

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD
CASE NUMBER IA 86-~~85~~, 1786-61

NY& PUBLIC EMPLOYMENT RELATIONS BOARD
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CONCILIATION

In The Matter Of The Interest Arbitration Between
CITY OF SCHENECTADY

-and-

SCHENECTADY POLICE BENEVOLENT ASSOCIATION

As a result of a continuing dispute in negotiations between the City of Schenectady (hereinafter referred to as "City") and the Schenectady Police Benevolent Association (hereinafter referred to as "PBA"), the New York State Public Employment Relations Board, under the provisions of Civil Service Law, Section 209.4 on June 29, 1987, appointed the following as a Public Panel to make a just and reasonable determination of the dispute between the parties.

The members of the Panel are:

Public Panel Member and Chairperson, Jonas Aarons, Esq.

Employer Panel Member, Joseph Buchyn, Esq.

Employee Organization Panel Member, Frank Grasso, Esq.

The City of Schenectady was represented by Buchyn, O'Hare and Werner, Esqs., 6 Union Street, Schenectady, New York 12305, with Paul J. Campito, Esq. and Margaret D. Huff, Esq. appearing on behalf of the City.

The PBA was represented by Grasso and Grasso, Esqs., 124 Clinton Street, Schenectady, New York 12305, with Jane K. Finin Esq., appearing on behalf of the PBA.

Hearings were held in Schenectady, New York, on July 16, 1987, October 23, 1987, February 14, 1988, February 16, 1988, April 11, 1988, April 12, 1988, June 20, 1988, July 8, 1988, and December 9, 1988. The members of the Panel also met in Executive Session in Schenectady, New York, on several occasions, to wit, October 28, 1988, March 20, 21, 1989 and April 13, 1989.

At all hearings held, all parties had an opportunity to introduce whatever evidence they chose, to conduct direct and cross examination of all witnesses, and received all rights usually granted to parties in matters of this type.

The parties submitted posthearing memoranda, all of which were considered by the Panel prior to reaching its determination in this matter.

BACKGROUND

The collective bargaining history between the parties extends in one form or another back to the 1930s, with the PBA being recognized as the negotiations agent for the Police under the then new Taylor Law in November of 1967. The first contract between the parties was sometime in 1968. Much of what is now in dispute arises out of language first negotiated back in the late 1960s. The parties have enjoyed both amicable relations and, unfortunately, at times less than amicable negotiating relations. There have been three prior Interest Arbitrations between the parties over the years.

The petition for Compulsory Interest Arbitration in this case was filed initially by the City on March 6, 1987, to have a Panel convened relating to the successor to the 1983-1985 labor agreement between the parties. During the course of the proceedings here, the parties entered into an agreement relating to base salary for the calendar year 1986 as well as other matters then in dispute. This agreement was entered into evidence as Joint Exhibit 1 before the Panel, and will be incorporated by reference herein. The Panel has before it a number of Issues which were not resolved by the parties, including wages and other economic items for the years 1987 and 1988. Additionally, there was an application or petition to the Public Employment Relations Board by the City relating to a claim of a lack of negotiability on a number of items in dispute between the parties, and there was a decision rendered by PERB on these Issues in dispute. The Panel has before it an application by the PBA to retain its jurisdiction over those matters initially in dispute between the parties for the successor agreement of the 1983-1985 agreement which were found by PERB to be nonmandatory and for which substitute language has been proposed. The Panel will hereinafter render its determination regarding such question as well as its decision on the Issues presently and properly before it under relevant statutes and rules and regulations of PERB.

The Panel sees no reason to set forth at length the specifics of each of the proposals or demands of the parties; it will set forth such in generalized form as follows:

The City proposals are as follows:

1. Amend the provision of the contract entitled "Purpose and Intent--Article II." It should be noted that this provision of the current agreement was found by PERB to be a non-mandatory subject of negotiations and will be discussed hereinafter as to whether the Panel should retain jurisdiction over such.

2. Amend the provisions of the contract entitled and covered under "Definitions--Article III." The parties have agreed that paragraphs A, B, C, D, E, F, G, H, J, K, L, M and O of Article III would continue unchanged; however, they have not agreed regarding paragraphs I and N of Article III. Paragraph I has been found by PERB to be a nonmandatory subject of negotiations and thus will be treated as such at this time; however, as the Panel has noted above, it will determine whether it will retain jurisdiction over this provision in dispute if necessary for further proceedings to be held on these items. Paragraph N of Article III was submitted to PERB along with a number of other disputed areas as to whether they are mandatory subjects of negotiations, and PERB found paragraph N to be a mandatory subject of negotiations.

3. Amendment of the provision of the contract entitled "Management Rights and Responsibilities--Article VI."

4. Amendment of the provision of the contract entitled "Rights of Employees--Article VII." Paragraphs A, B and C of the current labor agreement have been found by PERB to be nonmandatory subjects and thus will be treated as noted above relating to other areas which have been found to be nonmandatory subjects of

negotiation by PERB. The City has no objection to the present paragraph D, however it seeks to amend the present paragraph E by excluding such from the contract.

5. Amendment of the provision of the contract entitled "Disciplinary Action--Article VIII."

6. Amendment of the provision of the contract entitled "Grievance Procedure--Article IX."

7. Amendment of the provision of the contract entitled "Arbitration--Article X."

8. Amendment of the provision of the contract entitled "Wages and Other Economic Provisions--Article XI." In particular, the City makes proposals regarding Article XI (1), (2), (4), (5), and (7).

9. Amendment of the provision of the contract entitled "Hours of Employment, Vacations, Sick Leave, Leaves of Absence, Etc.--Article XII." Specifically, the City proposes changes in Article XII (1), (2), and (6). Regarding Article XII (1), PERB has found the present language--that is, that contained in the old agreement--to be nonmandatory and the City has proposed substitute language therefor. The Panel will discuss this area together with the other subjects which were found to be not subjects of negotiation by PERB.

10. Amendment of the provision of the contract entitled "Seniority--Article XIV." Specifically, the City seeks to delete the present paragraph D of Article XIV and add a new paragraph G which would deal with light duty.

11. Amendment of the provision of the contract entitled

"Professional Training and Improvement Courses--Article XV."

Specifically, the City seeks to retain unchanged paragraphs 3 and 5 of Article XV, but to amend paragraphs 1, 2 and 4 of Article XV.

12. Amendment of the provision of the contract entitled "Transfers--Article XVI." The present language of Article XVI was held by PERB to be a nonmandatory subject and the City has proposed substitute language therefor in the present provision of Article XVI found to be a nonmandatory subject by PERB. This area will be discussed by the Panel along with the other areas found to be nonmandatory by PERB.

13. Amendment of the provision of the contract entitled "Newly Created and Vacant Positions--Article XVII." PERB has found the present language relating to this subject area to be a nonmandatory subject of negotiations, and this item will be treated along with the other areas similarly found to be nonmandatory by PERB.

14. Amendment of the provision of the contract entitled "Miscellaneous Provisions--Article XVIII." The City and the PBA have no dispute relating to the continuing of the present paragraphs 1, 2, 3, 4, 5 and 11. Paragraph 7 has been found by PERB to be a nonmandatory subject of negotiations and will be discussed together with the other items similarly found by PERB to be nonmandatory. The City proposes amendment of the present paragraphs 6 and 8.

15. The City closes its proposals by seeking the Panel to not Award that any of its affirmative findings on behalf of the PBA's proposals be retroactive.

The PBA's proposals are as follows:

1. Improvements in economic benefits provided in Article XI, Sections 1, 2, 5, 6, 7 and 9 (salary, longevity, clothing allowance, pensions, holidays and shift differential);
2. Improvements in benefits provided for in Article XII, Sections 2 and 3 (sick leave and vacation pay);
3. Retention by the Panel of jurisdiction over substitute language relating to the provisions found to be nonmandatory by PERB.

In reaching its determinations hereinafter set forth, the Panel was guided by the evidence and arguments submitted by the parties, and, substantively, by the provisions of Section 209.4 and other relevant provisions of the Civil Service Law governing criteria to be applied in Compulsory Interest Arbitration. The relevant provisions of such statutes are, in the main, as follows:

"Statutory Provisions Applicable to Compulsory Interest Arbitration Pursuant to Civil Service Law, Section 209.4 (as amended July 1, 1977)"

"(iii) . . . The Public Arbitration Panel shall hold hearings on all matters related to the dispute. . . .

"(iv) . . .

"(v) The Public Arbitration Panel shall make a just and reasonable determination of the matters in dispute. 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 disputed Issues will be discussed and awarded on in as summarized a form as possible. Suffice it to say the Panel has considered all of the evidence and arguments submitted by the parties on the Issues in dispute prior to reaching its determination hereinafter set forth.

It should be noted at the outset that the parties agreed in an agreement entered into evidence as Joint Exhibit 1 that the parties extended the statutory two year limitation on the jurisdiction of the Panel to three years, and agreed to be bound by the determination of such Panel for the third year. Further, the Panel was requested, and accepted such, the agreement of the parties that it determine all Issues presented to it by the parties for the period of three years commencing January 1, 1986 and terminating December 31, 1988, which included a wage determination for 1987 and 1988. The Panel, in accord with the agreement of the parties, as entered into evidence before the Panel as Joint Exhibit 1, will render its determination in accord with such agreement.

BACKGROUND

As can be seen from the passage of time devoted to this matter, as well as to the number of Issues still outstanding before the Panel, the parties are divided as to their positions on a number of Issues. The Panel throughout these proceedings has attempted to motivate the parties to resolve their differences, however without any significant success. In a sense, it is obvious to all some if not many of the Issues in dispute may be academic, as the parties are waiting to negotiate on a successor accord to that presently before this Panel. The time affected by our Award here has passed, with the parties waiting on the sidelines for this Award so they can begin negotiating the future and part of the present. There are, as we have noted, significant differences between the parties on a number of areas of concern, economic as well as otherwise. It is clear to a majority of the Panel that the place for the resolution of the major Issues is most appropriately at the negotiating table; however, for good or for ill, this Panel is presented with the task of substituting its judgment for that of the parties themselves, with reliance on the statutory criteria as well as the evidence and arguments offered to it.

The City is, as is known to all concerned, a medium-sized one with the present problems of many of similar municipalities throughout the state, if not the country. Accompanying these problems, economic and social, are the hopes for the future. The employees represented by the PBA here are, according to the

probative evidence, dedicated and hardworking in their law enforcement activities. The City representatives have recognized such and seek to balance the priorities perceived by the City with the needs of the unit employees. The PBA, as well, has attempted to balance its proposals with the recognized concerns of the City. Sadly, they have not been able to achieve a meeting of the minds as to how to appropriately balance their mutual interests and aspirations. We have perforce had to here render our determination as to what we believe to be the appropriate equating and balancing of the parties' interests and needs with, hopefully, a full consideration of the relevant factors to be considered as set forth by statute, reason and the evidence and arguments offered. The Panel has not achieved its decisions here easily, as the Issues in dispute are not subject to facile determination. The Panel sincerely and unanimously hopes the Award here will close out the past disputes and lay a salutary basis for resolution of future contests. The varying Issues in dispute have caused us to rely on the criteria provided by statute in a relative fashion; that is, some of the Issues in dispute call for reliance on some criteria and other Issues in dispute force reliance on criteria which are relatively important to such as opposed to other criteria offered by the statutes. The Panel has pondered long and hard on its determinations hereinafter set forth, and the brevity of the discussion on any particular item in Issue in no way indicates the importance thereof nor of the amount of consideration given by the Panel to it.

DISCUSSION AND AWARD
ON ISSUES IN DISPUTE

CITY PROPOSALS

1. The dispute relating to Article II, entitled "Purpose and Intent," is based on the PBA seeking the retention of such initially and the City moving before PERB to have this provision declared a nonmandatory subject of negotiations. PERB did, in fact, declare it to be a nonmandatory subject of negotiations, and the PBA has not proposed substitute language for the prior Article II. Thus, the Panel determines this provision is not before it for determination.

2. The City was upheld by PERB in its assertion that the current definition of "Grievance" in paragraph I of Article III was a nonmandatory subject of negotiations. The City has proposed another definition of "Grievance," as has the PBA. The parties have not negotiated, at least as such term might be meaningfully defined, on their respective proposals for language substituting for the form found a nonmandatory subject. Under this posture of circumstances and evidence, a majority of the Panel feels that it would be inappropriate for it to substitute its judgment for that of the parties on such an important area of the parties' agreement without the parties having a full opportunity to negotiate upon it themselves. Therefore, the Panel will not make an affirmative Award on the City's proposal regarding paragraph I of Article III.

The City has also proposed deletion of the present paragraph N of Article III. The basis for the City's proposal is primarily on argument regarding the lack of need for such a provision and the probability of conflict with other areas already existing or proposed for the contract.

A majority of the Panel does not believe that the burden of the probative evidence, nor accord with any of the statutory criteria, call for an affirmative awarding on this proposal. Therefore, the Panel will not Award affirmatively on the City's proposal regarding deletion of paragraph N of Article III.

3. The City has proposed changes in Article VI, which is entitled "Management Rights and Responsibilities."

The City seeks to add language which would, in effect, add what is commonly known in labor relations as a zipper clause with consequent argued-for salutary effects. There were additional items in dispute between the parties which were determined to be nonmandatory subjects of negotiation by PERB, and therefore not before the Panel for consideration at this time. The PBA has proposed a substitute for some of the areas determined to be nonmandatory subjects by PERB.

In regard to the amendment sought by the City to the language of Article VI, a majority of the Panel finds no evidence warranting any change to provide for a "zipper clause." There was no demonstration by the City of any substantial problems calling for the addition of the language sought by it, barring negotiation with the PBA. A majority of the Panel believes that

such a change in the contract provisions as sought by the City in this article of the contract should be a result of negotiations between the parties, rather than by fiat of a third party, at least under the circumstances presented here. The Panel would also point to the proposal of the PBA regarding substitute language for some of the areas declared not mandatory subjects by PERB as affording an opportunity or a forum in which the parties may address whatever concerns they may have relating to the language of Article VI. In sum, a majority of the Panel will not make an affirmative Award on the City's proposals relating to any change in Article VI of the contract.

4. The City has proposed the deletion of paragraph E of Article VII of the present contract between the parties. It should also be noted that paragraphs A, B and C of Article VII have been determined by PERB to be nonmandatory subjects of negotiation, but are in fact the subjects of substitute language proposals by the PBA. Thus, these areas are not before the Panel for consideration at this time. In regard to the proposed excision of paragraph E of Article VII sought by the City, a majority of the Panel sees no probative evidence in the record to warrant any change in this provision or its deletion from the agreement between the parties. The City's assertion in regard to this proposal is based on conjecture and is thus insufficient to warrant affirmative action by the Panel. The Panel will therefore not make any affirmative Award on the City's proposal regarding a change in Article VII of the agreement.

5. The City seeks to make a major change in the provisions of Article VIII, entitled "Disciplinary Action." The effect of the City's proposal will be to remove as a form of appeal or remedy for disciplinary action against an employee which is claimed to be improper the grievance procedure culminating in arbitration provided for in the parties' agreement. A majority of the Panel would point out that the proposal of the City runs counter to the prevailing trend in public sector labor relations, as the majority of labor agreements covering public sector employees provide for arbitration rather than resort to the Civil Service Law provisions of Section 75 as an avenue for appeal by employees affected by disciplinary action in the public sector. Additionally, the provision in question has been in the contract for a number of years with little prejudice shown to the City by its implementation through action of disciplined police officers. The cases cited by the City in support of its proposal offer little warrant for remediation by this Panel. At best, the City's evidence discloses fears that arbitrators might act on occasion to its prejudice in disciplinary actions or conjecture that the time taken by arbitrators is in excess of that which would be expended by another reviewing agency. There was little or no demonstration that any of the criteria offered by the statute for use by the Panel would be served or met by the granting of the City's proposal. A majority of the Panel strongly believes that it would be presumptuous of the Panel to make such a drastic change in the contractual rights of bargaining unit members such as is sought here without the agreement of both sides to such a

change. This is particularly so considering the relative lack of proof of any prejudice to the proposing party here. Therefore, the Panel will not make an affirmative Award on the City proposal regarding Article VIII of the present agreement.

6. The City has proposed considerable modification of the present Article IX, "Grievance Procedure." The general language of the grievance procedure has been in the contract for a number of years, and except for some problems concerning time limitations, has not, according to the evidence, been much of a problem, if a problem at all, to either of the parties. Except for the arguments and evidence relating to time limitations on the filing of grievances and so on, there was not such an affirmative showing as to warrant a majority of the Panel to believe that any of the statutory criteria would be promoted or met by the proposal relating to the changes in the grievance procedure proposed by the City. In regard to the time limitations, it does appear to a majority of the Panel that there is a need for the inclusion of reasonable periods of limitation in which to file a grievance and proceed to the grievance procedure. A majority of the Panel believe such is called for by the statutory criteria, in particular a comparison of terms and conditions of employment of similar employees, and the Panel would point to the prevailing trend, if not overwhelming presence, in labor agreements in the public sector of periods of limitation for the grievance process. Furthermore, a majority of the Panel believes that the overall interest and welfare of the public, as well as the mutual benefit which would accrue to both parties here, would

be advanced by the inclusion in the present grievance procedure of relevant time limitations. It has long been the prevailing opinion among experts in labor relations that stale claims should be laid to rest, and that reasonable time limitations are called for in the processing of grievances. This is reflected by the overwhelming presence in the labor agreements offered as evidence here of some form of period of limitations in the processing and filing of grievances. The public and unit members are ill-served by delay in filing and processing of grievances. A lack of time limits for the filing and processing of grievances breeds dilatoriness in action by all concerned. The interest and the welfare of the public is not served by permitting hoary grievances nor are the interests of the overall bargaining unit and labor organization served by aged grievances. Therefore, the Panel will Award that all grievances shall be submitted in writing at the first available stage for a written grievance within fifteen calendar days after the grieving party or person knew or reasonably should have known of the facts giving rise to the grievance. A failure to file or submit the grievance within the fifteen calendar day period will be deemed a waiver by the grieving person or party of such grievance. All time limits provided for in the grievance procedure may be extended by the mutual agreement of the parties. Furthermore, a failure or omission by the public employer or its agents to respond within the time limits provided for it to so respond by the grievance procedure shall permit the grieving person or party to proceed to the next stage of the grievance procedure, including arbitration.

7. The City has proposed considerable change in the provisions of Article X, entitled "Arbitration." Except for conjectured fears of the "untrammelled power" of an arbitrator and an affirmative showing of need for time limitations for the filing for arbitration, the Panel Majority believes the City has offered little probative evidence warranting the changes sought by it in Article X. The City could point to no prejudice in the past by the existence of the present Article X, and there was no persuasive showing that the criteria set forth in the statute would be met or furthered by the changes sought by the City in Article X. A majority of the Panel, however, does note the exception of the perceived need for reasonable time limits in the move to arbitration of a grievance. For the reasons the Panel set forth regarding the need for time limits in the processing of grievances, the Panel believes a reasonable period of time should be provided for the progression to arbitration of an unresolved grievance. Therefore, the Panel will Award that any grievance may be submitted to arbitration by either party to the agreement within twenty calendar days after the grievance has been processed fully through the last step of the grievance procedure. A failure to comply with the time limitation for the submission to arbitration shall be deemed a waiver of such grievance.

8. The City has made several proposals in regard to Article XI, entitled "Wages and Other Economic Provisions." Such proposals include a three percent increase in the base salary and an inclusion of the salary schedule in the main body of the contract rather than as it presently exists as an appendix. The City

has also proposed the incorporation of the present appendix relating to longevity in the contract and retention of the present longevity schedule. There is also a proposal for revision to the current overtime and callback language of the contract, with relatively major modification proposed. There was also modification sought in the present Article XI (5) relating to clothing allowance and a proposal to modify the current Article XI (7) relating to holidays.

The economic items are also part of the PBA proposals in the main, and will be discussed hereinafter as to what amounts, if any, that the Panel will Award relating to these areas. In regard to language changes proposed by the City in the varying provisions of Article XI, the Panel has considered such proposals and, although it may very well be that there might be some economic savings from the results of some if not all of the City's proposals, yet the Panel majority does not believe that the City has sustained its burden to warrant a change in the varying areas of Article XI as proposed on by the City. The Panel Majority would note that much of the changes sought by the City would be to benefits the PBA has long enjoyed and which would be resultant not from a face-to-face confrontation across the negotiating table but rather by direction of an external Interest Arbitration Panel. Furthermore, the Panel Majority notes the City has not been able to sustain its burden of demonstrating any particular prejudice to it from the language of any of the areas of Article XI complained of as causing difficulty to it. The City has at best shown that it has had to go to arbitration and defend

its actions in, for example, the callback area. The City, of course, claims this is an unreasonable burden; however, it is, for want of a better term, part of the cost of doing business in labor relations. That is, it is not unusual or unreasonable to expect that there be grievances and arbitrations arising out of interpretations by competing interests as to language in a contract. It is probably certainly true, and more probably will always be certainly true, that some individuals under virtually any contract will seek to achieve unearned windfalls. That is really what the City is complaining of in the area of callback. Furthermore, in regard to the area of compensatory time also complained of as needing change by the City, the Panel Majority notes that there have been changes over the years agreed to by the parties, and if further changes are to be made, a majority of the Panel believes that such should be achieved by negotiations. In short, a majority of the Panel has determined that the City has not achieved its burden of demonstrating the changes it seeks in the varying provisions of Article XI meet to any reasonable degree the statutory criteria so as to call for this Panel making the changes sought by the City in Article XI. The Panel Majority would further note that much of the language complained of by the City exists in collective bargaining agreements throughout the public sector, having been achieved through negotiations by the parties, and if to be changed, should be by the same modality. The Panel Majority notes that in those areas where there has been abuse, and a majority would agree that where an employee seeks callback pay for his or her appearance in a forum

where he or she is receiving a benefit or a class of which he or she is a member receives a benefit, then such should be at the employee's own expense, but as the Panel has noted hereinabove, the City has been successful in arbitration in a denial of such an overreaching. The Panel notes that it has long been considered that arbitration has been thought to be part of the negotiations process, if you will. Thus, the history of at least some areas of Article XI wherein the City may have a legitimate case to make has shown the labor relations process including arbitration to have achieved the goal sought.

Again, the Panel Majority reiterates its conclusion that the changes sought by the City in the provisions of Article XI are not warranted by the evidence offered to show a meeting of the statutory criteria.

9. The City seeks several changes in the provisions of Article XII. The first proposal relates to substitute language for Article XII (1), which had been the subject of a scope petition before PERB and which PERB found in the present form-- that is, the present wording of Article XII (1)--to be nonmandatory; thus, the City has proposed substitute language for Article XII (1). The Panel would note that the PBA has also offered substitute language for the provision found to be a nonmandatory subject by PERB. A majority of the Panel believes that if there is to be language incorporated in the contract to substitute for that which PERB has found to be a nonmandatory subject, then such should be the result of a meeting of the minds of the parties involved rather than this Panel. Thus, the Panel will not make

an affirmative Award on the proposal of the City regarding Article XII (1).

The City proposes considerable change in the provisions of Article XII (2) relating to sick leave. The present sick leave provisions have been in substantially the same form for many years. In major shape, they existed prior to the onset of negotiations between the parties under the Taylor Law. The City cataloged several cases wherein they claimed abuse and objected to the PBA's challenge to the City's actions. The Panel noted that in some instances the PBA challenges were upheld by arbitration Awards. It therefore seems to the Panel majority that the City is seeking here to undo what it had agreed to do over the years through prior negotiations and the effect of which had been upheld by at least some arbitrators to the City's detriment and to unit members' advantage. It should be pointed out that some of the areas about which the City complains have been achieved by administrative action; that is, the evidence showed that there has been an ordering as to the appropriate medical facility to report to in an appropriate case of employee sickness or injury. It further appears that some amelioration might be further achieved if necessary of what the City complains are abuses by other administrative actions. But in the main, the City's proposals seek a major modification of the sick leave benefit to the bargaining unit employees, and a majority of the Panel believes that given the long-term existence of such benefit and the lack of persuasive evidence to demonstrate such prejudice to the City and/or abuse by unit members as to warrant a change such

as is sought by the City here, the statutory criteria and general practice of labor relations do not mandate the changes sought. Therefore, the Panel will not Award affirmatively on the proposals by the City to change the provisions of Article XII (2).

The City also seeks to modify Article XII (6) regarding leaves of absence for Union representatives. The provision in Issue here--that is, the leaves of absence for Union representatives--has been in the contract between the parties for a number of years and has had a varying history throughout the years of alleged abuse and then accommodation and then claims of further abuse by the City with, on occasion, further accommodations by the PBA. The City seeks to make considerable changes in the present provisions, and has to some degree proven a case for a limiting of this benefit. A majority of the Panel, based on the statutory criteria, particularly when comparing this benefit to similar benefits in other public sector contracts and the public welfare in general, believes that some modification is called for by the statutory criteria as supported by the credible evidence offered here. A majority of the Panel would note that there has been accommodation by the PBA over the years in this area, and this is demonstrative of the ability, at least on occasion, for the parties to engage in meaningful collective negotiations. However, a majority of the Panel concludes some change is warranted for the foregoing reasons, and will Award that the benefit provided for in the first two paragraphs of Article XII, Section 6, will be limited to 390 man days. Further, that the number of man hours set forth in the third paragraph of

Article XII, Section 6, be changed from "nine hundred and sixty (960)" to "four hundred and eighty (480)." The Panel will so Award.

10. The City seeks changes in Article XIV D and G. The City has proposed changes to remove what it states to be the rule of strict seniority mandating varying actions affecting unit employees.

The Panel would point out at the outset that it does not read the contract as providing for strict seniority but that there are reservations on such as, for example, contained clearly in Article XIV D. The City argues that, among other things, if it complied with the rule of strict seniority, it might open itself to lawsuits and the like by actions resulting from having incompetent employees performing work for which they were unsuited. The last sentence of paragraph D of Article XIV seems by the Panel to cover that very area where it says, "However, it is recognized that the public safety must not be jeopardized through artificial constraints resulting from the application of the principle of strict seniority." The City was unable to demonstrate any concrete instances where there has been substantial prejudice resulting from the implementation of the provisions of the contract it seeks to change here. It strikes a majority of the Panel that where there is contract language which has existed for a number of years without major probative evidence of substantial prejudice resulting from the implementation thereof, that any change should be the result of the parties' own mutual determinations. This is particularly so in such a vital

area of the labor relationship between employee and employer as seniority. Seniority is generally considered along with the grievance provisions of a contract as the most important sections of a labor agreement. The City has also sought to add, in effect, a light duty section by appending a provision to Article XIV, G. This change is part and parcel of what the City claims is a means of dealing with the alleged abuse of the unlimited sick leave benefit. The Panel has discussed the sick leave area hereinabove. It sees no reason to overextend its discussion in regard to the proposal to add a light duty provision. The Panel majority believes that there was no demonstrable evidence to demonstrate the need for the addition of such light duty language barring the agreement of the parties. The Panel Majority finds, therefore, that on the basis of the statutory criteria and the evidence there is no basis for any changes in Article XIV as proposed by the City and will not affirmatively Award thereon.

11. The City seeks to make changes in Article XV, paragraphs 1, 2 and 4, which in effect would modify the present mode of selection for training and improvement. The Panel Majority finds the City has failed to demonstrate there has been any substantial prejudice from the implementation of the present language, which has existed for a long period of time, or that there would be any actual meeting of the statutory criteria by the changes sought by it, other than some perhaps increased flexibility in the administration of the professional training and improvement courses. Therefore, the Panel will not affirmatively Award on the changes sought to be made by the City

proposals regarding Article XV in the area of professional training and improvement courses.

12. The City seeks to substitute language for that in Article XVI relating to transfers which has been found by PERB to be a nonmandatory subject of bargaining. It is noted the PBA has also offered substitute language for this provision found to be a nonmandatory subject of bargaining by PERB. The Panel majority believes that it is inappropriate for it to substitute its judgment for that of the parties in regard to this important area. The Panel will therefore not Award affirmatively on the City proposal for Article XVI relating to transfers.

13. This relates to Article XVII, "Newly Created and Vacant Positions." PERB has found this to be a nonmandatory subject of negotiations, however the PBA has proposed substitute language for that which PERB found to be inappropriate. The Panel will make no affirmative Award on this, but refer it to the parties for negotiations in accord with their varying obligations under applicable statutes.

14. The City has proposed varying changes in Article XVIII, entitled "Miscellaneous." Paragraph 7 of the current agreement has been determined by PERB to be a nonmandatory subject of negotiations, but the PBA has proposed substitute language, and the Panel majority believes that this is a matter best resolved by the parties themselves in accord with their statutory obligations. In regard to the other change sought by the City in Paragraph 6, Article XVIII, the Panel Majority notes that the major premise of the City in regard to such changes is speculative as

to possible fears as to the effect of the continuation of such language. However, the Panel Majority notes the language has been in the contract for a goodly number of years with no demonstrable proof of substantial prejudice of the City's ability to run its Police Department and provide law enforcement to its citizens. What the City seeks in some considerable part is more definition of language, and the Panel Majority would note in such regard the way to achieve such is across the bargaining table. Thus, the Panel will make no affirmative Award on the City's proposals relating to Article XVIII.

15. The City makes an affirmative proposal that any implementation of the Panel's determinations be prospective. In effect, this would be a distribution of the burden of the prolonged proceedings here so that the parties would share in such taxing. In the view of a majority of the Panel, there is a major flaw in this argument, and that is that the by far major portion of the burden would fall on the unit members. The argument offered by the City in support of its position is more persuasive in form than in substance. It has been the practice, both of Interest Arbitration Panels as well as negotiators over the years, that when a contract dispute over terms and conditions of employment has finally been resolved in one form or another, that the benefits are generally retroactive barring agreement of the parties and/or good reasons for limiting their retroactive effect. Here, a majority of the Panel believes that good and persuasive reasons have not been demonstrated nor will the statutory criteria be met or promoted by the limiting of the retroactive effect of any

benefits provided herein. Therefore, the City proposals for limiting the retroactive effect of the Award herein will not be affirmatively awarded upon.

PBA PROPOSALS

1. The PBA proposals are essentially one, although they are broken down into certain categories. The proposal, as the Panel sees it, is really one that is solely economic and seeks improvement in recompense albeit derived from different forms of benefits. The PBA seeks an increase in salary, which it claims should be in the range of 8½% to 14% for 1987 and 1988, a considerable increase in longevity benefits, an increase in clothing allowances, an increase in compensation by a share in alleged savings to the City when unit members are involved in different forms of retirement plans, improvement in holiday benefits, improvements in shift differentials, improvement in sick leave bonuses, and improvement in vacation benefits.

As always in these matters, it is the economic section of the parties' dispute which is the core of the conflict. It is clear from the tenor of the proceedings that the PBA is seeking improvement in compensation for their labors, either in all, some, or one of the areas they argue for. By that is meant that whether the Panel Awards a portion of improvement in all of the areas or some of the areas or in the one, that is, salary, the result is effectively the same. The PBA essentially rests its position for improvement, and considerable improvement, on a number of premises incorporated in the statutory criteria. The PBA argues on the

comparability issue and points to neighboring communities, in particular one, as well as improvements granted to the other uniformed force of the City--that is, the uniformed firefighters. The PBA further argues that although there may be some concession that the City has economic problems, yet such have been long existent and provided for, and as noted, other bargaining units have received improvements in their economic benefits without, the PBA underlines, a similar request for give-backs such as has been made on the PBA. It is further asserted that the Police Officers involved in this matter are at the cutting edge of major social problems such as the unfortunate major increase in drug traffic and related crimes resulting therefrom, AIDS, and general social upheavals in such an urbanized area as Schenectady, which cause stress and pressure on the Police Officers which can only be partially compensated for by improvement in economic benefits. There is also the claim that the Schenectady police force unit members have over the years enjoyed a relatively high status in economic benefits, and there is no real reason why they should not continue to do so, given the overall circumstances. These together with other arguments raised by the PBA point, according to it, to only one conclusion, that there should be a substantial increase in the economic benefits provided to the bargaining unit members of the Schenectady Police Department.

The City, of course, on the other hand argues that there are major economic problems existing in, which will continue in the future for the City of Schenectady, and that its ability to pay has been severely compromised thereby, so that any increase

offered to the bargaining unit should be a moderate one in the area of three percent overall. The City also points to the status of the unit members as being a relatively high one economically, and that its proposal would not severely change their status, but keep them essentially where they are, which is not unreasonable given the overall circumstances. All in all, the City argues that the PBA's case in support of its claims for the major increases are not substantiated by probative evidence and that the Panel should Award in accord with the City proposals relating to improvement in economic benefits.

The above is obviously just a generalized limning of the parties' arguments and positions in regard to the major question of economic benefits. The parties offered considerable amounts of evidence in support of their respective positions. This included an overall and fine detailing of the City's past, present and future economy, the sociological and economic breakdown of the City's residents, the statistics as to crime and other related activities affecting the bargaining unit members, and a host of other proofs offered by the parties in support of their respective claims.

The Panel has considered carefully all of the evidence and arguments offered by the parties in support of their respective positions, and would note that, as in most of these matters, it is most difficult to winnow out the wheat from the chaff. Municipal budgets are arcane affairs, as are the reams of economic data offered. To the degree possible, the Panel has attempted to strike a reasonable compromise with the acknowledged needs of

the unit members for improvement in their compensation as well as the needs of the City to maintain and hopefully improve their rendering of services to their citizens and maintenance of economic health. We have considered to the degree possible the comparability factor--that is, the comparing of the situation of the Schenectady Police Department unit members with comparable employees outside the City of Schenectady and within the City of Schenectady. In the latter regard, obviously we are referring primarily to the Fire Department personnel. We have used the comparability factor as a major base for our Award as well as the ability of the City to pay as the Panel has determined such from the probative evidence offered by the parties here. We have further considered the overall collective bargaining agreement benefits offered to the unit members, as such is one of the criteria provided for by the relevant statute in Interest Arbitrations. We have noted, as is clear from the attempts in proposals of the City to, in effect, achieve give-backs, that overall the collective bargaining agreement between the parties here is relatively positive in affect to the bargaining unit members. We have considered, in short, all of the criteria as applicable to the proposals of the parties relating to economic benefits, as we have throughout. A majority of the Panel has determined that rather than parcel out the economic provision of this Award, we will make one single percentage increase for each of the years involved--that is, for 1987 and 1988; 1986 having been taken care of in the economic area by Joint Exhibit 1 introduced into evidence in this proceeding.

On the basis of all of the above, the Panel will Award there be an increase in salary for 1987 to the bargaining unit members affected by this Interest Award of 6.5% across the board; and similarly, for 1988, of 4.5%.

The above is the Award on all economic benefits sought for by the PBA in this matter and is in lieu of any specific increases sought in other areas than salary. The majority of the Panel makes this Award giving consideration to the economic benefits achieved by other bargaining units employed within the City of Schenectady, as well as in comparable locales, and further in light of the overall benefits enjoyed by the unit members here together with the nature of their employment, which includes, clearly, the interest and the welfare of the public to continue to enjoy the fine performance rendered to it by the unit employees.

2. The Panel has considered the application by the PBA for it to retain jurisdiction over those sections of the agreement which the parties seek to revise as a result of PERB's determination that such are nonmandatory subjects of negotiation. The PBA relies on PERB Rule 205.6(c), which states: "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."

The City contests the retention of jurisdiction by this Panel after the completion of its awarding herein on the Issues presented to it.

The Panel notes both sides make excellent arguments in support of their respective positions as to this question. As a practical matter, the Panel is well aware of the timing of the circumstances; that is, the parties are, or will shortly be engaged in negotiations for a successor agreement to that which gave rise to this proceeding, and there will probably be included therein the Issues involving the matters in dispute arising out of the PERB findings as to such items not being mandatory subjects for bargaining. Clearly, if the parties are unavailing of achieving compromise in negotiations, they can have resort to the impasse resolution procedures culminating in Interest Arbitration. So that, regardless of what this Panel determines, there will probably be some Interest Arbitration Panel to determine the questioned Issues here. We believe there is sufficient flexibility in PERB's administrative procedures to provide whatever is necessary. Therefore, we make no determination regarding this proposal.

3. Except as required by the Award here, all proposals submitted for continuation in the parties' agreement shall continue.

In light of the determinations hereinabove set forth, the Panel sees no reason to discuss any other evidence or arguments submitted by the parties in this matter; suffice it to say all relevant, competent and material evidence and arguments submitted by the parties has been considered although perhaps not set forth herein at length.

AWARD

The following is the Award of the Arbitration Panel on those matters submitted to it which are in dispute and which have not been withdrawn by the parties during the course of these proceedings.

1. Any proposals relating to Article II entitled "Purpose and Intent" are found by the Arbitration Panel as not before it for determination.

2. A majority of the Panel denies the City's proposals on definition of "Grievance" in Paragraph I of Article III.

A majority of the Panel denies the City's proposal to delete the present Paragraph N of Article III.

3. A majority of the Panel denies ^{the City's} / proposed changes in Article VI entitled "Management Rights and Responsibilities."

4. A majority of the Panel denies ^{the City's} / proposals relating to Article ^{VII(E)} / of the contract.

5. A majority of the Panel denies ^{the City's} / proposals for change in Article VIII entitled "Disciplinary Action."

6. A majority of the Panel Awards the present Article IX entitled "Grievance Procedure" be amended to provide that all grievances shall be submitted in writing at the first available stage for a written grievance within fifteen (15) calendar days after the grieving party or person knew or reasonably should have known of the facts giving rise to the grievance. A failure to file or submit the grievance within the fifteen (15) calendar day period will be deemed a waiver by the grieving person or party of such grievance. All time limits provided for in the grievance

procedure may be extended by the mutual agreement of the parties. Furthermore, a failure or omission by the Public Employer or its agents to respond within the time limits provided for it to so respond by the grievance procedure shall permit the grieving person or party to proceed to the next stage of the grievance procedure, including arbitration.

Other than the above change a majority of the denial of all City proposals for Panel Awards / other changes in the present Article IX entitled "Grievance Procedure."

7. A majority of the Panel Awards to amend Article X entitled "Arbitration" to provide that any grievance may be submitted to arbitration by either party to the agreement within twenty (20) calendar days after the grievance has been processed fully through the last step of the grievance procedure. A failure to comply with the time limitation for the submission to arbitration shall be deemed a waiver of such grievance.

Other than the above awarded on change, a majority denial of all City proposals for of the Panel Awards / changes in Article X entitled "Arbitration."

8. A majority of the Panel Awards to deny any proposals made in regard to Article XI entitled "Wages and Other Economic Provisions" other than those provided hereinafter regarding wages.

9. A majority of the Panel Awards that the benefit provided for in the first two paragraphs of Article XII, Section 6, will be limited to 390 man days. Further, that the number of man hours set forth in the third paragraph of Article XII, Section 6, be changed from "nine hundred and sixty (960)" to "four

hundred and eighty (480)."

Other than the above, a majority of the Panel of the City's Awards to deny any/other proposals for changes in Article XII of the contract.

10. A majority of the Panel Awards to deny/ the City's proposals for changes in Article XIV D and/or G.

11. A majority of the Panel denies / the City's proposals for changes in Article XV, paragraphs 1, 2 and/or 4.

12. A majority of the Panel denies / the City's proposals for changes in Article XVI.

13. The Panel will make no Award relating to Article XVII entitled "Newly Created and Vacant Positions."

14. A majority of the Panel will make no Award relating to Article XVIII, entitled "Miscellaneous," paragraph 7, and denies any proposals for changes in Article XVIII, paragraph 6.

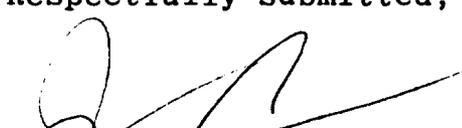
15. A majority of the Panel will Award there be an increase in salary for 1987 to the bargaining unit members affected by this Interest Award of 6.5% across the board; and similarly for 1988 of 4.5%, which for both years shall be retroactive for all unit employees employed during the relevant years.

16. The Panel makes no determination regarding proposals for retention of jurisdiction of any matters covered by this Award.

17. Except as required for the Award here, all proposals submitted for continuation in the agreement shall continue.

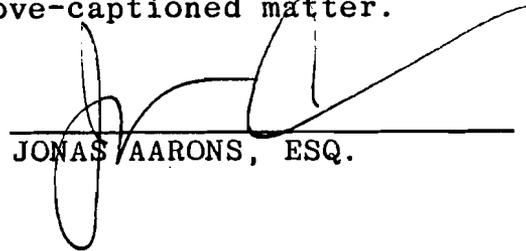
DATED: May 9, 1989

Respectfully submitted,


 JONAS AARONS, ESQ.
 CHAIRPERSON AND IMPARTIAL
 MEMBER OF THE ARBITRATION
 PANEL

AFFIRMATION

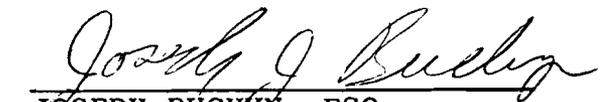
In accordance with Section 7505 of the Civil Practice Laws and Rules, I hereby affirm that I have executed the foregoing as my Opinion and Award in the above-captioned matter.



JONAS AARONS, ESQ.

DATED: ~~April~~ *May 9*, 1989

Respectfully submitted,



JOSEPH BUCHYN, ESQ.
CITY OF SCHENECTADY MEMBER
OF THE ARBITRATION PANEL

Joseph Buchyn, Esq., concurs in Award of City proposals at paragraphs 6, 7, and 9, and dissents from all other Awards by opinions attached, except Awards 3 and 5.

AFFIRMATION

In accordance with Section 7505 of the Civil Practice Laws and Rules, I hereby affirm that I have executed the foregoing as my Opinion and Award in the above-captioned matter.

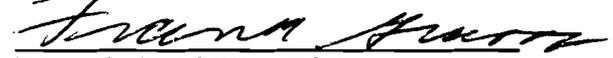


JOSEPH BUCHYN, ESQ.

DATED: ~~April~~ *MAY 9*, 1989

Respectfully submitted, *I concur*

except as indicated in attached separate opinion



FRANK GRASSO, ESQ.
PBA MEMBER OF THE
ARBITRATION PANEL

AFFIRMATION

In accordance with Section 7505 of the Civil Practice Laws and Rules, I hereby affirm that I have executed the foregoing as my Opinion and Award in the above-captioned matter.



FRANK GRASSO, ESQ.

In the Matter of the Interest Arbitration between

CITY OF SCHENECTADY,

NYS PUBLIC EMPLOYMENT RELATIONS BOARD
RECEIVED
JUN 11 1989

Petitioner,

-and-

SCHENECTADY POLICE BENEVOLENT ASSOCIATION, CONCILIATION

Respondent.

SEPARATE OPINION
BY PBA PANEL MEMBER

At the outset I should state that I concur with the reasoning of the Panel Chairman in the majority opinion except for the points raised here. The Chairman has substantially denied the City's attempt to have this panel destroy a negotiated agreement which has been re-affirmed many times, over many years, by these parties. I fully concur with the reasoning and philosophy behind the Chairman's award denying most of demands submitted by the City in its attempt to tear up the negotiated agreement.

I am submitting a separate opinion in this matter for the purpose of dissenting on two points and concurring on one for reasons other than those advanced in the Chairman's opinion.

I must concur in the Chairman's award as it relates to salaries. I do so only because otherwise there would be no majority opinion for salaries for 1987 and 1988. However, the increases of 6.5% and 4.5% which were awarded fall far short of

the increases to which the Schenectady police are entitled. The overwhelming evidence, especially comparability factors, prior agreements and the adverse working conditions of the Police prove and justify their entitlement to greater salary increases than those which were awarded.

I dissent from the award to the extent that it reduces the Association release time benefit and adds time limits to the grievance and arbitration procedures. There is not one shred of evidence in the record to support these changes in the agreement, especially when both provisions have been in effect for 20 years. None of the statutory criteria support these changes. Moreover, in view of the penurious salary increases, the City is getting something for nothing from this Panel. In view of the lengthy history of inclusion of both provisions in the agreement, lack of any evidence to support the changes and failure to provide any economic quid pro quo there is no justification for these reductions in benefits.

Dated: May 9, 1989

Respectfully submitted,



Frank N. Grasso
PBA Panel Member

STATE OF NEW YORK
COUNTY OF SCHENECTADY SS:

Sworn to before me this 9th day
of May, 1989



Notary Public *Comm. Deeds*

In order to fully understand the perspective and basis of this dissent, it is helpful to understand that the arbitration panel met and heard the parties and their witnesses on nine (9) different days (page 2 of majority opinion), that approximately seven hundred sixty-seven (767) pages of testimony were transcribed, that there were eight exhibits submitted jointly, approximately fifty (50) exhibits presented by the PBA and approximately eighty-eight (88) exhibits presented by the City. Since many exhibits were multipage or "packaged" documentation, the exhibits from both sides were voluminous and varied. PBA Exhibit #4, for example, consisted of approximately 80 pages. PBA Exhibits #5 and #6 were of similar magnitude. City Exhibit #51 was a copy of the Colonie PBA agreement of 44 pages, with attachments. The parties submitted post-hearing briefs summarizing their respective positions on the disputed issues with supporting rationale, exhibits, citations of law and awards and decisions made by third parties under the auspices of the Taylor Law. The PBA's brief was 36 pages and the City's brief was 94 pages.

In view of the foregoing, it is my opinion and judgment that there is evidence in the record relative to each and every issue present by either side. That such evidence was wrongly perceived or credited by the majority is the issue of this dissent.

I wish it to be noted that I have made every effort to base my opinion on the record as I see it, rather than on any personal feelings or predispositions. I concur with the majority in acknowledging that the rank and file police officer in Schenectady provides excellent and

in many cases meritorious services. I further concur that such officers should be paid well and the record establishes that they are well paid. It is no reflection upon individual members of the PBA, or its officers, that problems and disputes arise in the administration of the collective bargaining agreement which require resolution in accordance with the provisions of the Taylor Law.

Deferral by Panel to Collective Bargaining

It must be noted that the issues now being resolved by the panel award have been in dispute between the parties since January 1, 1986.

It is further noted at page 9 of the panel report that efforts were made by the panel to motivate the parties to resolve their differences without any significant success.

The panel majority states that the major issues should be resolved at the negotiating table (p. 9) but acknowledges that the panel is presented with the task of substituting its judgment for that of the parties themselves (p. 9).

Nevertheless, the panel majority has refused to resolve many of the issues in dispute before it, and has chosen to defer such issues to negotiations between the parties.

The panel majority refused to make a determination in regard to the definition of "grievance" as proposed by the City (p.11) because it "feels that it would be inappropriate for it to substitute its judgment for that of the parties on such an important area of the parties' agreement without the parties having a full opportunity to negotiate upon it themselves". The panel majority abdicated its responsibility and failed

to fulfill the obligation for which the panel was created. It denied the City's proposal - Award #2.

The panel majority refused to make a determination on Item #3 (p.13) on the ground that language changes proposed by the City should be accomplished as a result of negotiations between the parties, rather than by fiat of a third party. This is a complete negation of Section 209(4)(c)(IV)(V). City proposal denied - Award #3.

The panel majority strongly believed that it would be presumptuous of the panel to make the changes proposed by the City at Item #5 (p.14) without the agreement of both sides to such change. City proposal denied - Award #5.

The panel majority believed that many of the proposals made by the City at Item #8 should result from a "face to face confrontation across the negotiating table" rather than "by direction of an external Interest Arbitration Panel". (pp.18 & 19) City proposals denied - Award #7.

The panel majority stated that the City proposals at Item #9 (XII-1) "should be the result of a meeting of the minds of the parties involved rather than this Panel"(p.20). City proposal denied. Award #9. The only proposal before the panel on this issue was proposed by the City. The panel majority is in error when it states that the PBA has also presented a proposal to the panel. The PBA has no proposal on this item before the panel.

The panel majority states at page 23 that the changes proposed by the City at Item #10 should be the result of the parties' own mutual determinations. City proposal denied - Award #10.

"The panel majority believes that it is inappropriate for it to substitute its judgment for that of the parties in regard to this important area" (p.25) The panel, therefore, denied the City's proposal with respect to Item #12. Award #12.

As to Item #13, the panel majority "will make no affirmative Award on this, but refer it to the parties for negotiations in accord with their varying obligations under applicable statutes. (p.25) City proposal denied - Award #13. The panel majority is in error by stating that the PBA has a proposal on this issue before the panel. The PBA has no proposal before the panel.

Item #14. The panel majority believes that "this is a matter best resolved by the parties themselves in accord with their statutory obligations", (p.25) and it would further "note in such regard the way to achieve such is across the bargaining table (p.26). Thus, the panel will make no affirmative award on the City's proposals. Award #14.

The catch-22 created by the panel majority and not contemplated by the Taylor Law is its refusal to make a just and reasonable determination of the matters in dispute as required by law and, instead, its referral of those disputed issues back to the parties who have not been able to resolve the same issues in more than three years, giving rise to the creation of the panel.

More significantly, the abdication of its responsibility by the panel majority raises a legal issue as to whether it has refused to act as a panel under Section 209 and that its award is a legal nullity.

The Court of Appeals in Caso v. Coffey, 41 NY2d 153, stated that ".....the essential function of these compulsory arbitration panels is to 'write collective bargaining agreements for the parties'".

Purpose and Intent

The proposal identified at Item #1 of the panel report (p.11) was a PBA proposal which was held to be non-mandatory. It was not a City proposal. Whether or not the PBA proposed substitute language, the subject matter of the proposal is not before this panel. The panel majority states frequently throughout the Discussion and Award that the PBA has proposed substitute language for PBA proposals determined to be non-mandatory items of negotiation, suggesting, erroneously, that such proposals are before this panel. Such substitute proposals, if made, are neither before this panel nor are they presently before PERB.

It is for this reason that the panel majority refuses to rule as to its jurisdiction over such proposals. Award #16. Any disposition made by the panel majority of issues in dispute based on the fact that the PBA has made proposals which are not before this panel and not pending before PERB is arbitrary, capricious and without any foundation or basis either in the record or in law.

Definition of Grievance

The panel majority has refused to accept the City's proposed definition of "grievance" (Item #2 of the report). There is no other proposal for such definition before the panel. The last contract

definition was held to be non-mandatory. The panel is not aware of the status of proposed substitute language that may have been made by the PBA. The majority has determined that no definition of "grievance" is preferable to the proposed definition by the City. The panel majority does not identify any legal or practical deficiency in the only definition submitted for the panel's consideration. The panel majority has determined that there shall be a grievance and arbitration procedure for the parties but no definition of grievance. Such a determination is arbitrary and capricious and shows the prevalence of a predisposition on the part of the panel majority in disregard of the criteria and mandates of Section 209(4). The City's proposal that "'Grievance' shall mean a claimed violation of a specific term of this agreement" appears to be a common and reasonable definition which assures an orderly implementation and management of the agreements between the parties. It satisfies the statutory criteria.

Grievance Procedure

The panel's report acknowledges that there should be "reasonable periods of limitation in which to file a grievance and proceed to the grievance procedure" (p.15). It further acknowledges that the public and unit members are ill served by delay in "filing and processing" of grievances (p.16). The Award, however, provides a limitation only on the filing of a grievance. No time limits are provided for the several steps in the appeal process, allowing grievances, once filed, to languish in the procedural steps (Award #6). This award by the majority is defective, arbitrary and capricious.

Arbitration

The City made various proposals to arbitration procedures directed toward limiting and directing the powers of an arbitrator. Without such limitations, arbitrators may make arbitrary and capricious decisions. Such scope of power to third parties in managing the City's affairs, when understood by the average taxpayer, is, I believe, offensive and unacceptable. The City stated in its brief at page 36 as follows:

"The Court of Appeals in School District v Teacher Association, 41 N.Y.2d 578 recognized that the surrender of power by a public employer to an employees' union may later prove to be inconvenient or may even disrupt the normal function of the public employer in some respects. The court stated, however, that such problems will not be addressed by the courts but, rather, that a public employer should appropriately recognize its responsibilities by asserting its rights at the bargaining table".

Arbitration decisions can severely impact public funds and governmental operations and administration. The current procedure, by its own language, places no constraints on an arbitrator. The City is presently subject to "Russian Roulette" in its fiscal and manpower management. The City's proposals propose a degree of accountability on the part of arbitrators. The panel majority has denied any and all of such attempts. It is my opinion that the panel majority was arbitrary and capricious in denying every proposal by the City directed at the arbitration procedure. The majority can take judicial notice that the current standard of review applicable to arbitration decisions is that it will not be overturned unless it is wholly irrational. The City has tried unsuccessfully to achieve some constraints at the bargaining

table. The panel majority has now determined that the statutory criteria of Section 209(4) would best be met by a continuation of "Russian Roulette".

Call-Back Compensation

The City has proposed that call-back duty be redefined and limited to recall to active duty and appearances in legal proceedings on behalf of the City, as originally intended by the City. Call-back time has in recent years been paid officers for testifying on behalf of the PBA against the City in various proceedings, such as arbitration and PERB hearings. Numerous grievances have been filed seeking call-back pay in situations not intended as a "call-back". Overtime pay has been claimed for answering a phone call from the Chief during sick time, for attending a physical exam related to sick leave pay and attendance at disciplinary hearings on behalf of the employee charged. The overtime costs in such cases impact the budget significantly. The City presented numerous exhibits on the issue. The panel acknowledges that there has been abuse (p.19) and that employees should not be paid call-back overtime where such employee "is receiving a benefit or a class of which he or she is a member receives a benefit". (PERB and arbitration hearings on behalf of the PBA, etc.) Nevertheless, the panel majority has denied all efforts by the City to eliminate such abuses. The panel majority must be charged with the knowledge that past practices cannot be discontinued without negotiations. The decision of the panel to deny the City's proposal (Award #8) assures a continuance of the noted abuses through past practice. Such denial by the panel

majority is arbitrary, capricious and contrary to the statutory criteria as interpreted by the courts. The panel makes passing reference to arbitration procedures as the source of remedy to the City. No cases were presented or identified by the panel that suggested relief to the City in this area. It is an abdication of responsibility, as stated earlier, to simply defer this matter to the bargaining table. Reference is made to City Exhibits numbered 25 through 32 in particular.

Compensatory Time Off

The City proposed that all overtime be paid in cash rather than in compensatory time off in order to limit the amount of overtime charges to the City. The panel majority denied this proposal summarily.

The City also expressed serious concern about a serious risk in the protection of the public due to current language which would permit the entire department to use compensatory time off at the same time. The City, therefore, proposed a limit on the number of officers who could be absent at the same time on compensatory time off. The panel majority summarily dismissed the City's proposal. (p.19, Award #8). The panel majority is arbitrary and capricious in continuing such vulnerability in the safety and welfare of the public. City Exhibit #29 sets forth a threat by the PBA attorney to call all officers to a hearing. However serious such threat, the vulnerability of all or substantial numbers of police officers being gone at the same time is real and present. A reasonable limitation in this area is critical when there is

no contractual provision for mandatory overtime. The panel majority is in error by referring a matter of such immediate importance back to the bargaining table in view of the bargaining history.

Sick Leave

The City has made numerous proposals with respect to current sick leave plan providing for unlimited sick leave. The numerous exhibits submitted by the City on this issue demonstrate the seriousness of the problems raised. The issues related to the sick leave practices and policy have received great notoriety in the community and especially the local press. (See, for example, City Exhibits 16, 21, 39, 40, 41, 50, 52) City Exhibit #42 indicates that the average sick leave per man has risen from 13.2 in 1978 to 27.2 in 1986. City Exhibit #62 shows the monthly aggregate and individual sick leave absences for each month of 1986. It appears to illustrate that the majority of the police officers do not approach the average of the absences by substantial margins. A conclusion must be drawn that small numbers of officers take a disproportionate share of sick leave absences. While sick leave is made available as needed, the substantial costs associated with such leave require reasonable measures for the accountability of such absences and associated costs. The City made numerous proposals related to cost containment and accountability. Each and every City proposal has been denied by the panel majority. The panel majority again abdicates its responsibility by deferring such issues and concerns to the bargaining table. The panel majority acted arbitrarily and capriciously by determining that the identified uncertainty and lack of accountability in

the administration of the unlimited sick leave plan must continue until alternative procedures are negotiated at the bargaining table. The panel majority acted contrary to the statutory criteria since it could have determined to continue the benefit subject only to improved procedures for control, reporting and accountability. It chose, rather, to deny all of the City's proposals. (Award #9) The City presented in its brief the sum of \$393,366.00/year as the cost of base salary at the level of sick leave absences reached in 1986 (pension benefits and other fringe benefit costs were not calculated).

Strict Seniority

The language in Article XIV (D) and (G) either provides or has been construed to provide the application of strict seniority in the administration of the contract provisions. It is stated by the panel report, page 23, that the panel does not read the contract as providing strict seniority. The City did not seek to alter current application of seniority to vacation scheduling or layoffs. It did seek in its proposal to limit seniority as a factor to be considered in making work assignments. Ability, training, experience and other related factors are currently disregarded in the application of strict seniority. City Exhibit #35 is a correspondence sheet from an Assistant Chief to Chief Nelson outlining examples in which the total operation of the department is hampered by the application of strict seniority. City Exhibits #37 and #38 are copies of arbitration decisions applying strict seniority. These illustrate the impediment of strict seniority to efficient operations

and selection of the most qualified persons to fill assignments or vacancies. The panel majority could have given weight to seniority while at the same time redirecting it in a way that would not prevent the assignment of the most competent qualified officers regardless of seniority. The majority chose not to do so, deferring the issues to the bargaining table. In doing so, the majority acted arbitrarily, capriciously and in violation of its charge under Section 209(4).

Light Duty

Current practice is to permit sick leave absence to police officers who are minimally ill or injured. Even those able to perform light duty need not do so. City Exhibits 22, 49 and 50 deal with a female officer who sought a sick leave of absence once she became aware of her pregnancy, even though such pregnancy was normal and did not prevent her from performing some form of light duty. The issue was litigated in the courts. The essential basis of her claim to be absent from work was that male officers were never required to perform light duty, however minor their injury or disability. This position was asserted on her behalf in City Exhibit #22, a memorandum of law by Mrs. Wunning's lawyer. The attorney stated therein that no bargaining unit member has ever been required to work when the member was incapable of performing the full range of his or her normal duties. He stated further: "No bargaining unit member has ever worked any type of 'light duty' due to a physical disability". Such a practice is particularly costly to the City in light of a policy of unlimited sick leave. The Colonie PBA contract

(City Exhibit #51) to which the Schenectady PBA made frequent reference in support of its positions contains the right of the department to assign light duty as it may determine to be appropriate.

There is no rationale that can support the denial of light duty assignments to an employer if an injury or disability is so minor that a physician authorizes the assignment of light duty.

The panel majority denied the City's proposal to contractually permit light duty assignments under any circumstances. In doing so, it acted arbitrarily and capriciously.

Professional Training and Improvement Courses

Current practice requires that assignments made under this section be based on seniority. An officer within a year or two of retirement could successfully bid for a professional training and improvement course. The City's proposal was to select candidates for training based on various considerations and qualifications, including departmental needs and distribution among platoons and rank.

The panel majority summarily denied such proposal by the City. The panel could have and should have protected seniority rights by weighing seniority as a factor while simultaneously permitting the City a needed degree of flexibility and efficiency. (Award #11)

Transfers

The only proposal before the panel on this item was the City proposal. Current language was determined by PERB to be non-mandatory. Since the PBA has no proposal for consideration by the panel, the panel majority's denial of the City proposal leaves the parties without a posting requirement. Since all parties would be served by a posting requirement, the panel majority acted arbitrarily and capriciously. The panel majority erroneously suggests that the PBA has language pending on this proposal. (Award #12, p.25)

Salary Increases of 6.5% for 1987 and 4.5% for 1988

The testimony and exhibits with respect to an appropriate salary increase for police officers was voluminous for both sides.

City Exhibit #5 indicates that all city unions (669 employees) accepted a 5% wage settlement for 1987 and a 4% for 1988. City Exhibit #8a demonstrates that Schenectady police officers are well paid and receive superior benefits when compared with their peers in other communities of comparable size and geography. Through the testimony of the mayor, fiscal experts and other documentation, it was well established that the City is facing substantial declines in significant revenue areas and that the tax rate for the City has increased substantially to compensate for the loss of such revenue sources.

Considering further the Cost of Living Index for the past several years, a wage settlement on the terms of the majority award would have

been appropriate at 5½% for 1987 and 4½% for 1988. A settlement of 5½% and 4½% would have continued the superior pay structure for the City's police officers when compared to their peers.

Retroactive Effect of Proposals

The parties have been at a stalemate in reaching agreement for a successor agreement since January 1, 1986 or approximately three years and five months. It takes two parties to agree and it takes two parties to disagree. Collective negotiations is the preferred method of reaching agreement. Both parties should not only be encouraged to reach settlement at the bargaining table, but some incentive to do so ought to be also considered. Since the City cannot retrieve the past three years in which to implement cost containment provisions it might have desired or cost effective personnel practices, it seems unfair that the other party should be made whole by applying wage improvements retroactively to January 1, 1986. I would limit the retroactive application to a shorter period or to a lesser dollar amount by ½%. In this manner, both parties would have paid some price for the protracted impasse. It would hopefully discourage similarly protracted procedures in the future. Nor would I apply retroactivity to those who have retired since January 1, 1986. There is no compelling reason to do so since such retirees received all the benefits available to them up to the time of retirement without any additional constraints that may have been achieved through bargaining. Such retirees were and still are immune from any give-backs as quid pro quo for the wage settlement. The equities do not favor such retroactivity for retirees.

Award #17 Continuation of Proposals
Not Before the Panel

As indicated by the first sentence of the "Award" (page 33), the panel acknowledges that the authority of the panel is limited to "those matters submitted to it which are in dispute and which have not been withdrawn by the parties during the course of these proceedings". Such acknowledgement paraphrases the authority or jurisdiction granted to the panel by Section 209 subd. 4, paragraph (c), sub. (IV) & (V).

The majority had no authority or jurisdiction to make "award" number 17. All proposals not dealt with by the panel were items agreed to by the parties for continuation or held to be non-mandatory subjects of negotiation. Those items were neither in dispute nor presented to the panel. (Award #15)

Respectfully submitted,


Employer Panel Member