

STATE OF OHIO

2004 DEC 22 A 11: 44

STATE EMPLOYMENT RELATIONS BOARD

CONCILIATION AWARD

December 20, 2004

In the Matter of:

Columbiana County Sheriff's Department	)	Case Nos. 03-MED-09-0879
	)	03-MED-09-0880
and	)	03-MED-09-0881
	)	03-MED-09-0882
Fraternal Order of Police,	)	03-MED-09-0883
Ohio Labor Council, Inc.	)	

APPEARANCES

For the Employer:

Eugene P. Nevada, Clemans, Nelson & Associates  
Sandy Conley, Clemans, Nelson & Associates

For the Union:

Hugh Bennett, Senior Staff Representative, FOP/OLC  
Michael Piotrowski, General Counsel, FOP/OLC  
Mark E. Drum, Senior Staff Representative, FOP/OLC  
Wes Smith, Deputy Sheriff  
Jacquelyn Endicott, Communications  
Thomas Smith, FOP Representative

Conciliator:

Nels E. Nelson

## BACKGROUND

The instant case involves negotiations between the Fraternal Order of Police/Ohio Labor Council, Inc. and the Columbiana County Sheriff's Department for a contract to be effective January 1, 2004. The negotiations involve three bargaining units -- deputies, sergeants and above, and dispatchers and office employees. The three units consist of approximately 30 employees.

When negotiations reached an impasse, Marvin Feldman was appointed as the Factfinder. He conducted a hearing and issued his recommendations on February 2, 2004. His recommendations were rejected by one or both of the parties.

Following the rejection of the Factfinder's recommendations, Robert Stein was appointed as the Conciliator. He scheduled a hearing on May 19, 2004, at which time he attempted to mediate the dispute. When no settlement was reached, he opened the conciliation hearing. At that point, the department argued that Conciliator Stein had no jurisdiction to accept any evidence from the union because it had not provided a copy of its pre-hearing statement to the State Employment Relations Board five days prior to the conciliation hearing. The hearing was adjourned without any evidence being taken.

Conciliator Stein subsequently withdrew from the case and this Conciliator was appointed on September 27, 2004. A conciliation hearing was held on December 6, 2004, and this decision was prepared.

The Conciliator is required to select the offer of one party or the other without modification. The selection between the final offers is based upon the criteria set forth in Section 4117.14(G)(7) of the Ohio Revised Code. They are:

- (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, and 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 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.

### PROCEDURAL ISSUES

Prior to the start of the conciliation hearing, two procedural issues were raised by the parties. One of the issues was raised by the department and the other was brought forward by the union.

1) Presentation of Evidence by the Union – The department argued that the Conciliator did not have jurisdiction to hear the union’s position and evidence. It indicates that an affidavit from Mary Robertson, an official from SERB, reported that the union’s final offer package or rationale statement was not on file at SERB five calendar days prior to the hearing before Conciliator Stein. The department claims that this violates Section 4117.14(G)(3), of the ORC that requires each party to submit its pre-hearing statement to SERB no later than five calendar days before the hearing. It relies on In the Matter of State Employment Relations Board v. Greenville Patrol Officers Association, SERB 2000-005-(06-13-00) in support of its position.

The union responded that it was not barred from presenting evidence. It claimed that the triggering event for the filing of pre-hearing statements was the appointment of this Conciliator on September 27, 2004. It states that it submitted its pre-hearing statement to SERB within five days of the scheduled hearing before this Conciliator. The union further claims that there is a submission requirement rather than a filing requirement.

The Conciliator denied the department's motion to bar the presentation of evidence by the union. First, he believes that the union satisfied the statutory requirement relating to providing a copy of its pre-hearing statement to SERB. Section 4117.114(G)(3) of the ORC requires the parties to "submit" a copy of their pre-hearing statement to SERB five calendar days prior to the hearing. The term "submit" is not defined in Section 4117 of ORC or the Ohio Administrative Code but Section 4117-9-06(E) of the OAC uses the term "submit" and "serve" interchangeably and Section 4117-1-02(C) of the OAC states that "service by mail shall be deemed complete upon mailing." In the instant case, the department charges that SERB had not "received" the union's pre-hearing statement. Second, the Conciliator recognizes the union's argument that his appointment following the withdrawal of Conciliator Stein restarted the entire process including the requirements relating to the submission of pre-hearing statements.

Finally, the Conciliator believes that the instant case is distinguishable from the Greenville case. Thus, the remedy imposed in that case would not be applicable in the instant case.

2) Transcript of Conciliation Hearing – The union objected to the presence of a court reporter at the conciliation hearing. It claimed that the ground rules for

negotiations prohibit the use of a court reporter. The department rejected the union's claim. It argued that the conciliation hearing was not part of the negotiations process so that it was not subject to the ground rules governing negotiations.

The Conciliator denied the union's request to bar the court reporter. Since no copy of the ground rules for negotiations was submitted, it was not clear that they would have barred the presence of a reporter. Furthermore, the Conciliator would note that Section 4117.14(G)(6), of the ORC requires the Conciliator to "provide for a written record to be made of all statements at the hearing." While this is seldom, if ever, done, it is consistent with the right of either party to create a written record of the hearing.

### SUBSTANTIVE ISSUES

The parties presented seven issues to the Conciliator. For each issue, he will set forth the positions of the parties and then summarize the evidence and arguments they offered in support of their positions. The Conciliator will then provide his analysis of the issue and present his award.

1) Article 18 – Holidays - The current contract provides that employees get triple time and one-half their regular rate of pay for work on the ten holidays named in the contract. It also includes a me-too clause that requires the department to grant compensatory time to members of the bargaining unit for any additional holiday time off given to any other county employees. The department seeks to reduce the rate for holiday work to double time and one-half effective January 1, 2006, and to eliminate the me-too provision. The union wishes to continue the current contract language.

Department Position – The department argues that double time and one-half pay for working on a holiday is the “industry standard.” It points out that three of its six comparable departments pay employees who work on a holiday time and one-half for working plus holiday pay. The department notes that the remaining departments pay straight time for holiday work.

The department reports that paying triple time and one-half for holiday work is a cost item. It estimates that its proposal results in a cost saving of \$14,169, which represents 1.5% of payroll.

The department contends that the me-too provision of Article 18 creates problems. It states that whenever a county official closes down, the union maintains that the holiday provision of its contract is triggered as when the MRDD Board had a program closing period. The department claims that the me-too provision leads to disputes and grievances.

Union Position – The union charges that the department is trying to eliminate an existing benefit. It points out that the triple time and one-half rate for holiday work has existed for many years and was actually proposed by the previous sheriff as a way to reward employees for their work. The union adds that the department has already modified the language by decreeing that only essential employees will work on holidays.

The union questions the department’s assertion that triple time and one-half violates an “industry standard.” It states that this term is from the private sector where double time and one-half is the norm. The union notes that its position is consistent with Mahoning County, which pays triple time and one-half for holiday work.

The union challenges the department's demand to eliminate the me-too clause. It claims that it is not listed as an unresolved issue in the department's pre-hearing statement. The union also observes that the issue was not addressed by the Factfinder.

Analysis – The Conciliator must select the department's final offer. First, the comparable departments offered by the department strongly support its position. None of the five contiguous counties pay triple time and one-half for holiday work. In addition, only one of the union's comparable departments pay that rate for holiday work.

Second, the Conciliator believes that cost considerations also support the department's position given that the union is seeking 3% wage increases in each year of the contract and fully paid health insurance.

Third, the department's demand to eliminate the me-too provision is not unreasonable. The department is a different kind of operation than the other county agencies. This makes it somewhat illogical to tie its holidays to other agencies.

Finally, the Conciliator must reject the union's claim that the department's demand to eliminate the me-too provision must be rejected because the issue was not raised in factfinding. The department's proposal at factfinding included this demand. The Factfinder's decision not to address the demand indicates that he was rejecting it.

Award – The Conciliator selects the department's final offer. It is as follows:

Sections 1, 2, 4, and 5 - current contract language

Section 3 – Current language with the addition of the following:

Commencing January 1, 2006, holiday pay for time worked on a holiday shall be at the rate of one and one-half (1½) times the usual rate of pay in addition to the regular holiday pay.

Section 6 – delete

2) Article 24 – Wages – The current contract establishes wages that range from \$25,833 for tech typists to \$41,527 for lieutenants. The union seeks 3% wage increases effective January 1 of 2004, 2005, and 2006. The department offers 2.4% increases effective January 1 of 2004 and 2005 and a 3% increase effective January 1, 2006.

Union Position – The union argues that internal comparisons support its demand. It points out that other county bargaining units almost consistently received 3% wage increases. The union notes that four units received 3% increases for 2004 and two units, whose contracts expire in 2005 or 2006, will get 3% increases in 2005.

The union states that the ability to pay is not a factor. It observes that the department did not raise this issue. The union asserts that the county's finances are probably better than in the past.

The union contends that wages in comparable departments support its demand. It reports that Columbiana County ranks fourth among its six comparable departments and that deputies are paid almost 5% less than the next highest county. The union reports that similar situations exist for other jobs in the bargaining unit.

The union challenges the department's choice of comparable counties. It claims that they have smaller populations, which means smaller tax bases. The union notes that its comparable counties consist of all of the contiguous counties.

The union contends that the wage increases received by other public employees support its demands. It observes that the SERB Quarterly for the first quarter of 2004 reports first, second, and third year wage increases of 3.15%, 3.18%, and 3.26% for contracts negotiated in Ohio in 2003.

Department Position – The department argues that comparisons support its position. It points out the maximum wages for deputies, sergeants, and lieutenants in Columbiana County exceed the average for its six comparable counties by 2.87%, 3.29%, and 2.71%. The department insists that its comparables are appropriate because the per capita income in the county slightly exceeds the average per capita income for its comparable counties.

The department contends that cost considerations give credence to its wage offer. It states that the cost of its wage proposal in 2004, 2005, and 2006 is \$28,706, \$29,452, and \$37,733 compared to the \$35,579, \$37,342, and \$38,157 for the union's wage demand.

The department observes that the voters recently rejected a 1% sales tax. It indicates that although the levy can be placed back on the ballot, the commissioners may not do so because there is another sales tax issue on the ballot.

Analysis – The Conciliator must select the union's final offer. First, while wages in Columbiana County exceed wages in the department's comparable counties, they are generally less than the wages in the contiguous counties. Second, the wage increases received by other sheriffs' departments and public employees in general, are consistent with the union's demand. By granting an increase similar to what other departments have received, the Conciliator maintains the current wage rankings. Finally, the selection of the department's offer for holidays provides a financial cushion for the department. This makes the Conciliator confident that the department will have the ability to pay the union's wage demand.

Award – The Conciliator awards the union's final offer. It is as follows:

Section 1 – Effective January 1 of 2004, 2005, and 2006, wages shall be increased by 3%.

3) Article 26 – Hospitalization – The current contract requires the department to continue to provide the health insurance in force as of the effective date of the prior agreement. It further states that “if it becomes necessary to change carriers and/or benefits, the Employer agrees to meet and negotiate with the FOP/OLC no later than sixty (60) days prior to the date of such proposed change ... and should the parties be unable to reach agreement ... they will have recourse to the dispute resolution procedures of ORC 4117.”

The department’s proposal gives the union two options. First, it requires the continuation of fully paid health insurance with the benefits and coverage determined by the county commissioners. Second, the proposal provides that if the union wishes a health insurance plan different from the county plan, negotiations will take place and, if no agreement is reached, the choice of a plan will be submitted to final offer arbitration with the Arbitrator selected through the Federal Mediation and Conciliation Service. In addition, the department demands that if an alternative plan is agreed to or selected by the Arbitrator, employees will be required to contribute 13% of the premium for single coverage and 15% for family coverage.

The union seeks to retain the current contract language.

Department Position – The department argues that its offer must be adopted. It states that pursuant to Section 305.171 of the ORC only the county commissioners can negotiate health insurance for county employees. The department further suggests that health insurance should be negotiated by the commissioners because better rates are available to larger groups and that the rates for orphan plans are significantly higher.

The department maintains that comparisons to other jurisdictions support its position. It points out that in its comparable counties sheriffs are required to provide the same insurance as offered by the county commissioners. The department notes that employee contributions are required in all its comparable departments.

Union Position – The union contends that its final offer for health insurance ought to be selected. It indicates that virtually all contracts in the county call for 60 days' notice of any change in health insurance and require either bargaining over the decision or the effects of a change in health insurance. The union complains that while the department's proposal requires fully paid health insurance, the plan could be so decimated by the commissioners that the out-of-pocket expenses might create an untenable situation.

The union objects to the department's proposals relating to the negotiation of an alternative to the county plan. It complains that it did not see the proposal prior to conciliation and does not know what it means. The union asserts that the proposal is contrary to the commissioners' concern regarding a plan that is different from the county plan.

The union claims that no other organized or unorganized employees in the county contribute toward the cost of health insurance. It reports that the county engineer recently negotiated an agreement that requires the maintenance of a fully paid health insurance plan with the benefits at least equal to the current plan. The union indicates that the agreement is in effect through 2006.

Analysis – The Conciliator must select the union's final offer. He cannot award

language requiring the maintenance of a fully paid plan where the benefits and coverage are left to the county commissioners. As the union pointed out, this could result in large co-pays and deductibles, which might make health care unaffordable.

The department's alternative position is also unacceptable to the Conciliator. While it allows the union to demand to negotiate a health insurance plan other than the county plan, it pre-establishes employee premium contributions without any indication of what benefits and coverage might be negotiated. Furthermore, this option appears to conflict with the department's position that only the commissioners can negotiate health insurance for county employees.

Award – The Conciliator awards the union's offer of the current contract language.

4) Article 29 – Bargaining Unit Work – The current contract prohibits supervisors and other non-bargaining unit employees from performing work that is customarily performed by bargaining unit employees except in an emergency or when qualified bargaining unit personnel are not available to perform work that is necessary to maintain normal operations. The department proposes to expand the list of situations in which bargaining unit work can be performed by individuals who are not members of the bargaining unit. The work includes:

Work that is overlapping in nature in that it may be performed by a supervisory/non-bargaining unit employee even though the same or similar duties are found within bargaining unit classifications.

Work which under the circumstances that exist would be unreasonable, impractical, or inefficient to assign to bargaining unit personnel.

Work historically performed by bargaining unit and non-bargaining unit personnel alike.

Work performed by the Sheriff in carrying out the statutory responsibilities of the Sheriff.

The union offer consists of the current contract language.

Department Position – The department argues that under the current contract the sheriff “can’t be sheriff.” It observes that pursuant to the ORC the department is charged with and empowered to perform all of the duties of his office. The department complains that members of the bargaining unit have more authority than the sheriff.

The department charges that the current contract language has been construed in such a manner as to prevent the sheriff from doing his job. It cites a grievance settlement where the sheriff was barred from transporting a prisoner from Florida to Columbiana County. The department reports that the executive director of the Buckeye State Sheriffs’ Association indicated in a letter that when a sheriff appoints deputies, he does not relinquish his duties and responsibilities and he cannot negotiate them away.

The department contends that none of its comparable jurisdictions have language similar to the current contract. It reports that none of the jurisdictions restrict the performance of bargaining unit work or the contracting out of work.

The department maintains that the union’s position on the bargaining unit work issue is driven by past history. It claims that the problem is that it is being punished for the commissioners’ decision to contract out the operation of the jail. The department states that the contracting out is addressed by Article 30 so that it does not need to be addressed in Article 29.

Union Position – The union argues that the department is trying to get the Conciliator to ram its proposal down its throat. It states that prior to conciliation the

department simply proposed eliminating Article 29. The union complains that it never had the opportunity to bargain over the proposed changes in the contract language.

The union charges that the department is proposing the elimination of the restriction on non-bargaining unit employees performing bargaining unit work because the department has violated the existing restrictions on a number of occasions. It observes that ten of the twelve grievances it filed were settled by the sheriff or the chief deputy. The union reports that it won the two grievances that went to arbitration.

The union contends that the department wants to amend Article 29 so it can hire part-time deputies. It points out that it warned the department that if it did so, it would file a grievance. The union reports that when the department went ahead with its plans, an Arbitrator ordered the department to pay the union for the number of hours that were worked by the part-time deputies.

Analysis – The Conciliator must award the union’s final offer. The record demonstrates that on a number of occasions non-bargaining unit employees have performed work customarily performed by members of the bargaining unit in violation of the contract. While some modification of the current contract might be agreeable to the union, the department’s proposal appears to remove virtually all protection of bargaining unit work.

Award – The Conciliator awards the union’s offer of the current contract language.

5) Article 31 – Education Pay – The current contract provides an annual payment of \$250 to employees who are instructors in law enforcement or criminal justice or have completed the courses for an associates degree in law enforcement or criminal

justice. It also grants \$500 per year to employees with associates degrees and \$750 per year to employees with bachelors degrees in those areas. The union proposes adding an annual stipend of \$250 and two days off with pay for deputies to attend “any law enforcement related educational seminar, conference or class” and an equal stipend for dispatchers and secretaries for work-related continuing education programs. The department opposes the union’s demand and wishes to maintain the current contract language.

Union Position – The union argues that the purpose of its proposal is to enhance the job performance of its members. It claims that the county has been in a money crunch so that employees have not had an opportunity to attend training in a number of years. The union indicates that unless training was mandated by law, it was considered a luxury and the money was used for other purposes.

The union observes that the Factfinder recommended education pay. It recognizes that his recommendations referred specifically to dispatchers and secretaries. The union asks the Conciliator to extend the benefit to other members of the bargaining unit.

The union acknowledges that among its comparables only Mahoning County enjoys a benefit similar to the one it is seeking.

Department Position – The department opposes the union’s demand. It complains that the union’s proposal is poorly worded and confusing. It contends that the phrase “any law enforcement related educational seminar, conference or class” is so broad that it might include the FOP convention.

The department suggests that the union's demand is too costly. It indicates that the proposal would cost \$7500 which is equivalent to a .6% wage increase. The department further claims that the days off would trigger overtime.

The department reports that the union's position is not supported by its comparables. It points out that five of its six comparables do not offer education pay. The department acknowledges that the contract in Guernsey County provides for training but only for training that is necessary to obtain or maintain required certificates or licenses.

Analysis – The Conciliator cannot award the union's demand. It is not supported by the comparables offered by either side. While the Conciliator recognizes that education and training are very important in law enforcement, he understands that when budgets are tight, difficult choices have to be made.

Award – The Conciliator awards the department's offer of the current contract language.

6) New Article – Bargaining Unit Application of Civil Service Law –

The department proposes a new contract provision that lists the specific sections of the ORC that will be trumped by the collective bargaining agreement; that states that Sections 124.57 and 124.388 of the ORC will apply to bargaining unit employees; and that indicates that the Ohio Department of Administrative Services and State Personnel Board of Review will have no authority or jurisdiction over bargaining unit employees or matters covered by the collective bargaining agreement. The union rejects the department's demand.

Department Position – The department argues that its offer ought to be selected. It acknowledges that the Factfinder rejected its demand because he felt that “it lacked the specificity demanded for such waivers.” The department stresses that its current proposal addresses the Factfinder’s concern.

The department contends that many negotiators naively and incorrectly assume that their contracts supersede conflicting laws. It cited In State, ex rel. OAPSE/AFSCME Local 4, et al., v. Batavia Local School Dist. Bd. Of Edu. et al., (2000) 89 Ohio St. 3d 191, and a number of other cases in support of this point.

The department maintains that its proposed language has been accepted by the FOP in other jurisdictions. It indicates that the union agreed to almost identical language in Jefferson and Tuscarawas Counties and a variation of its proposal in Galia County. The department reports that the FOP accepted the language it proposed in factfinding in seven counties and the City of Liverpool.

Union Position – The union opposes the department’s proposal. It charges that the department is employing “a shotgun approach ... to negate broad sections of state civil service law that would apply to this bargaining unit.” The union asserts that the department’s proposal is using the cover of Batavia but maintains that the department failed to follow the ruling in Batavia in drafting its proposal. It contends that the department must list the specific section of the ORC that it intends to preempt along with the corresponding articles and sections of the contract. The union characterizes the department’s proposal as an attempt to insert a “Trojan horse” into the collective bargaining agreement.

Analysis – The Conciliator must reject the department’s demand. While he understands the department’s concern and realizes that its current proposal is more specific than its proposal at factfinding, it still is very difficult to appreciate the potential impact. The Conciliator believes that the issue needs to be thoroughly explored by the parties in negotiations.

Award – The Conciliator rejects the department’s demand.

7) New Article – Minimum Manning – The union demands a new article that requires a minimum of two deputies to be on duty at all times. The proposal also mandates that a deputy be called in when one of the two deputies on duty must leave the county for more than ten minutes. Under the union’s proposal, deputies who are called out are entitled to a minimum of four hours of pay at their overtime rate of pay. The department rejects the union’s demand.

Union Position – The union argues that its demand ought to be adopted. It claims that its proposal is brought forward as a safety issue. The union indicates that Columbiana County is too large for a single deputy to patrol. It emphasizes that if a deputy is out of the county, help must come from another agency, which could take 15 to 20 minutes.

The union acknowledges that it is “probably unrealistic” to require a deputy to be called in when a deputy is out of the county for ten minutes. It complains, however, that no bargaining took place regarding the issue because the department asserted that minimum manning is a permissive subject of bargaining.

The union contends that minimum manning is a mandatory subject for bargaining. It cites In re Youngstown City School Dist. Bd. Of Ed., SERB 95-010 (6/30/95), in support of its position.

Department Position – The department opposes the union’s demand. It charges that the union’s demand is not a mandatory subject for bargaining and, as such, cannot be taken to impasse. The department reveals that it responded to the union’s demand by filing an unfair practice charge with SERB.

The department argues that it is not required to have a road patrol. It cites Lorain County Deputies Assn. v. Vase, 1992 Ohio App. LEXIS 6392.

The department contends that the union’s proposal is in derogation of Section 4117.08 of the ORC. It claims that the union’s proposal cannot be effective unless the union specifically names Section 4117.08 as being “short circuited” in its proposal. The department cites Batavia and Section 4117.10(A) of the ORC.

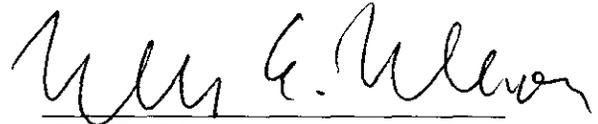
The department questions the union’s safety concerns. It points out that even if more than one deputy is on duty, there is no guarantee that a deputy will be close enough to be available as a back-up. The department claims that the number of employees on duty relates more to the level of service to the public than to the safety of deputies. It insists that the level of service is a policy/political decision that is not subject to bargaining.

The department maintains that its comparables do not support the union’s demand. It reports that five of the six departments have no minimum manning provisions in their contracts. The department observes that in Belmont County the contract requires

the sheriff to make a reasonable effort to provide one road supervisor and one deputy on duty at all times.

Analysis – The Conciliator must reject the union’s demand. Although he appreciates the union’s concern about the safety of deputies, he recognizes the financial implications of its demand. The Conciliator also realizes that despite similar concerns about safety in other counties, the comparables do not include language similar to what the union is seeking.

Award – The Conciliator rejects the union’s demand.



Nels E. Nelson  
Conciliator

December 20, 2004  
Russell Township  
Geauga County, Ohio