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STATE EMPLOYMENT RELATIONS BOARD

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF CONCILIATION PROCEEDINGS BETWEEN:

FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.
Employee Organization,
and

THE CITY OF MANSFIELD,
Employer.

CONCILIATION AWARD

CASE NUMBER:
00-MED-06-0695

DATE OF HEARING: August 8, 2001

PLACE OF HEARING: Mansfield, Ohio

CONCILIATOR: Charles W. Kohler

APPEARANCES:

FOR THE EMPLOYEE ORGANIZATION:
Hugh Bennett, FOP Staff Representative
Eric Bosko
Bret Snavley
Dan Martincin
Mike Yankovich
Brian Cassidy

FOR THE EMPLOYER:
James N. Bowers, Human Resources Director
Ronald Kreuter
Robert Korstam
James J. Boyer

PROCEDURAL BACKGROUND

On June 5, 2001, the State Employment Relations Board ("SERB") appointed the undersigned as Conciliator upon selection by the parties pursuant to Ohio Revised Code Section 4117.14(D)(1). A hearing was held on August 8, 2001, in Mansfield, Ohio.

This matter involves the negotiation of a successor collective bargaining agreement between The City of Mansfield ("City") and the Fraternal Order of Police, Ohio Labor Council, Inc. ("FOP") for the bargaining unit comprised of all full-time, sworn patrol officers in the Mansfield Police Department. The prior agreement covering these employees expired on August 31, 2000.

The parties engaged in at least ten formal negotiation sessions, and at least one day of mediation. A fact-finding hearing was held on April 24, 2001. On May 8, 2001, the fact finder, Philip H. Sheridan, Jr., issued his report and recommendations. The fact finder's report was accepted by the City, but was rejected by the FOP.

The sole issue at the fact-finding hearing was the language in Section 10.2 of the collective bargaining agreement . The language of Section 10.2 was also the only issue in dispute at the conciliation hearing on August 8, 2001.*

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*Section 10.2 of the collective bargaining agreement, which expired on August 31, 2000, consists of two paragraphs. For conciliation, only the first paragraph of Section 10.2 is at issue. All references to Section 10.2 herein refer only to the first paragraph. The parties are in agreement concerning the remainder of Section 10.2.

Section 4117.14 of the Ohio Revised Code provides that the Conciliator must resolve the dispute by selecting, on an issue-by-issue basis, from each of the party's final settlement offers, taking into consideration the following:

> (a) Past collectively bargained agreements, if any, between the parties;
>
> (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
>
> (c) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
>
> (d) The lawful authority of the public employer;
>
> (e) The stipulations of the parties;
>
> (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

The Conciliator has considered all reliable evidence presented to him with respect to the issue at impasse. The Conciliator, after carefully reviewing all of the relevant evidence, together with the arguments of the parties, hereby submits his opinion and award with respect to the outstanding issue submitted for resolution.

Article 10 - Hours of Work and Overtime
Section 10.2 Overtime

Background

On October 10, 2000, during negotiations, the parties reached a tentative agreement on Section 10.2, which included some changes in the language relating to the manner of calculating overtime. Later, the City reviewed the tentative agreements in preparation of a final draft of the entire agreement to be submitted for ratification. At that time, the City became concerned that the new language in Section 10.2 might require a change in the manner in which overtime is calculated.

Both parties agree that the manner in which overtime was being calculated was not properly reflected in the expired agreement. The City had calculated overtime in the same manner for many years, without any objection from the FOP. The City contemplated that the new language in Section 10.2 would reflect the current practice, rather than make any changes in the manner in which overtime was calculated.

On February 9, 2001, the City requested the FOP to sign a Letter of Understanding stating that the current practice regarding calculation of overtime would not be changed. The Letter of Understanding provided, in pertinent part, as follows:

> The parties acknowledge and agree that the new language contained in Section 10.2. Overtime, is intended to describe the way overtime is currently paid to bargaining unit members and not intended to add to or change any current practices.

The FOP refused to sign the letter, as it believed that it had successfully negotiated a change in the method of calculation of overtime when a tentative agreement had been reached on Section 10.2.

When the FOP refused to sign the Letter of Understanding, the City effectively withdrew its tentative agreement to Section 10.2, and proposed that the language in the expired agreement be retained. The FOP did not agree to the retention of the language in the expired agreement, and the parties reached an impasse.

Position of the City

The City contends that, during negotiations, both parties agreed that the language in Section 10.2 should be changed to reflect the current practice. The City admits that it drafted language which was tentatively approved by both teams of negotiators.

The City asserts that, when it was compiling a final draft of the new agreement, it determined that Section 10.2 could be construed in a manner which would change the existing and long-standing method of calculating overtime. The concern was over the phrase "regular rate of pay," which was used in the tentative agreement in Section 10.2. The City contends that it intended to continue to pay bargaining unit members for overtime at a rate of one-and-one-half times their "straight time rate of pay," but the new language might require that overtime be paid based on the FLSA overtime rate. The FLSA rate is higher than the straight time rate, as it includes more wage components than the straight time rate.

The City maintains that it offered the FOP a reasonable solution, which was to enter into a Letter of Understanding confirming that the existing practice would be unchanged. The City asserts that the FOP refused to sign the letter, and the FOP stated, for the first time, that it was the intent of the bargaining unit to require the City to pay overtime at the higher FLSA rate. The City contends that the FOP had previously

indicated that it did not intend to require any change in the method of calculating overtime.

After the FOP refused to sign the Letter of Understanding, the City asserts that it had the right to withdraw its approval of the tentative agreement with respect to Section 10.2. The City points to the "Guidelines for Negotiations" which were approved by the parties on June 28, 2000. The City argues that the parties agreed that any tentative agreement on a specific part of the collective bargaining agreement can be withdrawn until a total agreement is ratified by the parties. In this case, the City notes that a total agreement was never reached, and there was no ratification by the parties.

The City states that the FOP filed an Unfair Labor Charge with SERB on this issue. It points out that the charge was dismissed by SERB, with prejudice, on July 25, 2001. The City claims that the reason for the dismissal of the ULP by SERB was that, under the terms of the negotiating guidelines "tentative agreements are not finally resolved until such time as total agreement is reached and ratified by the parties."

The City further argues that, if the Conciliator agrees with the FOP and adopts the new language for Section 10.2, then wage rates must be reduced by 1.523 percent to 1.977 percent. The City maintains that the adjustment is necessary to keep the total wage increase to the 3.5 percent per year agreed to by the parties.

Position of the FOP

The FOP states that the City drafted the language in Section 10.2, and presented it to the FOP for review. After reviewing the language, the FOP signed off on the language to indicate tentative agreement. It argues that there was a "meeting of the

minds" because both parties agreed to the language. The FOP asserts that the tentative agreement on Section 10.2 properly resulted in an effective raise of 1.523 percent for members of the bargaining unit. The FOP contends that the language in the tentative agreement for Section 10.2 was meant to change the manner in which overtime was calculated for bargaining unit members. The FOP maintains that it continued to negotiate the remainder of the agreement, including wage provisions, based on the assumption that the new language in Section 10.2 would provide members with a more favorable method of calculating overtime.

The FOP notes that the City waited until four months after the tentative agreement was signed to renounce the language in Section 10.2. It points out that the City acted unfairly by waiting until all proposals had been either agreed to or withdrawn, and then reneged on its agreement on the new language in Section 10.2. The FOP alleges that the City was, in effect, asking the Union to relinquish a financial gain obtained during negotiations.

The FOP points out that the City was the party which first proposed to change Section 10.2, when, on September 15, 2000, it presented a proposal to the FOP to change the existing language. The FOP explains that it then offered a handwritten counterproposal, which the City responded to by submitting its own typewritten counterproposal. On October 10, 2000, the FOP accepted the typewritten counterproposal of the City, and both parties initialed the counterproposal to indicate tentative agreement.

The FOP argues that the fact finder missed the essence of the question at issue. The FOP maintains that the issue is not whether the FLSA applies to all overtime, but

whether a signed tentative agreement should be deemed an agreement.

Further, the FOP claims that maintaining the language of the prior agreement in Section 10.2 would be a windfall for the City, and a loss for members of the bargaining unit.

Discussion

At issue is the question of whether Section 10.2 of the successor collective bargaining agreement should include the changes made in the tentative agreement of October 10, 2000, or should include the language from the collective bargaining agreement which expired on August 31, 2000. It is undisputed that changes in Section 10.2 were tentatively agreed to by the parties. It is also undisputed that no final agreement was ever ratified by both parties.

At the time the negotiations began, the parties entered into "Guidelines for Negotiations Between The City of Mansfield and Fraternal Order of Police, Ohio Labor Council, Inc." ("Guidelines"). The Guidelines were signed by members of both bargaining teams on June 28, 2000. The Guidelines provide, in pertinent part:

> **IV. ORDER OF PROPOSALS AND COUNTERPROPOSALS**
>
> The parties agree that they will attempt to reach tentative agreement on all * * * issues * * *
>
> C. It is mutually agreed that such tentative agreements are not finally resolved until such time as total agreement is reached and ratified by the parties.
>
> D. After the final tentative agreement is reached on all articles, the bargaining committee will present the Agreement to the membership for ratification * * * The Employer will submit to the ratification procedure * * * following the Union's ratification * * *

From a review of the Guidelines, it is apparent that the negotiation process consisted of specific steps to enable the parties to move from proposals to a ratified agreement. Once representatives at the bargaining table reached an agreement on a proposal, it was to be approved by the parties as a tentative agreement. After tentative agreements were reached on all issues, a final tentative agreement is submitted to the parties (bargaining unit membership and city council) for ratification.

The FOP believes that a more favorable method of overtime calculation was successfully negotiated when the tentative agreement was signed on October 10, 2000. The City maintains that when it approved the tentative agreement, it did not intend to change the method by which overtime was computed. Thus, it is questionable whether there was a "meeting of the minds" when Section 10.2 was tentatively approved. In the final analysis, however, it makes no difference whether or not there was a "meeting of the minds" on the effect of the changes made in Section 10.2. The terms of the Guidelines control the question of whether the parties were bound by the language of the tentative agreement.

The Guidelines clearly provide that a tentative agreement does not mean that the parties have reached final agreement on a particular issue. The parties had, by agreement, reserved the right to rescind a tentative agreement up until the time that the entire final agreement was submitted for ratification. The Guidelines specifically provide that: "It is mutually agreed that such *tentative agreements are not finally resolved* until such time as total agreement is reached and ratified by the parties" (emphasis added).

There is no dispute as to the operative facts. A *tentative* agreement was reached on new language for Section 10.2. Prior to the "final tentative agreement" which is to be

presented to the parties for ratification, the City determined that it could no longer agree to the new language in Section 10.2. The City was clearly acting within the Guidelines.

The FOP argues that, since it was the City which both initially proposed a change in Section 10.2, and it was the City which prepared the typewritten proposal which was initialed by the bargaining teams, the City should be forced to accept the language of the tentative agreement. The Conciliator acknowledges that the FOP's argument has some merit, and would be quite persuasive in the absence of the Guidelines. Here, substantial consideration must be given to the Guidelines which were approved by the parties.

Nothing in the Guidelines places a different burden on the party which initially proposes language. The Guidelines do not prohibit a party from rescinding language which it initially proposed. Similarly, the party which prepared the draft of a tentative agreement is not prohibited from withdrawing its tentative approval at a later time.

Under the Guidelines, once the City decided to rescind its tentative approval of Section 10.2, the FOP could have withdrawn its tentative agreement on other issues. The FOP argues that it suffered a reduction in wages when the City rescinded its approval. However, the FOP was not prevented from reassessing its position on other issues, included wages, after it learned of the City's decision to withdraw its tentative approval of Section 10.2.

If a party maintains a practice of withdrawing tentative agreements, it is likely that the party would not be bargaining in good faith. The remedy in such a situation is for the complaining party to file a ULP charge with SERB. In this case, the FOP filed a charge with SERB alleging that the City's withdrawal of its tentative agreement on Section 10.2

constituted an unfair labor practice. On July 19, 2001, SERB dismissed the ULP charge filed by the FOP.

The FOP has not presented any evidence from comparable jurisdictions that necessitate the adoption of its proposal for Section 10.2. The evidence does not show that any of the other factors contained in Section 4117.14 of the Ohio Revised Code would require the implementation of the FOP proposal.

The Conciliator finds that the language from Section 10.2 of the expired agreement must be included in the successor agreement.

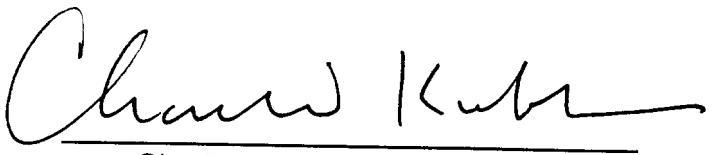
Award

Section 10.2 of the successor collective bargaining agreement shall provide as follows:

> Section 10.2. Overtime. Whenever it is necessary for a sworn officer to work in excess of eight (8) hours in any twenty-four (24) consecutive hour period or in excess of forty (40) hours in any six (6) consecutive day period, the officer shall be entitled to time and one-half for the excess hours actually worked; provided that, there shall be no overtime pay to officers who, at their request, work more than eight (8) hours in a twenty-four (24) hour period while changing watches; and provided further that the overtime entitlement for employees assigned to four (4) ten (10) hour watches in a seven (7) calendar day period shall be for time actually worked over ten (10) hours in any twenty-four (24) consecutive hour period or in excess of forty (40) hours in a seven (7) consecutive day period. Time and one-half overtime pay shall not be applicable to the hours scheduled and worked within the multiple week cycle.

Conclusion

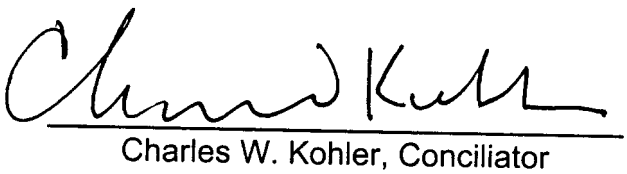
In conclusion, the Conciliator submits his decision with respect to the outstanding issue and orders that the award be incorporated into the collective bargaining agreement of the parties.



Charles W. Kohler, Conciliator

CERTIFICATE OF SERVICE

I do hereby certify that on September 7, 2001, a copy of the foregoing Conciliation Award was served upon Catherine A. Brockman, Fraternal Order of Police, Ohio Labor Council, Inc., 222 East Town Street, Columbus, Ohio 43215; James Bowers, City of Mansfield, Human Resources Director, 30 North Diamond Street, Mansfield, Ohio 44902 ; and Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213, by regular U.S. Mail, postage prepaid.



Charles W. Kohler, Conciliator