STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Conciliation Between:	)	
CITY OF RICHMOND HEIGHTS, OHIO	)	**Case No. 03-MED-09-1034**
-and-	)	**Jonathan I. Klein, Conciliator**
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2009	)	

FINAL OFFER SETTLEMENT AWARD

Appearances

For Union:
James P. Astorino

For Employer:
Marc J. Bloch, Esq.

Date of Issuance: December 11, 2004

I. PROCEDURAL BACKGROUND

This matter came on for hearing on October 5, 2004, before Jonathan I. Klein, appointed as conciliator by the State Employment Relations Board ("SERB"), pursuant to Ohio Rev. Code Section 4117.14(D)(1). The hearing was conducted between the City of Richmond Heights (hereinafter "Employer" or "City"), and the International Association of Fire Fighters, Local 2009 (hereinafter "Union"), at the Richmond Heights City Hall, 457 Richmond Road, Richmond Heights, Ohio. The bargaining unit involved in this conciliation consists of approximately eighteen (18) full-time fire fighters.[1]

Following a fact-finding hearing on March 24 and April 8, 2004, the fact-finder issued his report on June 19, 2004, addressing twelve issues on which the parties had reached tentative agreement. The City subsequently agreed to accept the fact-finder's recommendations. However, the Union rejected the fact-finder's report and recommendations, and as of the commencement of the conciliation hearing the parties remained at impasse on the following issues:

1. Work Week - Article 20
2. Paramedic Bonus - Article 22
3. Fitness - New Language
4. Compensatory Time - Article 20
5. Scheduled Time Off - New Language
6. Recalls

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1. The bargaining unit consists of all regular, full-time employees in the City's Fire Department classified as lieutenants, fire prevention officers and fire fighters. (Article 3 of the collective bargaining agreement).

The conciliator incorporates into this Final Offer Settlement Award all tentative agreements entered into by the parties prior to the conciliation hearing aside from any tentative agreement(s) on the issues at impasse, listed above.

II. CONCILIATION CRITERIA

In the determination of the facts and the selection, on an issue-by-issue basis, from between each of the party's final settlement offers, the conciliator considered the applicable criteria from those enumerated in Ohio Rev. Code Section 4117.14(G)(7)(a)-(f), and Ohio Admin. Code Section 4117-9-06(H)(1)-(6). This criteria consists of the following:

(1) Past collectively bargained agreements, if any, between the parties;

(2) 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;

(3) 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;

(4) The lawful authority of the public employer;

(5) Any stipulations of the parties;

(6) 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.

III. FINDINGS OF FACT AND LAST BEST OFFERS

Introduction

The City has a population of approximately 10,000 and is located in northeastern Cuyahoga County. As previously noted, there are currently eighteen fire fighters employed by the City within the bargaining unit. Upon review of the jurisdictions submitted by both parties, the following cities have been referenced for comparability purposes throughout this Final Offer Settlement Award based upon their populations, number of calls and/or proximity to the City: Highland Heights, Lyndhurst, South Euclid, Mayfield Heights, Euclid, Cleveland Heights and University Heights.

Issue 1: Work Period and Workweek (Article 20)

The Union proposed that the workweek be reduced from its current level of 51.7 hours to 49.8 hours in the third year of the new agreement. The Union based its request on an effort at seeking "[parity] with the surrounding communities." (Union position statement at 2). It noted that while it had been willing to back off on this position during fact-finding, it did so in order to obtain other items in the mediated settlement that found its way into the fact-finder's report.

The Union acknowledged that in March 2004 the City hired three new fire fighters. However, when the so-called "Hillcrest area" comparables of Highland Heights, Lyndhurst, Mayfield Heights and South Euclid are considered, all communities to which the City's call volume is comparable, a trend in reduction of the workweek can be seen as developing. By implementing the proposed reduction in the third year of the agreement, the City will have sufficient lead time to prepare for the changes and inevitable scheduling problems. When the City of Euclid is included in the list of comparables, the City ranks fifth out of sixth similar jurisdictions. As far as internal comparability may be considered, the workweek for members of the bargaining unit is only 2½ percent below the FLSA maximum for fire fighters compared with the City's police who enjoy a workweek 7½ percent below the FLSA maximum. (Union Ex. 3).

Phillip Salvia, a member of the Union's negotiating committee, stated at hearing that at the time of fact-finding the fire fighters in South Euclid and Lyndhurst only had tentative agreements with their respective cities, and as it was still summer and the bargaining unit wanted to "get two guys off during the summer when they need it," the mediated settlement was reached. This is why the Union was willing to table its proposal on this issue, but the summer is long gone and South Euclid and Lyndhurst currently have 50 hour and 49.8 hour workweeks, respectively.

The City charged the Union with "sophistry at its finest," and contended the Union's proposal was "insane, not just absurd," noting that the proposed workweek reduction translated into an extra 3.8 percent wage increase. Currently, the bargaining unit is well below FLSA standards, and the Union's proposal will only exacerbate financial problems. Indeed, the

proposed loss of hours will result in generating a great deal more overtime. Highland Heights has a fifty-three hour workweek, and due to the number of part-time employees it has a great deal more flexibility in scheduling. The City, recognizing the need for additional people, recently hired three new fire fighters. In exchange, the Union demands more time off, greater flexibility and less hours worked – a classic example of the employer being punished for "doing good."

Further, the City urges that the comparable jurisdictions fail to justify the Union's proposal. Euclid is in a fiscal crisis and its collective bargaining agreements are under review with layoffs possible. Lyndhurst has a substantially stronger tax base with new additions such as Legacy Village. The wage package is more than generous, but the Union's proposal on the workweek is without justification.

In rebuttal, Kenneth Ratkosky, vice president and treasurer of Local 2009, asserted that the use of earned time off does not always generate overtime. He insisted that compared to the City's own police department and other fire fighters in comparable cities, the Union's demand is not out of line.

Last Best Offer

Based upon the evidence of record, the conciliator concludes that the City's final proposal on the workweek is the last best offer. While the conciliator notes the testimony from the Union witnesses that the Union may have had a different negotiating strategy at the time of fact-finding, such theory is hardly persuasive that its current position represents the last best offer. The fact-

finder's report was the product of extensive mediation and represented the terms of a tentative agreement – the basis for a collective bargaining agreement which the parties' respective negotiating teams, at least, deemed acceptable in principle if not ultimately as to the specifics of its wording. In fact, the report was rejected by the Union due to a dispute over the application of certain language in another section of the report. The absence of any reasoning from the fact-finding award, coupled with the report's rejection makes its value to the conciliator *de minimus*.

Of greater importance to the conciliator, however, was the fact that only four (4) years earlier in his role as fact-finder this conciliator recommended a reduction in the workweek from 53 hours to its current level of 51.7. The conciliator notes that the evidence strongly supported his recommendation in 2000, but the same cannot be said about the relative strength of the comparable jurisdictions today. Only two of the comparable cities actually saw a reduction in work hours between 2000 and 2004. Further, unlike the situation between the parties in 2000 when the duration of the bargaining unit's workweek was 3.31 percent above the average workweek of the comparable jurisdictions, in 2004 that difference has lessened to 1.97 percent above the average. In sum, the more persuasive evidence is that the City's proposal stands as the last best offer for the current collective bargaining agreement.

Issue 2: Paramedic Premium (Article 22)

Currently, the paramedic pay is a yearly premium of $1,000. (Section 22.4). The Union reasons that because the City had been hesitant to establish this fairly recent payment under the

collective bargaining agreement as a percentage of the base wage, adjustments to the level of payment are needed for each contract term since the comparable communities are increasing their payments on an annual basis. For example, South Euclid's paramedic bonus is set at 4 percent of base salary ($2,229); Lyndhurst is currently at 5 percent of base ($2,787) and other comparables are at $1,500.

The City argues that as part of the overall tentative agreement the Union agreed not to seek further compensation in exchange for the wage increase and changes in scheduling. The City then posited that the tentative agreement is a "dead issue," and the fact remains that since all of the City's fire fighters must be certified paramedics, they are not entitled to a bonus and this is merely a wage increase through the back door. While the City does not seek to eliminate paramedic pay, any attempt to increase it must be rejected and it adopts the fact-finder's award.

Last Best Offer

If the City felt so strongly that the requirement of paramedic qualification no longer warranted payment of this premium and that it should be rolled into the base, that is a position it could have taken as its last best offer. It did not do so and perhaps for legitimate reasons, including financial ones. Moreover, the conciliator cannot so readily discern the *quid pro quo* for the terms of the tentative agreement represented by the fact-finder's summary award aside from the conflicting explanations and rationale offered by each party. The statutory mandate in

conciliation calls for selection between the parties' final settlement offers on an issue-by-issue basis.

Under such circumstances, the conciliator finds the Union's proposal to be the last best offer. A review of the paramedic pay in comparable jurisdictions demonstrates the City's fire fighters are paid a paramedic premium significantly below the other jurisdictions. Even under the Union's proposal, and using the assumption that three of the comparable jurisdictions receive no increase in paramedic pay through 2006, the bargaining unit will receive almost $500 less in 2006 than the average of the paramedic premium paid to comparable fire fighter bargaining units.

Issue 3: Fitness

The City reasoned that Union's original proposal on this issue consisted of a monetary bonus equivalent to the $1,000 fitness bonus received by the City's police department. However, the police fitness bonus, in turn, was specifically designed to equate to the paramedic bonus received by the fire fighters. Now, in the City's view, the Union is seeking to bootstrap itself ahead of the other safety force unit by seeking a similar bonus. During negotiations and fact-finding, the parties agreed the City would purchase $2,500 of fitness equipment annually with discretion on allocation of those monies residing with the Fire Chief. However, the City is insistent that such a provision contain a sunset provision so that the "endless spiral" between the police and fire departments will end as of December 31, 2006.

Again, the Union reasons that it agreed to this provision simply because it understood that an overall agreement would be reached. The amount at issue is only a fraction of the fitness bonus provided to members of the police department, and while the City may suggest this provision as incorporated into the collective bargaining agreement will cause the police to seek another form of "bonus," the police already enjoy a number of ways to earn additional income that are not provided to the fire fighters. (Union Ex. 6-1). The Union seeks greater involvement in the selection and acquisition of the actual equipment, particularly as one member of the bargaining unit is trained to be a fitness coordinator. For these reasons, it is unfair to have a sunset provision inserted in this fitness bonus, but no similar provision relative to the Police bonus.

Last Best Offer

After considerable discussion in the presence of the conciliator, the parties agreed to the following language on fitness, and the conciliator directs its incorporation into the new collective bargaining agreement.

> The City will purchase Two Thousand Five Hundred Dollars ($2,500) of fitness equipment on an annual basis for use by fire fighters to maintain a fitness routine. The Chief shall retain discretion as to how the money is allocated taking into consideration the recommendation of the Union's fitness coordinator. Also, the equipment may be melded into a City-wide fitness center, if built. This stipend shall end at the at the end of the current collective bargaining agreement.

Issues 4, 5 and 6: Compensatory Time, Scheduled Time Off & Recalls[2]

From the City's standpoint, the issue of compensatory and all time off involves the small size of the department, the fact three new fire fighters were recently hired and the presence of up to fifteen part-time fire fighters. It is not a perfect system, but as currently constructed it has reduced the City's overtime costs. Allowing employees to have unrestricted use of compensatory time would destroy the notification period. Currently, the employees are permitted to schedule their compensatory time thirty (30) days in advance. By increasing the notice period to sixty (60) days as proposed by the City, the Fire Chief will be afforded a better opportunity to find part-time employees to fill in, and thereby reduce overtime. The bargaining unit employees are permitted to build up an inordinate amount of compensatory time and the resort to such time invokes the use of overtime and/or part-timers. Under the FLSA, the parties have a right to agree upon contract language addressing compensatory time use that is more restrictive than otherwise provided under the statute.

With this in mind, the City proposes that permitting two fire fighters to be off at any one time will put the City on the verge of overtime every day since the current minimum staffing levels stands at six full-time fire fighters and one part-time fire fighter per shift, together with a five man minimum. Consequently, there are three steps the City wants to take to preclude this situation of excessive overtime from rearing its ugly head once again. First, the sixty-day notice

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2. Due to the interrelatedness of these three issues, both sides consolidated all three issues into one, overarching argument.

proposed will allow the Fire Chief to schedule part-timers when certain planned events occur such as holidays and vacations, particularly since employees are not required to schedule on an annual basis.

Second, while the workforce has been increased, the number of fire fighters permitted off has been increased, which in turn triggers the recall language. Thus, modification of the recall system is necessary in order that the City not be required to call back employees thereby creating additional, unnecessary overtime. The City seeks to eliminate hospital transports and any mutual aid requests for recall purposes, but will agree to continue the recall practice for general recalls. In point of fact, there are very few returns on recall: in 2003 general recalls ran at 6 percent efficiency, and shift recalls were at 3.4 percent efficiency. (City Ex. 11). The Fire Chief should retain discretion over the recall procedures for which he bears ultimate responsibility.

If the conciliator decides the first part of its proposal is not acceptable, then the City offers that it be granted the express contractual authority to revert to a four man minimum if the overtime costs generated exceed $30,000 over any twelve-month calendar period. However, this does not mean to suggest any twelve-month *rolling* year. As a so-called "additional" or alternative proposal, the City would seek to alter the side agreement regarding the part-time to full-time ratio from 2:1 to 3:2. This alternative proposal is not a blanket right to substitute part-time employees for full-time, but it does permit the Fire Chief to operate the department in a fiscally responsible manner. The change in ratio could be implemented separately or in concert with its other proposals, although the City maintains it is not "crazy about part-timers." In any

event, the City needs to insure the relief from overtime which it bought by hiring three, full-time fire fighters.

Initially, the Union objects to the City's proposal to alter the ratio of part-time to full-time fire fighters. This issue was never raised at fact-finding nor at any time prior to the conciliation hearing. To bring it up for the first time at conciliation shows that the City is attempting to sneak the offer in – it does not represent the proper way to handle negotiations. Further, this ratio was established by fact-finding in the past and represents a safety issue, not a staffing issue. The City can afford to supplement the fire fighter force at the current 2:1 ratio, and it is not safe for the community to suddenly and without good cause alter that ratio.

As it concerns recalls for mutual aid, the City is overreaching. This is similar to the notification requirement which was adequate at fifteen days, then thirty and now the City seeks to raise it to sixty days. This issue, as presented to the fact-finder and memorialized by the Union in a letter dated April 26, 2004, was clear – that in exchange for a five-man minimum, the City would no longer recall personnel during hospital transports, but continue to do so for mutual aid and general recalls. (Union Ex. 5).

Further, the Union understood that only when a second or third man was called in to maintain the five-man level, and if by so doing overtime in excess of $15,000 would be generated in a calendar year, had the parties agreed to revisit this issue. The fact-finder stated the $15,000 would be triggered only by the second man recalled. In contrast, the first man would always be paid at the overtime rate consistent with the past practice in the department. The

Union reasoned that it initiated the proposal to have a $15,000 limit in exchange for eliminating the obligation of the City to recall fire fighters for hospital transports. By eliminating those costly recalls, the City is financially capable of maintaining a true five man minimum until the $15,000 level in overtime is reached. Finally, the new seven-man maximum, five-man minimum staffing levels establish sufficient separation to reduce overtime, and the City itself recognized the fact-finding report's phrase on recalls, "if overtime costs generated in adhering to a five-man minimum," to mean costs associated with the second or additional employees recalled as result of increasing scheduled time off from one to two men. (Union Ex. 6).

With respect to its position on compensatory time, the Union proposed that all bargaining unit members be allowed to use 72 hours of their compensatory time bank without restrictions and regardless of whether or not such use would generate overtime.

Last Best Offers

The conciliator has carefully reviewed the arguments with respect to the issues of compensatory time and recalls, and has selected the respective proposals indicated below. As to the issue of scheduled time off, the parties were able to resolve their disagreement on the applicable contract language, which language immediately follows:

1. Scheduled Time Off

Article 20.7 of the new collective bargaining agreement shall provide, as follows:

> Two (2) fire fighters will be scheduled off thirty (30) calendar days in advance of the time requested. No more than one (1) man will be allowed off on a "Kelly" day (MTO); one (1) man allowed off on a holiday or vacation even if someone is scheduled for "Kelly" (MTO) day.

2. Compensatory time

The conciliator selects the City's proposal as the last best offer. The Union argued that its proposal is necessary to remove severe restrictions placed upon the bargaining unit members requests for scheduled time off. The evidentiary record, however, fails to support the Union's contentions. There was no showing that reasonable requests for use of compensatory time off have been unreasonably or capriciously denied. Much of the discussion at the conciliation hearing (and apparently at fact-finding) centered on efforts to control overtime, and through lengthy negotiations, including the hiring of three new fire fighters, the parties appear to have made substantial progress in that direction and are to be commended for their efforts.

However, in the conciliator's judgment the Union's proposal, on its face, would grant contractual permission to ignore or disregard those efforts and permit members of the bargaining unit to utilize 72 hours of compensatory time without concern as to the generation of additional overtime. The Union's proposal falls short of both logic and evidentiary support based upon the record presented to the conciliator.

For each of the foregoing reasons, the conciliator selects the City's proposal as the last best offer and directs that the following sentence be added to Section 20.6:

"The use of compensatory time will be permitted so long as it does not create overtime."

3. Recalls

On perhaps the most contentious issue remaining at conciliation, each of the parties presented able arguments in favor of their respective offers of the proper contract language governing recalls. It would serve no useful purpose to repeat those arguments set forth above. Suffice it to say that what the parties believed was an issue settled by a tentative agreement incorporated into a fact-finder's report was more tentative and fragile than anyone involved imagined.

First, while the City initially couches its proposal on recalls as containing two separate and distinct proposals at hearing and suggested the same in its position statement at page 9, the reality is that the actual contract language of the proposal is not in the alternative. Further, in the City's statement of the case its proposal to modify the side agreement on the part-time to full-time ratio provides that it "must be amended to revise the ratio from 2:1 to 3:2." (City's position statement at 17) (underlining supplied). Shortly thereafter in its brief, the City urged the conciliator to pick and chose between the two proposals.

However, conciliation is not a process of selection between one party's single offer, and two, three or even four alternative offers from the opposing party. Second, even taken separately, the conciliator is not convinced the City's proposals in the "alternative" are warranted. The

actual overtime costs appear to have been drastically reduced by the hiring of three additional fire fighters. A change in the part-time to full-time ratio is a serious matter and runs contrary to the City's stated aversion to employing part-time fire fighters.[3] Third, the purpose of the new contract language is to "codify" within the structure of the collective bargaining agreement both a correction of recall practices which were costly to the City, and at the same time recognize a staffing level that will serve to reduce the incidence of overtime. The conciliator is convinced that the best interests of the City and employees is to select the Union's offer, and to continue the recall practice for mutual aid and "general" recalls.

The conciliator is also convinced that the overtime cost limit should apply to the second (or more) man called out on overtime over a twelve-month calendar year period. It is recognized that this selected language, just as virtually all other provisions in the collective bargaining agreement, is not carved in stone. Significant changes have been implemented by some of the contract language agreed upon by the parties, and the actual assessment of accurate cost figures will require time and application of the selected contract language. However, the conciliator discerned a level of sophistication and willingness to address the hard issues of cost control, safety and efficiency such that should this selection of contract language prove less than

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3. There was a question raised by the Union as to whether the City's proposed language on changing the ratio is properly before the conciliator. It is unnecessary to address this issue based upon the conciliator's selection of the Union's proposal as the last best offer.

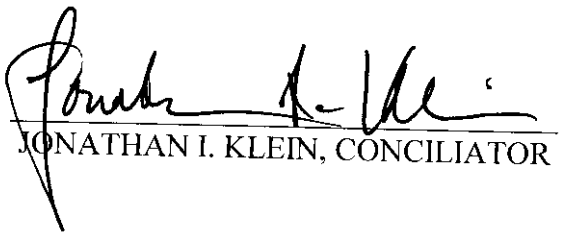
manageable and/or efficient, it will resurface at the next set of contract negotiations, if not before.

Article 38, Section 38.3 shall read, as follows:

> Two men shall be allowed to be on scheduled time off at one time. In exchange for a five-man (5) minimum, the City will no longer be obligated to recall personnel during out-of-the-City hospital transports. The City will continue the recall practice for mutual aid and "general" recalls. However, if overtime costs generated by adhering to a five-man (5) minimum for the second (or more) man on overtime exceeds $15,000 over any twelve (12) month calendar period (i.e. January 1 through December 31) the Fire Chief shall have the sole discretion to determine if the additional overtime for the second (or more) man will be necessary.

FINAL AWARD

Each of the last best offers selected by the arbitrator shall be incorporated into the parties' new collective bargaining agreement, together with all tentative agreements not inconsistent with the terms of this Final Offer Settlement Award.



JONATHAN I. KLEIN, CONCILIATOR

Dated: December 11, 2004

CERTIFICATE OF SERVICE

Originals of this Final Offer Settlement Award were served upon James P. Astorino, Northern Ohio Fire Fighters, 17703 Grovewood Avenue, Cleveland, Ohio 44119-3100, and upon Marc J. Bloch, Duvin Cahn & Hutton, Erieview Tower, 20th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114, and upon Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, each by U.S. mail, sufficient postage prepaid, this 11th day of December, 2004.

JONATHAN I. KLEIN, CONCILIATOR