

808

DG 111
file

STATE OF MICHIGAN
DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration Between:

CITY OF TROY,

Employer

AND

Case No. D86 A-182

MICHIGAN COUNCIL,
FRATERNAL ORDER OF POLICE
(TROY POLICE OFFICERS ASSOCIATION)

Union

DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

ARBITRATION PANEL:

Donald F. Sugerman, Impartial Arbitrator and Chairman
Ronald M. Dowell, City Delegate
Michael P. Somero, Union Delegate

APPEARANCES:

City: Craig W. Lange, Esq.
Union: Jerome Sabbota, Esq.

CHRONOLOGY

The petition in this case was filed by the Union on August 29, 1986. Thomas V. LoCicero was appointed Impartial Arbitrator and Chairman and conducted hearings on April 23 and 29, 1987. Thereafter, he issued an Act 312 Arbitration Opinion on all matters in dispute with the exception of Physical Agility Testing, which the panel intended to handle separately. Last offers of settlement and supporting briefs on physical agility testing were submitted on December 28, 1987. Mr. LoCicero suffered a heart attack in December 1987 and was unable to further participate in this case. Pursuant to an agreement between the parties, the

undersigned was appointed by the Commission on May 2, 1988, to replace Mr. LoCicero. The newly appointed chairman met with the parties on May 19 and June 8, 1988, at which time the matter was remanded for further negotiations for a period not to exceed three weeks. The undersigned acted as a mediator at a meeting held on June 21, 1988. Additional meetings were held on July 12 and July 28, 1988, at which time the award was announced with the understanding that it would later be reduced to writing and signed by the parties.

O P I N I O N

Background

In their prior collective bargaining agreement (expiring June 30, 1986), the parties added a provision requiring officers to have physical examinations. The applicable provision reads as follows:

Members of the Association 27 years of age and older shall submit to a physical examination between September 1st and December 1st biennially. Such examination shall be conducted by Troy Beaumont Hospital and the Employer shall determine the extent of said examination. The examination shall be conducted during the officer's off duty hours. Results of the examination shall be submitted to the Employer who shall furnish the employee a copy upon written request. The employee shall be required to pay one-half of the cost of said examination which is not covered by medical insurance as provided in Article 36, Section A (1) with the Employer paying the remaining one-half. (Article 37).

The City wants to replace these physical examinations with a battery of tests designed to measure the physical fitness of its officers.

The test that the City proposes is one developed by the Michigan Law Enforcement Officers Training Council (hereinafter, Council). The Council, which was established by Public Act 203 of

1965, as amended, is composed of eleven members,¹ and is empowered to set employment standards for persons entering law enforcement in Michigan. The Council,

has developed two examinations to test critical skills required of police officers.

One of the examinations is a Reading and Writing Test designed to measure writing skills and reading comprehension required both in basic police training and on the job. The other examination is a Physical Skills Test designed to measure the strength and agility which is required of police officers.

Both of these tests are based on job analyses which were conducted in the State of Michigan and involved a representative sample of all types of law enforcement agencies. These tests are job-related and validated for persons entering the law enforcement profession in Michigan. (Pretest Information Booklet p.1).

With respect to the Physical Skills Test (hereinafter PST) it consists of six events. The officer's right and left hand grip is tested using a dynamometer, then he or she is timed in doing pushups, running an obstacle course, dragging a one hundred and sixty five pound life form dummy thirty feet, lifting and carrying a ninety five pound bag thirty feet, and doing a one half mile shuttle run. (Exhibit 103). The PST was developed under the direction of Dr. Merle Foss an exercise physiologist. A study was done by Wollack and Sand Associates, a Psychological corporation, validating the testing procedures.² Since July 4, 1985, all persons entering law enforcement in Michigan have been required to take and pass the PST.³

Last Offer of Settlement

The City's last offer is set forth immediately below.

Section A:

Members of this bargaining unit shall be required, as a condition of employment, to submit to a Health Risk Appraisal (HRA), consistent with currently accepted medical standards, which will be administered by the City each year. Employees who, through the results of the HRA, are deemed fit to submit to a physical agility test shall be required to take the physical agility test. Those who are not deemed fit to submit to the physical agility test because of health problems, shall be required to follow the directions of the City's physician to correct the health problems.

Section B:

The physical agility test shall be identical to that which is administered to entry level police officers by the Michigan Law Enforcement Officers Training Council (MLEOTC) in compliance with MCLA 28.601, 28.602 and 28.609. Employees who submit to the physical agility test shall pass the male standard of the test as designated by the MLEOTC.

Section C:

Employees who pass the physical agility test, as outlined in Section B above, shall have their names posted in a conspicuous place as having passed the test. In addition, such employees shall be awarded an additional ten (10) hours of holiday leave for having passed the test.

Section D:

Employees who fail to pass the physical agility test, as outlined in Section B above, shall not be awarded any additional holiday time as provided in Section C and shall be rescheduled to submit to the physical agility test within six (6) months of the first test. Employees who fail the physical agility test on three (3) consecutive attempts shall be subject to disciplinary action.

Section E:

The first scheduled physical agility test will be administered on or about May 1, 1988 and will be scheduled for the purpose of providing officers with a practice run through the test. When the first test is administered for practice, Sections C and D above will not apply. The first scheduled physical agility test in which Sections C and D above will apply will be scheduled on or about September 1, 1988 and will be administered every year thereafter. (Exhibit C 101).

The Union's offer is that "the status quo be maintained and that it's members not be subjected to physical agility testing." (Union's Brief, p.6). It opposes PST for a variety of reasons, but principally because it feels that it is unfair for experienced officers who have never been required to meet the standards of PST to now do so (especially under threat of sanctions), and furthermore, it fears that if some of its members are not able to pass the test they will be subjected to discipline or discharge. This, it says, is unjust---particularly in light of the fact that no showing has been made that any officer is unable to perform his or her job.

The Standards

Section 9 of Act 312 establishes the standards for determining the award and requires the panel to "base its findings, opinions and order upon the following factors, as applicable:

- a) The lawful authority of the employer.
- b) Stipulation of the parties.
- c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, 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 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 pending 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.

The City relies on the first phrase of subsection (c) dealing with the interests and welfare of the public while the Union rests its case on subsection (d) that is commonly referred to as the comparable communities.

In reaching its decision, the panel has relied primarily on subsection (h) and to a lesser degree on (c). It has also considered the impact of subsection (d). The panel has been guided by the following comments of the Michigan Supreme Court in City of Detroit The Police Officers Association, 408 Mich. 410, 484 (1980):

The legislature has neither expressly nor implicitly evinced any intention in Act 312 that each factor of Sec. 9 be accorded equal weight. Instead, the Legislature has made their treatment, where applicable, mandatory in the panel through the use of the word "shall" in Secs. 8 and 9. In effect then, the Sec. 9 factors provide a compulsory check list to ensure that the arbitrators render an award only after taking into consideration those factors deemed relevant by the Legislature and codified in Sec. 9. Since the Sec. 9 factors are not intrinsically weighted, they cannot of themselves provide the arbitrators with an answer. It is the

panel which must make the difficult decision of determining which particular factors are more important in resolving a contested issue under the singular facts of a case, although of course, all applicable factors must be considered.

Discussion

The first question is whether there should be PST. Employers and employees (especially law enforcement employees) are becoming increasingly aware of the importance of fitness and good health. A healthy and fit staff is in the best interest of all concerned; the citizens, the administration, the employees and their dependents. Citizens benefit from a police force that is better able to respond to calls for assistance and from reduced costs in operating the department. The City benefits from increased productivity, reduced use of sick time, and the corresponding reductions in overtime costs for replacements and for health and sickness benefits. Employees and their dependents benefit from reduced levels of stress that better fitness brings, from improved performance, and from other intangibles that accompany improved physical wellness.

Although the comparable communities factor of Section 9 (d) is generally accorded significant weight, the chairman believes that its importance in this case is overshadowed by factors (c) and (h).⁴ First, it is noted that of the comparables, only Troy requires employees to have regular and periodic physical examinations.⁵ Second, PST appears to be nothing more than a logical extension of biennial physical examinations. Finally, the

Council's development and administration of PST for all persons seeking employment as police officers suggests a very real correlation between police work and fitness. It makes virtually no sense to mandate PST for recruits on the theory that it measures the type of activity they face while on duty and on the other hand to disregard the same conditioning for incumbent officers who must face similar events in their every day work. I conclude that PST for Troy police officers is similar to a program of continuing education that is required of many other professionals.

The Chairman believes that PST -- if used properly -- can be a stepping stone to improved health and fitness and is therefore something to be encouraged. Accordingly, it is concluded that PST should be adopted. However, it must be pointed out PST is not an end in itself, but rather a tool to be used to achieve the main goal of raising the fitness levels of police officers on the staff.

The parties stipulated that the Chairman was not bound to select a last offer and that he was authorized to change those submitted as well as to supplement them.⁶

One of the preliminary issues is whether PST should be mandatory. Here again, the parties are at opposite ends of the spectrum. The City, relying on its expert, says that a voluntary system will not work. It envisions a situation in which all

result from peer pressure. The Association says that testing should be strictly voluntary, asserts that the City's "worst case scenario" is totally unfounded, and believes that most of the officers will volunteer--especially if the rewards are sufficiently attractive.

A W A R D

The Chairman concludes that if there is to be a program, it must have certain mandatory components. Preliminarily, employees must submit to a health analysis appraisal to determine whether or not they may even take the PST. Obviously the test cannot be given to a person who would be placed at risk by taking it. This is fundamental! For example, the Council requires each participant to submit a Physician's Health Screening Form on which the exercises are described and the doctor is asked to opine whether or not the applicant should be allowed to perform them.

As the proponent of this unique program, the City is to bear its full cost. There must be a comprehensive health screening test (including cardiovascular fitness) and it is to be paid for by the City (except for those parts paid by the employees' health insurance). This testing shall be done at an area hospital that specializes in such screening. Employees shall be released from work or paid for the time necessary for the screening appointment.

Employees who are physically able to take the PST, will be

evaluated by an exercise physiologist (or a recognized fitness specialist). The physiologist will be hired by the City. He or she will recommend a plan--tailored for each employee--that is designed to improve the health and fitness of the officers and assist them in passing the PST.⁷ The City will otherwise help its officers to complete the aforesaid plan.⁸ Employees shall be released from work or paid for the time necessary for them to meet with the physiologist.

The first formal PST will be given in the summer of 1989, but employees may be excused from participating in the plan by passing the PST at an earlier date.

With the approval of the exercise physiologist, those officers who believe they can pass the PST, will be permitted to take the test, on a scheduled basis, beginning in the fall of 1988.⁹ The test will correspond to the one administered by the Council (except as it may be modified by mutual agreement of the parties or by the Joint Committee, of which more will be said below). Scoring will conform to the conversion table established by the Council (valid for the period during which the test is given) with separate measurements for males and females.¹⁰ Employees will be released from work or paid for the time spent in taking the PST.

Those officers who pass the PST will be excused from further participation in the fitness program and instead, will be provided

with a recommended maintenance program designed to ensure their continued fitness and good health.

An employee who passes the PST shall not be required to requalify for two years and will be awarded twenty hours of holiday leave in the calendar year in which he or she passes the test and twenty hours for the second year. Employees hired in 1987 and 1988 who passed the Council test shall be exempt from participating in the evaluation plan and from taking the PST for two years from the date of such passage and will also receive holiday leave; those who passed the exam in 1987 will receive leave for 1988 and those who passed in 1988 will receive it for 1988 and 1989. However, these exempt employees shall also be provided with a recommended maintenance program as described above.

Employees who do not pass the PST during the formal testing in 1989 shall be reevaluated by the physiologist to determine if the plan originally established for them should be modified or an entirely new plan adopted.¹¹ Each employee shall participate in the program.

No police officer shall be disciplined or discharged because of the failure to pass the PST.

An employee who the City's physician determines is unable to take the PST shall have the reasons therefore evaluated. If the

condition preventing such testing is temporary, the employee shall commence his or her participation as soon as the impediment is removed.

An employee who is unable to take the PST because of a permanent condition will not be affected by the provisions contained in this document. However, his or her tenure shall be subject to other applicable provisions of the collective bargaining agreement.¹²

Recognizing that this is a pioneering program, a joint committee will be established to continually review and monitor it and to resolve all disputes arising in conjunction therewith. The committee will have the authority: To select the hospital and/or physicians to perform the screening test, the exercise physiologist and any other professionals who are to be used, the firm, institution, or individuals who will give and score the PST; To modify or change the program as the need occurs, and; To decide all other matters and disputes that may arise from time to time.

The joint committee will be composed of five persons. The City and the Association will each appoint two members who in turn will select a neutral member.¹³ The Association members will be released from work or paid for the time spent in attending committee meetings.¹⁴ The neutral will decide all disputed issues in accordance with the expedited rules of the American Arbitration Association.

Donald F. Sugerman

Donald F. Sugerman, Impartial Chairman

Ronald M. Dowell

Ronald M. Dowell, City Delegate

for Mike Somero

Michael P. Somero, Union Delegate

Dissenting

TROY, MICHIGAN

August 2 , 1988

END NOTES

¹ The eleven members are appointed as follows: one each by the Fraternal Order of Police, Detroit Police Officers Association, Metropolitan Club of the State of Michigan, the Governor and the Attorney General; and three each by the Michigan Association of Chiefs of Police and the Michigan Sheriff's Association.

² In his validation report to the Council, Dr. Stephen Wollack stated: "The three previously-described events: the 95 lb. Carry-Lift, 165 lb. Dummy Drag, and the Obstacle Course, correspond quite well to the job analysis findings with respect to the previously-described quantitative parameters. The remaining three examination events are somewhat more abstract than the work samples and depend upon further evidence of construct validity. Table 21 presents corrolational data for the six-event battery. Of particular note is the correlation evidence for the Static Strength, Cardiovascular Endurance, and Calisthenic measures. (Exhibit C102, pp50-51).

³ Hiring authorities are permitted to use alternate tests if they can demonstrate that they are professionally validated and job related (Pretest Informational Booklet, p.2), but it does not appear that any hiring authority has availed itself of this option.

⁴ The remaining subparagraphs of Sec. 9 are not applicable to a resolution of this dispute.

⁵ Concerned about the wellness of its employees, the City makes a variety of programs available to them. To mention just a few, Weight No More r a program designed to assist employees in controlling their weight and Smokeless r to assist employees in ending their use of tobacco products.

⁶ The Union contended in its brief that the issue was non-economic. (Page 5).

⁷ Implicit in this program is that employees will follow the recommended plan (or its equivalent) to improve their fitness.

⁸ By way of example only, this may involve such things as altering the employee's schedule (on the recommendation of the program's advisor) providing counselling, engaging the services of various specialists, adding equipment and supplies to the weight room, making gymnasium or fitness facilities available (through the Department of Recreation) or by negotiating reduced or group rates at local fitness clubs (with the cost to be paid by employees).

9 It is anticipated that the test will be given twice each year.

10 The City proposes a single test for both men and women. While this nonsexist approach is appealing, adopting as it has the entire procedure developed by Council requires that its scoring system be used as well.

11 In addition, the Joint Committee may be called upon to determine the efficacy of the scoring system insofar as it applies to such employees.

12 An employee in a position that does not involve patrol work (or its equivalency) who has a permanent condition preventing him or her from taking the PST, shall be excused from participating in this program.

13 It is not contemplated that the neutral will attend all meetings of the Joint Committee. Certainly there is no need for him or her to attend routine meetings. The neutral will be present at the request of the parties or when it is necessary to resolve a matter in dispute.

14 Fees and expenses of the neutral will be shared between the City and the Union.