

ARBITRATION

CITY OF LEBANON, ILLINOIS,
EMPLOYER

173
CASE NO. S-MA-08-~~137~~
INTEREST ARBITRATION

vs.

ILLINOIS FRATERNAL ORDER
OF POLICE LABOR COUNCIL,
UNION

JAMES A. MURPHY,
ARBITRATOR

DECISION AND AWARD

APPEARANCES:

For the Employer: Corey L. Franklin

For the Union: Richard V. Stewart Jr.

September 8, 2009

BACKGROUND

The City of Lebanon (City), population 4,099, is located in southern Illinois approximately 25 miles east of St. Louis. The City employs a police force of ten full time officers. The police are the only city employees represented by a union for collective bargaining. The officers are represented for collective bargaining by The Fraternal Order of Police Labor Council (Union), and have been since 1999, including the current contract covering May 1, 2005 through April 30, 2008. The City's fiscal year is May 1 through April 30.

The Parties began bargaining for a successor contract in April 2008. The chief negotiator for the City was R. Michael Lowenbaum, the principal attorney of the Lowenbaum Partnership. The City's bargaining committee was Parke Smith, the City Administrator. The chief negotiator for the Union was Tom Sonneborn, General Counsel for the Fraternal Order of Police Labor Council. The Union bargaining committee was Mark Russillo, an attorney in the Lowenbaum Partnership, Sgt. Steve Knepper, Officer Dave Heine and a third officer who was not identified. The chief negotiators and their respective bargaining committees met on three occasions, the 7th, 21st, and 28th of April 2008 during which offers were exchanged and discussed, and all issues except wages were tentatively agreed. The negotiators are not in agreement whether the City's final offer on wages was made verbally at the April 28 meeting or by telephone the following day after Lowenbaum conferred with the City Council. It is agreed that the City's final wage offer was never reduced to writing.

The wage proposals by both Parties contained two components. One was a percentage increase and the other was an equity adjustment. The City acknowledged that it was substantially behind

comparable communities in the wages paid to its police officers and agreed to annual equity adjustments in addition to the percent increases as a means to begin to close that gap over time. The City's verbal final wage offer was subsequently written up by the Union negotiators, and was presented to and ratified by the Union membership on May 6. The Union then sent a red lined copy of the proposed new contract to Lowenbaum. This copy contained an hourly wage chart which was derived by dividing the annual wage including the percent increases by 2184 hours, which is the usual divisor for 12 hour shift employees. Unbeknownst to the two chief negotiators, both of whom were bargaining the Lebanon contract for the first time, the Parties had agreed some six years earlier, when they went from 10 hour shifts to 12 hour shifts, to keep 2080 hour divisor they had been using with the 10 hour shift schedule. Shortly afterwards, Russillo, who had written the red lined, copy noticed the provision in the Wage Appendix A specifying the 2080 divisor and immediately notified the Lowenbaum office of the discrepancy in his hourly wage chart. Meanwhile the staff at the Lowenbaum office noticed that the wage chart in Union's red lined copy added the annual \$1,500 equity adjustment prior to the percent increase, which they believed was in error and notified Sonneborn's office. Eventually Lowenbaum and Sonneborn talked and determined they could not resolve the differences. This arbitration ensued.

PARTIES' PRE-HEARING STIPULATIONS

ILLINOIS LABOR RELATIONS BOARD INTEREST ARBITRATION BEFORE ARBITRATOR JAMES A. MURPHY

CITY OF LEBANON

Employer,

No. S-MA-08-173

and

ILLINOIS FOP LABOR COUNCIL,

Union.

PRE-HEARING STIPULATIONS

A) **Arbitrators and Authority:** The parties stipulate the procedural prerequisites for convening the hearing have been met, and that the Arbitrator, James A, Murphy, has jurisdiction and authority to rule on the issues set forth below, including to award increases in wages and all other forms of compensation fully retroactive to May 1, 2008, May 1, 2009 and to May 1, 2010 on all hours paid. Each party expressly waives and agrees not to assert any defense, right or claim that the Arbitrator lacks jurisdiction and authority to make such a retroactive award. Each party expressly waives the tripartite panel and agrees that Arbitrator Feuille shall serve as the sole arbitrator in this matter.

B) **The Hearing:** The hearing will be convened on April 2, 2009 in the City Hall, in the City of Lebanon, Illinois. Section 14(d), requiring the commencement of the arbitration hearing within fifteen (15) days following the Arbitrator's appointment has been waived by the parties. The hearing will be transcribed by a reporter the Employer will secure, and the cost of the reporter and the Arbitrator's transcript copy shared equally by the parties.

C) **Impasse Issues:** The parties agree the only issues in dispute are as set forth below:

- (1) Shall the \$1,500 equity adjustments be added to Base rate before or after the across-the-board percentage increases?

(2) How shall the hourly rate be calculated?

D) **Tentative Agreements:** All tentative agreements shall be incorporated in the Award for inclusion in the agreement.

E) **Final Offers:** The Arbitrator shall adopt either the final offer of the FOP or Employer as to each economic issue in dispute. Said final offers shall be **simultaneously exchanged through the arbitrator by close of business on March 10, 2009. Once exchanged, final offers may not be changed except by mutual agreement.**

F) **Evidence:** Each party shall be free to present its evidence either as narrative or through witnesses, with advocates presenting evidence to be sworn on oath and subject to examination. The FOP shall proceed first with its case-in-chief, followed by the Employer. Each party may present rebuttal evidence.

G) **Briefs:** Post-hearing briefs shall be submitted to the Arbitrator on or within forty-five (45) days of receipt of the transcript of the hearing or such further extensions as may be mutually agreed or granted by the Arbitrator. Said briefs shall be simultaneously filed with the Arbitrator who shall then forward a copy to the other party at the expiration of the forty-five (45) day period. The post-marked date of mailing shall be considered the date of filing. There shall be no reply briefs.

H) **Decision:** The Arbitrator shall base his decision upon the applicable factors set forth in Section 14(h) and issue the same within sixty (60) days after submission of briefs or any agreed upon extension requested by the Arbitrator. The award shall also include an order stating that separate retro checks shall be issued within forty-five (45) days of the issuance of the award, unless an extension is granted by the Arbitrator. The Arbitrator shall retain the entire record in this matter for a period of six months or less than six months if notified that retention is no longer required.

I) **Continued Bargaining:** Nothing contained herein shall be construed to prevent negotiations and settlement of the terms of the contract at any time, including prior, during, or subsequent to the arbitration hearing.

FOR THE EMPLOYER

THE F.O.P.

Michael Lowenbaum, Attorney
Authorized Representative of the
Employer

Richard V. Stewart, Jr., Attorney
Authorized Representative of the
Illinois FOP Labor Council

Date: March 2009

RELEVANT CONTRACT SECTIONS Current Contract

Appendix A - Wages and Compensation

Section 1. Wage Schedule.

	Current Scale		Effective 5/1/05 3.25%		Effective 5/1/06 3.50%		Effective 5/1/07 4%	
	Annual	Hourly	Annual	Hourly	Annual	Hourly	Annual	Hourly
Start	26,827.34	12.90	27,699.23	13.32	28,668.70	13.78	29,815.45	14.33
After 1 Year	28,973.53	13.93	29,915.17	14.38	30,962.20	14.89	32,200.69	15.48
After 3 Years	30,422.21	14.63	31,410.93	15.10	32,510.31	15.63	33,810.73	16.26
After 5 Years	31,943.32	15.36	32,981.48	15.86	34,135.83	16.41	35,501.26	17.07
After 7 Years	32,582.19	15.66	33,641.11	16.17	34,818.55	16.74	36,211.29	17.41
After 9 Years	33,233.83	15.98	34,313.93	16.50	35,514.92	17.07	36,935.51	17.76
After 11 Years	33,898.51	16.30	35,000.21	16.83	36,225.22	17.42	37,674.23	18.11
After 13 years	34,576.48	16.62	35,700.22	17.16	36,949.72	17.76	38,427.71	18.47
After 15 Years	35,268.01	16.96	36,414.22	17.51	37,688.72	18.12	39,196.27	18.84
After 17 years	35,973.37	17.29	37,142.50	17.86	38,442.49	18.48	39,980.19	19.22
After 19 years	36,692.84	17.64	37,885.36	18.21	39,211.34	18.85	40,779.80	19.61
After 21 Years	37,426.69	17.99	38,643.06	18.58	39,995.56	19.23	41,595.39	20.00

(a) Annual wage increases.:

Effective 5/1/05, each step of the wage scale shall be increased by three and one-quarter (3.25%) percent.

Effective 5/1/06, each step of the wage scale shall be increased by three and one-half (3.5%) percent.

Effective 5/1/07, each step of the wage scale shall be increased by four (4.0%) percent.

All wages are retroactive to May 1, 2005 and payable on all compensable hours.

(b) Schedule movement

Employees will move through the wage schedule on their anniversary date.

Section 2. Rank Pay.

(a) Sergeants Pay.

The pay for an employee holding the rank of Sergeant, shall be one thousand five hundred (\$1,500) dollars annually above and in addition to the employee's wages as determined by the wage schedule above.

(b) Lieutenants Pay.

The pay for an employee holding the rank of Lieutenant, shall be three thousand (\$3,000) dollars annually above and in addition to the employee's wages as determined by the wage schedule above,

Section 3. Hourly Rate-of-Pay.

An employee's hourly rate of pay shall be determined by dividing his annual wage from Section 1 above, plus any rank pay, differential pay, or any other specialty pay, by 2080 hours. Employees covered by this Agreement are considered hourly employees.

Appendix F — Twelve-hour Schedule

Twelve-hour Schedule

The parties agree to institute a twelve-hour work schedule. As a result of this agreement, the parties agree to the following modifications to the Collective Bargaining Agreement. These modifications shall remain in effect so long as the twelve-hour work schedule remains in place or are as otherwise changed by-mutual agreement. The parties agree as follows:

1. The twelve-hour work schedule shall consist of eighty-four (84) regular scheduled work hours in a fourteen (14) day period.
2. The workday shall consist of two work shifts (Day Shift and Night Shift) of twelve consecutive hours each and have regular starting and quitting times. The work schedule cycle, a copy of which is attached to this agreement, shall consist of the following:
 - Two consecutive workdays, followed by two consecutive days off;
 - Three consecutive workdays, followed by two consecutive days off;
 - Two consecutive workdays, followed by three consecutive days off. The schedule then repeats itself.
3. Employees will receive overtime pay at time and one-half rate after working more than twelve (12) hours on a shift or after working eighty-four (84) hours in the 14-day work cycle (Monday through Sunday).
4. Rotation of non-rank officers through a work group or team shall occur after every three work cycles. Rank officers shall select their work group assignment first by rank then by seniority.
5. Section 13.01 Vacation Accrual, shall be modified as follows:

Employees shall be eligible for vacation leave, which shall be accrued on the employee's anniversary date of hire, as follows:

- a. 1st year Pro-rated, based on four workdays, to be taken in conjunction with second year.
- b. 2-5 years of service Eight workdays or ninety-six (96) hours.
- c. 6-10 years of service Twelve workdays or one hundred forty-four (144) hours.

d. 11-14 years of service Sixteen workdays or one hundred ninety-two (192) hours.

e. 15+ years of service Twenty workdays or two-hundred forty (240) hours.

6. The last paragraph of Section 15.3-Sick Leave shall be modified by removing the phrase "or scheduled days off."

7. In the event the staffing level of officers assigned to patrol duties is eight (8) or more officers, the department may adjust the provisions of Section 2, above, as follows:

A third 12-hour shift, designated as the power/cover shift, shall be added to the current two daily fixed 12-hour shifts.

The power/cover shift shall have a regular daily starting and quitting time (i.e. 3:00 p.m. to 3:00 a.m.), but have may have its regular starting times moved in order to cover vacancies on the other two, same-day, shifts created by officers using accrued time off.

Movement of officers assigned to the power/cover shift, to the earlier or later regular starting times of the other shifts in order to cover vacancies on the other two shifts, on the same workday as the power/cover shift affected, shall not requirement the payment of overtime when notice of such schedule change is given at least 35 hours prior to the change. The power/cover shift could not be used to cover such vacancies on the alternate work-group or on its regular scheduled days-off without the payment of overtime.

Other than the preceding provisions, any officer assigned to the power/cover shift shall enjoy all other benefits as provided in the parties' collective bargaining agreement and its side letters and appendices.

In the event that the Employer reduces its police officer staffing below the level of eight (8) officers assigned to patrol duties, this section shall become null and void, and the provisions of this Side Letter of Agreement shall prevail.

8. All other provisions of the Collective Bargaining Agreement, and its Side Letters of Agreement and/or Understanding, not specifically addressed by this Side Letter of Agreement shall remain unchanged.

9. This Agreement shall remain in effect for the duration of the parties' current Collective Bargaining Agreement.

ISSUES

The Parties were unable to agree on a statement of the issues, and left it to the Arbitrator to frame the issues. I find the issues to be:

- 1) Is there a valid contract between the Parties?
- 2) Should the hourly wage rates be calculated by using a divisor of 2184 hours or 2080 hours?
- 3) Should the annual percentage increase be applied to the annual equity adjustment?

DISCUSSION

This case presents something of a hybrid interest/contract interpretation arbitration. If I find that there is a valid contract, I am to determine specifically how the contract should be interpreted. If not, I am to apply the applicable factors set forth in Section 14 of the Illinois Public Labor Relations Act (5 ILCS 315/14), and select the final offer of either Party on each economic issue. To that end, the Parties have painstakingly prepared and introduced voluminous well documented exhibits on economics and comparability.

The threshold question is whether the Parties have reached a binding contract. The only bargaining issues which remain unresolved in these negotiations are those described at Issues 2 & 3 above.

DOES A VALID CONTRACT EXIST?

Police officers in the City of Lebanon currently work a schedule of 12 hour shifts. When employees work a standard 12 hour schedule, as they do here, they work 2184 regularly scheduled hours per year, so the standard calculation of the hourly rate is to divide the annual salary by 2184 hours. Not so in Lebanon.

In 2001 the Police officers were working a 10 hour shift schedule, which resulted in 2080 regularly schedule hours per year. The standard calculation of that hourly rate is to divide the annual salary by 2080 hours, and that was the case in Lebanon prior to November 12, 2001. In 2001, the City requested and the Union agreed to switch to a 12 hour schedule as a cost saving measure. Under the then existing 10 hour schedule, officers received overtime pay after 40 hours in a week. Under the new 12 hour schedule requested by the City, the officers would work 84 hours in a two week period. The officers agreed to work the extra four hours in the two week 84 hour cycle at straight time, but the quid pro quo was that their hourly rate was to continue to be calculated using the 2080 divisor. This agreement was subsequently incorporated into the 2002 contract as Appendix F and Appendix A Section 3 and they were carried over in 2005 into the current contract as appendices. The Parties had been acting on this arrangement for over six years at the time of these negotiations.

In these negotiations the Parties agreed to incorporate the provisions of Appendix F into the body of the contract by replacing the language in Article VII describing the ten hour shift schedule with the language from Appendix F describing the 12 hour shift schedule. The hourly rate of pay provision specifying the 2080 divisor, however, remained in Appendix A without discussion.

Thus, when Lowenbaum verbally transmitted the City's offer he believed that the usual divisor of 2184 hours would be used to calculate the hourly rate. When Russillo initially did the hourly wage rate tables, he also utilized the usual 2184 divisor, but subsequently noted that the contract specifically provided for the 2080 hour divisor. He immediately redid the tables and notified Lowenbaum's office. Everyone agrees that the negotiations were exclusively in terms of annual salaries and the 2080 divisor or the hourly rates were never mentioned by anyone at any point in the bargaining.

It is clear that mistakes were made here by both Parties. The City's negotiator assumed the standard 2184 divisor for computing hourly wage rates on a 12 hour shift schedule would apply, unaware of the anomaly in Lebanon that the Parties had, in the past, agreed upon and were currently using the 2080 divisor. The Union's negotiators also used the standard 2184 divisor when they first calculated the spread sheet on the hourly wage scales which was presented at the ratification meeting and was ratified by the union membership without anyone catching the apparent error in calculating the hourly rates. It appears that the bargaining teams for both Parties failed to inform their outside negotiators of the local anomaly of using a 2080 divisor in a 12 hour schedule.

Throughout the bargaining over wages there were two components. One was a percent increase and the other was an equity adjustment. The question here is in what order they were to occur. The City believed that its final offer, in keeping with its position throughout the negotiations, was to give percentage increases followed by an equity adjustment. The Union believed, in keeping with its wage offer which it maintained throughout the negotiations, that the City's wage offers including its verbal final offer which the Union accepted were for an equity adjustment followed by a percentage increase which included the adjustment. When the Union negotiators wrote up

the final offer for ratification, the language stated the percent increase plus the equity adjustment, but the wage tables added the equity adjustment prior to the percent increase. Again, the matter was never specifically discussed.

The question then arises whether there was a meeting of the minds sufficient to create a binding contract. Although they differ on what the agreement was, both Parties contend that there was an agreement. I agree.

“When the parties attach conflicting meanings to an essential term of their putative contract, is there then no "meeting of the minds" so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.” (Elkouri & Elkouri, HOW ARBITRATION WORKS, Sixth Edition p. 428)

As to the hourly rate calculation, I find that both Parties knew or should have known that the 2080 divisor was in the Contract (Appendix A section 3) and that the City had been calculating the officers' hourly rates that way for about six years. Unfortunately, neither bargaining team informed their chief negotiator, both of whom were new to these Parties' negotiations, of that fact. The role of the bargaining team is to provide the chief negotiator with the relevant information dealing with their issues and local working situation. As is common practice among outside negotiators, neither of them read the entire contract looking for issues. They concentrated their attention on the issues and sections that were identified to them by their bargaining teams as matters to be addressed. While the chief negotiators may not have known of the 2080 anomaly, both bargaining teams were certainly chargeable with the knowledge.

As to the sequence of the equity adjustment, I find that both Parties upon more diligent inquiry into of the other's offers should have known of the details that are now in dispute. Furthermore, I

find that the yield from the percentage increase on the \$1,500 adjustment does not constitute such an *essential* term of the contract to support voiding it.

Therefore, I find that a valid contract does exist between the Parties.

CALCULATION OF HOURLY RATES

Both Parties urge the principle that the other should not be able to get from the Arbitrator what it could not get at the bargaining table. The City contends that the use of the 2080 divisor results in absurdly large increase in wages which the City would never agree to. The City demonstrates that use of the 2080 divisor rather than 2184 results in a percent increase in excess of the 5% - 3% - 3% which was intended by the City. The Union contends that the converse is that the status quo was that the wage rates in the current contract were being administered on the basis of the 2080 divisor, and that introducing a 2184 divisor would result in a percent increase less than the 5% - 3% - 3% which the Union would never have agreed to.

The City argues that the application of the 2080 divisor results in an increase in compensation that the City did not and cannot agree to because the City stretched to its financial limits to make the offer it did, assuming the hourly rate would be based on a standard 2184 hour divisor. The fact is, however, that the City was then currently paying the officers' hourly salary on the basis of the 2080 divisor. The bargaining was done, as is usual, on the basis of percent increase to current base salaries while hourly rates are simply a function of calculation. The fact that the City may have mistakenly calculated the total budgetary impact on the basis of a 2184 divisor does not change what the clear language of the contract states – 2080 hours.

The City makes a convincing case that awarding the Union's proposal will create financial problems throughout the City, including jeopardizing the current practice of granting the non-represented employees the same wage increases in the year following the granting of them to the police. While I certainly empathize with the potential plight of those employees, it cannot be made the burden of this Union to ensure benefits for the non-represented. Furthermore, I am constrained by the fundamental principle that: "No arbitrator is empowered to relieve a party of a bad bargain or to improve an existing contract." Cascade Corp., 82 LA 313 (Bressler, 1984) quoted in Elkouri @ p553.

In addition, the City emphasizes the difficult economic times for local governments in Illinois. It is a fact that the police budget is a substantial part of the total City budget, and that an unanticipated increase in that budget has adverse effects on the entire City budget. The extent of the hardship is contested by the Parties. I believe that it is probably neither as slight as the Union portrays nor as dire as the City portrays. In any event, even the City's account, does not rise to the level of a claim of impossibility, but rather, hardship. It is another of the fundamental principles of contract law that "arbitrators are expected to recognize the obligation to perform the contract despite the existence of hardships." Elkouri @ p 553

Finally, the City contends that when the Parties incorporated the 12 hour shift language from Appendix F into Article VII of the contract in these negotiations, that superseded the 2080 language in Appendix A which was not incorporated but remained in an appendix, even though neither Party mentioned the hourly rate or the 2080 divisor at any time in the negotiations. This argument might have had some slight surface appeal if this was the first contract after the side letter agreement, but it is not. The Appendix A, Section 3 language was carried over into the

2002 contract and again in 2005 into the current contract, and the Parties had been acting on it for six years at the time of these negotiations. Furthermore, Appendix A also contains the wage schedules which were amended and the provisions for schedule movement and rank pay which were not amended. It would not be reasonable to assume that only this one section of Appendix A would be superseded by default because it was not incorporated into the body of the contract. If the City wished to change the status quo of calculating the hourly rate with the 2080 divisor which was stated in the contract and was a long standing practice, it was their burden to clearly negotiate the change. An assumption that the long standing method of using the 2080 divisor stated in Appendix A would be superseded by the ordinary 2184 divisor by virtue of incorporating Appendix F, but not Appendix A, into the contract without ever mentioning the 2080 provision of Appendix A section 3 at the table does not meet that burden even if the Union made the calculation error and did not catch the change until after ratification.

Therefore, I award the Union's position that the percent increases are to be calculated using the 2080 divisor.

EQUITY ADJUSTMENTS

Union was consistent from the beginning in its one and only wage offer that: "on May 1st of each year of the agreement each step of the pay plan be increased: (a) first by a \$1,500 equity adjustment, (b) followed that same day by a 5.0% cost of living increase". The City, in response, verbally offered several scenarios of percent increases and equity adjustments without specifying in writing the order in which they were to be applied. Lowenbaum testified that it was always the

City's position that the equity adjustments followed and were not included in the percent increase because that is the way such equity adjustments are customarily handled.

It is clear and undisputed that the Union's position throughout the negotiations was to apply the equity adjustment first then to apply the percent increase. This was last stated in the package proposal the Union made on April 28 along with a 5% increase in each of the three years of the contract. The City, however, declined to bargain as a package.

Sonneborn testified that on April 28 the Union made a package proposal which maintained the Unions original wage proposal of a \$1,500 equity adjustment followed immediately by a 5% increase in each of the three years of the proposed contract. The City verbally made the counter proposal of an equity adjustment of \$1,500 each year and an increase to base wage including the equity adjustment of 5% in 2008, 3% in 2009 and 3% in 2010 at their meeting on April 28. He then recommended to the Union bargaining committee that the offer be accepted subject to ratification by the membership.

Lowenbaum testified that at the April 21 meeting the City verbally offered a \$1,500 equity adjustment and percent increases of 4% in 2008, 3% in 2009 and 2% in 2010. There was no discussion whether the equity adjustment preceded or followed the percent increase, but he assumed it followed because, in his experience, that is the way it is usually done. At the April 28 meeting, the Union made a package proposal as stated above, but he declined to accept a package and they discussed the items separately. As to wages, there was a sidebar with Lowenbaum, Sonneborn and Russillo in which Lowenbaum stated he was disappointed that the Union had not come off of their initial wage offer, but he would take the Union's offer to the City Council to see

what he could do and would call Sonneborn the next day with a final offer. He gave Sonneborn the City's final offer of a \$1,500 equity adjustment each year and a percent increase of 5%, 3% and 3% on the phone the following day, May 1. He believes that he made it clear that the percent increases would follow and not include the equity adjustments.

The City argues that the fact that Russillo's testimony disagrees in some particulars with Sonneborn's regarding the sequence of events in the bargaining undermines the credibility of Sonneborn's testimony regarding the content of the final offers. I disagree. Nor do I find it significant that Russillo's memory differs somewhat from Lowenbaum's as well. It appears that the two chief negotiators remember the sequence of events differently regarding the timing and content of the economic offers and discussions. Both gentlemen are men of the highest integrity. While Lowenbaum's notes support his account of the sequence of events I do not find that controlling as to the two men's respective memory of the wording of the City's verbal final offer.

The Union contends that Lowenbaum's notes regarding the wage offers support their position that the equity adjustment preceded the percent increase.

On 4/7 he wrote:

“\$1,500 equity each year
5% each year”

On 4/21 he wrote:

“ML offered U \$1000 + 0/2 4
ML offered U \$1500 each year 0/2/4
ML offers \$1500 per year plus 4% - 3% - 2%”

On 4/28 he wrote:

“Want \$1500 + 5%”

I am not persuaded that a negotiator's shorthand notes support that close analysis. They are written for reference by the writer, and are not intended as detailed accounts. This is not to say that notes are not frequently good evidence of what was said or done – they are. In this case I

merely find that they are not persuasive regarding the content of the respective components of the final offers.

Each Party argues that their account of the sequence of the proposals on equity adjustment and the percent increase favors their position that the final offer is as they portray it, and the other Party should have understood it that way. Even if you credit the Union's interpretation that the City's earlier offers contemplated the equity adjustment preceding the percent increase, that is not determinative. The City's final offer, countering the Union offer raised the percent increase, and it would not be uncommon to also adjust the sequence of the equity adjustment as a partial trade off for that. This is particularly true where, as Lowenbaum remembers it, the City is down to the wire and stretching to make the final adjustments they feel they can make to avoid arbitration.

In the end, it comes down to this. The City's position is supported by the fact that the initial red lined draft of the Agreement done by the Russillo contained the language:

(a) Annual wage increases:

Effective ~~5/1/05~~ 5/1/08, each step of the wage scale shall be increased by five (5.0%) percent, plus an equity adjustment of one thousand five hundred (\$1500) dollars.

Effective 5/1/04 5/1/09, each step of the wage scale shall be increased by three (3.0%) percent, plus an equity adjustment of one thousand five hundred (\$1500) dollars.

Effective ~~5/1/07~~ 5/1/10, each step of the wage scale shall be increased by three (3.0%) percent, plus an equity adjustment of one thousand five hundred (\$1500) dollars

All wages are retroactive to May 1, 2005 2008 and payable on all compensable hours.

This is the complete opposite of the Union's wage proposal which read:

Article XIV, WAGES, Section 14.1 - Base Wages and Appendix A (pp. 18 and 32): The Union maintains its proposal for a three year agreement that provides on May 1st of each year of the agreement each step of the pay plan be increased: (a) first by a \$1,500 equity adjustment, (b) followed that same day by a 5.0% cost of living increase, with the stated term of successor agreement to be May 1, 2008 through April 30, 2011.

Unlike shorthand notes which might or might not reflect exact details, this is a contract provision which is intended to set forth the Parties' exact agreement, and which ever factual account of the timing of the offers you accept, this is what Russillo apparently understood from Sonneborn after Sonneborn's final conversation with Lowenbaum, whenever it occurred. It is also significant that this was a total change from the Union's proposals which Russillo had been involved with and which were in writing and available to him as he drafted the disputed contract language.

Granted that the calculations were done contrary to the language by adding the equity adjustments prior to the percent increase, and that is what the Union ratified. However, similar to my conclusion above in regard to the hourly rate, I find that the specific language controls over the calculations.

Therefore, I award the City's position that the equity adjustments follow, and are not included in the percent increases.

In view of my decision that a valid contract exists, it is not necessary to delve into the Section 14 criteria or the economic and comparability issues.

AWARD

1. THE PARTIES' TENTATIVE AGREEMENTS ARE HEREBY ADOPTED.
2. THE UNION'S POSITION THAT THE HOURLY RATE CALCULATIONS ARE TO UTILIZE THE 2080 DIVISOR IS HEREBY ADOPTED.
3. THE CITY'S POSITION THAT THE EQUITY ADJUSTMENTS ARE TO BE APPLIED FOLLOWING THE PERCENTAGE INCREASE IS HEREBY ADOPTED.
4. THE CITY SHALL ISSUE SEPARATE CHECKS FOR ALL RETROACTIVE PAY WITHIN 45 DAYS OF THE ISSUANCE OF THIS AWARD, UNLESS AN EXTENSION IS REQUESTED FOR GOOD CAUSE AND GRANTED BY THE ARBITRATOR.

AS STIPULATED BY THE PARTIES, I RETAIN JURISDICTION AND WILL PRESERVE THE RECORD FOR SIX MONTHS UNLESS NOTIFIED OTHERWISE BY THE PARTIES.

Entered this 8th day of September, 2009

James A. Murphy
Arbitrator