

INTEREST ARBITRATION

CITY OF JACKSONVILLE

Employer

and

IAFF LOCAL 637

Union

Interest Arbitration
S-MA-94-49

Barbara W. Doering
Impartial Arbitrator

September 16, 1994

Opinion and Award

ADVOCATE MEMBERS OF THE ARBITRATION PANEL

Dennis Franklin, Union Panelist

Daniel Beard, City Panelist

APPEARANCES

For the Union:

Ronald McDonald, So. District V. President, IAFF
Scott Jess, President Local 637
Mark Hopkins, Union Negotiating Team
Larry Hill, Union Negotiating Team

For the City:

Donald W. Anderson, Attorney
Edward Morales, Attorney
James Hiatt, Fire Chief
Ronald Tendick, Mayor

PROCEDURE

This arbitration, called for under Sec. 14 of the IPLRA, occurs under ground rules and stipulations negotiated by the parties. A pre-hearing meeting and mediation effort was undertaken on June 6, 1994, by which a substantial number of issues were resolved. Unfortunately, despite all their efforts, the parties were unable to agree upon resolution of the last 4 issues, and these were therefore the subject of the arbitration hearing conducted on June 7, 1994. A transcript was taken and briefs were eventually received on July 20, 1994, at which time the record was closed. After reading and considering the arguments set forth in the briefs, the arbitrator contacted the advocate members of the Arbitration Panel in conference calls of August 22nd and August 30th. Thereafter, the Panel met in executive session and issues the following opinion and award this 16th day of September, 1994.

THE ISSUES

Among the issues settled by the parties was an agreement that the contract be for 3 years with a 3% wage increase in each year. It was stipulated that the 4 unresolved issues be treated as occurring separately within each year of the 3 year contract and it was also stipulated that the vacation issue and "entire agreement" issue be regarded as non-economic. Thus, on those two issues the Panel is not necessarily restricted to one final offer or the other. Briefly summarized, the issues are:

Holidays:

UNION: no change in current language -- i.e. retain all 7 ATO days in addition to the 7 (newly agreed upon) Kelly Days and leave pay at regular straight time rates.

CITY: time and a half for holidays actually worked, and eliminate ATO days (which the City believes to have been part of the understanding about the move to a Kelly Day system).

Vacations:

UNION: language to guarantee that City may not refuse to schedule 2 people off. Also, if the City does not act after vacation requests have been put in, after 10 business days approval should be deemed to have been given.

CITY: make it clear there is no guarantee as to 2 slots for vacation scheduling. Further make clear that 2 person max. includes Kelly days and is subject to other concerns per arbitrated interp. of current language won by City. City rejects "default approval" proposal and, for its part, seeks to limit vacation carry-over.

Working out of classification:

UNION: reduce current 3 shift qualifier to 12 hours, and ban working up more than one class.

CITY: no change in current language -- i.e. no restriction on move up of more than one classification and 3 shift qualifier (for acting pay which is then retroactive to beginning of assignment).

Entire Agreement:

UNION: Delete whole two paragraph clause.

CITY: Keep current language and add to it a waiver of "effects" bargaining.

FACTS

Jacksonville, population 19,324, lies about 35 miles west of Springfield. Its fire department has a Chief and 3 captains and 21 bargaining unit employees, of whom 3 are lieutenants and the remaining 18 are evenly divided in the ranks of driver and hosemen -- 9 of each. The 3 non-bargaining unit captains and the 21 bargaining unit employees are deployed on 3 shifts working a 24-on and 48-off schedule. A key feature of this round of bargaining was agreement on a Kelly day system to reduce scheduled hours of work and thereby largely avoid FLSA overtime liability. The move to Kelly days had been suggested by the Union in the November 30th 1993 bargaining session. It appears to have been a response to the City's (initial) proposal to reduce time off for holidays to comp time. The prior contract had provided 7 days off (ATO days) as compensation for the 11 recognized holidays. With 3 shifts on a 24-48 schedule, each individual only works a third of the holidays (assuming they fall evenly) and comp time rather than ATO days would reduce time off from 7 days to about three and a half.

On November 30, 1993, the Union suggested the idea of Kelly days to provide time off and reduce hours, and it proposed that holiday work be paid at double time which would more than make up the loss of FLSA overtime while serving as a holiday benefit which the Union considered comparable to holiday benefits given other City employees. Mr. Morales testified that the City responded that Kelly days would have to replace ATO days for the City to buy into any Kelly day provision (TR 63-64). The Union thereafter made a proposal deleting ATO days from the holiday provision and calling for double-time for work on holidays and inserting Kelly days -- one every 9th shift (13 of them) -- into the hours of work provisions. The City countered with a proposal for half the number of Kelly days, which is essentially the same number of Kelly days as there had been ATO days (although the last one spans a year and one every 18th shift comes out to 6.75 days per year), and the City offered time and a half for working on holidays. Time and a half for holidays is almost the same cost as the FLSA overtime saved by the Kelly days. At the December 14th session, the Union amended

its initial Kelly day offer to accept the City's position on the number of Kelly days -- at one Kelly day every 18th shift -- while continuing its demand for double time on holidays. It did not withdraw deletion of ATO days, and the City, rightly or wrongly, assumed the time-off issue to have been resolved at maintaining the current number of days rather than cutting them in half (as earlier proposed by the City) or doubling the number (as proposed by the Union). Union President, Scott Jess, indicated in his testimony that after the December 14th session the matter was left with the City's 53 hour work week/Kelly day offer "on the table" and no agreement on the holiday benefit. Neither party claims there was any further discussion of the hours or the holiday issue in the next 4 bargaining sessions. Both sides agree that the holiday benefit had not been worked out, but the City assumed that to be a pay issue with ATO days having been traded for Kelly days, whereas the Union apparently felt the ATO days were still an alternative if premium pay could not be agreed upon.

Although something may have been said to the mediator in the March 31st mediation session, it was not until May 24th, at the meeting to exchange final offers for arbitration, that the Union told the City it was withdrawing previous deletion of the 7 ATO days in connection with its position on holidays and substituting retention of all 7 ATO days for its double-time pay demand. The City objected at arbitration that the Union should not prevail for having moved back to an original position which it had long since abandoned in the course of negotiations. The Union argued that if the City really objected to both Kelly days and ATO days, the City could have adjusted its final offer in order to respond to this move by the Union, just as the Union did with respect to unexpected positions taken by the City on physical fitness and drug and alcohol (TR 81). The City, however, chose instead not to go back on the agreed upon move to Kelly days, but rather to argue the unreasonableness of the Union's final offer both as a matter of a bargaining tactic which should not be encouraged by arbitrators and in the context of the City's problems with time off and the reasonableness of the move to premium pay for actually working on the holiday.

As noted above, the City's time and a half premium pay offer for working

on holidays is not really a new benefit or a net gain. Rather, the premium pay is a part of the swap of Kelly days for ATO days, because Kelly days have the advantage of largely eliminating the FLSA overtime payable when hours in the 28 day cycle exceed 212. In fact the cost of time and a half on holidays, estimated at \$11,592, will save the City about \$800 over the year based on its 1993 cost of \$12,366 for the FLSA overtime. Aside from the slight decrease in the amount of overtime pay for its members, the Union does not regard being paid an additional half-day's pay on top of what one would be paid anyway as a sufficient reward for working on a holiday. The Union notes that other City employees who work a holiday get their regular pay plus an additional day's pay (not merely an additional half-day's pay) for working the holiday. While that may be so, the other bargaining units are on 8 hour days and the additional holiday pay they get is only 8 hours. It is true that after 8 hours they get to go home and spend at least part of the holiday -- either before or after work -- with their family, but even at only time and a half, the firefighters are being offered 12 hours of additional pay for the inconvenience of being on duty on any of the 11 holidays. While there is more that could be said and there are a number of different ways this issue might have been resolved, the Union chose to go back to all 7 days off instead of its premium pay proposal, and the arbitration panel's choice is limited to the City's premium pay offer or the Union's time-off demand.

Moving to the vacation scheduling issue, the City's position on this issue is reflective of its general concern with time off that had prompted its initial holiday proposal which would have cut the ATO days by half. The City is concerned about having sufficient people on a shift. Including the captain, 8 people are assigned to each shift. Having 1 or 2 of these 8 away on leave of one sort or another is not a problem, but the City is not comfortable with having 3 of the 8 away, leaving only 5 on the shift. There have been occasions with only 5, but the City wants to keep them to a minimum. For scheduling purposes Kelly days are not as "discretionary" either for the employee or the department. The employee does not choose when they fall, but the department cannot require that they be given up and re-scheduled, as it had occasionally done with ATO days

(in order to maintain manning). The point of Kelly days is that they are "scheduled time off" which reduces hours and allows avoidance of FLSA overtime. Not only does the City not want to double the number of days off in the context of the holiday issue, but in context of the vacation issue it wants to assure retention of discretion to limit the number of scheduled vacations so as not to increase the number of occasions of only 5 people on a shift. Under a grievance arbitration won by the City, current language provides a 2 slot ceiling rather than a 2 slot guarantee. The City does not want to guarantee 2 vacation slots because, aside from Kelly days which would put them down to 5, 2 slots would also leave only 5 if there were someone off on disability or someone called in sick. The Union argues that if only one person per shift is allowed to be on vacation at one time, 2 or 3 senior employees can monopolize the entire summer, so that others are unable to schedule any vacation when their children are out of school. The Union points out that the City has not called-back on overtime to cover for shortages leaving only 5 on a shift and argues that the City should not refuse to schedule two vacations simply because there may be a few days (Kelly days and/or absences) where staffing falls to 5 as a result of 2 vacations. While it is theoretically possible to cover for such absence with call-back overtime, that is not only expensive, but it also deprives someone of time off and not being deprived of time off -- particularly at prime time -- is what much of the unresolved dispute is about.

The issue of "acting" pay for working out of classification also has a relationship to time-off, which would be accentuated if there were to be a significant increase in the number of days off. Current language provides that only those who work at least 3 consecutive shifts in a higher classification get paid at the higher rate. The Union argues that individuals filling in at higher responsibility levels should not be required to work more than 12 hours at that level without being compensated accordingly. The City argues that the current system is not inconsistent with what is done in many other fire departments and City also points out that most of the other communities which are deemed comparable do not have a "driver" (or intermediate) classification between the rank of fire fighter and lieutenant. The City notes that the only one of 9 comparable

communities has a driver classification, and it only gives "acting" pay after 15 (rather than 3) consecutive shifts. Two of the others also require 15 consecutive shifts, while 3 give acting pay immediately and 2 others have 6 hour or 1 day requirements and one department does not have acting pay in its contract.

With respect to external comparison with other fire departments, the parties agreed upon 9 communities as "comparable". Among the 10 (counting Jacksonville), Jacksonville is 4th in population, 6th in department size, 6th in sales tax revenue and 3rd in equalized assessed valuation. When you take out paid time off, Jacksonville fire fighters work more hours than all but 2 of the 9 comparable departments. With a single exception, however, at the 13th year (average length of service) Jacksonville fire fighters are better paid than those in comparable departments, and are significantly better paid at the driver level which fully half of them are at, and which is not generally available in the other departments. Paramedic or EMT or other educational bonuses do not make up the difference in what can be earned here versus the other departments.

The City also pointed out through its exhibits that although its fire fighters work more hours than some of the other departments, they are not currently providing significant EMT or Paramedic service and their total number of runs stood at 441 compared to 1700 to 2400 in the busier of the comparable departments. The number of fire runs, at 381, was 5th of the 10 departments, and even with respect to fires they were less busy than Collinsville, Mt. Vernon, and Ottawa (reporting 500, 529 and 483 fire runs). The departments with really significantly greater time off are Marion, Collinsville, Ottawa, and Charleston. Of these, only the latter two are on a similar shift schedule, and the Charleston department is large enough to have 9 or 10 people per shift. Moreover, although there was no information as to Marion's level of activity, the other 3 all provide much more extensive EMT service with more than 2000 runs per year. The City suggests that a level of activity which is so much higher than Jacksonville's may have relevance to the higher amount of time off.

There is, of course, much more that could be said and gleaned from the comparisons. The arbitrator spent a significant amount of time studying the exhibits provided

by both sides. For the purposes of this text, however, the key thing is that the net result of that study was a conclusion that either of the two offers under consideration here can be seen as fair. That is, external comparison does not suggest that one side's position on any of the issues in this dispute is clearly unreasonable. To the extent that the City's offer may be short on time-off compared to some other departments, its fire fighters have the advantage of lower level of activity, similar or higher pay and an intermediate rank not enjoyed in many of the other departments to whom they are compared. At the same time, of course, the ATO days the Union seeks, even on top of Kelly days would not put this department out of line with other communities in terms of total time off, even though the City might encounter expense and practical difficulty in staffing the shifts the way it would like to.

OPINION & AWARD

HOLIDAYS: Accept City Offer for implementation in 2nd Year.

Rationale: Up to the point of exchange of final offers -- that is, from November through the March 31st mediation session -- the deal under consideration was Kelly days in lieu of ATO days and a disputed rate of overtime pay for working the holidays. It is not credible that the Union bargaining team did not understand the linkage the City was insisting upon between adoption of Kelly days and elimination of ATO days. The Union had deleted ATO days from its initial Kelly day proposal (Nov. 30th) and in its December 14th proposal the Union agreed to reduce its Kelly day demand to the level counter-proposed by the City. There was no evidence or testimony to suggest that the Union, in agreeing to the reduced number of Kelly days, made any statement that ATO days would have to go back on the table. While the Union may have thought it could bring back ATO days if the City continued to reject its double-time demand, it should have tried that in bargaining and not waited until arbitration. Asking for all 7 ATO days

on top of a substantially equal number of Kelly days looks like the very position which was rejected and modified in reaching agreement on the Kelly days. Granted the Union was then asking for double-time as well, to which the City had responded with time and a half, but double time for the 3 or 4 holidays each person could have expected to work, amounts to 3 or 4 days, not the 7 the Union backed up to in its final offer.

By trying to re-capture all 7 ATO days in its final offer, it is my opinion that the Union took a serious move backwards and bought itself a heavy burden with respect to the holiday benefit issue. In my view a party that may have gained something by appearing to have softened its position during bargaining should not be allowed to re-capture what it appeared to give up unless the other party's position is entirely unreasonable. To do otherwise at the arbitration step would discourage serious bargaining and the giving of clear signals in the bargaining process.

In this case, the City's offer is not unreasonable, and might have prevailed as the more reasonable of the two offers even if the Union's position did not appear to be a move backward to a position previously dropped in bargaining. Looking at external comparisons, the City's offer pretty much preserves what it had before. While the Union may have hoped to improve its position in the comparison, when pay and level of activity are considered along with time off, there was no special reason shown to justify moving higher in the time off comparison. The evidence from (internal) comparison with other employees of this city shows that while other bargaining units may get double time for work on a holiday, they do not work 24 hour shifts and the extra pay they get is only 8 hours. It is true that after 8 hours they go home and get to spend at least part of the holiday -- either before or after work -- with their family. For the inconvenience, however, of being on duty all 24 hours of the holiday, fire fighters will get 12 additional hours pay instead of 8.

VACATION SCHEDULING: Adopt the following to be effective 1/1/95:

Selection of vacations shall be on a shift seniority basis. Employee's vacation periods may be split into three (3) increments, one of which may be comprised of two (2) non-consecutive (i.e. stand-alone) duty days, but all others of which must be either a single full duty day or for a consecutive duty day period. No more than two (2) employees per shift shall be scheduled off for vacation and/or Kelly days at the same time. Only one (1) driver shall be on vacation per shift, except by permission of the Fire Chief.

The senior employee on each shift shall pick one vacation consisting of as many consecutive days of his vacation entitlement as the employee desires within the guidelines of this contract. The list shall then be passed on to all other employees according to seniority for their picks. When all employees have picked a vacation increment, the list shall be passed around again in seniority order, for selection of second vacation increments, and shall then be passed a third time for selection of any remaining increments of allotted vacation.

Employees' vacation requests shall be submitted to the Fire Chief's office as soon as possible after January 1st, but not later than by February 1st of each year, and employees shall be notified, preferably within 10 business days, but at least within 10 shift days of approval of requested vacation schedules. After an employee's vacation schedule has been approved, it can only be changed by mutual consent.

Any employee who is separated from the fire service by way of resignation, death or retirement shall be compensated in case for all unused vacation leave accumulated at the employee's regular rate of pay at the time of separation.

With the prior written approval of the Chief (or his designee(s) in the event of the Chief's absence or unavailability), an employee may be allowed to use accumulated compensatory time off to extend a vacation, provided that compensatory time may not be used to extend a vacation for more than ten (10) duty shifts (in other words, the previously scheduled vacation, plus the comp time added, may not total more than ten (10) duty shifts). Absent emergency, requests to extend the vacation must be submitted two (2) weeks in advance of the additional duty shift(s) requested. As used in this paragraph, the term "compensatory time off" shall mean comp time earned in lieu of overtime pay.

Rationale: The 2 slots remain a ceiling (as per the arbitration award won by the City) rather than a guarantee. Part of the downside, however, from the employees' point of view, of substituting Kelly days for ATO days is the lack of stand-alone days off available to fire fighters. Reducing minimum vacation increment from 2 duty days to 1, and allowing what will amount to up to 3 stand alone days, could provide some flexibility and at the same time give junior employees a shot at sought-after vacation periods..

WORKING OUT OF CLASSIFICATION - An agreement was reached during the pendency of proceedings, taking this out of all-or-nothing consideration. It was agreed that

current language remain effective in the first year of the contract and that changes be added in the 2nd and 3rd year. In relevant part, Article 19 provides:

Compensation will be provided to bargaining unit members for work in a higher classification at the base wage rate for such classification provided that the employee works at least three (3) consecutive duty shifts in the classification. Compensation will be made in such cases retroactive to the first duty shift worked in the higher classification.

And the agreement is to add:

Effective 1/1/95: When a hoseman works out of classification as a lieutenant and/or when a driver works out of classification as a captain compensation at the base wage rate of such higher rank shall start immediately.

Effective 1/1/96: When a driver works out of classification as a lieutenant and/or a lieutenant works out of classification as a captain compensation at the base wage rate of such higher rank shall be provided if the employee works at least 2 consecutive duty shifts in that classification and such compensation shall be retroactive to the first duty shift worked in the higher classification.

OTHER ITEMS NOTED AND AGREED TO DURING DECISIONAL PERIOD: In addition to working out an agreement on out-of-classification pay, the panel raised some questions about holidays - when they start and whether the list was reflective of the most important ones in the context of a 24-48 schedule. After consulting the parties, it is the Panel's understanding that:

1. Holidays, for premium pay purposes, start at 7 a.m. on the day of the holiday.
2. Starting in 1995, Christmas Eve will replace Washington's Birthday and Easter Sunday will replace Good Friday as holidays for which premium pay will be given.

ENTIRE AGREEMENT: Retain current language.

Rationale: The point of bargaining a contract is that, once you have done it, you live by it and can turn your attention to other things. Having a bargaining relationship does not make the Union or its officers into some sort of co-managers who have to be consulted in advance of every decision. This is so whether you have an entire agreement clause or not. While removal of the clause would not give the Union the right to continuous bargaining, in view of the argument surrounding this issue, there could be false expectations if deletion were accepted. On the other side of the coin, the bargaining for which the

City seeks (added) waiver has to do with new duties, responsibilities, or requirements imposed by state or federal government where the Union would arguably have the right to bargain over the "effects" of implementation of laws which were not existent at the time the contract was negotiated. Since the City itself cannot change the conditions of employment without bargaining, if some other governmental entity passes laws or regulations that do so, it is reasonable that the Union be consulted and be bargained with as to implementation. If the Union is willing to waive that right as a part of a bargaining package, so be it, but as non-economic item, where the arbitration panel is not required to select one side's offer or the other, the arbitrator is of the opinion that this issue should be resolved by retention of current language.

AWARD as to UNRESOLVED ISSUES

1. Holidays: The City's Final Offer is Adopted effective Jan. 1995 for the remaining 2 years of the contract.
2. Vacations: Section 22.2 shall be as re-drafted by this Panel at page 10 above, effective January 1995 for the remaining 2 years of the contract.
3. Entire Agreement: Current Language shall be retained.

September 16, 1994.

Barbara W. Doering, Chairman

Daniel Beard, City Arbitrator,
Concurring #1, #2, #3

Dennis Franklin, Union Arbitrator
Dissenting #1, #3, Concurring #2