IN THE MATTER OF CONCILIATION

BETWEEN

F. O. P. /O. L. C., Inc.

AND

01-MED-08-0720

CITY OF CANAL FULTON

BEFORE: Robert G. Stein

Conciliation
Hearing held August 16 and September 10, 2002

PRINCIPAL ADVOCATE(S) FOR THE UNION:

Chuck Choate, Labor Relations Representative
Michael Piotrowski, Esq. 2nd Chair
FATERNAL ORDER OF POLICE/ O. L. C., Inc.
2721 Manchester Road
Akron OH 44319

And

PRINCIPAL ADVOCATE FOR THE UNIVERSITY:

Robert J. Tscholl, Esq.
236 Third S.W., Suite 200
Canton Ohio 44702

INTRODUCTION

The bargaining unit consists of seven Police Officers employed by the City of Canal Fulton ("City" or "Employer"). The parties held ten (10) negotiating sessions and resolved (tentative agreement) all but twelve (12) issues in their effort to establish the first collective bargaining agreement. The fact-finding sessions, held on April 4 and 5, 2002, were mediation sessions conducted by Fact-finder Jonathan Dworkin. ORC 4117.14 (C)(3)(f) and the State Employment Relations Board encourage Fact-finders to mediate disputes prior to holding a fact-finding hearing. According to the Fact-finding report, the parties resolved four (4) issues during mediation, leaving eight (8) unresolved issues that were referred to the Fact-finder for his recommendations. The Fact-finder issued his report, which was accepted by the Union and rejected by the City. The parties then proceeded to conciliation.

The oral portion of the conciliation hearing was held on August 16, 2002 and September 10, 2002. At the request of the City, the parties submitted post-hearing arguments on three (3) of the issues: hours of work/overtime, compensation, and longevity. The briefs (post hearing arguments) were postmarked September 30, 2002. After receiving these initial filings from the parties, they submitted additional written responses to each other's briefs. On October 9, 2002 the City filed a motion requesting that the Conciliator disregard the Union's entire brief due to a perception by the City that it was filed after the agreed upon September 30th deadline. The undersigned Conciliator refrained from any evaluation of the case until this matter was resolved. More correspondence was exchanged, and the matter was finally settled in a letter dated

October 15, 2002, in which the City's advocate indicates he was in error in assuming the Union's brief, was untimely filed. The Union refrained from submitting further responses, and following this last piece of correspondence from the City; the hearing was officially closed on October 16, 2002

According to SERB guidelines, a Conciliator's Report is due thirty days following the close of the hearing (in this case, November 17, 2002). Although SERB guidelines provide a Conciliator with up to thirty (30) days to submit his report, this Conciliator attempted to issue his report early: on October 21, 2002, and then by October 31, 2002, in an effort to finally bring this long disputed matter to a close However, these deadlines could not be met due to a heavy workload and the delay caused by the parties' post-September submissions. The inability of the Conciliator to submit an early report was communicated to the parties by telephone (in person or voice mail) during which time the parties were informed the report would be issued by the third week in November (November 17, 2002).

PROCEDURAL ISSUES

Conciliators should give great deference to well-reasoned fact-finding reports that are issued in accordance with statutory guidelines. The City raised two preliminary issues regarding the conciliation of this matter. It argued the Conciliator should not consider the Fact-finding report because the Fact-finder failed to provide a supporting rationale in his Report. The City further asserts that it did not request that the Fact-finder's forgo rationale in his report. In support of this assertion, the City offered in its exhibit 10 and 11 a transcript of a phone message that was allegedly left by Mr. Edward Kim, the

attorney who represented the City in negotiations and fact-finding, on the voicemail of Ms. Margaret Loretto, City Manager. In the voice mail, Mr. Kim states in part:

> *"There was never an agreement – as far as I understand – not to provide support for the Factfinder's decision."*

Whether Ms. Loretto's transcript of Mr. Kim's voice message represented an accurate accounting of its content and intent is unclear. Mr. Kim did not testify at the conciliation hearing. Although formal rules of evidence are not normally applied in matters of labor conciliation, the Union was not afforded an opportunity to subject this hearsay evidence to the rigors of cross-examination.

Ms. Loretto also provided testimony in support of the City's position. She stated she was not aware that the parties requested that the Fact-finder submit his report without rationale. However, she admitted that she often did not directly take part in the mediation process conducted by Fact-finder Dworkin. Why the City did not have Mr. Kim testify in support of the City's position is not clear. Such testimony would have removed any doubts as to the substance of the City's claim. On the second day of hearing the Conciliator suggested that the parties attempt to reach Mr. Kim by telephone in order to have him testify via speakerphone as to the contents of City Exhibit 10. The parties agreed to this form of telephonic testimony; however, Mr. Kim was not available.

The Union, in response to the City's arguments, contends that O.R.C. 4117 does not require a Fact-finder to submit a rationale with his report. The Union argues that Mr. Dworkin's Fact-finding report was a reiteration of what the parties agreed upon in mediation. It offered substantial proof of its position in the form of testimony and evidence. Mr. Choate stated in his Position Statement that the advocates for both parties

"...reviewed this language again prior to its submission to Fact-finder Dworkin. He testified under oath that the Union and the Employer made significant movement in mediation and that the advocates for both parties believed they had reached final agreement on the language of each of the eight (8) outstanding issues.

In terms of evidence the Union submitted a letter sent to the Union's advocate, Mr. Choate, and to Fact-finder Dworkin by the City's own advocate, Mr. Kim (Ux 2). The April 11, 2002 letter contains language that is identical to the recommended contractual language that appears in Mr. Dworkin's fact-finding report. Union Exhibit 2 substantiates the Union's position that Mr. Choate and Mr. Kim reached a detailed and refined agreement on all eight (8) of the issues that were recommended by the Fact-finder and that his recommendations reflect these agreements. The record also indicates that the Fact-finder faxed an advanced copy of his fact-finding report to Mr. Choate. Whether Mr. Kim was provided the same courtesy was not clear (See attachment #2, Union's Post-hearing brief).

Fact-finder Dworkin stated in introductory portion of his Fact-finding report:

> *"Some of the recommendations that follow incorporate the tacit, but unofficial agreements the bargaining teams carved out between the two factfinding hearings. Others derive from the Fact-finder's comparison of the competing* positions under relevant criteria. **At the joint request of the parties made to conserve time and expense, the decisions will not recite the Factfinder's supporting rationale."**

In response to the Union's arguments and evidence, the City's advocate argues that City Manager Loretto, was excluded from most of the fact-finding proceedings due to the following:

> *"...she did not go along with the "program" and was apparently perceived to be uncooperative regarding "fixing" the agreement. The reason that Ms.*

Lorreto was uncooperative was because the Union's proposals on these important issues were non-meritorious and Ms. Loretto was not willing to 'play ball'. The system is seriously undermined by the conduct as stated above. The final agreement should be based upon the statutory criteria and not what the Union 'believes' should be recommended by a Fact-finder. The proceeding in finding as outlined above has an offensive odor and should be ignored by the Conciliator" (Employer's Post Hearing Brief, September 30, 2002).

The reality of this case is the Fact-finder's report represented what he believed to be the parties' "agreement" on all of the issues at impasse in Fact-finding. He relied upon the positions of the parties and what they sent him in writing (Ux 2). If there were internal miscommunications between members of the City's bargaining team, that is the City's responsibility and is not the fault of the Union or the Fact-finder. Whether the Fact-finder was asked or presumed no rationale was necessary is unimportant. Arguably, an agreement reached in good faith by the two parties is far better than a set of recommendations that Fact-finder hopes will address the concerns of a union and an employer.

In spite of the Fact-finder's efforts to resolve this matter and what appeared to be a resolution of all items at impasse reached in good faith, the City exercised its statutory right to reject the Fact-finder's Report. The Union labeled the City's conduct as bad faith bargaining. Determinations of bad faith bargaining are under the jurisdiction of the State Employment Relations Board and not that of a Conciliator. Regardless of the circumstances leading to the instant matter, the Fact-finder Dworkin's report is devoid of rationale and unfortunately provides no guidance to this Conciliator in analyzing any of the eight (8) unresolved issues. Therefore, the evidence and testimony provided by the parties during conciliation, analyzed within the context of the statutory criteria, will be the basis of the Conciliator's findings. The City's position on this issue is sustained.

A second issue raised by the City during the hearing dealt with what issues were at impasse in conciliation. The City argued that in addition to the eight (8) unresolved issues that were rejected by the City in its vote on the Fact-finder's report, it had a right to submit to the Conciliator any of the issues that were tentatively agreed upon in negotiations or during the mediation stage of the fact-finding process and were not determined by the Fact-finder. The City submitted thirty-one (31) issues to the Conciliator. The Union submitted the eight (8) issues that were recommended by the Fact-finder and argued that they are the only issues that should be before the Conciliator. The City requested that the Conciliator provide a bench ruling on the submission of its additional twenty-three (23) issues. After consultation via telephone with the Executive Director of the State Employment Relations Board, the Conciliator verbally ruled on the City's request. The Conciliator's ruling sustained the Union's position and can be summarized as follows:

Prior to fact-finding both parties voluntarily entered into agreement on issues that they jointly decided not to place before Fact-finder Dworkin for his recommendation. The representatives of both parties are listed on the cover page of Fact-finder Dworkin's report. Being tentative agreements, representatives of either party had the option prior to fact-finding to declare that certain issues were no longer resolved. Such issues could have been placed before the Fact-finder for the purposes of mediation, or failing that, for a formal recommendation. On the twenty-three (23) issues in question this was not done prior to or during the fact-finding process. The parties simply asked Mr. Dworkin to incorporate the tentative agreements in his report by reference (See p. 7 and 13 of Fact-finder's Report). This is a common practice in these proceedings. In fact, Section (f) of O.R.C. 4117.14 (G)(7) specifically identifies "settlement through voluntary collective bargaining" in its standards. Furthermore, in its guidelines, SERB requires that parties submit to fact-finding all "unresolved issues" (See O.A.C. Rule 4117-9-05(F). Conciliation is a process of last resort and is designed to resolve those issues that caused the parties to be at an impasse after they have been through negotiations and the fact-finding. Previous tentative agreements voluntarily reached by the parties in good faith negotiations and not placed before a Fact-finder for a formal independent recommendation are not appropriate subjects for a Conciliator to rule upon.

In this report the Fact-finder shall reference the Position Statement of each party on each of the issues. The Union's Position Statement shall be referred to as UPS and the Employer's Position Statement shall be referred to as EPS. The Conciliator will render his Award on an issue by issue/ last best offer basis in accordance with O.R.C. 4117.

CRITERIA

OHIO REVISED CODE

In the finding of fact, the Ohio Revised Code, Section 4117.14 (G) (7) establishes the criteria to be considered for conciliators. For the purposes of review, the criteria are as follows:

1. Past collective bargaining agreements, if any, between the parties;
2. Comparison of issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employers doing comparable work, giving consideration to factors peculiar to the area and classification involved;
3. The interests 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;
4. The lawful authority of the public employer;
5. The stipulations of the parties;
6. Such factors not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of issues submitted to final offer settlement through voluntary collective bargaining, mediation, conciliation, or other impasse resolution procedures in the public service or in private employment.

These criteria provide the basis upon which the following recommendations are made:

ISSUE 1 HOURS OF WORK AND OVERTIME

Union's position

SEE UPS

Employer's position

SEE EPS

Discussion

The Union is proposing what appears to be a typical hours of work/overtime arrangement that can be found in many municipalities. The City argues it cannot agree to the Union's proposal due to the fact that it does not have part-time officers to keep overtime at an acceptable level and is restricted from using them based upon its agreement under Article 3 UNION RECOGNITION. The City stated in its posting hearing brief, *"Perhaps if the parties had a provision which allowed them to use part-timers to offset overtime, and the Chief was required by the Mayor and City Council to utilize part-timers in order to comply with budgetary constraints, this "traditional" provision would be acceptable to the Union."* The City also argued that even some of the comparables used by the Union (e.g. Jackson Township) allow for part-time officers. The City argues that it has used a scheduling system that has worked for many years.

It is reasonable for police officers to have predictable hours of work and a schedule of those hours. The Union provided several comparable police departments where they have work hour provision that it is proposing in Canal Fulton. Jackson Twp., Massillon City, Lawrence Twp., and Perry Twp were the comparable examples provided by the Union. Union Representative, Chuck Choate, also testified that in none of the thirty (30) bargaining units he represents (comprised of 21 employers) is the work schedule based upon what the City is proposing.

The City provided submitted data from seven other nearby jurisdictions comprised of six (6) villages and one city to support its position (Cx 4). However, the data addressed benefits and wages and not comparable work schedules. It is also noted that five (5) of the jurisdictions have a population of less than 1,800 residents. The largest comparable, Minerva, has a population of 3,493 people compared with Canal Fulton's 5,061. The City contends Jackson Twp. has a substantial funding base (including Beldon Village) and a police levy. Canal Fulton does not have a police levy, argues the City. The City argued that Massillon has considerable commercial development and industry in contrast to Canal Fulton. Lawrence Twp. is larger than Canal Fulton, has only three or four full time police officers and utilizes volunteers to keep overtime down, argues the City. The City asserts that Canal Fulton is unique and enjoys an important F.S.L.A 207k police and

fire overtime exemption. The City also argues that the Union position would have an adverse effect upon the ability of the City to finance the Union's proposal (Cx 2, 3).

The Union points out that the Chief of Police, a member of the administration, worked over half of all the overtime incurred in 2001 (City Exhibit 1a). He worked a total of 762 of the 1396 hours (or 54.5%) for the year. Using the administration's cost projection figures of $45,267 over three years of this contract, the hours worked by the Chief of Police represent $24, 670 of this projected cost. However, the Chief testified that he would not be working such hours in the future, suggesting that some or all of these hours would be worked by bargaining unit members. The Union provided a persuasive case (based upon comparables) for an eventual change in this area. However, the City's argument regarding its ability to finance and administer this issue and the totality of the financial impact of other awards contained in this report support the City's position to maintain the status quo during this contract period. To attempt to make a change in the structure and payment of overtime at the same time wage structures are being completely overhauled (See Issue 3) places too great an administrative burden upon the City. The City is simultaneously going through a time of growth (2000 census), a demand for new services (based upon Service Director's and Mayor's comments), and a shifting tax base. The allocation and work schedule of safety services needed during this period of change is likely to require further study.

Award

The City's position is awarded.

ISSUE 2 COURT TIME

Union's position

See UPS

Employer's position

See EPS

Discussion

The Union offered comparables from three county sheriff departments, three townships, and the City of Massillon. The City argued that its current administrative code calls for two (2) hours of time in accordance with the overtime provisions of the same section of the code. Section 141.08 (d) of the Code reads:

"(d) If an employee who is eligible for overtime pay is called out because of an emergency during hours other than regularly scheduled hours, he shall be paid according to the overtime provisions of this section and shall be given credit for a minimum of two hours for <u>any</u> call out" [Emphasis added] *(Cx 6).*

According to City Exhibit 4 this provision also covers court time that occurs outside of their regularly scheduled hours. The City stated during the hearing that it was never its intention to take anything away from police that they had by administrative code. It is reasonable and consistent with the standard in police departments to pay officers for time they spend in court during their off hours. It is work they have generated by their efforts in performing sound police work for the City. However, it appears from the City's position that the bargaining unit already receives a minimum of two (2) hours of overtime pay for call out (or working outside of their normal work hours).

Award

The City's position is awarded.

ISSUE 3 WAGES

Union's position

See UPS

Employer's position

See EPS.

Discussion

There are several inequities in the wages. Officer Ruthrauff, who began his employment in 1991, currently makes $17.63 per hour, while Officers Kassinger (hired 1989) and Harbaugh (hired 1990) make $16.57 and $16.53 respectively. The remainder of the bargaining unit employees do not have any logical distance between their wages. Two employees hired in 1995 make 7.5% more than Officer Kosco, who only has two years less seniority. Yet, Officer Kosco makes 10.5% more than Officer Crookston who has two years less seniority than Kosco. The City's position in providing its own equity adjustments indicates that it also realizes how current internal inequities need to be corrected. However, the problem with the City's approach is it eliminates longevity. This approach creates yet another form of inequity for the police officers in the bargaining

unit. They would no longer have a benefit that all other employees, including another unit that is represented by the FOP. The history of providing the longevity benefit and the fact it is part of the benefit plan for all other city employees work against the City's approach.

There is no question that the Union's proposal increases wages more than does the City's adjustment. This is particularly true in the first year. However, the Union's proposed wages are not out of line with other police departments. Anytime it is necessary to establish a new wage structure and place employees on it, there are likely to be initial establishment costs. As stated above, both parties agree that the current compensation system is unreasonable and needs to be overhauled. Upon close examination, most of the increase in the Union's proposal is driven by the need to correct inequities. Much of what the City is offering also addresses inequities between officers. For example, Officer Kosco, who has a start date of 1991, currently makes 12.05 per hour in base wages. Officers Swartz and Barabasch, make 13.37 per hour in base wages, even though they have four less years of seniority. In order to correct this inequity and place Officer Kosco on par with officers of similar seniority, the Union proposes that his pay needs to be adjusted by 51.43% to $18.25 per hour. Although this is a substantial increase, his level of pay would simply match other like senior officers such as Ruthrauff (1976), Kassigner (1988), and Harbaugh (1990).

In the third year of the City's proposal the salaries of six out of the seven current bargaining unit officers is $18.48 per hour or $38,438.40 per year. The Union's proposal differs by 1.45 per hour, which totals $41,454.40 per year. For these six officers the total straight time cost difference (based upon 2080 hours per year) between the City's wage offer and the Union's wage offer, both of which address internal and external inequities, is $18,072 (or $3,016.00) per officer. In comparison with a city budget of over 1.5 million dollars per year this difference represents .012 % of the current budget ($18,072 divided by 1.5 million). The City and the Union are both proposing new salary schedules that are based upon experience. Both parties' proposals represent a commitment of additional funds. However, I do not find that the difference between the Union's proposal and the City's is significant when compared to the overall budget of the City. In addition, the City will be realizing a sizeable savings in longevity costs and will not be required to expend additional money for overtime, vacation, or officer in charge pay that was sought by the Union (See Award in Issue 1, 6, and 8). The Union's proposal is chosen because of the comparable data presented. It places bargaining unit officers in more competitive position with respect to one another and with officers in surrounding police departments.

Award

The Union's position is awarded.

ISSUE 4 LONGEVITY

Employer's position

See EPS

Union's position

SEE UPS.

Discussion

According to the City's calculations the Union's proposal would represent a decrease in the payment of longevity. This decrease over a three (3) year period is $48,756, according to City Exhibit 1a. The City position regarding longevity is to eliminate it as a separate benefit. The City proposes rolling it into the general salary of all bargaining unit employees. Longevity for all intents and purposes is a wage tied to years of service. It was originally designed for purposes of retention and recruitment. The City stated there has been no turnover problem in the department. However, the Chief of Police testified during the hearing he was worried about losing good officers if they are not sufficiently compensated in the future. In the experience of this Neutral, more employers in the public sector are concerned over a shortage of people willing to enter into police work without proper compensation. Since the events of September 11, 2001, the field of security has greatly expanded and it has increased the competition among employers for qualified applicants.

Even though there are substantial equity problems with the current wage structure that both parties are addressing (see above discussion under wages), there is little justification to completely eliminate a long time benefit that is enjoyed by all employees in the City of Canal Fulton. Elimination of said benefit would simply create another inequity between groups of employees and would do little for morale. The Union's scaled down proposal preserves a form of longevity for the bargaining unit. It is also a relatively inexpensive benefit in its scaled down form. The City calculates the cost of the scaled down longevity to between eight and nine thousand dollars annually. Considerable resources will be required to correct these seriously disparate wage rates, which justifies the scaling down of this benefit; however, internal comparability of employee benefits justifies its preservation.

Award

The Union's position is awarded.

ISSUE 5 HOLIDAYS

Employer's position

See EPS.

Union's position

See UPS.

Discussion

The Union is proposing ten (10) holidays and two (2) personal days. The City, by ordnance, already provides for ten (10) holidays and two (2) personal days. The parties generally appear to be in agreement on the level of this benefit. However, the Union proposal provides comprehensive language that is typically found in labor agreements.

Award

The Union's position is awarded.

ISSUE 6 VACATION ALLOWANCE

Union's position

See UPS

Employer's position

See EPS

Discussion

The City argues that bargaining unit employees are eligible to receive up to four (4) weeks of vacation pay and may carry over one week of vacation by ordnance (Cx 5). The Union is proposing five (5) weeks of vacation with up to a two (2) week carryover. The Union provided several comparables (Ux 14). The bargaining unit consists of only seven (7) full employees. From a practical point of view adequate staffing becomes an issue with a small staff of bargaining unit employees. In addition to being a small staff, it is a young staff. During the life of this three (3) year agreement only two employees will have fifteen-plus years of service and will be eligible to take the additional fifth vacation week being proposed by the Union. Although many city jurisdictions have vacation benefits that exceed those of Canal Fulton, they often have more staff to meet the demands of covering for employees who are on vacation. And at this juncture, the financial impact of this additional benefit must be weighed against the costs of providing necessary inequity adjustments.

Award

The City's position is awarded.

ISSUE 7 UNIFORM MAINTENANCE ALLOWANCE

Employer's position

SEE EPS.

Union's position

SEE UPS.

Discussion

The City's ordnance regarding uniform allowance is out of date. It provides for $450.00 worth of clothing and equipment per year. However, the City argues the current level is $700.00 per year. The first problem with the City's position is that it is not supported by ordnance or contract language. Arguably the administration does not have authority to pay a clothing allowance above $450.00 and any payment above this amount could be subject to an auditor's challenge. The Union is proposing a clothing allowance that remains at $700 the first year and increases fifty dollars ($50) each of the next two contract years. A fifty-dollar ($50) annual clothing allowance increase is common in police collective bargaining agreements in Ohio. The cost for bargaining unit members is

increasing. For example, the bike patrol employees have had to pay up to $300 dollars out of their own pocket for clothing and equipment.

What the Union is proposing is reasonable and is supported by comparable jurisdictions (Ux 15).

Award

The Union's position is awarded.

ISSUE 8 OFFICER IN CHARGE

Employer's position

SEE EPS.

Union's position

SEE UPS.

Discussion

The City argues that the Union with this proposal is just seeking another way to gain an increase in pay. It contends that employees may do part of the Chief's job in his absence, but no one performs his entire job. The City flatly states that no one replaces the Chief when he is absent. The Union offered three (3) comparables in support of its proposal; however, two of these comparables (Massillon and Stark County Sheriff) are of far larger and more complex departments that are likely to need constant and close supervision. The Union's proposal maintains managerial control over determining a need for an officer in charge (OIC) and who shall fill it. This is a very small department. It is not clear from the evidence what a bargaining unit member is responsible for if he or she is asked to substitute for the Chief or how often this occurs. This certainly may be an issue that needs to be addressed in the future as the department grows, but it does not appear to be a pressing priority when compared to other issues before this Conciliator. Once again, the ability to fund such a cost must be weighed against the reality of the need for such a special wage rate that is likely to only benefit a few employees.

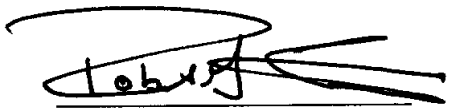
Award

The City's position is awarded.

TENTATIVE AGREEMENTS

During negotiations and fact-finding, the parties reached tentative agreement on several issues. These tentative agreements are awarded as part of this report.

The Fact-finder respectfully submits the above award to the parties this 14th day of November 2002 in Portage County, Ohio.



Robert G. Stein, Fact-finder