

In the Matter of the Interest Arbitration

Between

MASSENA POLICE PROTECTIVE ASSOCIATION

and

VILLAGE OF MASSENA

OPINION

AND

AWARD

Case Number: PERB IA88-13; M87-472

Date of the Award: December 29, 1988

Public Arbitration Panel:

Wade J. Newhouse, Public Panel Member and Chairman
William Maginn, Jr., Employee Organization Panel Member
Francis C. LaVigne, Employer Panel Member

Representatives:

For the Employee Organization: D/Sgt. Michael Kroeger, President, MPPA
For the Village: Hon. Charles R. Boots, Mayor

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I. INTRODUCTION.

On August 3, 1988, the New York State Public Employment Relations Board (hereafter referred to as PERB), having determined that a dispute continued to exist in negotiations between the Village of Massena and the Massena Police Protective Association (hereafter referred to as the MPPA), and acting under the authority vested in it under §209.4 of the Civil Service Law, designated the above listed Public Arbitration Panel "for the purpose of making a just and reasonable determination of the dispute." A hearing was held at the Town Hall Building in Massena, New York, on August 17, 1988.

Both parties agreed that a tape recording of the hearing was a sufficient record. At the hearing, both parties were provided opportunity to introduce evidence, present testimony and to summon witnesses and engage in their examination and cross-examination. On August 17, 1988 the Panel met in executive session prior to the hearing to consider certain procedural matters, and met in executive session, again, following the conclusion of the hearing to discuss the record. By agreement among the Panel members, drafts of a possible Award were exchanged. Thereafter, on December 29, 1988, this Award and Opinion were issued.¹

II. BACKGROUND OF THE DISPUTE AND IDENTIFICATION OF THE ISSUES BEFORE THE PANEL.

A. THE STATUTORY STRUCTURE AND THE PROCESS.

Neither of the parties had previously been involved in interest arbitration pursuant to the "Taylor Law" (Article 14 of the Civil Service Law), and some of those involved expressed some uncertainty about precisely what was going on. Therefore, it is desirable to sketch the statutory structure for this process, so that there will be no misunderstanding, by either the immediate parties or interested constituencies, about the outcome.

Subdivision 4 of §209, of the Civil Service Law, was enacted to provide a means for resolving negotiations impasses between public employers in New York State and police and firefighters, as defined in the statute. Subdivision 4 provides that when PERB determines that an impasse exists, it shall appoint a mediator to assist the parties to effect a voluntary resolution of the dispute. If the mediator is unsuccessful within a stated period, either party may petition PERB to refer the dispute to a Public Arbitration Panel.

Section 205.4 of PERB's Rules and Regulations promulgated to implement Subdivision 4 of §209, requires that a petition requesting referral to a Panel contain:

- (3) A statement of each of the terms and conditions of employment raised during negotiations, as follows:
 - (i) terms and conditions of employment that have been agreed upon;
 - (ii) petitioner's position regarding terms and conditions of employment not agreed upon. * * *

The response to the petition must also "contain respondent's position specifying the terms

1. The draft by the Chairman of the Panel was sent to the other members on September 13, 1988. At the request of the Panel members representing the Employee Organization and the Employer, the matter was referred back to the parties for further negotiations. From that date until early December, the parties sought to reach a voluntary agreement. On December 19, 1988, the Chairman of the Panel was informed that these efforts had been unsuccessful, and the final draft of the Award and Opinion was distributed on December 23, 1988.

and conditions of employment that were resolved by agreement, and as to those that were not agreed upon, respondent shall set forth its position." (Rules and Regulations, §205.5.)

If PERB refers the dispute to a Public Arbitration Panel, the Panel shall hold hearings on "all matters related to the dispute (§209.4(c)(iii)), and "all matters presented to the" Panel shall be decided by a majority vote of the members of the panel (§209.4(c)(iv)).

The Panel is directed to "make a just and reasonable determination of the matters in dispute." (§209.v(c)(v).) More specifically, the statute spells out the following criteria which must be taken into consideration, when relevant:

In arriving at such determination, the panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:

a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions

and with other employees generally in public and private employment in comparable communities.

b. the interests and welfare of the public and the financial ability of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically,

- (1) hazards of employment;
- (2) physical qualifications;
- (3) educational qualifications;
- (4) mental qualifications;
- (5) job training and skills;

d. the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

The Panel's determination is "final and binding upon the parties for the period prescribed by the panel". (§209.4(c)(vi).) The maximum period is for two years (from a point in time fixed by the statute), and the determination "shall not be subject to the approval of any local legislative body or other municipal authority". However, it is subject to judicial review "in the manner prescribed by law." (§209.4(c)(vii).)

B. THE SEQUENCE OF EVENTS; ISSUES BEFORE THE PANEL.

The Village and the MPPA were parties to a collective agreement effective from June 1, 1986 until midnight May 31, 1988.¹ Discussions between the parties were begun during January 1988, for the purpose of negotiating a successor agreement.²

By documents dated February 25, 1988, the MPPA submitted to PERB a "Declaration of Impasse". A Memorandum recounting negotiations to that date, and several other lengthy documents were attached to the Declaration of Impasse form provided by PERB. Mediation was unsuccessful, and by petition dated May 25, 1988, the MPPA submitted to PERB its request for "compulsory interest arbitration". The petition identified nine "Items" of negotiations. By Memorandum received by PERB on July 25, 1988, the Village responded to the nine Items listed in the MPPA petition.

By letter dated August 12, 1988 (Exhibit P-1), Attorney William Maginn responded to a request from the Village attorney (Francis LaVigne), and clarified the position of the MPPA on the issues, now consolidated into eight issues. (Part of the delay may be attributed to the fact that the MPPA did not engage counsel until shortly before this letter was written.) Those eight open issues may be labeled as follows:

1. Retirement plan.
2. Upon retirement: unused sick leave; payment of health insurance premium.
3. Vision and dental care.
4. Shift differential rate.
5. Sick leave.
6. Manner of taking 5th week of earned vacation.
7. Personal days leave.
8. Wages.

While this letter clarified the open issues to be submitted to the Panel, the matter became entangled with a pending Improper Practice which required the Panel to make a preliminary ruling.

C. THE MATTER OF THE PENDING IMPROPER PRACTICE.

At the opening of the Hearing, on behalf of the MPPA, Panel member Maginn moved that the Hearing be delayed pending a determination by PERB of an Improper Practice filed by the MPPA against the Village. The Panel was informed that a preliminary conference on that Improper Practice charge was scheduled before an Administrative Law Judge, in Syracuse, on the following day, i.e., August 18, 1988.

This was not the first reference during the course of these negotiations, to a pending Improper Practice charge. In its response to the MPPA petition to PERB for designation of a compulsory interest arbitration panel, after stating its position on the

1. Exhibit J-1, page 22. That agreement was not structured with a numbering system to facilitate references. That is, it did not identify the several parts as numbered or lettered Articles, or by any other title. It simply inserted a reference to a subject, and text followed.

2. For convenience, that agreement will hereafter be referred to as the "expired agreement", or "expired contract", without intending to ignore the effect of Section 209-a.1(e) of the Taylor Law, concerning the maintenance of the status quo after the expiration of an agreement.

open issues, the Village had added: "There is an improper labor practice charge pending Case #U-10169." (Memorandum received by PERB, 7/25/88.)

After the designation of a Panel by PERB, Attorney Maginn wrote a letter to Village Attorney LaVigne, dated August 12, 1988. (Exhibit P-2.) Mr. Maginn stated: "In response to your request that I clarify the Improper Practice charge filed by the Massena Police Protective Association," he was submitting the following clarification (the underlining with bold print, in the text of the letter, has been added for emphasis):¹

The contract between the Village and the Police stated on page 22 as follows:

"Period of Agreement:

Except as otherwise provided below, this agreement shall be in effect on June 1, 1986, until midnight May 31, 1988, and will be reopened in the second year to discuss the age limit in Option B in Health Insurance."

Option B is contained at the top of page 13 under the heading, **"Retirement"**.

"B" Anyone retiring at age 55 may select to have his/ her and their eligible dependents covered by the Village health insurance plan until he/she becomes eligible for Medicare. At that time, the Village will pay cost of Medicare under AARP Plan."

According to the information provided me, **the Village and the Police moved to reopen this section.** They first met in January of 1987, with the prior administration headed by Mayor Markarian. The negotiations continued through the change in administration up until November of 1987, when an agreement was reached. At the meeting where the agreement was reached were Randy Currier and Mike Kroeger on behalf of the Massena Police Protective Association, and Mayor Boots and Trustees Feeley and LaShomb on behalf of the Village. **The agreement** was to rewrite the option provisions of the retirement section to eliminate the options and to provide every retiree who retires at age 55 or above and has earned his retirement with both unused sick time at his current rate of pay and health benefits for himself and his dependents under the village Health Insurance Plan. **This agreement was reached under the reopener provision of the 1986/88 contract. It was verbal and it was to be finalized in writing in the new contract. However, as far as both sides were concerned, it became the new language of the prior contract.** Further, at that meeting, Mr. Kroeger specifically asked Mayor Boots whether or not Joe Mayfield, who was above 55 and was retiring, would get his payment for full sick time at his current rate of pay, and his health insurance for himself and his dependents, and the Mayor answered "yes" to both questions.

1. It should be emphasized that this letter from counsel to the MPPA states the position of the MPPA with respect to the alleged improper practice. That letter is included in this Opinion solely as background to the decision of the majority of the panel to deny the motion to adjourn the hearing. The Panel made no findings with respect to the contents of that letter, or with respect to the position of the MPPA.

This was again brought up by the Police during the contract negotiations. It was brought up just to remind the Village that they had agreed to this section and that it was now contained in the agreement. On April 15th, 1988, or thereabouts, the village then withdrew this and said they didn't want to meet with the Police anymore. This was the first Improper Practice Charge filed by the Police.

The second Improper Practice Charge came as a result of the April 28th, 1988, impasse meeting. At that time, the Police agreed to take a Village offer back to its members for a vote. When the Police asked the village for a date to discuss the results of the vote and go over other issues of impasse, the Mayor stated that he did not want to meet with the Police anymore. This was a second Improper Practice Charge.

Finally, during the course of this meeting, Wayne LaShomb said to Patrolman LeCuyer that the incentive for the Police to accept this contract was that they should be thankful that they had jobs. There is an obvious implication in this statement, and the Police view this as a third Improper Practice.

At the hearing, it was position of the MPPA, as stated by Mr. Maginn, "that if the Improper Practice with regard to the agreement with the Village and then the withdrawal of the agreement on the prior existing contract, is upheld, then that contract will be different from the contract that is now in front of [the panel], that if the [panel] does not consider that contract as it has been amended by the parties, then it will have a prejudicial effect on the MPPA, in that any award with regard to that section will have to be [compensated for, in some way]. Therefore, at this time, we are asking for an adjournment of this proceeding until such time as the improper practice charge has been disposed of by PERB."

As restated in a post-hearing memorandum, the MPPA argues that "any deviation from this clause in the [expired] contract [which the MPPA claims was changed under the reopener clause] is a concession on behalf of the [MPPA] and should be treated as such, and is not a proposal drafted anew."

The Village opposed any adjournment. It took the position that there was no such agreement to amend the expired contract and that there was no improper practice committed by the Village. It also took the position that the subject matter of the claimed improper practice would not preclude the Panel from proceeding.

The Chairman (and Public Member) of the Panel observed that he had been alerted to this matter, before arriving, and that the Panel had discussed it at length in an executive session held just prior to the hearing. He pointed out that §205.6(c) of PERB's Rules and Regulations concerning the compulsory interest arbitration process, addresses the matter of delay based upon objections to arbitrability:

The public arbitration panel shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge, until final determination thereof by the Board or withdrawal of the charge; the panel may make an award on other issues.

Section 205.6(a) of PERB's rules also states that:

Objections as to arbitrability may include, but not be limited to, the following circumstances:

- (1) a matter proposed is not a mandatory subject of negotiations;
- (2) a matter proposed was not the subject of negotiations prior to the petition;
- (3) a matter proposed had been resolved by agreement during the course of negotiations.

The Chairman pointed out that the description of the pending Improper Practice charges, as set forth in the letter of August 12th (Exhibit P-2, quoted above), could be read very broadly. (And see the first paragraph of the MPPA petition to PERB for compulsory interest arbitration, dated 5/25/88.) However, in the Chairman's opinion, the clarification provided by the discussion in the executive meeting preceding the hearing, summarized in Mr. Maginn's request for adjournment, emphasized that the focus of the Improper Practice charge which was now invoked as grounds for adjournment, was on the MPPA claim that the expired contract was amended during its term. That claim is framed in the underlined portions of the letter, as quoted above.

Therefore, the Chairman stated, the subject of the Improper Practice charge did not fall within any of the identified categories in Rule 205.6(a); specifically, it was not a claim that a matter for a new contract had been resolved during the course of negotiations. Nor were any other circumstances suggested, which might be the predicate for an objection as to the arbitrability of any of the issues. Even if we assumed the best case for the MPPA, i.e., that ultimately the improper practice would be upheld,¹ the remedy would be limited to assuring retroactive benefits with respect to individual rights acquired when the expired agreement was in effect. The remedy in the improper practice proceeding would not resolve the issue of retirement benefit for a successor contract.

Having been alerted to the claim, the Chairman assured the MPPA that the situation could be adequately taken into consideration by the Panel in making "a just and reasonable determination of the matters in dispute", matters which included the MPPA proposals with respect to retirement and post-retirement benefits. Therefore, there was no apparent reason to delay these proceedings, and it would be proper for the Panel to make an award with respect to all issues before it.

The Chairman proposed to the Panel that the motion to adjourn the hearing be denied. The Village member (Mr. LaVigne) agreed, and the motion to adjourn the hearing was denied by a majority vote of the Panel, with the MPPA member of the panel (Mr. Maginn) dissenting.

1. This assumption is made solely for the purpose of supporting the conclusion that the pending improper practice charge should not delay this hearing. See the footnote, above, on page 5 of this opinion.

III. DISCUSSION OF THE ISSUES BEFORE THE PANEL.

The MPPA has made its priorities among the open issues very clear; both parties have linked results on some issues; and the Village has submitted an overall estimate of the total cost of both parties' proposals, based on estimates of cost with respect to proposals for each issue. However, the discussion can best proceed by addressing the eight issues before the panel, in the order noted above, after first addressing the matter of the period for the Panel's determination.

A. THE "PERIOD PRESCRIBED" FOR THE PANEL DETERMINATION.

Section 209.4(c)(vi) of the Civil Service Laws provides that "the determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the panel, but in no event shall such period exceed two years from the termination of any previous collective bargaining agreement".

Neither of the parties specifically addressed this matter, in documents or at the hearing. The "previous collective bargaining agreement" (Exhibit J-1, page 22) terminated at midnight May 31, 1988, as pointed out above.

Conclusion. In the interest of providing a breathing period before the parties begin negotiations for a successor agreement, the Panel determines that the "period prescribed" shall be a two year period, beginning June 1, 1988 and ending midnight May 31, 1990.

B. RETIREMENT PLAN.

Under the subject "Retirement", the expired contract between the parties provided (Exhibit J-1, page 12): "It is agreed that as soon as possible all Department members currently under the 375(I) system shall be permitted to change to the 384 system if they so choose. The Village Board will assist the Police Protective Association in their efforts to obtain state legislation which will permit members to change their status."

Village Exhibit 3 consists of three pages from the "Employer's Guide: Bulletins", distributed by the New York State and Local Retirement System. It includes these two summaries (from pages 59, 61):

New Career Plan [Section 375-i]

Members are not required to contribute. Minimum retirement age is 55. When a member retires with 20 or more years of service, the retirement allowance (including annuity purchased by any Age 60 Plan member for service before April 1, 1960) is 1/50th of FAS for each year of service. The pension portion of this allowance cannot exceed 75% of FAS. * * *

Special 25 Year Plan [Section 384]

The member is eligible to retire, upon completion of twenty-five or more years of credited service, with an allowance of 1/2 of FAS.

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

Permitting members of the Massena Police Protective Association to retire from active service at 20 years of service and further at 1/60th of their salary for each year thereafter to a maximum of 3/4 of full salary.

2. Positions of the Parties.

(a) The MPPA position. The proposal is given top priority by the MPPA, as determined by a vote of members of the unit in September 1987. D/Sgt. Kroeger, speaking for the MPPA, stressed that this priority represented the feelings of the younger members of the Department. He argued that the cost was very reasonable, asserting that, in future years, the start up cost would be credited back to the Village, and that the Village had consistently "made money" on the retirement plan. To support that last conclusion, he argued that the billing of the Village at a lower rate in 1987 resulted in a "savings" to the Village directly attributable to the Police and it should be shared with them. D/Sgt. Kroeger gave an estimate for the total cost to the Village if all police and firefighters opted in favor of 20 years, but argued that on the basis of interest expressed among the police officers, in fact, the initial actual cost would be much less than that estimate. The actual dollar figures D/Sgt. Kroeger mentioned are not repeated here, for the reasons noted below.

Mr. Kroeger stated that among police departments in the immediate geographical region which are similar in size to Massena, 20 year retirement is available in Potsdam, Ogdensburg, and Gouverneur. He stated that 20 year retirement was offered in the Village of Canton but was turned down for a substantial wage increase. He added that 20 year retirement was standard for the State Police.

On questioning by the Village member of the Panel, D/Sgt. Kroeger acknowledged that he had provided estimates for both police and fire departments, because if the police got 20 year retirement, he would expect the fire department members would also request it. During further questioning by the Village member of the Panel, D/Sgt. Kroeger stated that he had gotten his information concerning the cost of the 20 year retirement plan during a telephone call to the Retirement System. Based on this information, he asserted that there would be a savings to the Village in payments to the system, as a result of going to a 20 year plan from the present 25 year plan.

Under cross examination by the Village Panel member, D/Sgt. Kroeger stated that his information about retirement plans in other departments in the region was based on telephone calls to members in those departments. He had no letters or other documentation. He acknowledged that no other bargaining unit in Massena has a 20 year retirement plan at this time. He was also asked about his information from the Retirement System and his costs estimates, and Det. Kroeger acknowledged that the billing fluctuates every year, and that he had simply been given a general percentage estimate from the person with whom he talked.

In rebuttal testimony, Det. Kroeger submitted data on behalf of the MPPA, listing all present members of the department, their age and their starting date. (Exhibit P-3.) From this list, he estimated how many of the department would actually be eligible for 20 year retirement and how many would likely opt for 20 years. In his estimate, only 8 of the present members would actually be eligible. And he repeated that he had talked to someone in the Retirement System on the phone about startup cost information, and now provided the name of the person with whom he talked. Det. Kroeger also repeated his understanding of what the start up fee would be, and what dollars would be credited toward the change.

In a post hearing memorandum, the MPPA adds, in support of its position, that being a police officer is one of the most hazardous of all occupations, and a police officer must be in good physical condition and able to sustain long hours and difficult physical strains.

(b) The Village position. The Village is flatly opposed to the 20 year retirement plan. The principal testimony at the hearing, for the Village, was by Mr. Joseph Trombino, Treasurer, and that testimony largely related to the startup and continuing cost of the 20 year plan, as contrasted to the present 25 year plan. His testimony was supported by a letter and data forms from the Retirement System. (Exhibits V-2, V-5.) Without setting forth the details of his testimony, on both direct and cross examination, it is sufficient to note that he sharply disagreed with the MPPA estimates of cost, and he estimated a significantly higher cost. The details of these estimates are not set forth, for reasons explained below.

Mayor Boots also testified that the Village flatly opposed the 20 year retirement plan from the beginning of negotiations. The Village thought it is too expensive for the Village to get into.

3. Discussion.

The statutory criteria most relevant to take into consideration with respect to this proposal are: (a) comparability of conditions of employment with other security forces, in particular, and other employees generally; and (c) comparability with respect to hazards of employment and physical qualifications. Only if the case is made on the merits to support the proposal, would the matter of the financial ability of the public employer to pay have to be weighed in the balance.

We begin with the proposition that the merits of going to a 20 year retirement plan are not self-evident, in so far as the peculiarities of the profession is concerned. With all due respect, the general public -- for whom government exists, and whose taxes pay for that government -- can readily wonder if a 20 year retirement plan tends to simply provide additional support when an individual moves on to a second job or career.

There is no question about the hazardous nature of the occupation of police office, and the stiff physical qualifications. However, no persuasive evidence is offered to suggest that the hazards of the profession or the physical qualifications are such that after 20 years of service, which is likely to occur when the individual is less than fifty years of age, job stress diminishes the ability of the individual to continue to perform at the same level of competence, and that "retirement" is in the interest and welfare of the public.

In the absence of persuasive evidence to the contrary, one may doubt whether a 20 year retirement plan for most of those opting for it leads to "retirement", that is, the conclusion of one's working or professional career. And the social purpose of adequate retirement plans, which justifies their cost, is explicit in the nomenclature: "retirement", a purpose seeking to assure that adequate resources for a decent standard of living are available when the retiree is no longer "working" (i.e., bringing in a paycheck). This is made clear in the continuing national debate, reported on almost daily in the press, about the "graying" of the population and the fair allocation of resources to support that "retirement" system which has been an integral part of our social and governmental structure since the 1930's.

Without resolving the significant differences between the parties as to the actual increase in cost to the Village in moving from the 25 year to a 20 year retirement plan, one may seriously question whether it is in the public interest to pay the increased cost necessary to withdraw productive individuals from the work force at such an increasingly early age. Moreover, that concern is to be considered apart from the more debatable question, the matter of the cost for support of such a plan for individuals who, in fact, continue in the work force in another job, another career.

Apart from such general principles, the MPPA has not provided compelling evidence with respect to comparability, which would warrant the additional cost. They can point to some movement to the shorter 20 year plan in other police departments in the geographical region, but there is no evidence of such general adoption of the shorter 20 year plan in either comparable work forces or the work force in general, to warrant awarding this benefit as a part of compulsory interest arbitration. This is a benefit for which the MPPA must rely on the give and take of hard collective negotiations to achieve, recognizing that a public employer that agrees will, in all likelihood, expect significant economic concessions in return, in order to justify to the public the agreement to this benefit.

There is some hint of such concessions, when the MPPA suggests that it dropped a step back in the level of starting pay, in order to set the ground for getting the retirement plan during the 1988 negotiations. But it claims this movement was thwarted by a change in administration of the Village. Changes in viewpoints, reflected in changes in administrations, can be trying and frustrating for employees. But the compulsory interest arbitration process is not intended to prevent such changes, and while it may be frustrating for the MPPA, the place for this issue to be resolved, in the context of the relations between the Village of Massena and the MPPA, is at the table for negotiations of future contracts.

Conclusion. The Panel concludes that it is not justified in awarding the MPPA proposal with respect to a 20 year retirement plan, and determines that the retirement plan (or plans) provided for under the expired contract shall continue for the two year period beginning June 1, 1988.

C. UPON RETIREMENT: (1) UNUSED SICK LEAVE; (2) PAYMENT OF HEALTH INSURANCE COVERAGE.

Under the subject "Retirement", the expired contract provided the following options:

Upon retirement, an employee can accept only one (1) of the following options:

- (A) To be paid 10% for unused sick day when they retire. This will be paid in 10% installments to retiree or estate. I.e.: - person retires at 50 years of age, has accumulated 100 days sick leave, his daily wage is \$88.00 per day - 100 days x 88.00 = 8,800, 10% of 8,800 = \$880.00. The Village would pay the person or estate who selects this option \$880.00 a year for 10 years. The estate would receive only the balance that has not been paid.
- (B) Anyone retiring at age 55 may select to have his/her and their eligible dependents covered by the Village health insurance plan until he/she becomes eligible for Medicare. At that time the Village will pay cost of Medicare under AARP Plan.
- (C) At time of retirement at any age a person may choose to take his/her pay for unused sick days and apply its dollar value towards the Village health insurance plan. (This would affect anyone retiring before age 55 who did not want to accept option A.)
- (D) If person retires before age 55 and does not choose to take option A or C, he/she can pay the full cost of the insurance plan until they reach the age of 55 at which time the Village will pick up the premium. This would apply only to people who have no sick time days to cash in or apply to paying for health insurance as in option A & C.

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

After a member of the Massena Police Protective Association achieves retirement, then full health insurance earned regardless of age, plus 100% payment of sick time at hourly rate.

2. Positions of the Parties.

(a) The MPPA position. The position of the MPPA, as presented by D/Sgt. Kroeger, merges with events occurring under the expired contract and negotiations with respect to the reopener provision in the expired contract. D/Sgt. Kroeger recounts that during the first year of the expired contract, an individual under 55 retired and was unable to get full coverage of health insurance and full payment for unused sick time. The MPPA was concerned, believed that these benefits should be provided, and approached the administration of the Village for discussion.

At this point, the MPPA argument becomes entangled with the claimed improper practice. The Village member of the Panel objected to any mention of those alleged facts. However, it does not validate the MPPA claim of an improper practice, to listen to the reason why the MPPA believes its proposal, stated above, deserves more weighty consideration for not being a "new" proposal, because the underlying facts simply relate to the merits of the proposal.

However, it should be noted that the MPPA proposal is broader than those facts. The MPPA desires "100% payment of sick time at hourly rate", after retirement, "regardless of age" of retirement. Thus, when it is said in the MPPA post hearing memorandum that "the sick leave retirement of 100% payment in full on retirement has already been agreed to and is part of the contract" (page 3), this should be compared to the more limited statement found on page 1, that the "agreement was reached under [the] reopener" with respect to "every retiree who retires at age 55 or above".

The rationale of the MPPA does not extend substantially beyond this position: when it first appeared that neither of the benefits set forth in the MPPA proposal were available, effort was made to see that such benefits were provided.

(b) The Village position. The Village response to this proposal, was to offer "to pay \$50.00 per day up to 200 days unused sick time upon member's retirement." (Village response to MPPA petition to PERB for compulsory interest arbitration.) As with the other proposals, the Village's primary concern appears to be cost. It estimated that the average cost would be at a \$100.00 per day rate, with the average unused days on retirement amounting to 100 days.

3. Discussion.

The implicit premise in the MPPA proposal with respect to payment for unused sick time upon retirement, is widely relied upon by employee organizations in public sector negotiations. The argument is made that sick time is earned time, and if not used, then the employee should be compensated. Of course, this is in the teeth of the purpose for which "sick time" was first fought for; that is, to protect the employee who was sick, and unable to report to work, from loss of wages. Moreover, this type of benefit can possibly encourage an employee to not use sick time, except in extreme cases, in anticipation of the equivalent of a retirement "bonus". Nevertheless, this type of provision is

commonplace, to some degree, in public sector collective agreements. However, neither party has offered data related to any of the relevant statutory criteria, such as comparability.

There was a similar lack of comparative data, or arguments as to underlying premises, with respect to the second part of this proposal, concerning payment of health insurance upon retirement. There was no discussion of how this relates to federal programs for health care of the elderly.

Conclusion. Given the practice of the parties in previous agreements, and common understanding as to practice with respect to these matters, generally, the Panel determines that for the two year period beginning June 1, 1988:

(1) Upon retirement, regardless of the age of retirement, the retiree shall be paid for all unused sick time at the rate of \$100.00 per day, not to exceed one-hundred (100) days. The total amount shall be paid to the retiree at the time of retirement.¹

(2) Upon retirement, regardless of the age of retirement, health insurance provided to the employee and his/her eligible dependents shall continue to be provided at Village cost until the employee becomes eligible for Medicare, at which time the Village will pay the Medicare premium.²

D. VISION AND DENTAL CARE.

The only provision in the expired contract, relevant to this matter, is the item "Health Insurance", which reads: "The Village shall provide an improved health plan and a new vision care plan effective June 1, 1979."

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

Vision care of 100% and dental care of 80%, plus dependency on both; the police are willing to phase in the dental over a period of years.

2. Positions of the Parties.

(a) The MPPA position. No comparative data is provided by the MPPA, and no particular rationale is offered. The Panel is simply told that this is the proposal, that it is fair, and that the Village is able to pay the cost.

(b) The Village position. The Village position, as stated in its Response to the petition by the MPPA to PERB, is simply that it is opposed to this proposal. It provided the Panel with its estimate of the cost to expand present coverage to the extent set forth in the proposal.

1. The rate is the Village estimate of the average rate, and avoids the uncertainty of precisely what is meant by "at hourly rate". Use of the average unused days upon retirement, is a minimal barrier to wholesale conversion of the sick time benefit to retirement bonus.

2. It is fair, and reasonable, to tie this Village provided benefit in with the federal programs.

3. Discussion.

No comparative data was presented to the Panel with respect to this matter, and comparison to the present benefits was limited to some general statements from D/Sgt. Kroeger for the MPPA. No documentation was provided as to possible plans which the Village might contract for in order to provide this service.

The variations in available plans for vision and dental care are not endless, but the different plans involve considerable detail and options. In the absence of adequate data to identify a particular plan, in order to evaluate cost and desirability, the Panel concludes that this matter is most appropriately dealt with in the next round of negotiations.

Conclusion. The Panel determines that for the two year period beginning June 1, 1988, the Village shall continue to provide the vision and dental care in effect for members of this bargaining unit on May 31, 1988.

E. SHIFT DIFFERENTIAL.

The expired contract did not have any provision providing for shift differential wage rates. Under the item "Working Hours", it did provide: "The working hours of the Police Department Patrolman, Sergeant and Desk Officers shall be 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m. and p.m. to 7 a.m."

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

A shift differential increase as follows:

- 7 to 3 p.m. - no differential;
- 3 to 11 p.m. - 10c per hour increase;
- 11 to 7 a.m. - 25c per hour increase;

The above is for the first year of the contract, and both shift differentials will increase by 25c in the second year of the contract.

2. Positions of the Parties.

(a) The MPPA position. In presenting the MPPA positions, D/Sgt. Kroeger, after noting the shift rotation system in effect, stated that the rationale for this proposal was to offset the inconvenience of working these hours, that there was usually more stress during the shifts for which differentials were proposed.

(b) The Village position. The Village simply rejected this proposal without directly addressing the MPPA rationale.

3. Discussion.

Again, the Panel had no data or documentation presented by either of the parties, either as to comparability or the stress and inconvenience factors. Moreover, there was no analysis of the frequency of service on the evening or "night" shifts, if there is a rotation system. The Panel does not believe it is satisfactory to rely upon common understandings, or generalities about shift work, in imposing differentials. Context and documentation of general practice is critical to making an informed and sound judgment on this matter.

Conclusion. The Panel concludes that it is not justified in awarding the MPPA proposal with respect to shift differentials.

F. SICK TIME BONUS CLAUSE.

The expired contract, under the time "Sick Leave Regulations", provides:

Any permanent member of the police force in the Village who is disabled by injuries or illness not attributable to the performance of his duties who shall have been regularly and continuously employed for a period of six (6) months prior to the request for sick leave by reason of such accident or illness, shall be allowed sick leave at the rate of one (1) day for every "month of work" starting with the seventh (7) month of continuous employment. * * * Sick leave within this article of this agreement shall be deemed to mean leave with pay.

An employee shall earn one (1) bonus sick day each six (6) months - (June-December) (December-May) I.E.: total of four (4) days over two (2) years. To earn the bonus sick day, employee shall not have used any sick time per six (6) months.

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

To change the sick time bonus clause on page 9 of the contract to read, instead of one day per month to 9 and 3/4 hours per month for the first year, and ten hours per month for the second year of the contract.

2. Positions of the Parties.

The positions of the Parties will be referred to in the discussion, which follows.

3. Discussion.

Candidly, the Chair of the Panel found considerable confusion about this proposal which has not been fully clarified. The MPPA proposal specifically refers to the "sick time bonus clause", which would seem to refer to the second quoted paragraph from the expired contract. This is less clear in the petition to PERB for compulsory interest arbitration, where the covering memorandum refers to "Item #5 - Sick Time to Hours first year".

In its response to that petition, the Village stated: "5. Sick time may be taken in hours instead of only days. Add 8 hours sick time in second year". This appears to view the proposal more broadly, as to sick time generally, i.e., the subject of the first paragraph of the quoted provision from the expired contract. And that may be perfectly reasonable, given the phrasing in the memorandum petitioning PERB for compulsory interest arbitration.

At the hearing, the MPPA focus was more explicitly directed at the sick time "bonus" clause, in keeping with the phrasing in the letter of August 12th, quoted above. D/Sgt. Kroeger was asked to explain what the proposal would, mean in terms of how it would affect each officer on the sick time. His response specifically referred to the operation of the "bonus" clause, referring to the 6 months periods. Unfortunately, his

explanation did not make it at all clear, precisely what it is that the MPPA wants. And questions by the Village member of the Panel did not result in D/Sgt. Kroeger fully clarifying the proposal. As is indicated in the Village post hearing memorandum, the Village still appears to be viewing the proposal as simply a request for changing the computation of sick time from "days" to hours.

Any changes in the sick time "bonus" clause -- and, by that, I refer to the second paragraph quoted above from the expired contract -- should be made only after the effect of any change is made clear. The matter is simply clouded with too much confusion to be the subject of an Award in compulsory interest arbitration.

Conclusion. The Panel determines that for the two year period beginning June 1, 1988, the sick time "bonus" clause of the expired contract shall continue in effect, unchanged.

G. MANNER OF TAKING FIFTH WEEK OF EARNED VACATION.

Both parties agreed at the hearing that this proposal was already agreed to. Therefore, no discussion is necessary. The only point that needs to be made is that the proposal was summarized in the letter dated August 12, 1988 (Exhibit P-1), as follows: "To provide that a member of the Massena Police Protective Association can take the 5th week of his earned vacation in one day intervals". No elaborate discussion is needed, to point out that the MPPA is negotiating for members of the bargaining unit, not just members of the MPPA.

Conclusion. The Panel determines that for the two year period beginning June 1, 1988, employees in the bargaining unit may take the fifth week of her or his earned vacation in one day intervals.

H. PERSONAL DAYS LEAVE.

The expired contract provides for "Bereavement Leave", "Vacation Schedule", and "Holidays", but does not provide for personal days leave.

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

Two personal days be added to the contract per police employee for the first two years of the contract * * *.

Both parties agreed at the hearing that agreement had been reached with respect to this proposal. Therefore, no discussion is necessary. It is reasonable, and common, to limit personal leave days to employees who have been employed for a minimum amount of time. This accounts for the one year limit in the determination, below.

Conclusion. The Panel determines that for the two year period beginning June 1, 1988, each employee in the bargaining unit shall be entitled to two (2) personal days leave per year after completing the first year.

J. WAGES.

The expired contract contained the following wage rate provisions:

Longevity:

June 1, 1986 (1st Year of Contract):

5 years - \$300.00 10 years - \$550.00 15 years - \$850.00

June 1, 1987 (2nd Year of Contract):

5 years - \$500.00 10 years - \$750.00 15 years - \$1,000.00

Longevity shall be paid over 52 equal installments (added to weekly pay check).

Compensation (Pay schedule):

<u>June 1, 1986</u>	<u>Patrolman</u>	<u>Sergeant</u>	<u>Detective Sgt.</u>
1st	16,748.00	22,618.57	24,488.39
2nd	17,748.00	23,215.35	25,123.63
3rd	19,895.69	24,325.36	26,171.38
4th	20,417.89		
5th	21,889.50		

All steps were increased 5.5% plus increment.

June 1, 1986 (1st year of contract - 6.5% new money includes
longevity increases

June 1, 1987 (2nd year of contract - 7% new money includes
longevity increases

1. The MPPA proposal.

As summarized in the letter dated August 12, 1988 (Exhibit P-1), the proposal of the MPPA is as follows:

Wages - if the 20 year retirement plan is approved, then six per cent increase in wages in the first year of the contract and seven and one-half percent increase in wages in the second year of the contract.

This was clarified at the hearing, when the MPPA stated that if the 20 year retirement plan is not approved, it proposes increases of 7 1/2% in both the first and second years of the contract.

2. The Village proposal.

The Village responded to the MPPA proposal, which was stated in the MPPA petition to PERB for compulsory interest arbitration, by proposing a wage increase of 5% in the first year, and 5.5% in the second year, and 6% in the third year if there was a three year contract.

3. Discussion.

Neither party has provided documentation with respect to comparability of wages of either other police departments in New York State, or other employees generally in public and private employment in comparable communities. Also, there has been no documentation with respect to the actual tax base of the Village and the actual pattern of

tax rates for the past several years, as such data might reflect the financial ability of the Village to pay. There have been general statements by both parties, but no documentation. The documentation has largely been the Village's estimate of the costs of both MPPA and Village proposals. The MPPA has also claimed that the Chief of Police had "recommended" a 10% increase. But, I repeat, we do not have an actual comparison of the wages of employees of this bargaining unit with wages of, for example, other police departments in local government units of comparable size and location.

Unfortunately, the fact is that the Panel has little to go on to guide its determination with respect to wages, other than common knowledge about public employee wage increases during the past year in New York State, and the general economic situation of state and local finances. It is common knowledge that the State has settled with units for state employees for increases of 5%, 5%, and 5+%, in three year contracts. Substantially higher percentage settlements have occurred in some school districts. Yet the recent settlement in Erie County are not untypical, where units settled for 4.75%, and 4.75% for two year contracts.

The determination for the Panel is further complicated by the fact that neither party related its general proposal to the operation of the longevity steps. That is, each party has simply stated its proposal in terms of a percentage increase in wages for a given year. Yet, as the quoted provision from the expired contract indicates, how that percentage is applied can result in controversy, and even litigation, if the application is not made clear.

Against the background of the past agreements between the parties, and general understanding of comparable wage structures in the state, while taking into consideration the hazards and stress of this particular occupation, the Panel concludes that the following determination is both fair and within the ability of the Village to pay.

Conclusion. The panel determines that for the two year period beginning June 1, 1988, the longevity increments in the expired contract shall continue to be in effect, and that after the longevity increment is added to the amount of the employee's salary on June 1st following the completion of the five, ten, or fifteen years, the following adjustments shall be made:

June 1, 1988: All salaries shall be increased by 5.75%, after the addition of appropriate longevity increments.

June 1, 1989: All salaries shall be increased by 6%, after the addition of appropriate longevity increments.

IV. AWARD.

For the foregoing reasons, the Panel determines that a just and reasonable determination of the matters in dispute between the Village of Massena and the Massena Police Protective Association, is as follows:

A. THE PERIOD OF THE AWARD; CONTINUATION OF EXPIRED CONTRACT.

This Award is for the two year period, beginning June 1, 1988 and ending midnight May 31, 1990. During that period, the expired contract between the parties shall continue to be in effect, except in those instances in which it has been changed by the determinations of this Panel, in this Award.

B. RETIREMENT PLAN.

The retirement plan, or plans, provided for under the expired contract between the parties shall continue for the two year period beginning June 1, 1988.

C(1). UPON RETIREMENT: UNUSED SICK LEAVE.

For the two year period beginning June 1, 1988, upon retirement, regardless of the age of retirement, the employee retiring shall be paid for all unused sick time at the rate of \$100.00 per day, not to exceed one-hundred (100) days. The total amount shall be paid to the retiree at the time of retirement.

C(2). UPON RETIREMENT: PAYMENT OF HEALTH INSURANCE COVERAGE.

For the two year period beginning June 1, 1988, upon retirement, regardless of the age of the retirement, health insurance provided to the employee and his/her eligible dependents shall continue to be provided at Village cost until the employee becomes eligible for Medicare, at which time the Village will pay the Medicare premium.

D. VISION AND DENTAL CARE.

For the two year period beginning June 1, 1988, the Village shall continue to provide the vision and dental care in effect for members of this bargaining unit on May 31, 1988.

E. SHIFT DIFFERENTIAL.

For the two year period beginning June 1, 1988, the Village is not required to pay shift differentials.

F. SICK TIME BONUS CLAUSE.

For the two year period beginning June 1, 1988, the sick time "bonus" clause of the expired contract shall continue in effect, unchanged.

G. FIFTH WEEK OF EARNED VACATION.

For the two year period beginning June 1, 1988, employees in the bargaining unit may take the fifth week of her or his earned vacation in one day intervals.

H. PERSONAL LEAVE DAYS.

For the two year period beginning June 1, 1988, each employee in the bargaining unit shall be entitled to two (2) personal days leave per year after completing the first year.

J. WAGES.

For the two year period beginning June 1, 1988, the longevity increments in the expired contract shall continue to be in effect, and after the longevity increment is added to the amount of the employee's salary on June 1st following the completion of five, ten, or fifteen years, the following adjustments shall be made:

June 1, 1988: All salaries shall be increased by 5.75%, after the addition of appropriate longevity increments.

June 1, 1989: All salaries shall be increased by 6%, after the addition of appropriate longevity increments.

AFFIRMATION

We do hereby affirm upon our oaths as Arbitrators that we are the individuals described in and who executed this instrument, which is our award.

Wade J. Newhouse
Wade J. Newhouse,
Public Panel Member and Chairman

Date: 12/29/88

"I concur in A, B, D, E, F, G, H, and J. hereafter."

I dissent C(1) and C(2) for the reasons stated

Francis C. LaVigne, Esq.
Francis C. LaVigne, Esq.
Employer Panel Member

Date: 1/4/89

William Maginn, Jr.
William Maginn, Jr., Esq.
Employee Organization Panel Member

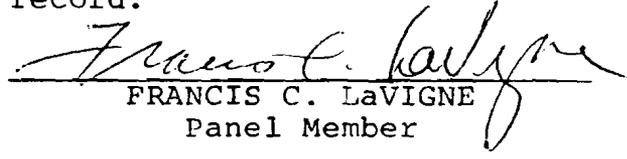
Date: 12/30/88

See over for Dissent

DISSENT

C(1) & C(2). The expired contract provided that when an officer retired, he could choose, at his option, to take payment of his unused sick time, at his daily rate, over a ten year period, or health insurance paid by the Village. This award substantially changes the terms of the expired contract, by removing the option, and requiring the Village to pay both unused sick leave and provide health insurance or Medicare. Neither party addressed the time of payment of unused sick leave, nor presented evidence on that subject. The one time expense of a maximum of \$10,000.00 for an officer on retirement causes a substantial impact on the Village budget for police expense.

It is to be noted here that the retiring officer receives a pension payment from the New York State Retirement System. These awards substantially increase that pension at the expense of the Village taxpayers, impose additional impact on the Village budget for the next two years, and are unwarranted, unsubstantiated and improper in view of the record.


FRANCIS C. LAVIGNE
Panel Member