

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF NEW YORK
Case No. IA-10; M76-485

U.S. PUBLIC EMPLOYMENT
RELATIONS BOARD
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In the Matter of the Arbitration :
-between- :
Fairview Fire District :
-and- :
Fairview PFA, Local 1586 :
-----x

CONCILIA
AWARD

Appearances:

For the Union:

Thomas Flynn, Vice-President, I.A.F.F.
Gary A. Merritt, Local President

For the Employer:

Garrison R. Corwin, Jr., Esq., Counsel

Before the Public Arbitration Panel:

Prof. Walter L. Eisenberg, Public Panel Member and Chairman
Jon Hammer, Esq., Employer Panel Member
John Przekop, Employee Organization Panel Member

* * * * *

THE ISSUES

The Fairview Professional Firefighters Association, Inc.,
Local 1586, I.A.F.F. (hereinafter "PFA" or "Union") and the
Fairview Fire District (hereinafter "Employer" or "District")
submitted to the Undersigned as the designated Public Arbitration
Panel for final and binding determination those issues which
remained unresolved in direct negotiations and

mediation over the terms of a contract to succeed the parties' Agreement which expired on December 31, 1976.

Hearings on the issues were held before the Panel on October 29, 1977 and November 14, 1977 at the headquarters of the District in Greenburgh, New York. The parties were ably represented, and were afforded full opportunity to introduce evidence, to examine and cross-examine seven witnesses who testified before the Panel, and to present argument on the issues. There were 28 Exhibits entered into the record (1 Joint Exhibit, 12 Union Exhibits, 13 Employer Exhibits, and 2 Panel Exhibits). Substantial post-hearing briefs and reply briefs were filed by the parties in support of their respective positions on the issues involved. By explicit mutual agreement at the outset of the hearings, the parties declined to have a verbatim transcript of the proceedings made.

The Panel met and conferred several times on the ample record before it and reached its decisions on the issues after giving consideration to, and determining the relevance of, comparative data pertaining to wage levels, wage increases, hours and conditions of employment of firefighters and other public employees; after weighing the interests and welfare of the public and the Employer's ability to pay; after taking into account the special characteristics of fire district employment and performance in the community involved; after considering the results of the parties' ef-

forts to reach agreement on the issues during their direct negotiations; and after considering other relevant factors typically related to the terms of employment of employees in the public sector.

According to the Union, 13 of its "demands" upon the District remained "open" issues to be decided by the Panel. According to the District, 12 of its "demands" upon the Union remained "open" issues to be decided by the Panel. It was evident to the Panel from the record that the parties had reached tentative understandings on at least 11 issues in the course of their direct negotiations. However, their failure to achieve a total contract settlement in direct negotiations led them to decline to acknowledge formally any of the concessions they made to one another as a basis for any of the tentative understandings.

The open issues presented to the Panel by the Union involved: salaries, dental insurance, vacation benefits and procedure, overtime pay, personal leave, additional medical insurance, salary schedule, holidays, grievance procedure, welfare fund, education, time for union activities, and uniform allowance.

The open issues presented to the Panel by the District involved: contract duration, holdover time, education, overtime, emergency leave, bereavement leave, sick leave, union activity, uniforms, repair and maintenance duties, computation of holiday pay, and computation of annual leave.

The issue that created the basis for what was clearly the sharpest disagreement between the parties involved salaries. It is apparent that the parties had thought they had worked out a mutually acceptable settlement of the salary issue in the final stage of their direct negotiations. However, upon separate review of the presumed salary settlement it turned out that the parties did not have identical impressions of the detailed form and substance of their supposed salary settlement. Indeed, if the parties could have bridged the gap in their respective understanding of the salary settlement, it is likely that they would have reached agreement on a new contract without recourse to arbitration.

The issues on which the parties reached tentative understandings in their direct negotiations involved modifications of the Agreement under 11 contract (or other) headings: recognition, union security, promotions, omissions and disputes of final draft, time owed employees ("Kelly days"), public employees, liaison meetings, exchange of duty, correspondence, residency, and annual leave.

DISCUSSION

General

The parties' disagreement on this issue centers on the contents of a handwritten two-page "Memorandum of Understanding" (Union Exhibit No. 9A) signed on an unspecified date in May 1977 by the Union's representative and by the District's representative, upon conclusion of the parties'

discussions late in the night of the final negotiating session, a session which had originally been scheduled as a fact-finding hearing. That Memorandum provided, in applicable part, the following:

The Duration of this agreement shall be two years from 1/1/77 to 12/31/78 inclusive. Salaries of the top pay Firefighters are listed below:

| | |
|-------------------------------|----------------|
| Effective 1/1/77-\$15,800.00) | 5% in 1977 |
| 10/1/77- 16,800.00) | |
| 1/1/78- 17,400.00) | 5.5[%] in 1978 |
| 7/1/78- 18,400.00) | |

The above salary schedule will be implemented for all men at top pay. The same four steps below top pay of \$750.00 per step will continue. The same differential in the previous contracts for Lieutenant and Captain will continue.

The salary maximum for a Firefighter (after 4 years in rank) under the expired contract was \$15,182.50 (Article XIV, Sections 3A and 3B, Joint Exhibit No. 1). The record shows that the parties reached the salary "settlement" reflected in their Memorandum following protracted discussions of various pay proposals and counterproposals, and following participation in the fact-finding (and mediation) process then required by State law covering Firefighter interest arbitration. It is noted in passing that a change, effective July 1, 1977, in the applicable law eliminated the fact-finding step that previously preceded arbitration, so that no fact-finding report was issued in this case.

The disputed Memorandum was ratified by the Union's members, but not by the District's Board. The basis for the District's refusal to endorse the settlement appears to have rested in large part on a belatedly discovered disparity between

the dollar amounts of negotiated pay increase and the percentages of pay increase entered near the dollar amounts in the Memorandum. The District's negotiators had limited their best offer to two pay increases in a two-year contract: one of 5% for 1977 and the other of 5.5% for 1978. While the Memorandum carried those two percentages as part of the salary settlement, it also showed dollar amounts of salary level which turned out to be, on subsequent checking by the District, a 5.6% increase for 1977 and a 6.5% increase for 1978. The Union acknowledges that the disparity represents an error in reporting the final position reached on salaries by the negotiators, and points out that the negotiators were working very quickly in their concluding negotiating session to try to overcome the Union's dissatisfaction with the 5% and 5.5% pay proposals and the District's dissatisfaction with the "split" pay increases, i.e., two increases within each year, being sought by the Union. The apparent emphasis and objective of the District was to limit the "cash flow" effect of any split pay increases to 5% and 5.5% respectively for the two years involved. The apparent emphasis and objective of the Union was to increase the dollar amounts of salary level through split pay increases, and to stay within the District's specified percentage increase limits while so doing. Unfortunately, in the rush of last-minute discussions of their seeming meeting of the minds on salaries, neither of the parties caught the incongruity in the dollar and

percentage figures which were entered into the Memorandum.

The District took the initial position at the arbitration hearing that absent an agreement on the key issue of salaries it had no agreement at all on any other issue, not even those for which there were initialled or signed "understandings". The Union took the initial position in the arbitration hearing that the Memorandum (Union Exhibit No. 9A) and the initialled "understandings" in Union Exhibit No. 9B could provide a suitable partial framework for the hearing and for the Panel's deliberation on the issues. The Union, however, did present to the Panel pay and other proposals (Panel Exhibit No. 1) which were in excess of those contained in the Memorandum, on the grounds that the negotiated settlement was intended to avoid the need for arbitration of new contract terms and that the failure to achieve such a settlement justified its requests for enlarged pay proposals and for enlarged improvements in other terms of employment. The District, which had not served any "demands" of its own upon the Union in the parties' direct negotiations, presented for arbitration by the Panel 12 "demands" (Panel Exhibit No. 2), under the headings specified hereinabove.

The Panel has adopted the view that the parties do not have--in the special circumstances involved--a prior consummated agreement on any of the issues presented to the Panel for decision. However, the Panel believes it would be illogical--as well as insensitive to what has apparently been

a harmonious and stable past collective negotiating relationship between the parties--to ignore the details of their frustrated attempts to reach agreement on a new contract for the period beginning January 1, 1977. Accordingly, the Panel has elected to consider, in the making of its determinations on the issues, all of the factors in the record of this arbitration proceeding, including the positions reached by the parties on the various issues in their aborted attempt to achieve a contract settlement through direct negotiation.

Salaries

The Panel has examined the salary issue in the light of Firefighter salary levels in nearby and other comparable fire districts; in the light of the budget allocations and budgetary outlook for the Fairview Fire District; in the light of family budget and, past and projected, Consumer Price Index data; in the light of the past patterns of Greenburgh police and Fairview firefighter pay levels; and in the light of the pay levels and percentage pay increases set forth in the parties' joint Memorandum. The Panel is also mindful of the fact that the contract involved expired on December 31, 1976 and that any salary increase(s) awarded and paid them, even retroactively, will not have been in their possession for the periods of time to which they were applicable, reducing their opportunities for non-postponable spending and for the earning of interest on saved portions of any such

increase(s).

The Union sought in this proceeding increases which would yield by the end of the new contract a Firefighter base salary maximum of \$18,400 per annum, while the District urged the Panel to hold such increases to an eventual maximum of \$16,817 per annum. One of the principal thrusts of the Union position was that there were Firefighters in Hartsdale, Eastchester, Harrison, and Scarsdale whose salaries were well above those in Fairview and that its proposals were designed to raise the Fairview pay levels gradually during the contract to about the levels which prevailed elsewhere. One of the principal thrusts of the District position was that, with an eye to the severely restricted tax outlook characteristic of the Fairview area, it had set aside in its 1977 budget \$620,738 for Firefighter salaries, inclusive of pay increases, and that it set aside \$659,213 for such salaries and increases in its 1978 budget. The Panel found that it was possible and reasonable to apply judiciously both the District's "cash flow" and the PFA's salary needs analysis to the conflicting pay proposals, in a manner which would meet most--not all--of the principal salary objectives of both parties for the new contract. Moreover, such an approach would also serve to help resolve other differences between the parties touched off by their dispute over the inadvertent disparity in the pay provisions of the aborted Memorandum. The Panel's analysis

showed that pay increases in four steps in a two-year contract could be granted which would put Fairview Firefighter salaries at reasonably comparable levels with those in other fire districts, would account in some measure for consumer price inflation and family budget strains since December 31, 1976 and as projected for at least the next year, and would be payable within the established confines of the District's 1977 and 1978 adopted Budgets.

Accordingly, the Panel will direct the payment of retro-active pay increases to Firefighters and other ranks covered by the parties' Agreement based upon a schedule of basic annual pay levels for Firefighters after 4 years in rank, as follows: \$16,000 as of January 1, 1977; \$16,720 as of October 1, 1977; \$17,400 as of January 1, 1978; and \$17,600 as of July 1, 1978. The parties will also be directed to establish increased pay levels for other ranks and for personnel at steps below maximum in the pay schedules, in a manner consistent with their past practice for doing so and as provided in their aborted Memorandum.

Contract Duration

The Union seeks a two-year contract, while the District had sought a three-year contract to replace the expired contract. Considering the length of time that has elapsed since the expiration of the parties' old Agreement, a proposal for a longer term contract would, under ordinary circumstances, deserve serious attention. However, the Panel is foreclosed

by statute from awarding a longer contract term than two years, a bar which the District implicitly recognized in its post-hearing Reply Memorandum when it indicated concurrence with the PFA's proposal for a two-year contract. Further, given the dramatic and continuing changes in the circumstances of the Employer and the employees here involved, a two-year term for the new contract is not only logical for "external" reasons, i.e., general and local economic developments, but for reasons "internal" to the parties' past negotiating relationship.

Accordingly, the Panel will direct the parties to enter into a new two-year contract, beginning January 1, 1977.

Grievance Procedure

The expired Agreement contains a grievance procedure (Article XXXIV) which stops short of any steps which would result in final and binding determination of an unresolved grievance; an impartial third party can be called in at Step III, but has no authority to make a binding award. Even though the Panel was impressed by testimony which showed the spirit of cooperation that prevails in the District between the employees and their superior officers, grievances have the potential for generating lasting ill-will if their ultimate disposition rests solely in the hands of management or on the outcome of a protracted and expen-

sive court proceeding. The PFA's proposal for binding arbitration of contract grievances is consistent with a widespread practice among fire districts and other public sector agencies for such arbitration. Indeed, the Hartsdale fire district--included by both parties in their lists of closely comparable firefighting units--is covered by a contract which provides for final and binding arbitration of contract grievances. The grounds stated by the District for its resistance to binding arbitration are not persuasive. The Panel believes the values of binding grievance arbitration to be such that a contract clause which makes such arbitration available to the parties can serve to assure the survival into the future of the spirit of harmony that has prevailed between the present complement of firefighters and the present Chief and other superior officers.

The Panel finds the Hartsdale contract provision on the arbitration of grievances to be soundly conceived and written, and will order its adoption for the Fairview contract.

Emergency Leave

The basis presented for the District's proposal to amend the emergency leave provisions (Article XXXIII) in the expired Agreement is not entirely clear, given the wording of Article XXXIII, Section 2 of that Agreement. The Panel finds the language of that provision adequate from an administrative point of view to cover the possible problems underlying the

District's proposal.

The Panel will not order a change in this provision of the expired Agreement.

Sick Leave

The District's proposal to amend the brief contract provision on procedure for granting sick leave, by adding language pertaining to the content of a medical statement pertaining to an illness, does not appear to the Panel to be a needed change in Article XXXVI. The Panel finds adequate authority for the Employer in the old contract provision to cope with the underlying problem reported by the District at the hearing as having prompted its proposal.

The Panel will not order a change in this provision of the Agreement.

Union Activities

The District's proposals to amend Article XXXVII of the old contract so as to restrict the activities of the Union in fire stations and eliminate shift delegates and their prescribed functions represent a needlessly drastic measure to deal with the manning problems said to underlie the proposals. The Panel finds adequate authority for the administration under Article XXXVII and other provisions of the old contract to avoid or handle any of the problems which could possibly arise out of the continued implementation of Article XXXVII.

Health and Safety Committee

The Union's proposal to establish a "general Health and Safety Committee" of a type dealt with in a PERB decision (September 15, 1977) in a New Rochelle Firefighters case is made to the Panel for the first time in the Union's post-hearing brief (pages 32 and 33, and Appendix K, page 2). Regardless of any merit or mutual advantage that may inhere in a proposal for such a Committee, the Panel finds that the proposal is not properly before it. However, the Panel will not foreclose any voluntary action(s) on the part of either party to undertake discussion of such a Committee. The Panel will make no ruling on the issue, but will merely recommend possible discussion of the matter wholly at the option of the parties.

Bereavement Leave

The status of the District's original proposal to modify Article XXXIV of the Agreement by redefining the eligibles and reducing the amount of such leave is not clear. Despite the District's indication that this proposal was withdrawn "in the course of the hearing", the record does not show that there was a clear-cut statement of such withdrawal. Accordingly, the Panel will rule upon the proposal as if it were an open issue, and will direct no change in this provision of the expired Agreement.

Annual Leave and Personal Leave

The Union made proposals to increase the amount of vacation leave, payment for vacation time prior to the vacation period, and related contract language changes in Article XXXII of the Agreement. The District made a proposal to compute vacation pay (annual leave) on the basis of hours, distinguishing thereby between those on night tours of 14 hours and those on day tours of 10 hours. The Union also proposes paid leave days for the personal and family needs of Firefighters.

Whatever merits such proposals by the Union and the District might have at other times and under other circumstances, the Panel finds in the record no justifiable basis at this time for adding to or subtracting from the contract costs already involved, the costs inherent in the proposals the parties have made to each other on paid vacation or personal leave time or method of payment.

The Panel will reject the demands the parties have made upon each other under the leave headings here involved, but will direct incorporation in the new Agreement, as specified below, of the "understanding" reached in negotiations by the parties on "two men on vacation at same time".

Prior "Understandings"

Even though the District has resisted endorsing any of the so-called prior "understandings", on issues other than salaries, which were a part of the aborted Memorandum (Union

Exhibit No. 9A) and a part of the initialled provisions contained in Union Exhibit No. 9B, it is evident to the Panel that the results of sincere and productive attempts by the parties to resolve in direct negotiations a significant number of matters discussed between them over a long period of time can not be ignored.

The Panel is convinced that those "understandings" deserve to be incorporated in the new Agreement, as a perfectly consistent accompaniment to the salary determinations made by the Panel.

Union Exhibit No. 9A makes reference, on its second page, to two items which should be incorporated in the new Agreement: choice of vacation days and time owed employees ("Kelly days").

Union Exhibit No. 9B makes reference to a series of items, in Roman-numbered sections, which should also be incorporated in the new Agreement: II-Public Employees, III-Recognition, V-Liaison Meetings, VII-Union Security, X-Exchange of Duty, XII-Promotions, XIV-Correspondence, XVII-Omissions and Disputes of Final Draft, XXXII-Residency, XXXIII-Time Owed Employees ("Kelly Days"), and L-Annual Leave (2 men on vacation at same time).

The Panel will direct the incorporation of the several understandings involved into the new Agreement, and will retain jurisdiction over the implementation of its order as to these "understandings" so as to permit any dispute over imple-

mentation to be brought to the Panel Chairman for binding clarification or determination.

Other Proposals

The Panel has decided that all of the other Union proposals pertaining to, e.g.: medical insurance, overtime, dental insurance, cost-of-living escalator, pay supplement for education, overtime, and uniform allowance, replacement and maintenance; as well as the District's other proposals pertaining to, e.g.: holdover time, education benefits, overtime assignments, uniform allowance, repair and maintenance work, should not be subjects for directed revision in the new Agreement. Any other proposals made by the parties to each other or to the Panel on subjects not specifically mentioned in this AWARD shall also be deemed rejected by the Panel. The Panel's AWARD will reflect its findings and conclusions on such issues.

New Agreement

To assist the parties in speedy and binding resolution of any dispute that may arise in the course of their efforts to implement that part of the AWARD which pertains to their joint completion of the details of the new salary schedule, the Panel will retain jurisdiction over the schedule until such time as the parties sign a new Agreement, and will stand ready to make a binding Panel decision on any such dispute as may be presented to it by either party. Except as otherwise

explicitly provided in or required by this AWARD, the parties are to continue without change or modification all of the provisions of the expired Agreement which are unaffected by any provision of the AWARD. Of course, the parties remain free to make any additional changes in contract format and content upon which they can mutually agree.

Implementation

The terms of the Panel's AWARD are to be put into effect by the parties in a manner that is consistent with any applicable law(s).

* * * * *

AWARD

The Undersigned, constituting the duly authorized Public Arbitration Panel to whom was voluntarily submitted the matters in controversy (PERB Case No. IA-10; M76-485) between the parties above-named, and having received evidence and argument bearing on the issues in controversy, makes the following AWARD by unanimous decision:

1. Salaries--(a) The maximum annual base pay for a Firefighter (i.e., after 4 years in rank) shall be increased effective as of the dates, and to the pay levels, shown in the following schedule:

| | |
|---------------------------|--------------------|
| Beginning January 1, 1977 | \$16,000 per annum |
| Beginning October 1, 1977 | \$16,720 per annum |
| Beginning January 1, 1978 | \$17,400 per annum |
| Beginning July 1, 1978 | \$17,600 per annum |

(b) The parties are directed to develop jointly increases in the maximum annual base pay rates for Lieutenant, Captain and any other title(s) covered by the Agreement effective as of the dates shown in (a), above, in accordance with their past practice for adjusting the maximum pay levels for those other positions to reflect the increases in the Firefighter pay maximum awarded herein. Further, the parties are directed to develop jointly such adjustments of the base pay rates at steps or grades below the maximum levels for each of the covered positions, in accordance with their past practice for making such adjustments as they

mutually agree are necessary to reflect an increase in maximum for each position. The Panel retains jurisdiction over the implementation of this paragraph (b) of the AWARD, and will be prepared to hear and decide any dispute which may arise between the parties over implementation of this paragraph (b). Either party shall have the right to call upon the Panel, by written notice to the Panel Chairman and to PERB, to take steps to resolve by final and binding decision any matter relating to salary implementation about which the parties may be unable to agree.

(c) The parties shall amend all of the pay provisions of their expired Agreement to reflect the amounts and effective dates of the increases in salary level awarded herein.

(d) The pay adjustments herein awarded effective as of dates prior to the date of this AWARD, shall be made fully retroactive in a manner which incorporates those adjustments in all pay-related payments previously made to covered employees, as if the applicable awarded base pay rate increases were fully operative in the periods covered by the schedule of pay increases provided in paragraph (a), above.

2. Contract Duration--The term of the parties' new

Agreement shall be two years, covering the period January 1, 1977 through December 31, 1978.

3. Grievance Procedure--The parties shall amend Article XXXIV of their Agreement to incorporate the same grievance and arbitration procedure as that set forth in Articles IX and X of the 1977-1978 Agreement applicable to Firefighters in the Hartsdale Fire District (see APPENDIX "E", Post-Hearing Brief of the PFA).

4. Emergency Leave--The Panel rejects both the Union's and the District's respective proposals for the amendment of the emergency leave provisions of the contract, and directs continuation without change in the new Agreement of Article XXXIII, Section 2, of the expired Agreement.

5. Sick Leave--The Panel rejects both the Union's and the District's respective proposals for the amendment of the sick leave provisions of the contract, and directs continuation without change in the new Agreement of Article XXXVI of the expired Agreement.

6. Union Activities--The Panel rejects both the Union's and the District's respective proposals

for the amendment of the provisions of the contract pertaining to Union Activities, and directs continuation without change in the new Agreement of Article XXXVII of the expired Agreement.

7. Health and Safety Committee--This matter newly raised by the Union in its post-hearing brief, is not properly before the Panel for decision. The Panel would only recommend that the parties consider such mutual advantage as there may be in establishing such a joint Union and District committee, and that they take only such steps as each may voluntarily choose to take to initiate discussion of such a committee.

8. Bereavement Leave--The Panel rejects both the Union's and the District's respective proposals for the amendment of the bereavement leave provisions of the contract, and directs continuation without change in the new Agreement of Article XXXIV of the expired Agreement.

9. Holidays and Holiday Pay--The Panel rejects both the Union's and the District's proposals for the amendment of the contract provisions pertaining to the number of holidays, holiday pay and matters related thereto, and directs continuation without change in the new Agreement of Article XXXV of the expired Agreement.

10. Annual Leave and Personal Leave--The Panel rejects both the Union's and the District's respective proposals for the amendment of the annual leave and personal leave provisions of the contract, and directs continuation without change in the new Agreement of Articles XXXII, XXXIII, XXXIV, and any other provisions which may relate to said annual or personal leave, except that any modification(s) of those Articles mutually and previously made the subject of any understanding(s) of the parties shall have full force and effect.

11. Prior "Understandings"--(a) The parties shall incorporate in their Agreement effective January 1, 1977 those understandings which they reached in direct negotiations and which were jointly initialled or signed by the parties, as shown in Union Exhibit No. 9A (except as to salaries) and in Union Exhibit No. 9B. Those understandings relate to amendment of the following provisions in the expired Agreement:

Article II-Public Employees
Article III-Recognition
Article V-Labor-Management (Liaison Meetings)
Article VII-Union Security
Article XX-Exchange of Duty
Article XXVII-Promotions
Article XI-Correspondence
Article XXXII-Annual Leave

and, include also understandings with reference to three other matters not specifically covered in the

expired Agreement, viz.:

Time Owed ("Kelly days")
Residency
Omissions and Disputes of Final Draft

The understandings initialled or signed by the parties, as set forth on the second page of Union Exhibit No. 9A, relate to: choice of vacation days and time owed employees (Kelly days); and, as set forth in Union Exhibit No. 9B, relate to:

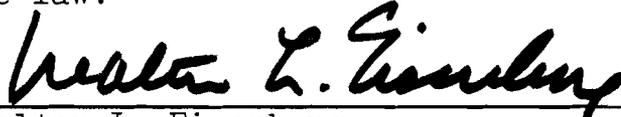
II-Public Employees
III-Recognition
V-Liaison Meetings
VII-Union Security
X-Exchange of Duty
XII-Promotions
XIV-Correspondence
XVII-Omissions and Disputes of Final Draft
XXVII-Residency
XXXIII-Time Owed Employees ("Kelly Days")
L-Annual Leave (2 men on vacation at same time)

(b) The Panel retains jurisdiction over the implementation of this paragraph 11. of the AWARD to resolve any disagreement between the parties over said implementation. Either party shall have the right to refer, by written notice to the Chairman of the Panel and to PERB, any dispute(s) which may arise between the parties over the inclusion in the new Agreement of any of the understandings to which reference is made in (a), immediately above. The Chairman of this Panel shall make a final and binding clarification and/or decision of any such matter(s) in dispute and so referred.

12. Other Union and Employer Proposals--All other contract changes proposed by the Union or by the District and not specifically referred to in this AWARD shall be deemed denied by the Panel.

13. New Agreement--The parties are directed to incorporate in a new Agreement between them such provisions as will reflect those terms of this AWARD which explicitly or otherwise require contract modification. In all other respects the provisions of the prior Agreement shall be carried forward into the new Agreement without change, except insofar as the parties may mutually desire, and agree to, other changes in the Agreement.

14. Implementation--The terms of this AWARD shall be implemented by the parties in a manner consistent with and to the extent permitted by applicable law.



Walter L. Eisenberg
Public Panel Member and Chairman



Jon Hammer
Employer Panel Member



John Przekop
Employee Organization
Panel Member

Dated:

New York, New York
May 1, 1978

State of New York)
 SS:
County of Kings)

On this 1st day of May, 1978 before me personally appeared WALTER L. EISENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

BEATRICE EISENBERG
NOTARY PUBLIC, State of New York
No. 24 in 1977
Qualified in Kings County
Commission Expires March 30, 1979.


Notary Public

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF NEW YORK
Case No. IA-10; M76-485



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In the Matter of the Arbitration : SUPPLEMENTAL CONCURRING
-between- : OPINION TO AWARD
Fairview Fire District : Jon H. Hammer, Arbitrator
-and- :
Fairview PFA, Local 1586 :

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Appearances:

For the Union:

Thomas Flynn, Vice President, I.A.F.F.
Gary A. Merritt, Local President

For the Employer:

Garrison R. Corwin, Jr., Esq., Counsel

Before the Public Arbitration Panel:

Prof. Walter L. Eisenberg, Public Panel Member and Chairman
Jon Hammer, Esq., Employer Panel Member
John Przekop, Employee Organization Panel Member

* * * * *

The public arbitration panel has held hearings in this matter and agreed upon an award dated May 1, 1978. Based upon the facts presented at the hearings, the nature of the documentary evidence received in evidence, and the briefs submitted by counsel

or representatives for both parties, it is believed that the award submitted herewith and agreed upon between the arbitrators sets forth a reasonable and equitable compromise between the positions of the respective parties. The undersigned has concurred in the award for the reason that it appears to be in the best interests of both parties, representing both the taxpayers of the particular fire district and the union representing the employees of the fire district in question.

Notwithstanding the foregoing, however, the undersigned believes it incumbent upon him as a member of the statutory panel - and as an attorney duly admitted to practice in the State of New York governed by the provisions of the Constitution of the United States and the State of New York - to set forth certain supplemental views in regard to the procedure here utilized and generally applicable under the controlling statutory pattern in these proceedings.

It should be noted at the outset that the compulsory interest arbitration procedure pursued in the instant proceeding is apparently of general applicability and uniformity in all such proceedings pending in the State of New York. It is the opinion of the undersigned that such procedures do violence to the basic provisions of the due process clauses of both the New York State and Federal constitutions. The undersigned sets forth this opinion, notwithstanding the award which appears to be an equitable determination of the issues in the instant proceeding; for the apparent absence of due process of law uniformly extant in such proceedings throughout the State of New York has within it the seeds for depriving all parties of their lawful procedural rights and

safeguards, with the concomitant result that decisions rendered may not in fact be fair and equitable and constitute a reasonable determination of the issues presented or a reasonable compromise between the arguments propounded by the respective parties.

The inherent nature of an arbitration procedure - whether a compulsory interest arbitration or otherwise - is one that mandates the appointment of and determination by an arbitration panel which is in all respects impartial, disinterested, and motivated solely by the effort to seek a just and fair result, all without regard to any particular predilections of the members of the panel. In this respect, parties subject to arbitration procedures are entitled to the same disinterested, impartial tribunal as are parties before a court or any other fact-finding administrative body, whatever may be the issues before it.

The present New York State Civil Service Law provisions applicable to compulsory interest arbitration in labor-management disputes in the public sphere mandate the appointment of a so-called public panel member, the appointment of a so-called employer panel member, and the appointment of a so-called employee organization panel member. It has become an accepted practice and uniform procedure throughout the State of New York for all the panel members and the parties to deem the employer panel member to be sitting in such capacity representing the employer and in like manner the employee organization panel member to be representing the employees. It is understood by the parties - and presumably by the aforesaid two panel members - that only the public panel member is presumed and understood to be acting in a solely disinterested capacity.

It is believed that an arbitration panel - incumbered with the obligation under law to act fairly, impartially, and to do justice to the parties, subject only to the dictates of constitution, conscience, and the law - cannot possibly or even conceivably act in such a manner, particularly when the statutory framework and universally accepted procedural policy deems two of the three arbitrators to be sitting as adjudicators who are not in fact disinterested, and may even possibly have a preconceived idea as to the positions espoused by the parties. Moreover, it is apparently an accepted procedure for the employer panel member and employee panel member to have continuing contacts and discussions with "the party they represent" during the course of the proceedings and deliberative processes, even with respect to the issues raised, arguments submitted, documents accepted in evidence, and facts or testimony pro- pounded. Again, it is believed that such a procedure flies in the face of the most elemental concepts of due process of law and inevitably, inherently, and as a matter of law denies due process to both the employer and the employee. It is at variance with the most basic principles which mandate that parties involved in a dispute which results in litigation, whether judicial, administrative, or by arbitration, have their dispute decided by a fair, impartial, and totally disinterested tribunal. Such cannot possibly be the case in terms of the procedure here in question.

The very nature of the inequity and infringement of due process which results from the procedure here implemented and applied throughout the State of New York - under color of law - may be demonstrated by one simple example. In the event that one of the

two supposedly interested panel members believes that his obligation to act fairly and impartially and render due process exceeds whatever prior views he espoused or opinions he may have had or relations maintained by him in regard to labor-management area, of either a general nature or with respect to the parties at issue; and the other supposedly interested panel member deems it his proper obligation under law to represent, on the panel, the interests of the party by whom he was appointed and by whom he is paid, then in fact the result would be two totally disinterested panel members and one panel member representing a particular party to the dispute or litigation. In such case the scales of justice are quite obviously not in balance. There is no conceivable procedure available under law whereby this potential and very practical inequity and imbalance of the scales of justice can be precluded. It constitutes an inevitable inherent procedure in derogation of due process of law. Certain panel members of the so-called interested class may be honestly and sincerely of the belief that their determinations and views herein should be guided by (a) their particular occupation or employment interest, quite often and possibly being in the same field of interest as the entity by whom they were appointed, whether the employer or the employee, (b) the entity by whom they are being paid in the proceeding, or (c) a pre-existing business relationship, quite obviously of a continuing nature by the very reason of which they were appointed to the panel.

It is axiomatic and beyond any reasonable possibility of refutation that an arbitrator being paid by a party to the litigation cannot possibly hope to serve as a disinterested adjudicator

of the dispute dividing the litigants. To say that the parties are receiving the judgment of a fair and disinterested, impartial panel of arbitrators constitutes a charade, one which is confirmed by every fact of common sense.

It is apparently presumed throughout the State of New York that the employer panel member and the employee panel member will bring to bear a certain degree of information, expertise, and knowledge which may be of assistance to the panel and particularly the public panel member in interpreting the evidence, the arguments of the parties, and in ultimately reaching a fair and impartial adjudication of the dispute. If this argument had the slightest degree of validity - in terms of constitutional due process of law and even practical value - courts, administrative agencies, and other arbitration panels would always find it in the best interests of an expeditious litigation for the parties to have a representative upon the adjudicating tribunal. It is not believed, however, that such procedure exists elsewhere, or were it to exist would it be consistent with the rights of the parties, the provisions of law, the Constitution of the State of New York or the United States. The expertise which may well be required in certain areas, whether it be in the labor relations area, the tax area, the transportation area, or whatever the case may be, may certainly warrant adjudication by bodies with a substantial degree of expertise not customarily possessed by members of the judiciary who are charged with resolving litigation disputes in a broad variety of areas and thus must be in the nature of generalists. Litigated areas requiring such a degree of expertise for appropriate resolutions of the

disputes may be observed in such administrative areas as the National Labor Relations Board, the Interstate Commerce Commission, and a plethora of federal and state agencies charged with a resolution of a host of disputes in specified areas. Even the Tax Court is a judicial body which acts in a particular area, one which is deemed essential and most expeditious in terms of resolution of disputes by reason of a particular expertise required. In none of these cases do we find a member of a panel to be imbued with a particular interest of a particular party, as is presumably and admittedly so with the procedure here in issue.

As the present posture of the procedure under which this panel and other similarly situated panels operate, it is conceivable that a particular interested panel member - whether he be an employer or employee appointed member - may in fact deem it proper to act wholly impartially and without regard to the interest of a particular party, or even more significantly the particular party by whom he was appointed. If this be the case and the other interested panel member does not in good conscience believe that such is the appropriate course of action, then the former panel member must inevitably disregard his views of impartiality and obligation to do justice, in order to act as a counterweight to the views of the other interested panel member. It is submitted that such a procedure is inherently unconstitutional; it renders the arbitration panel, in essence, a meaningless entity at least, and a biased hydra at worst. The principals of due process, fairness, and the objective of achieving an equitable determination would be better achieved by the appointment only of a public panel member to act individually,

or alternatively by only having the public panel member serve as a voting member of the arbitration panel and the other so-called members merely acting in an advisory capacity. Even this procedure would tend to unfairly impact upon a public panel member, depending on the personalities, abilities, and degree of expertise of the so-called interested panel members. The procedure here in effect intrudes upon the inviolability of the in camera determinations by a tribunal. It renders it impossible for panel members to act without the continuing influence of the party whom they supposedly represent. The practical problems created thereby and the ability of parties to improperly and unfairly influence the deliberative processes of the panel are patently obvious.

If in fact a public panel member or even a totally disinterested tri-partite panel required expert enlightenment on the various issues raised by the parties, the panel should certainly in the first instance rely upon the expert testimony presented by each party and weigh the credibility and respective positions of each. The panel might well even consider calling an expert - disinterested in all respects - as a witness to assist the panel in its deliberations. In this case both parties would have the opportunity to question and cross-examine the experts submitted either by its adversary or the expert called by the panel. The present procedure envisions a situation where it is presumed that interested panel members will be arguing during the course of the deliberative processes the position of the party by whom they were appointed. This denies to both parties the opportunity to inquire into the validity of the positions asserted by the interested panel

members, a right which is practicably translated into the right to confront and cross-examine. This right is knowingly denied by the present statutory procedure, and for this reason as well violates due process of law. Mr. Justice Frankfurter has described procedural due process as the fundament of ordered liberty. This procedural due process concomitant of ordered liberty is wholly repudiated by the procedure authorized and sanctioned by the existing New York State statutory pattern provided for the resolution of labor-management disputes in the public sphere.

Section 209 4(c) (V) of the Civil Service Law of the State of New York - pursuant to which this panel is serving - states in pertinent part:

"the public arbitration panel shall make a just and reasonable determination of the matters in dispute."

The very term "just" certainly connotes a procedure which mandates, as the sine qua non, the impartiality of the arbitration tribunal.

It has been clearly set forth by the courts in this State, that even with respect to Civil Service Law arbitration under Section 209, that:

" . . . the nominees to the Arbitration Panel of the respective parties were not agents of such parties and were entitled and required to use independent judgment." Bethlehem Steel Corp. v. Fennie, 55 A.D. 2d 1007, 391 N.Y.S. 2d 227 (4th Dept., 1977).

The Court of Appeals of the State of New York, in discussing arbitration concepts, stated in one case that:

"The view that an arbitrator chosen by a party is merely that party's agent and will act in a partial manner . . . may not be accepted." Matter of Lipschutz, 304 N.Y. 58, 64 (1952).

The concepts set forth hereinabove are certainly not novel nor of recent vintage. They do find clear sanction in earlier decisions of the Court of Appeals of the State of New York. See, for example, American Eagle Fire Insurance Company v. New Jersey Insurance Company, 240 N.Y. 398, 405-406 (1925), where the Court stated in pertinent part as follows:

"But first, the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor. The oath of the arbitrators is the rule and guide of their conduct.

* * * *

Although a known interest does not disqualify and the parties may not complain merely because the arbitrators named were known to be chosen with a view to a particular relationship to their nominator or to the subject-matter of the controversy, they are entitled to expect that arbitrators thus chosen will proceed with indifference and impartiality.

Viewed with this background, the law forbids the arbitrator, even though he acts with good intentions, so to conduct himself as to defeat the purpose of the arbitration by acting either for his own convenience or in the supposed interests of the party by whom he is named, . . .

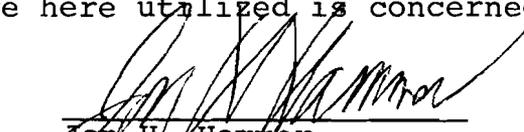
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He accepts responsibilities to which convenience and favor must defer. We may assume that Mr. Osborn's conduct was inspired by the best of reasons and with no intention to frustrate the arbitration for ulterior ends. Another might follow the same course of conduct that he followed with an eye single to his own convenience or the interest of his nominator to avoid an adverse decision. Such an untoward result should be avoided . . ."

It is clear that the foregoing concepts were certainly intended by the legislature of the State of New York to be incorporated within the applicable statutory pattern; yet, however, such concepts, having ancient roots, have been totally ignored by the customary practice and procedure which is imposed and accepted by the Public Employment Relations Board of the State of New York, as here implemented.

The opinion asserted herein is not intended to and does not in any way cast the slightest derogatory light upon any of this writer's colleagues on the present panel, before whom this arbitration was held and will be decided. It does, however, present a defect in law which is necessarily present in every one of the proceedings, such as the one between the parties herein; and notwithstanding the apparent surface equity of the present award and the actions of the panel acting with a sense of propriety, it is believed that such awards cannot pass due process muster. For these reasons they are subject to appropriate attack and invalidation

by a judicial tribunal with jurisdiction thereof. Whereas the undersigned concurs in the equity of the award set forth herein, it is necessary to submit what must be herein deemed a technical dissent insofar as the constitutional validity of the practice and procedure here utilized is concerned.

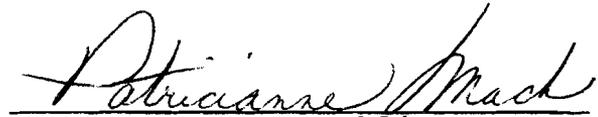


Jon H. Hammer
Employer Panel Member

Dated: White Plains, New York
May 8, 1978

State of New York)
) ss.:
County of New York)

On this 8th day of May, 1978, before me personally appeared JON H. HAMMER, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



Notary Public

PATRICIANNE MACK
Notary Public, State of New York
No. 33-4612066
Qualified in New York
Commission Expires March 03, 1979