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Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employers

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MANAGEMENT STRATEGY SUSTAINED IN RESIDENCY DISPUTE

Public employers recently gained significant support in the defense of residency requirements challenged in interest arbitration. In *Illinois Fraternal Order of Police Labor Council and City of Macomb*, S-MA-01-161 (Malin, 2002), Arbitrator Martin H. Malin relied heavily on evidence of internal comparability and the parties' bargaining history in adopting the City's final offer, which maintained the status quo requiring that employees reside within Macomb's city limits. Arbitrator Malin concomitantly rebuffed the Union's challenge to an existing zipper clause (defining mid-term bargaining obligations) while affirming the City's final offer on longevity pay. The result was a rare "sweep" for management on all issues.

Background

Similar to other municipalities, the City of Macomb has a long-standing ordinance stating that all city employees must reside within the city limits. During negotiations for the 1995–1998 agreement, the City and Union for the first time incorporated this residency requirement into the contract. The Union dropped its proposal to exempt more senior employees from the residency requirement. Thereafter, following enactment of the 1997 amendment to the Illinois Public Labor Relations Act making residency a mandatory subject of bargaining, the parties negotiated residency for the 1998–2001 contract term. The Union proposed total elimination of the residency requirement, while the City demanded that the residency requirement remain unchanged. The parties ultimately compromised, agreeing that employees would have to become City residents no later than 60 days after successful completion of an expanded, 18-month probationary period.

During negotiations for a successor contract in 2001, the Union proposed that non-probationary employees be allowed to reside within *20 miles* of the City's limits, and that new hires be required to move to within the 20-mile radius no later than *six months* after successful completion of the probationary period. In response to the City's inquiry, the Union declined to offer any *quid pro quo* for this change. Following several fruitless discussions at the bargaining table, the City proposed that employees with 15 years of seniority be allowed to reside within a radius no greater than that ranging from the courthouse to a residential subdivision just outside of Macomb—but still within the Macomb School District. As a *quid pro quo*, the City demanded that the agreement cap at current levels City contributions for employee dependent health insurance premium costs, and longevity pay remain unchanged for the bargaining unit members. The Union's counter—a demand that employees with five years of seniority be allowed to live within a 12-mile radius of the courthouse (within the county but with no regard to school districts), coupled with a rejection of the City's *quid pro quo*, and a demand for the same longevity increases earlier achieved in negotiations by the firefighters' bargaining unit—was summarily rejected by the City. Not

surprisingly, after two unsuccessful mediation sessions, interest arbitration ensued.

The Decision

Arbitrator Malin initially found that the parties' philosophies on residency simply could not be reconciled. The Union based its case for change on the argument that every employee possesses a fundamental right to choose where to live. Conversely, the City vigorously defended its residency requirement. The Union had accepted it at the bargaining table, and the underlying City ordinance was on the books for the prior quarter century. Moreover, the in-town residency rule caused no discernible hardship or safety risk to the employees. The City also argued that public safety employees have a civic responsibility to the City and the very nature of their work compels them to live within City limits.

Arbitrator Malin found such a strong divergence of views significant. He opined that, left to their own devices, the parties would likely fail to resolve their differences. This, in turn, militated against the arbitrator's crafting and imposing his own solution, since the purpose of interest arbitration was to place the parties in the position most likely resulting from an agreement they crafted themselves. Arbitrator Malin then proceeded to consider the interests and welfare of the public (which he found to be highly speculative); external comparability (deemed in this case a "mixed bag," meaning that no clear trend emerged from a review of residency rules of other towns); internal comparability within the City's workforce; and the parties' bargaining history. The latter two factors were pivotal considerations.

Arbitrator Malin found that, due to the absence of consistent evidence of residency practices in the external comparable communities, the evidence of internal comparability was "quite compelling." Prior negotiations in Macomb had in fact followed a format of "pattern bargaining," meaning that one bargaining unit set the bar on issues that apply to the other bargaining units and nonunion employees would then also receive the same terms and conditions. Each of the City's two other unions had twice negotiated in-town residency agreements in exchange for economic gains. Each union had written a "me too" clause into their agreement. Accordingly, if residency requirements for the police bargaining unit were modified, the City would be hard pressed to deny the same terms for its remaining employees. Arbitrator Malin found that such a change was not warranted based on the evidence presented at hearing.

Arbitrator Malin also found strong support for the City in the parties' bargaining history. The 1998 negotiations, resulting in the parties, adopting in-city residency within 60 days of completion of the probationary period, took place after residency became a mandatory subject of bargaining. Residency accordingly became a "breakthrough" issue, a factor carrying considerable weight in an interest arbitration. The arbitrator found that the Union failed to offer compelling evidence in support of a change in the status quo. The Union failed to establish, for instance, that employees endured any hardship or were the victims of threats or other unacceptable circumstances due to the residency rule. Indeed, the record was devoid of evidence of any kind warranting a "breakthrough" award on this issue.

The arbitrator analyzed the Union's position on the remaining two issues, zipper clause and longevity pay, in light of his ruling on residency. He found that the Union's offer to forgo an increase in longevity pay, offered as a belated *quid pro quo* for residency, was not appropriate because the evidence did not support a change in residency. The arbitrator also noted that longevity pay rates are always identical between Macomb's police and fire units. Finally, because the same zipper clause was included in every agreement between the parties over fifteen years, and no evidence of unfairness was introduced, no compelling reason existed to award the Union a breakthrough on this secondary issue.

Practical Considerations

While the general trend in interest arbitration at first blush would seem to favor union proposals to modify

residency rules, several significant lessons emerge from the City of Macomb decision:

- ✓ Where the parties bargain the residency issue to conclusion after 1997, the resultant agreement becomes a breakthrough issue.

- ✓ The party demanding relief on a breakthrough issue carries a heavy burden of persuasion and must be prepared to offer compelling reasons in support of change.

- ✓ Both parties remain obligated to engage in good-faith bargaining on the issue. Bargaining strategy may warrant naming a meaningful price for change. The parties' bargaining history is typically a focal point in interest arbitration.

- ✓ By naming its price for change, the City of Macomb seized the initiative and utterly destroyed the Union's claim that the City was unwilling to engage in meaningful bargaining on the issue. The Union was left with two arguments to win its case—safety and cost of living—and the evidence sustained neither.

- ✓ Thorough research can defeat claims that it is too costly or it is unsafe to live in town. Anecdotal evidence of crimes and/or threats against employees was utterly lacking in Macomb. Indeed, the opposite was the case: anecdotal evidence established that officers living in town acted on several occasions to prevent crime and to administer first aid in lifesaving acts of heroism. Moreover, the City's detailed financial analysis of the cost of living, including property tax data, insurance, travel and home ownership costs, proved it is cheaper to live in town than in those outside locations coveted by the Union. Analysis of school test score averages established that the level of achievement of Macomb elementary and high school students equaled or exceeded achievement levels at surrounding schools. This research led inexorably to the conclusion that the Union's position on residency was utterly devoid of support.

- ✓ Interest arbitration remains a complex web of analytical research, strategy decisions and evidentiary red herrings. Oral testimony is frequently overshadowed by the narrative presentation of a plethora of comparative financial statistics and other factual details gleaned from jurisdictions that may be spread across the state. Accordingly, planning a successful result in your case must begin prior to the commencement of collective bargaining. Your efforts should be undertaken carefully and with the assistance of experienced labor counsel.

For a copy of the decision in *City of Macomb* and to pose questions about the decision or the complex option of interest arbitration, please contact the Vedder Price Public Sector Group Chair, Jim Spizzo at (312) 609-7705 or feel free to call any other Vedder Price attorney with whom you have worked.

If you have questions regarding the contents in this bulletin, please contact its editor, James A. Spizzo (312/609-7705), Lawrence J. Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

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