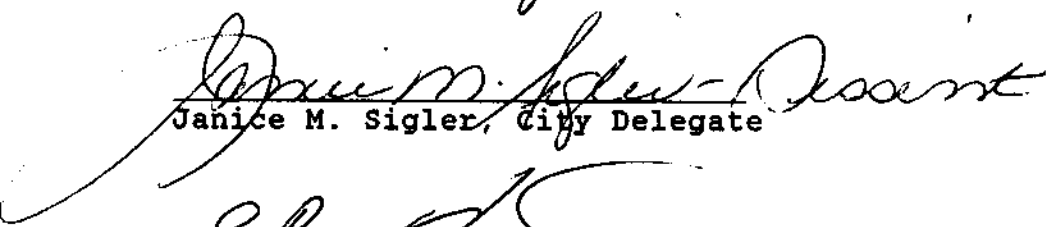
Ray Harwood, Union Delegate

4. The eligibility list shall remain in effect for two years from the date of certification. (Stipulation)

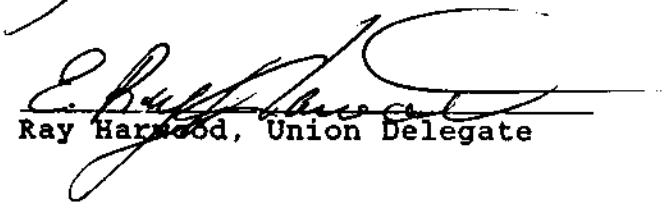
5. Employees hired after July 1, 1987, shall, as a condition of promotion, become residents of the City within one year after being promoted. Persons employed as police officers before the aforementioned date are exempt from this requirement.



Donald F. Sugerman, Chairman



Janice M. Sigler, City Delegate



Ray Harwood, Union Delegate

Signed at Flint, Michigan on January 25, 1988