

**State of New York
Public Employment Relations Board
Case No. IA 2003-011; M2002-314**

In the Matter of the Arbitration

between

City of Batavia

and

**Batavia Firefighters Association
I.A.F.F., Local 896**

AWARD OF THE

ARBITRATION PANEL

In accordance with the provisions of Section 209.4 of the New York Civil Service Law the parties hereto submitted some twenty-eight issues to the undersigned Arbitration Panel for its determination. Hearings on these issues were held on January 20 and March 18, 2004. At these hearings both sides were represented and given full opportunity to present oral and documentary evidence. Both parties submitted pre-hearing briefs, which they augmented with additional briefs submitted after the second hearing.

BACKGROUND

Batavia is a city of some 16,250 residents located in Genesee County just off the New York State Thruway. It is the County seat and is approximately equidistant from Buffalo and Rochester. It maintains its own police force and is served by one public high school, one middle school and three elementary schools. There are several private schools in the area, as well as Genesee Community College and the New York State School for the Blind.

The County's population consists of about 60,000 persons living in an area of some 500 square miles. Batavia is the only city in the county and is the county seat. Those dwelling outside of it live in rural areas, which include 13 towns and 6 villages. The latest available statistics show that the median household income is \$40,452 and the average per capita income is \$17,737.

The Fire Department is comprised of both firefighters and emergency medical personnel. There are two fire stations and two medical-based stations for ambulances. Both groups are in the same bargaining unit and are represented by Local 896. The Department is staffed 24 hours a day, 7 days a week by four platoons. Each is on duty for 4 days followed by 4 days off. Each has 10 firefighters and 4 emergency medical technicians. Employees work a 10-hour day shift or a 14-hour night shift. There are 40 firefighters and 17 emergency medical technicians in the bargaining unit.

The parties' last collective bargaining agreement ran from April 1, 2000, through March 31, 2003. The parties have attempted to negotiate a successor agreement, meeting on several occasions between October 2002 and March 2003. On March 27, 2003, the Union declared an impasse with PERB and requested mediation. Three mediation sessions were held but did not result in a resolution of all outstanding issues. On June 30, 2003, the Union, therefore, petitioned for compulsory arbitration. On August 13 PERB designated a Public Arbitration Panel consisting of James R. Markowitz, Public Panel Member and Chairperson; Matthew Coppler, Public Employer Panel Member; and Michael Mullen, Employee Organization Panel Member.

On April 13 and May 14, 2004, the Panel deliberated in executive session. This Award is based upon these deliberations, as well as upon respective beliefs of the individual panel members.

In agreeing upon this Award, the Panel has attempted to take a balanced approach, realizing that not all proposals can be granted at the same time. More important,

however, was the fact that the Panel used specific criteria in reaching its conclusions. Some of these criteria were afforded substantial weight and others lesser weight. Where applicable the Panel has relied upon comparative data. The Award, therefore, attempts to reflect settlements in communities similar to Batavia.

The Panel notes in passing that the parties' respective positions have been fully elaborated upon in the Petition and Response, in the exhibits submitted and in the pre-hearing and post-hearing briefs, all of which are hereby incorporated by reference into this Award. Accordingly those positions will merely be summarized herein.

The Panel further notes that in arriving at its conclusions it has specifically reviewed and considered the following factors, as set forth in Section 209.4 (v) of the Civil Service Law:

- 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.

COMPARABILITY

As noted above Section 209.4 (v) a. of the Civil Service Law provides that the Panel engage in a comparative analysis of the wages, hours and employment conditions with "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*." (Emphasis added) The City has argued that the appropriate comparable communities are Canandaigua, Corning, Cortland, Geneva, Olean and Oswego. These, it says, are similar to Batavia in that their population and per capita income is similar. It objects to the use of suburban communities because they "enjoy substantially greater wealth." More importantly, it objects to Buffalo, Rochester and Syracuse because they are far larger than Batavia and place "significantly greater demands" on their respective fire departments. The mere fact that Buffalo and Rochester are in the same labor market as Batavia should not be persuasive. The City cites an interest arbitration Award involving the Utica Firefighters to show that comparable communities should be limited to those with "similarities in size, population, fire department size and per capita income."

The Union believes that the appropriate comparable communities are Buffalo, Rochester, Dunkirk, Canandaigua and Ithaca. It believes that the populations of Dunkirk (13,131), Canandaigua (11,264) and Ithaca (29,287) make them comparable on the basis of size. It further notes that Ithaca is similar in size of fire departments and in building structures. Buffalo and Rochester should be considered because they are in the same labor market as Batavia. It maintains that if population size were the only valid factor in determining comparability, the New York Legislature would have made that clear.

Additionally, the Union contends that the City has supplied incomplete information consisting of a salary chart and summary sheets containing selected elements

of comparison. It notes that it has offered both summary data and the actual contracts upon which that data is based. Moreover, the Union emphasizes that a simple comparison of salaries provides an inaccurate assessment of relative compensation. Rather it suggests that the Panel consider all terms and conditions of employment when making its comparisons.

The Panel, or a majority thereof, rejects the Union's argument regarding the appropriate comparable communities. Buffalo and Rochester are so much larger than Batavia that they are of little value in determining the wages, hours and working conditions of a small city in a rural area. The complexities of urban fire fighting, whether they be dealing with airport emergencies or the evacuation of multi-story buildings, make the task qualitatively different from what is done in Batavia. The fact that they may share similar labor markets might have some impact on the Panel's analysis if there had been any showing that attracting a work force of quality was a problem caused by higher wages in neighboring large cities. The Union, however, has not suggested that attracting high quality firefighters in Batavia has been difficult.

The Panel, or a majority thereof, believes that the proper comparable communities include, as both parties agree, Canandaigua. In addition we believe that Dunkirk, Olean and Geneva offer a sound basis for comparison because all are relatively small cities with relatively small fire departments within an hour's drive of Batavia. To a lesser extent we find that Cortland, Oswego and Ithaca are also useful because they share the same characteristics, but are further away from Batavia than are the others. Additionally, all seven are cities in rural surroundings but are within one half-hour of a metropolitan area.

ABILITY TO PAY

The Union argues that the City is financially sound. The exhibits and documents reviewed at the hearing, as well as the testimony of economist Kevin Decker have established this fact. Specifically, says the Union, while Batavia's general expenditures between 1998 and 2003 have increased, expenditures for employee benefits have declined. Its revenues, on the other hand, have increased by almost 32%. Similarly, the full value of taxable real property has increased and has done so at a faster rate than other upstate cities. At the same time the property tax rates have failed to keep pace with inflation.

Batavia utilizes only 35.5% of its constitutional tax limit, which is lower than most communities. Its sales tax revenues have increased steadily for some ten years and its municipal debt is only 9.8% of its constitutional debt limit and only 1.98% of its full value. Again the Union emphasizes that these figures compare favorably with other cities. Last, an examination of the City's general fund and reserves demonstrates that it "has substantial funds at its disposal."

In addition to the above, the Union notes that since 1999 the fire department began providing ambulance service. While this service has created an expenditure it also has created revenue. The revenues, says the Union, have exceeded expenses by a substantial amount.

The City argues that the "poverty" of its residents is a good measure of its ability to pay. Its per capita income is no higher than the average of the communities with which it compares itself, yet its firefighters are paid more than firefighters in those communities. Nonetheless, in the next fiscal year those residents will face a real property tax increase of 6.4%.

The issue, says the City, is not whether it can afford to pay its firefighters a greater amount. Neither is it whether it may legally raise taxes to generate higher wages. Rather the question is whether it is prudent and responsible for it to pay more even if such an increase raises taxes. Given the relatively high salaries already received by the firefighters, the City asserts that its proposal is reasonable. This is demonstrated by the fact that Batavia's other municipal unions, including the police, have agreed to raises which are similar to those being offered to the firefighters.

ISSUES AND DECISION

From the outset it should be noted that the parties' economic arguments were based on the positions taken before the hearings commenced. At the hearings, however, many issues were dropped and others were modified. Most significantly, while the City's brief dealt with the Union's demands for a 5% "cost of living increase" in each contract year, at the hearing the Union changed this to 2.85%, 2.9% and 2.95% respectively in each year of a three-year contract. The City has argued that its proposal of 2.75% in each year of a two-year contract is "fair and reasonable" and suggested that it "may accept" the continuation of an annual \$500 bonus. The Panel's Award is based on these modifications of the parties' original positions. We note that at the conclusion of the hearing the parties were so close to each other that there is simply no basis for finding that the City has the ability to pay for its own offer but lacks the ability to pay for the slightly larger salary increases and other benefits provided for in this Award. Moreover, the Panel has concluded that the Award is well within the parameters established by comparable communities, given the parties' relationship with those communities.

1. Management Rights

The City has proposed to replace the words "consult with" with the words "consider comments from..." in Article I, Section 4, paragraph (b). The Panel has agreed to deny this proposal since the City has offered no convincing rationale for the proposed change.

2. Holidays

The Union has proposed that holiday pay be computed on the basis of a 12-hour day rather than on a 10-hour day. The Panel has agreed that holiday be based on a 12-hour day as the Union has proposed. Employees currently rotate between shifts of 10-hour days and 14-hour nights. The change simply represents an average day's work.

3. Sick Leave

a. The Union has proposed paying employees who consume no sick leave in a fiscal year \$500, those using only one sick day \$250 and those using only 2 such days \$100 as an incentive for minimizing sick leave use. The Panel has agreed to deny this proposal because it has seen no convincing rationale for the change.

b. The City has proposed reducing the number of sick days earned per month from one and one-quarter to one. The Panel has agreed to deny this proposal because it has seen no convincing rationale for the change.

c. Article II.2.b. requires the Chief to meet with the Union President should he or she find an "apparent" pattern of sick leave abuse by an employee. The City has proposed changing it so that no meeting is required and permitting the Chief to investigate where he perceives "one or more shifts of absence and a pattern of abuse." The Panel has agreed to deny this proposal because it has seen no convincing rationale for the change.

d. The City has proposed to buy back "accrued sick leave days for varying amounts depending upon the number of days redeemed, with the option of depositing the value of the redeemed days into a deferred compensation account." The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

4. Retirement Incentive

Article II, Section 4.c. currently provides for a retirement incentive which includes crediting 30 additional sick days to the retiree and a one-time cash payment of \$3,000. The Union has proposed changing 30 days to 50 days and \$3,000 to \$5,000. The Panel has agreed to deny this proposal. This clause contains a "sunset" provision and there has been no convincing rationale for its continuation. Accordingly, the Panel grants the City's "proposal" that the clause not be renewed.

5. Personal Leave

Article II, Section 2.2. disallows personal leave when more than four employees are off at one time. The City has proposed that personal leave requests be denied where the total number of personnel off would bring a platoon below the minimum staffing level. The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

6. Health Insurance Benefits (Dental)

The Union has proposed changing the current dental plan to one that is equivalent to "the current Dental Plan II of the Finger Lakes Blue Cross/Blue Shield Genesee Area Healthcare Plan." At the hearing the Union agreed that it would accept the new dental plan that the City was creating. Therefore, the Panel has agreed to incorporate that plan into this Award and require that language in Article II, 9.c. be changed to conform with the new plan.

7. Health Insurance Benefits (Buy Back)

Article II.9.f. states "The City will pay \$1,500 annually to each bargaining unit employee" who, under certain conditions waives his or her right to City paid medical insurance. The Union has proposed that amount be changed to \$2,000 in the contract's first year, \$2,250 in the second year and \$2,500 in the third year. The Panel has agreed to grant a modified version of this proposal such that starting in the second, and last, year of the contract the amount shall be changed from \$1,500 to \$2,500. This decision is made in light of the fact that the contract term will be two years, which is the legal maximum an interest arbitration panel may impose absent an alternative agreement by the parties. The reason for this decision is the Panel's belief that an increased incentive will result in more employees waiving health insurance benefits and consequent savings to the City.

8. Vacation

a. The City has proposed that all vacations shall be approved by the Fire Chief or Deputy Chief. The Panel has agreed to deny this proposal because it has seen no convincing rationale for it.

b. Currently five weeks of vacation are granted following 18 years of service. The City has proposed that "18" be changed to "20." The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

9. Compensatory Time

a. Article II.3.1.c.(1) provides (in pertinent part): "No request will be granted for compensatory time off when the total number of fire-based personnel will exceed four (4) members off at one time. This four (4) member limit will apply to compensatory time, Kelly time, vacation, and personal leave only." The Union has proposed adding the following language to the first sentence: "except for the holidays of Easter, Thanksgiving and Christmas Eve, when six (6) members will be allowed off at one time." The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

b. The City has proposed including absences due to sick leave in determining the 4-employee limit. The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

10. Sick Leave Accruals upon Retirement

Article II.4.b. currently credits "the equivalent of one eight (8) hour day for each earned, unused sick day..." The credits are "applied toward the cost of providing health insurance coverage" for the retiree or may be converted "into cash at the rate of 50 percent of (an employee's) base pay based on an eight (8) hour day..." The City has proposed that the credit be granted for every *two* days of unused sick leave and has further proposed the elimination of the cash conversion option. At the hearing, the parties agreed to eliminate the health credit conversion option, and reduce the cash

conversion rate to 40 percent of (an employee's) base pay based on an eight (8) hour day so that the City will be better able to fund insurance for retiree's in item 19.

11. Uniforms

Article II.5.a. currently gives each employee \$500 annually for "purchase and replacement of uniforms" and \$200 annually for "the maintenance of uniforms." The City has proposed a single payment of \$700 to cover purchase, replacement and maintenance. The Panel grants this proposal since it clearly works to the benefit of both parties.

12. Hours per Week

Article II.8.b. currently provides "The Overtime payment for filling all shift vacancies shall be calculated at the rate of 1.5 hours per each hour actually worked." The City has proposed that "Overtime for all shift vacancies be calculated at 1.5 hours for each hour actually worked for all hours over 212 in a 28-day payroll period."

The employer emphasizes that its proposal is in accord with the exemption for firefighters granted under the Fair Labor Standards Act. The purpose of the exemption is to grant public employers maximum flexibility in scheduling while controlling overtime costs. Such costs, says the City, are particularly high for firefighters because of the unusual shifts they work. Moreover, "categories of time, which may not otherwise be counted under the Fair Labor Standards act, must be included within the calculation of compensable hours." Thus, neither paid sleep time or meal time is excluded. Additionally, the City notes that the exemption can be used along with "Kelly time," referenced in Article II.8.e.

The panel decided to deny this proposal and, instead, grant the Union's counter offer regarding vacation. The vacation counter should save in overtime costs and this savings will enable the City to pay for health insurance for retirees.

13. Job Assignments

Article II.8.1. currently states "All fire-based firefighters will receive a 15% differential added to their pay for their temporary assignment to a hospital-based vacancy." The City has proposed that the "Fire Chief may direct understaffed platoon to relocate medical based personnel to fire headquarters when platoon falls below normal staffing and delete provisions regarding temporary assignment with premium pay."

The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

14. Health Insurance

a. Article II.9. provides health insurance coverage through the "City's Self Insured Healthcare Plan." The City has proposed language granting it the right to select an alternative health care provider with benefits at least equivalent to those presently provided. The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

b. Article II.9. currently provides for a drug prescription program "with a \$5 Co-pay for all prescription drugs." The City has proposed that "Co-payments be increased to \$7 for generic drugs, \$15 for formulary drugs and \$25 for non-formulary drugs."

The Panel has agreed that an increase in the co-pay is appropriate both because of the increase in drug costs paid by the City and because a three-tier system is likely to encourage the use of the least expensive, effective prescription drugs. Accordingly the Panel has agreed that the co-payments shall be increased to \$7 for generic drugs, \$10 for formulary drugs and \$15 for non-formulary drugs. These amounts are in line with economic realities faced by the parties.

c. Article II.9 currently provides for a non-contributory health insurance plan for its most senior employees and a contributory plan with two different contribution systems depending on hire date for the remainder of the bargaining unit. The City has proposed that "All members contribute \$400 toward the cost of single coverage and \$800 toward the cost of family coverage during the first 12 months of the agreement, with said amounts being increased to \$500 for single coverage and \$1,400 for family coverage thereafter."

The Panel has agreed that the members of the bargaining unit should make a uniform contribution to health insurance. We have further determined that starting in the second year of the contract (i.e. April 1, 2004) all unit members in the health plan shall make a 5% contribution of the cost of insurance to said health plan. The contribution, however, shall be capped at \$250 per annum for individual coverage and \$400 per annum for family coverage. The Panel has made this decision in light of the rising costs of health insurance and in the belief that employees should bear some portion of these costs. Moreover, we believe that since some employees are already making a contribution to health insurance, it is fair and reasonable to require that all employees do so.

15. EMT Certification

Article II.11.a. currently provides for a stipend of \$1,000 for those holding a valid Level 3 Emergency Medical Technician certification and \$1250 for those with a Level 4 certification. The City has proposed reducing Level 3 to \$500 and Level 4 to \$750. At the hearing, the parties agreed to reduce Level 3 to \$500 and Level 4 to \$1,000.

16. Longevity

Article II.12. grants a "longevity bonus" after 5, 10, 15 and 20 years of service respectively. The Union has asked that each of these be increased and that an additional

bonus be added for 25 years of service. The City has countered by suggesting that the payments in years 5 and 15 be deleted and that the payments be increased from \$300 to \$750 after 10 years of service and from \$1,000 to \$1250 after 20 years of service.

The Panel has agreed to the City's proposal as part of the parties' overall salary agreement, the rationale for which is set forth *supra* under the portions of the Award respectively denominated "Comparability" and "Ability to Pay."

17. Tuition Reimbursement

Article II.13. provides for full tuition reimbursement for job-related courses under certain conditions, one of which is that "the employee obtains a grade of A, B, or C or a passing grade on a pass/fail system." The City has proposed 80% reimbursement for a B and 50% for a C. At the hearing the parties agreed to 100% for A or a passing grade on a pass/fail system, 90% for B and 80% for C.

18. Salary Schedule

a. As is noted above, the parties reached virtual, if not actual, agreement on salary increases during the course of the hearings. This agreement was based upon a hoped-for three-year agreement under which the Union would accept an average of 2.9% as a "cost of living" increase. The parties, however, could not agree to a three-year contract and, under the law, this Panel may only impose a two-year settlement. Accordingly, the Panel finds that in the first year of the agreement there shall be a 2.9% cost of living increase in base pay retroactive to April 1, 2003, and in the second year of the contract a 2.9% cost of living increase in base pay retroactive to April 1, 2004.

b. The Panel further finds that, as a part of the total salary package, the \$500 annual "bonus" set forth in Article II.14.e. shall continue to be paid in each of the two years of the contract. While the City initially proposed the elimination of the bonus, it

eventually suggested that it might be acceptable as a performance incentive conditioned on criteria. The Panel sees no need for such an incentive. The bonus payment has been successfully used for three years to increase compensation without increasing base salaries. Accordingly we find that it should continue through the end of the contract.

19. Insurance for Retirees

This issue has been most difficult for the parties to resolve. They do not disagree that it is reasonable to grant employees who retire from the extant bargaining unit health insurance. The difficulty is the cost to the City. The Panel's approach to this issue, therefore, was to find ways of reducing other contract benefits, thereby achieving savings that would cover the estimated cost of granting health insurance to the employees who are likely to retire in the next few years.

The Panel has estimated that over the next 3 or 4 years some six employees would retire. The cost of providing family coverage to these retirees would be about \$8,600 per year or a total cost, when all six retire, of \$51,600. The Union has agreed to make a concession involving vacation which will save the City about \$15,000 in overtime costs.

In addition to the above savings the Union has agreed to modify Article II.4.b. such that retirees will receive payment for only 40% of accumulated sick leave instead of the current 50%. The Panel believes that the amount saved will cover the difference between \$51,600 and \$15,000. The result will be that the City will be able to provide for health insurance for retirees at little or no cost.

For the reasons set forth above, the Panel has agreed to grant health insurance to retirees until eligibility of Medicare, to impose the aforementioned concession on vacation and to reduce from 50% to 40% the current payment to retirees for accumulated sick leave.

20. Vacation

The Union has agreed to merge the vacation schedules of fire and medical personnel. Only two members may be on vacation at one time, thus reducing overtime costs. These savings will help offset the retiree health care provision.

21. Leaves of Absence

Article III.3.c. currently provides that employees "shall" be granted leaves of absences for certain purposes. The City has proposed to change the word "shall" to "may." The Panel has agreed to deny this proposal because it has seen no convincing rationale for granting it.

22. Employee Discipline

Article III.4.a. currently provides that negative documents in personnel files "older than 18 months shall not be considered for determining employee discipline." The City has proposed that "18" be changed to "48." The Panel has agreed that "18 months" shall be changed to "24 months" in the belief that two years represents a fair and reasonable time for negative comments to be considered for subsequent disciplinary actions.

23. Compensatory Time

Article II.3.1.c. provides that under certain circumstances employees may take compensatory time in lieu of pay. It further provides, however, that "No request will be granted for compensatory time off when the total number of fire-based personnel will exceed four (4) members off at one time." The Union seeks to add "except for the holidays of Easter, Thanksgiving, and Christmas Eve, when six (6) members will be allowed off at one time." The Panel has agreed to deny this proposal since it has seen no convincing rationale for granting it.

24. Mutual Aid

Article II.10. requires that the City refrain from calling for "mutual aid" until "all City firefighters have been called first." The City seeks to delete all of Article II.10. The Panel has agreed to deny this proposal since it has seen no convincing rationale for granting it.

25. Grievance Procedure

The City has proposed what its brief describes as "Certain technical revisions." At the hearing the parties indicated that they were in agreement on this issue. Accordingly, the Panel has agreed to modify step I a. of the grievance procedure by adding the words "of the occurrence of the grievance or the employee's knowledge thereof." Likewise the Panel has agreed to modify Step I b. by permitting the Fire Chief to give his written answer within 10 working days, as opposed to the 5 working days in the current contract. Last, the Panel has agreed to modify Step II a. by increasing both time limits referenced therein from 5 working days to 10 working days.

26. Embodiment of Agreement

Article VII, entitled "Embodiment of Agreement and Legislative Action," references "department rules and regulations." The City has proposed that the parties "review departmental rules, regulations and operational departmental documents during the term of the agreement and reach agreement regarding those to be incorporated into contract." The Panel has agreed to deny this proposal since the parties have agreed to take a good faith approach to this matter rather than incorporating the proposed language into the contract.

