

In The Matter Of  
The Arbitration Between:

**Fraternal Order of Police, Denver Sheriff Lodge 27  
And  
City and County of Denver**

Direct Appointment by the Parties  
Interest Arbitration  
Date of Award: March 26, 2005

Preliminary Statement

Arbitration hearings involving the above-captioned matter were held in Denver, Colorado on February 16, 17, 18 & 23, 2005. Representing the City at such hearings were Robert D. Nespor, Esq. and Robert A. Wolf, Esq., and representing the Union were Steve Bukaty, Esq. and Sean McCauley, Esq.. A transcript of the hearings was made; both parties filed post-hearing briefs which were received by the undersigned on March 16, 2005.

Issues

This case is an interest arbitration proceeding conducted pursuant to the provisions of Part 9 of the Denver City Charter. The Charter provides for final offer arbitration on an issue by issue basis.

The Denver City Charter does not define what is meant by the term "issue" as used in Part 9 of the Denver City Charter. No prior arbitral or judicial decision interpreting this term has been offered by the parties; consequently, the definition of "issue" is a matter of first impression in this relationship. Does "issue" mean all items falling within a particular Article, a particular section or a particular paragraph of the parties' collective bargaining agreement or does it mean something else?

I shall define "issue" in the manner in which it has been customarily used during my 35 years of experience in the arbitration field.<sup>1</sup> "Issue" means one or more provisions of the collective bargaining agreement which bear on a specific topic of a singular nature. Examples of the application of this definition can be found in the way I have categorized the issues to be decided in this case. For example, pay rates is one issue; longevity is another issue; uniform allowance is another issue; uniform allotment is another issue; and so forth.

### Analysis

The factors to be considered in this interest arbitration are enumerated in Sec. 9.9.10 of the Denver City Charter. That Section provides in pertinent part as follows:

"The arbitrator may apply the standards commonly used in interest disputes but shall rely predominantly on the following in arriving at a decision:

"(A) The interests and welfare of the public and the financial ability of the City to bear the costs involved;

"(B) The lawful authority of the City;

"(C) Stipulations of the parties;

"(D) Comparison of the compensation, fringe benefits, and pensions of Denver Deputy Sheriffs with positions with similar duties and responsibilities in other departments which are similar in the scope of duties and responsibilities.

"However, while the arbitrator may consider such comparisons in making a decision, in no event shall the arbitrator make an award:(i) That is indexed or otherwise expressed as a relationship to the compensation or fringe benefits of any other employee or employees who are not Deputy Sheriffs of the Denver Sheriff Department, or (ii) That modifies pensions of Deputy Sheriffs; and

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<sup>1</sup> Webster's New World Dictionary (College Edition 1966) defines issue as: "a point, matter or question to be disputed or decided."

"(E) The cost of living."

With these standards in mind I now turn to a discussion of the issues before me. I shall start with the issue that the parties acknowledge to be, by far, the paramount issue in this proceeding, and that is pay rates. The Union's final offer on wages seeks a 3% across-the-board wage increase for calendar year 2005, a 3% across-the-board increase for calendar year 2006, and a 4% across-the-board increase for calendar year 2007. The City's final offer on wages proposes a 1% across-the-board increase for calendar year 2005, a 2% across-the-board increase for calendar year 2006, and a 3% across-the-board increase for calendar year 2007.

In terms of costing out the difference between these proposals, I reject the City's costing methodology and accept the Union's. The Union's methodology calculates the incremental increase including a 23.1% roll-up from one year to the next year in the wage base whereas the City's methodology measures costs not incrementally from year to year but cumulatively from the base year which in this case is 2004. The City's method is not the norm in interest arbitration.

The Union's costing analysis indicates that the difference between the City's and Union's wage proposals in the first year of the contract is \$824,007, is \$440,844 in the second year of the contract, and is \$475,040 in the third year of the contract amounting to a total difference of \$1,739,891 over three years.

The question becomes which final offer should be accepted - the City's or the Union's? One standard typically relied upon in interest arbitration and cited by the Denver City Charter (hereinafter Charter) is wage comparability with other jurisdictions. The Charter standard on wage comparability is written in such a way as to significantly restrict its utility. It is common in interest arbitration for wage comparison purposes to look to geographically proximate communities which have similar characteristics and which draw from the same labor market. However, the language in the Charter on wage comparability provides: "Comparison of the compensation, fringe benefits, and pensions of Denver Deputy Sheriffs with positions with similar duties and responsibilities in other departments which are similar in the

scope of duties and responsibilities." This provision requires not only that there be a job match involving similar duties and responsibilities but also that the comparison between the Denver Sheriff's Department and other sheriffs' departments be limited to "other departments which are similar in the scope of duties and responsibilities" to the Denver Sheriff's Department. This particular restriction makes it exceedingly difficult to include a comparison with all the other Sheriffs' Departments in the greater Denver metro area because all these other Sheriffs' Departments have mixed patrol and detention responsibilities whereas the Denver Sheriff's Department has almost pure detention responsibilities. Patrol responsibilities means law enforcement duties as in police work. The City of Denver separates responsibilities by assigning law enforcement work to its police force (a bargaining unit in the Police Department) and its detention work to its deputy sheriffs (a bargaining unit in the Sheriffs' Department). Were it not for the restriction concerning Departments with similar duties and responsibilities, one could look at just the detention side of the Sheriffs' Departments in the greater Denver metro area and make some adjustment for the fact that these Departments tend to hire individuals capable of assuming hybrid responsibilities (patrol and detention work) whereas the Denver Sheriff's Department hires individuals who will assume only detention responsibilities. This restriction eliminates the possibility of local comparisons and, in fact, really any comparisons within the State of Colorado.

One is, thus, left with the prospect of doing a wage survey on a regional or even a national level. In a "meet and confer" climate prior to adoption of the Charter, the predecessor Union to the FOP agreed with the Employer on a list of some 31 jurisdictions, i.e., counties, with which to make wage comparisons. The present Union, which came into being after the adoption of the Charter, has not agreed with the Employer on a list of comparable jurisdictions. What has typically occurred since the mid-1990s is that the City does a wage survey of some of the 31 jurisdictions referenced above and the

Union does a survey of mixed jurisdictions (local and national). That is what occurred in the present case.

In the present case there are difficulties with each party's survey. In the City's case it surveyed only 18 of the 31 jurisdictions which is not enough to give me the requisite level of confidence about the completeness of the wage survey even assuming that the 31 jurisdictions provide a valid basis for comparison. My understanding is that the 31 jurisdictions were chosen largely on the basis of comparing jail populations, and that is not a comprehensive-enough basis in my view on which to rest the selection of comparable jurisdictions. In the case of the Union survey I am not entirely confident that its survey involved an exact enough job match as it appeared that in some cases it was comparing Denver sheriffs to law enforcement personnel in other jurisdictions.

In a prior interest arbitration proceeding between these same parties, Fraternal Order Of Police, Denver Sheriffs Lodge 27 and City and County of Denver, decided May 18, 1998, I urged the parties to consider limiting the number of comparable jurisdictions to a smaller number and to use factors beyond the size of jail populations for selecting a list of comparable communities. I reiterate that recommendation and specifically suggest as factors for selecting comparable communities such factors as regional geographical proximity, similar population size, and comparable cost of living indices. Also, I would urge that the job matches be as similar as possible.

Even with all their flaws the story that the surveys submitted by both parties tell is that, in general, the wages of Denver sheriffs do not compare that well with the wages of detention personnel elsewhere, particularly when COLI adjusted, and that the Denver sheriffs tend as well to work longer hours for their pay than those elsewhere.

Inflation, as measured by the Consumer Price Index (CPI) for the Denver-Boulder area, is another factor typically taken into account in interest arbitration. While inflation has been quiescent over the past contract term between these parties, one also has to consider what is likely to happen over the term of the parties' successor collective

bargaining agreement - the contract at issue here - which runs from 2005 through 2007. Given the evidence about where Denver is in the present business cycle, given the recent activity in the CPI index, and given the fiscal and monetary policies in place at the national level, there has to be some concern that inflation may not be as quiescent as it has been over the past three to four years.

Another factor which bears on the wage decision here is the concessions that the Union voluntarily made during 2004 to help the City through a constrained budget year. The evidence was that the Union voluntarily gave up a uniform allotment worth \$138,000, a paid holiday (Election Day) worth \$234,000, and bi-lingual pay.<sup>2</sup> Also, Union members along with other City employees began paying out of their pay a 2% pension contribution which payment increases in 2005 to 2.5%. Thus, a 3% pay increase for 2005 would serve in large measure to simply return bargaining unit members to the financial position they had attained prior to these concessions and the pension contribution. A return to the status quo ante ought to be supported given the general tenor of the wage surveys, the concerns about inflation, and equitable considerations concerning the concessions and pension contribution provided that the City can afford such a pay package.

I now turn to the crucial issue of whether the City has the financial ability to pay for the increase proposed by the Union's final wage offer. I start from the assumption that the City has the financial ability to pay the costs associated with its final offer; clearly, if the City did not have such ability, it would not have made such offer. As I have pointed out earlier, the difference between the City's wage offer and the Union's wage offer over the three year life of the agreement is \$1,739,891. The question is whether the City has the financial ability to pay this sum.

The record indicated that sales and use tax revenues, as opposed to property tax revenues, are the major source of revenue for Denver. It is also the case that sales and use tax revenues are more volatile

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<sup>2</sup> Bi-lingual pay involved no financial sacrifice for 2004 since no bargaining unit member was receiving bi-lingual pay in 2004.

than property tax revenues as they tend to rise and fall with the City's level of economic activity. During the years 2001-2004 the City experienced a modest downturn in economic activity as reflected in its sales and use tax revenues which declined each year during that four year period. While sales and use tax revenues declined during that four year period, the general fund revenues, of which the sales and use tax revenues are part, remained flat from 2000<sup>3</sup> through 2003 at the \$700,000,000 level. During the years 2000 through 2004 the City did an admirable job of reining in expenditures as a result of flat revenues and of finding additional revenue sources to make up for the declining sales and use tax revenues. In 2002 the City implemented a hiring freeze and reduced agency budgets somewhat; in 2003 the City deferred wage increases for career service employees for 6 months; and in 2004 FOP members made the voluntary concessions, previously described, and began paying pension contributions of 2% out-of-pocket to assist the City in managing its expenditures.<sup>4</sup> Also, during 2001 and 2002 the City used some reserves from its fund balance to balance its budget. Good fiscal management requires that a city maintain its fund balance within a range of 5% to 15% of total revenues (and for cities heavily dependent upon sales and use tax revenues closer to the 10 to 15% range), and the city has been able to maintain its fund balance above 10% even during the economic downturn. Between 2002 and 2004 the City reduced the number of permanent and part-time positions and in 2004 laid off approximately 50 City employees.

For 2005, the first year of the agreement under review here, the City is forecasting a 7% increase in retail sales over 2004 and a 2.1% (or 16 million dollar) increase in total revenues over 2004. The City is also forecasting an increase in expenditures over 2004. For 2006 the City is forecasting a 20 million dollar increase in total revenues over 2005. The revenue projection for 2005 suggests that the City has

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<sup>3</sup> In 2000 there was a one time spike in general fund revenues of 20 million from the settlement of a tax lawsuit. When the one-time spike is removed from the general fund revenues, the portrait is one of flat revenues of approximately \$700,000,000 each year during the years 2000 through 2003.

<sup>4</sup> The firefighters also voluntarily made some concessions during 2004.

turned the corner economically and is starting to participate in the recovery that the rest of the country is experiencing.

Also to be considered here is the Tabor Amendment which restricts the City's increase in spending each year to only that increase which represents the sum of local growth and the rate of inflation for the Denver-Boulder area unless Denver voters specifically approve a greater increase. Tabor requires that excess revenue obtained by the City beyond the Tabor limits be refunded to taxpayers unless the taxpayers authorize a different result. Local growth has been averaging about 1% (or roughly 7 million dollars) each year. Given the foregoing, the Tabor Amendment limit does not appear to bar the increase in spending proposed by the Union's wage proposal of approximately \$580,000 on average per year (above the City's wage proposal) or of \$1,419,160 on average per year above the previous year's wage base.

The evidence submitted in this case supports the testimony of Ron York, the Union's expert witness on municipal finance, that the City has the ability to fund the Union's wage proposal. While the City has been through a constrained fiscal environment over the period, 2000 - 2004, the record indicates that the City is looking at the prospect for renewed economic growth commencing with the year 2005 and beyond. City revenues are projected to increase some 16 million in 2005 and some 20 million more in 2006; the City's fund balance is also very healthy. The period of forecasted economic growth coincides with the period that will be covered by the collective bargaining agreement at issue here. I conclude that the City has the ability to pay the Union's wage proposal, and I hereby select the Union's last best offer on pay rates as the pay rates for the successor agreement for all the reasons I have set forth above.

I next address the issue of uniform allowance. The current uniform allowance is \$450. The Union is seeking to increase that allowance by \$25 each year over the course of the three year agreement; the City is proposing to maintain the uniform allowance at \$450. The marginal cost of the Union's proposal is \$17,900 per year

for a total marginal or incremental cost of \$53,700 over the course of three years.

The record indicated that the uniform allowance has not increased during the past ten years, and that both the bargaining unit members as well as the Division Chief are spending more than the current uniform allowance in cleaning and maintaining their uniforms. It is time to grant an increase in the uniform allowance. The marginal cost of this increase, \$17,900 per year, is clearly within the City's ability to pay and represents only a very modest increase in an expenditure for a very beneficial purpose. I select the Union's offer on uniform allowance for the foregoing reasons.

I next take up the issue of survivor benefits. The Union's proposal is that the City provide medical and dental insurance to the surviving spouse and children of any officer killed in the line of duty for a one year period. I am interpreting the Union's proposal to mean that the one year period shall run from the date of the officer's death and that the reference to "children" means dependent children. The City is not proposing any survivor benefits.

This benefit fortunately is one which would be seldom invoked. The evidence was that only four Deputy Sheriffs have been killed in the line of duty over the past 30 years. Accordingly, the cost of this benefit is negligible, and yet this benefit would assist a Deputy Sheriff's family at the time of its greatest vulnerability. I, therefore, select the Union's last offer on this issue.

On all the remaining issues I select the City's offer. A principal consideration behind such decision is cost. In terms of cost, while I have found that the City has the ability to fund the wage increase, the uniform allowance increase, and the survivor benefits, I think it must be recognized that the City is still dealing in the 2005 budget with keeping its costs under control, and that while the forecast for the next several years is one of increasing revenues, one must make allowance for the fact that forecasts do not always prove entirely accurate. There is no question that the City has done a remarkable job of disciplining its expenditures and finding additional revenue sources during a four year period of flat overall

revenues which included decreased sales and use tax receipts. The City should be asked to fund against the background of such a fiscal environment only those economic improvements which are essential to do justice to members of the bargaining unit.

Also, behind the decision to adopt the City's final offer on the remaining issues are certain considerations unique to some of these issues.<sup>5</sup> In the case of longevity and vacation pay I observe that the Union negotiated a so-called B scale with respect to these benefits during a prior negotiation and now wishes to remove the B scale it negotiated. The Union obtained certain benefits when it negotiated the B scale, and if I were to now remove the B scale, the delicate economic balance struck in the prior negotiation would be upset. I do not intend in this decision to disturb that balance.

In the case of shift pay I note that adoption of the Union's final offer would have the effect of granting shift (premium) pay to more than half the members of the bargaining unit, and such extension seems unwarranted.

A lengthy presentation was made on the issue of improving the Article (Article 2) granting pay to FOP members for union-related activities.<sup>6</sup> While I am convinced that the formula utilized by this Article could be improved with salutary benefits for both parties, neither party's offer constitutes the optimum result; I have chosen to leave the language largely as I found it.

In terms of the Union's proposal with respect to immunizations I would point out that giving Hepatitis B and influenza shots to members of the bargaining unit who desire them is much more costly than having the City cover any deductible payment a Deputy Sheriff might have to make to obtain such shots. I have decided not to adopt the Union's proposal on immunizations.

While I can understand the Union's desire to have a "me too" arrangement with respect to certain life insurance and voluntary

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<sup>5</sup> My decision on issues such as FTO pay, uniform allotment, jury leave, and off-duty appearance pay was made largely in terms of cost considerations.

<sup>6</sup> I would include, as part of this issue, the Union's proposal to amend the provision in Art. 17.1 regarding administrative leave for FOP business.

insurance benefits offered to Career Service employees, the Union by virtue of its bargaining relationship with the City obtains various benefits that unorganized Career Service employees do not receive. If the Union desires certain benefits that unorganized Career Service employees receive, it is incumbent upon the Union to bargain for those benefits as part of a comprehensive package. I choose not to grant the Union's request for a "me too" provision with respect to the insurance benefits identified above.

Finally, there is the Union's proposal to expand the scope of the grievance and arbitration procedure to include as grievances disputes over any term or condition of employment and to include adverse evaluation ratings and employee discipline within the scope of the arbitration procedure. Currently, contests regarding adverse evaluations and employee discipline are heard under the procedures of the Career Service Appeals Process. While I am sympathetic to the concerns that spurred the Union's proposal, particularly with respect to adverse evaluations and employee discipline, there is the question of whether the expansion of the grievance and arbitration procedure that the Union proposes would violate Sec. 9.9.3(A) of the City's Charter which provides that Deputy Sheriffs only have the right to bargain over issues pertaining to "compensation, fringe benefits, a means for the collection of union dues and an agency fee, and a grievance procedure for resolving any of the above listed issues". I do not see employee discipline mentioned in this list of subjects of bargaining, and I am not inclined in the context of this proceeding to enter the debate as to whether adverse evaluations are sufficiently linked to compensation to make them a proper subject matter for the grievance and arbitration procedure. Certainly, the list of permitted subjects of bargaining would not include a grievance procedure for resolving disputes over "any term or condition of employment". For the above reasons I select the City's final offer on this issue.

Therefore, after having considered the evidence and arguments of the parties, I award as follows:

The Union's final offer is adopted on pay rates, uniform allowance, and survivor benefits.

The City's final offer is adopted on longevity, shift differential, vacation (all sections), FTO pay, FOP member time off and pay, off-duty appearance (Art. 7.3), uniform allotment, immunization, life insurance, voluntary insurance, jury leave, service date, and grievance and arbitration procedure (including step plan).

Lawrence T. Holden, Jr.,  
Arbitrator