

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

JUN 21 10:25

In The Matter of the Conciliation Between:

THE CITY OF AMHERST            )     00-MED-10-1127  
                                  )  
          -AND-                    )  
                                  )  
OHIO PATROLMEN'S                )  
BENEVOLENT ASSOCIATION         )

APPEARANCES:

For The City:

Scott F. Serazin, Esq.,            Assistance Law Director  
Sherrill M. McLoda, Esq.,         Safety Service Director

For The Association:

Kevin Powers, Esq.,                Attorney  
Barbara Hudson                     Dispatcher  
Sandra Karpinski                    Dispatcher

---

BEFORE ALAN MILES RUBEN, CONCILIATOR

---

Cleveland-Marshall College of Law  
Cleveland State University  
1801 Euclid Avenue  
Cleveland, OH 44115  
Tele: (216) 687-2310  
Fax: (216) 687-6881

BACKGROUND:

The Employer, the City of Amherst, Lorain County, Ohio provides police, fire and municipal services for its approximately 10,300 residents.

The City's Police Department employs five full-time Dispatchers who form a Bargaining Unit exclusively represented by the Ohio Patrolmen's Benevolent Association.

The Department's Patrol Officers are organized into a separate unit which is also represented by the Association.

The City's various service employees constitute a third unit represented by Ohio Council 8, and Local 277 American Federation of State, County and Municipal Employees, AFL-CIO.

The City and the Association have been parties to Collective Bargaining Agreements, the last of which, a two year Agreement entered into in 1999, expired on February 6, 2001.

The parties resolved through negotiations all save one of the issues relevant to the entry into a successor Collective Bargaining Agreement, and agreed that the term of the new Contract would be two years. However, the parties were unable to reach agreement on the rate of pay to be received by employees who are scheduled to work on a Contractually designated holiday.

The parties proceeded to Fact-Finding before Virginia Wallace-Curry on their respective proposals for the text of the holiday pay provision contained in Article XXIV, Section 4. After the parties declined mediation efforts, the Fact-Finding hearing went forward on June 11, 2001

The City accepted the Fact-Finder's Recommendation while the Association rejected the Report. In consequence, the State Employment Relations Board issued a Conciliation Order on October 15, 2001, and appointed the undersigned as Conciliator to resolve after hearing, "the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the parties' final settlement offers."

Thereat, the parties timely submitted the pre-hearing statements required by O.R.C. Section 4117(G)(3) and O.A.C. Section 4117-9-06(E) setting forth, inter alia, their respective final offer and supporting position statement on the issue remaining in dispute.

At the direction of the parties the Conciliation hearing was held on December 4, 2001 in the City of Amherst's Police Department.

The parties agreed that all of the provisions of the 1999 Contract, not amended by consent in the negotiations of the parties were to be carried forward and incorporated into the two year successor Agreement, mutatis mutandis,

and further agreed that the economic terms were to be retroactively effective to February 7, 2001.

The advocates for the parties offered opening statements and made evidentiary presentations with respect to each of the unresolved issues. They introduced data on the number of holidays and the compensation for working on holidays provided to Patrol Officers and other employees of the City and to Dispatchers in other Cities within Lorain County.

The parties submitted post-hearing briefs and the Conciliator declared the hearing closed as of December 24, 2001.

In consideration of the Conciliator's docket, the parties graciously extended the time within which he might issued his Report and Award.

The Conciliator considers below the final proposals and positions of the parties, and the Recommendation of the Fact-Finder on the issue before him.

In keeping with his statutory obligation, the Conciliator has carefully considered the factors enumerated in O.R.C. Section 4117.14(G)(7), viz.:

"(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 involved 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 facts, 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 proceedings in the public service or private employment."

UNRESOLVED ISSUE:

Pay For Working On A Holiday

A. The 1999 Contract:

Inspection of the expired 1999 Contract reveals that it provided in Article XXIV, Section 4 for premium pay at the rate of 1.5 times the straight time hourly rate for employees who worked on four of the twelve designated holidays, viz., Memorial Day, Fourth of July, Thanksgiving Day and Christmas Day. On each of the holidays so worked,

of course, they also received either eight hours pay or eight hours of time-off.

The text of Article XXIV recited:

"Holidays - Article XXIV:

"Section 1. The following twelve (12) days listed below shall be considered and designated as paid holidays for all full-time employees:

"New Year's Day; Fourth of July; President's Day; Labor Day; Good Friday; Thanksgiving Day; Easter Sunday; Day after Thanksgiving; St. Patrick's Day; Christmas Eve; Memorial Day and Christmas Day.

"Section 2. Employees shall be compensated, at the base rate of pay, for said holidays, provided the employee is in active pay status during the week within which they were observed. For purposes of this section, "active pay status" shall mean: hours actually worked; sick leave; vacation leave; or compensatory time. Employees may choose their holiday time off upon the approval of the Chief of the Department.

"Section 3. All full-time employees shall be entitled to one (1) personal holiday. Employees may choose their personal day off upon the approval of the Chief of the Department.

"Section 4. If an employee is scheduled to work on Memorial Day, Fourth of July, Thanksgiving Day, or Christmas Day, he shall be entitled to pay for such time worked at one and one-half his regular base pay, plus he shall receive eight (8) hours of holiday pay. The selection of eight (8) hours of holiday pay or holiday time off at a later date shall be at the discretion of the employee and such notice shall be given to the City within the pay period such holiday is worked."

B. The Association's Final Offer:

The Association proposes that Bargaining Unit members receive time and one-half their base rate of pay for all hours worked on any of the designated public holidays in addition to eight hours of time-off at a later date or eight hours straight time compensation.

It would amend Article XXIV, Section 4 to read as follows:

"Section 4. If an employee is scheduled to work on any of the holidays listed in Section 1, he shall be entitled to pay for such time worked at one and one-half his regular base pay, plus he shall receive eight (8) hours of holiday pay. The selection of eight (8) hours of holiday pay or holiday time off at a later date shall be at the discretion of the employee and such notice shall be given to the City within the pay period such holiday is worked."

In support of its proposal the Association contends that time and one-half base pay as compensation for working on a holiday "has become virtually the industry standard for safety forces. Unlike most municipal operations, emergency dispatch does not shut down just because it is a holiday. The union's proposal is an attempt to compensate dispatchers for the hardship of having to work on days when most people are enjoying time with family and friends."

C. The City's Final Offer:

The City adopts the Fact-Finder's Recommendation which effectively provides for the addition of the Labor Day Holiday to the four existing holidays that carry the premium time and one-half rate for hours worked.

It would amend Article XXIV, Section 4 to read:

"Section 4. If an employee is scheduled to work on Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, or Christmas Day, he shall be entitled to pay for such time worked at one and one-half his regular base pay, plus he shall receive eight (8) hours of holiday pay. The selection of eight (8) hours of holiday pay or holiday time off at a later date shall be at the discretion of the employee and such notice shall be given to the City within the pay period such holiday is worked."

The City argues that its offer would equilibrate the holiday pay of Dispatchers with that presently provided to Patrol Officers and would place Amherst Dispatchers at the mid-range of holiday pay provided to Dispatcher (Communication Officers) in comparable Cities.

D. The Fact-Finder's Recommendation:

At the fact-finding hearing the City offered only to maintain the benefits provided in the 1999 Contract without change, while the Association made the same proposal as it now makes in Conciliation.



The Fact-Finder, Virginia Wallace-Curry, did not recommend either of the holiday pay proposals. Instead, she recommended that Dispatchers receive time and one-half base pay for working on the Columbus Day Holiday in addition to the other four holidays set forth in the 1999 Agreement. She thus suggested that Article XXIV, Section 4 be amended to read:

"Section 4. If an employee is scheduled to work on Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, or Christmas Day, he shall be entitled to pay for such time worked at one and one-half his regular base pay, plus he shall receive eight (8) hours of holiday pay. The selection of eight (8) hours of holiday pay or holiday time off at a later date shall be at the discretion of the employee and such notice shall be given to the City within the pay period such holiday is worked."

In making this Recommendation the Fact-Finder concluded that Amherst Patrol Officers were to be "used as a comparable measure to the dispatchers", and that since under their existing Contract they "receive time and one-half pay for hours worked on five holidays, one more holiday than dispatchers," the Dispatchers were entitled to parity.

She commented that "[w]hile the union cannot offer a compelling reason why the dispatchers should receive this premium pay for all holidays worked, the city offered no

explanation for the difference between the number of holidays ... [for which] patrol officers receive premium pay and the number of holidays ... [for which] dispatchers receive premium pay. Both units must work 'round the clock' on all shifts, on all days. Therefore, the most compelling argument would be to bring the dispatchers in line with the patrol officers."

She further found that the jurisdictions cited by the Association were located in Cuyahoga County and were "not comparable or contiguous to the City of Amherst and cannot be used as a point of comparison." Turning to the five contiguous Lorain County jurisdictions cited, she found that two - Oberlin and Avon Lake - provided fewer hours of holiday pay or holiday time, and three - Avon, North Ridgeville and Lorain - provided more.

CONCILIATOR'S ANALYSIS AND AWARD:

A number of Conciliators and Interest Arbitrators have taken a narrow view of their role in making an Award where one of the parties has adopted the recommendations of a Fact-Finder and the other has not. They perceive it their duty to "given great weight to the recommendations of a Fact-Finder," or to require the objecting party to either "show clear error on the part of a Fact-Finder before overturning in an Conciliation Award the terms contained in

a duly arrived at Report and Recommendation", or otherwise to prove "good cause for overturning his recommendation."

These various statements of the deference due a Recommendation by a Fact-Finder are all designed to protect the integrity of the statutory process, and deter use of the Fact-Finder's Report and Recommendation as only a "bottom line" spring board for obtaining better terms in a subsequent Conciliation proceeding.

Fact-Finders are trained, skilled and experienced neutrals, typically selected by, or mutually acceptable to the parties and in whose impartiality and parties have confidence. They reach their Findings and Recommendations after careful evaluation of the respective positions of the parties and the available data, taking into account all relevant factors.

The notion is that the Fact-Finder thus stands somewhat in the position of a judge in a non-jury trial, while the Conciliator serves as a quasi-appellate tribunal. Put somewhat differently, there is a rebuttable presumption that the Fact-Finder's Recommendations are correct, but the presumption may be rebutted by showing that relevant circumstances have materially changed since the Report was issued, that significant evidence was not available or considered by the Fact-Finder, that the data relied upon

was flawed or otherwise misinterpreted by the Fact-Finder or that some other similar fundamental oversight deprived the Fact-Finder's Recommendations of their presumptive validity.

Although this Conciliator subscribes to the view that a Fact-Finder's Recommendations ought not to be lightly disregarded, perhaps these formulations represent a too circumscribed reading of the Conciliator's function.

There is no escaping the fact that the Recommendation of a Fact-Finder on a particular issue, while restrained by evidentiary considerations and the statutory factors, represents, in essence, an exercise in judgment. That judgment should take into account the impact of the Recommendation on the long term relationship between the parties, the effect on relationships and negotiations with other Bargaining Units, the impact upon the effective and efficient rendition of City services, the competing demands upon finite governmental resources for other services, and the recruitment and retention of quality personnel in light of wages and working conditions elsewhere.

There ought to be an opportunity for the Conciliator to set aside a Fact-Finder's Recommendation, at least on those relatively rare occasions when the Conciliator is

convinced that the judgment of the Fact-Finder has been improvidently exercised.

But, no such reasons appear here to disturb the Fact-Finder's Recommendation.

It should be understood that deciding a single issue in a Conciliation proceeding is, to at least some degree, an artificial exercise divorced from reality. The holiday pay provision here at issue is but one of a number of interrelated and interdependent provisions which form a coherent economic package. The shape of the package is dependent upon the priorities of the parties and the strategic making and obtaining of concessions.

Confronted with this situation, and without evidence with respect to the negotiations which led to agreement on all other terms of the successor Contract, the Fact-Finder found most persuasive the fact that the Patrol Officers Unit, whose members are also scheduled to work holidays, receive time and one-half pay on five of the twelve listed holidays, and concluded that Dispatchers are entitled to equivalent treatment.

At the Conciliation hearing the Association witnesses testified that there is an "unwritten policy" in the Department which allows Patrol Officers to go home and remain "on call" if they are not needed during a holiday.

In contrast, no such allowance is granted to the Dispatchers who are "stuck in a room for seven and one-half hours and sometimes eight, going without lunch if the Officer in charge is called out."

While the Conciliator is not insensitive to this undesirable aspect of the Dispatchers' working conditions, that is a matter not within his authority (nor that of the Fact-Finder) to address.

As to the alleged "on call" concession made to Patrol Officers, there is no evidence whether any such arrangement constituted a regular practice, or a rare occurrence.

The Fact-Finder was therefore correct in failing to find any difference between the inconvenience imposed upon Police Officers and that suffered by Dispatchers in having to work on a publicly recognized holiday.

It should be noted that the part-time Dispatchers currently receive time and one-half pay for working the same five holidays as the Patrol Officers. However, unlike the full-time Dispatchers, part-timers do not have a regular schedule and are not required to work on a holiday.

The Association points out that one employee in the Water Treatment Plant whose operations require continuous monitoring has been paid time and one-half his base rate

for working on any holiday and, in addition, is given a paid day-off at a later time. It appears that the employee in question is a member of a Bargaining Unit represented by Ohio Council 8 and Local 277, American Federation of State, County and Municipal Employees, AFL-CIO (A.F.S.C.M.E.). The Collective Bargaining Agreement presently in effect between the City and A.F.S.C.M.E. contains no provision for working on a paid holiday. Consequently, this apparently anomalous treatment affords no precedential value.

The Association's principal reliance is upon the pay offered Dispatchers in other communities which it deems comparable.

As a preliminary note, the Conciliator observes that the parties presented information on the population of the cited Cities, but no evidence as to their tax bases, fiscal conditions, the percentages of their budgets allocated to their Police Departments, the sizes of the Departments and other relevant characteristics.

Nonetheless, on population size alone, the Conciliator excludes the City of Lorain from the list of comparable communities.

Lorain Dispatchers receive time and one-half their base rate of pay when they work on any of thirteen holidays. They also receive a personal day and 104 hours of

additional holiday time-off for a total of 268 paid holiday hours.

But, Lorain with 71,000 residents is seven times the size of Amherst which has a population of only 10,300. Its compensation arrangements cannot properly be used as a "benchmark".

The Association correctly argues that the calculations offered by the City as to the paid holiday hours available in the four other communities selected by the parties as comparable - Avon, Avon Lake, North Ridgeville and Oberlin - were inaccurate. Accepting the holiday pay determinations presented by the Association, it appears that the Fact-Finder's Recommendation as adopted by the City would allow Dispatchers 228 paid holiday hours, placing Amherst mid-way between the two communities offering more hours - North Ridgeville at 304 hours and Avon at 236 hours - and the two offering less - Avon Lake at 220 hours and Oberlin at 224 hours.

Selection of the Association's proposal would result in Dispatchers receiving 260 holiday hours, a total exceeded only by North Ridgeville.

The holiday pay data for each of these communities is portrayed in the following chart:



COMPARATIVE COMMUNITY HOLIDAY PAY PROVISIONS:

CITY:	POPULATION	NUMBER OF HOLIDAYS & PERSONAL DAYS	RATE FOR WORKING HOLIDAYS CONVERTED INTO HOUR EQUIVALENTS	ADDITIONAL HOLIDAY TIME-OFF	TOTAL HOURS
N. RIDGEVILLE	24,000	11+ 5 PERSONAL	11 @ 2.0=176 +40	88 HOURS	304
AVON	12,000	11+ 2 PERSONAL	11 @ 2.5=220 +16		236
AMHERST (POLICE PATROL UNIT)	10,300	13	5 @ 1.5=60 8 @ 1.0=64	104 HOURS	228
OBERLIN	8,200	10+ 3 PERSONAL	10 @ 1.5=120 +24	80 HOURS	224
AVON LAKE	15,000	8+ 3 PERSONAL	5 @ 2.0=80 3 @ 1.5 + 36 + 24	80 HOURS	220
AMHERST (ASSOCIATION'S PROPOSAL)	10,300	13	13 @ 1.5=156	104 HOURS	260
AMHERST (CITY'S PROPOSAL)	10,300	13	5 @ 1.5=60 8 @ 1.0=64	104 HOURS	228

Review of these data does not reveal any such inequitable disparity as would warrant the Conciliator departing from the Recommendation made by the Fact-Finder.

The Association finally contends that the additional annual cost imposed on the City were its proposal to be Awarded is only a modest \$2,723.76 - an amount the City can afford to pay. However, it is unlikely that the increased holiday pay can be confined to the Dispatchers Unit. In the ensuing set of negotiations, the Patrol Officers Unit would undoubtedly demand parity, and the City would lack a defensible ground to resist.

Although the City does not raise an "inability to pay" argument, its resources are finite but the demands upon them for additional public services are infinite. Every dollar spent in increasing compensation means a dollar less available for programmatic purposes.

Accordingly, the Conciliator Awards the City's Final Offer to increase the number of holidays on which Dispatchers who are scheduled to work will receive time and one-half their base rate pay from four to five by the addition of the Labor Day Holiday to the current list of Memorial Day, Fourth of July, Thanksgiving Day and Christmas Day. Consequently, he directs that the Fact-Finder's Recommendation for the text of Article XXIV, Section 4 be incorporated into the successor Contract as follows:

"Section 4. If an employee is scheduled to work on Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, or Christmas Day, he shall be entitled to pay for such time worked at one and one-half his regular base pay, plus he shall receive eight (8) hours of holiday pay. The selection of eight (8) hours of holiday pay or holiday time off at a later date shall be at the discretion of the employee and such notice shall be given to the City within the pay period such holiday is worked."

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan Miles Ruben". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Alan Miles Ruben  
Conciliator

Conciliator's Award signed, dated and issued this 28<sup>th</sup>  
day of January, 2002, at Cleveland, Ohio.

A handwritten signature in black ink, appearing to read "Alan Miles Ruben". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Alan Miles Ruben  
Conciliator

AMR:ljpg