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EMPLOYMENT
RELATIONS BOARD

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STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

CONCILIATION AWARD

April 2, 2005

In the Matter of:

City of Lyndhurst)
)
 and)
)
Ohio Patrolmen's Benevolent Association)

Case No. 03-MED-10-1162
Sergeants & Lieutenants

APPEARANCES

For the City:

Jon Dileno, Attorney
Anthony Adinolfi, Chief of Police

For the Union:

Randy Weltman, OPBA Attorney
David Strasshofer, Lieutenant

Conciliator:

Nels E. Nelson

BACKGROUND

The instant case involves the City of Lyndhurst and its police sergeants and lieutenants, who are represented by the Ohio Patrolmen's Benevolent Association. The contract between the parties expired December 31, 2003. The city and the union began negotiations in January 2004 after the patrol officers and dispatchers, who are also represented by the OPBA, reached agreements. The sergeants and lieutenants agreed to accept the same terms as the patrol officers and dispatchers but insisted on an increase in the rank differential. When the parties were unable to resolve this issue, the State Employment Relations Board appointed Virginia Wallace-Curry as the Factfinder. She conducted a hearing on November 3, 2004, and issued her report on November 29, 2004. Wallace-Curry recommended that the rank differential be increased from 10% to 12%. Predictably, the union membership accepted it. City council, however, unanimously rejected the increase in the rank differential.

The Conciliator was appointed on December 28, 2004. The parties submitted their pre-hearing statements on February 18, 2005. The conciliation hearing was held on February 25, 2005.

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.

ISSUE

The sole issue before the Conciliator is the rank differential. Article VIII – Salaries and Other Compensation, Section 1 – Annual Base Salary, of the current contract establishes a salary of \$62,526 for sergeants and \$68,797 for lieutenants. These amounts create a 10% difference between the top rate for patrol officers and sergeants and between sergeants and lieutenants. The union seeks to increase the differential to 12%. The city wishes to retain the 10% differential.

Union Position – The union argues that the Conciliator should select its offer. It reports that in the last couple of rounds of negotiations the emphasis has been on getting basic salaries in the department up to where it felt they should be in the county. The union indicates that since that goal has been achieved, it has turned its attention to improving the rank differential.

The union maintains that the rank differential has been an issue from the start of the current negotiations. It points out that after the patrol officers reached an agreement,

it continued negotiations with the mayor. The union notes that an increase in the rank differential and its implementation was among the issues they discussed.

The union stresses that Wallace-Curry recommended its position. It contends that where a Factfinder did not commit a simple or clear error, a Conciliator should not change the Factfinder's recommendation unless new evidence is presented. The union claims that the only new evidence is that Josh Mandel, a member of city council, suggested that, given the city's financial status, it should rebate \$400 to each of the 6300 households.

The union presented three Conciliators' decisions in support of its argument that a Conciliator should adopt the Factfinder's recommendation. It cites Conciliator Dennis Minni in City of Ashland and Ohio Patrolmen's Benevolent Association, SERB Case Nos. 91-MED-10-1183 and 91-MED-10-1184, October 27, 1992, where he states:

It is clear to both sides that proceeding to Conciliation has left the finalization of the unresolved terms to the undersigned in accordance with the precedential law that has been developed and followed in Ohio in recent years. That was formulated during the early period of proceedings under this law by Professor John Drotning, who, in a Conciliation award, first espoused the need to show clear error on the part of a Factfinder before overturning in a conciliation award terms contained in a duly arrived at Report and Recommendation.
(Page 4)

The union offers the decision of Conciliator I. Bernard Trombetta in City of Lyndhurst and Ohio Patrolmen's Benevolent Association, SERB Case Nos. 98-MED-02-0136, November, 1998, who stated:

Both representatives recognized the need for the conciliator to find error on the part of the fact finder before overturning the award (the City, argued that the conciliator need only find error and the Union that the conciliator must find grievous or prejudicial error before overturning the recommendation). Though the requirement of clear error is not statutory it appears to be the norm used by conciliators since first advanced by Professor Drotning. This Conciliator does not believe that he must first determine that the fact finder

committed clear, grievous or prejudicial error before overturning such an award. Nevertheless, it is clear that the prevailing practice is that error in some form must be found before overturning a fact finders' award. (No page number)

It provides the decision of Conciliator Dan F. Castle in Cuyahoga County Sheriff's Department and Ohio Patrolmen's Benevolent Association (Corrections Officers), SERB Case No. 97-MED-05-0605, July 6, 1998, which states:

It is this conciliator's view that deference should be given and that a fact-finder's recommendation should not be overturned lightly. The primary purpose of fact-finding is for the neutral to reach a fair and proper resolution of the matter(s) in dispute, which will hopefully be acceptable to both sides based on the evidence presented. Giving deference would encourage such acceptance. This position does not undermine the purpose of conciliation which still serves an important safety check, when necessary, for correcting error or abuse of discretion at the previous stage. In fact, to not give deference to the fact-finder's decision would reduce fact-finding to little more than a "dress rehearsal" with neither side having much to lose in relitigating an issue whenever it believes it can present a stronger argument a second time around. (Page 6)

The union rejects the city's argument that if the Conciliator awards an increase in the rank differential, he will break parity with the other units. It contends that the rank differential is a separate issue and is not part of parity. The union maintains that the process of determining sergeants' and lieutenants' salaries starts with the patrol officer's salary and then adds the differential rather than comparing their salary increases to the patrol officers. It further claims that the union is not asking for more on the common issues and stresses that the differential applies only to the sergeants and lieutenants for their supervisory skills. The union adds that if the city is correct that an increase in the rank differential breaks parity, it would never be able to increase the rank differential.

The union argues that a comparison of its rank differential to the rank differentials in other jurisdictions supports its position. It points out that the average rank

differential for 2003 for the five contiguous cities was 11.3%; the average rank differential for 16 eastside suburbs was 12.1%; and the rank differential for 32 Cuyahoga County cities was 12.8%.¹ The union notes that Wallace-Curry found that these comparables overwhelmingly supported an increase in the rank differential in Lyndhurst to 12%.

The union maintains that the job duties of the sergeant and lieutenants have increased while the rank differential has not increased in 16 years. It states that sergeants conduct training, including for the use of the baton and pepper spray; sergeants and lieutenants are responsible for supervising dispatchers and the firing range; and lieutenants supervise the auxiliaries and the city's five-day jail. The union claims that the added duties justify the increase in the rank differential.

The union concludes that its final offer ought to be selected.

City Position – The city argues that its final offer ought to be selected. It states that the mayor was able to negotiate successor agreements with all of the city's bargaining units except for the police sergeants and lieutenants. The city stresses that the agreements with the patrol officers and dispatchers increase wages by 3% in each year of the three-year contracts; improve the vacation schedule; and add two holidays while making only minor changes in health insurance. It claims that it took the "high ground" when it offered the union the same enhancements at factfinding rather than putting them at risk in response to the union's demand for an increase in the rank differential..

¹ All of the averages include Euclid where the rank differential was 10% in 2003. However, it is scheduled to increase by .5% each year through 2006 when it reaches 11.5%.

The city contends that comparisons to salaries in other cities reveal that the sergeants and lieutenants are well paid. It points out that in 2004 the salary for sergeants ranked 5th among 20 cities in Cuyahoga County with a salary of \$64,402 compared to the \$62,125 average for the 20 cities. The city notes that the salary for lieutenants ranked 8th out of 15 cities with a salary of \$70,861 compared to the average salary of \$69,467.

The city maintains that the sergeants and lieutenants compare even more favorably with respect to total compensation.² It indicates that the total compensation for sergeants ranks 4th among 20 cities in Cuyahoga County with compensation of \$66,750. The city observes that the compensation for lieutenants ranks 7th out of 14 cities at a salary of \$73,403.

The city argues internal parity supports its position. It reports that other bargaining units accepted what it offered the sergeants and lieutenants, including two units represented by the OPBA. The city adds that the sergeants and lieutenants have a history of settling on the same terms as the patrol officers.

The city states that “internal parity is a factor normally given great weight by neutrals.” (City’s Pre-hearing Statement, page 4) It feels that internal parity is important for “sane” labor relations and that internal parity should not be broken unless there is compelling evidence to do so. It asserts that in the instant case there is no basis to disregard parity. The city complains that Wallace-Curry erred by attaching no weight to parity.

The city characterizes the union’s argument that an increase in the rank differential does not break parity as “disingenuous.” It observes that the union’s final

² The city’s calculation of total compensation includes shift differential; special, firearms, and physical proficiency allowances; and longevity pay for ten years of service.

offer results in the sergeants and lieutenants receiving an average wage increase of 3.6% while the rest of its employees got 3% increases. The city worries that no union will want to be the first one to settle.

The city rejects the union's contention that the duties of sergeants and lieutenants have increased and justify an increase in the rank differential. It states that the duties listed by the union are normally performed by sergeants and lieutenants. The city maintains that the duties referred to by the union have customarily been done by members of the bargaining unit and are not new duties. It adds that any suggestion that the sergeants and lieutenants are burdened by additional duties is belied by the ample supply of applicants for promotion.

The city argues that the Conciliator should overrule Wallace-Curry. It claims that he does not need a compelling error to do so. The city stresses that Wallace-Curry made an error by relying on an isolated comparison of rank differentials rather than considering total compensation.

The city concludes that its final offer is more reasonable and ought to be selected.

Analysis – The issue before the Conciliator is very simple. The current contract has a rank differential of 10% between the rate for the top patrol officer and sergeants and 10% between sergeants and lieutenants. The union proposes increasing the differential to 12%. The city proposes keeping the current differential.

A comparison of the city's rank differential to those in other cities strongly supports the union's position. The average rank differential in 2003 in 16 eastside suburbs was 12.1% and the differential was 12.8% for 32 Cuyahoga County cities. Given that South Euclid's rank differential was increased in 2004, only two of the 32 cities in

the union's list of Cuyahoga County cities had a rank differential as low as Lyndhurst's 10%. Neither of these cities is on the eastside of the county.

The Conciliator must reject the city's argument that he should not consider the rank differential in isolation but should focus on sergeants' and lieutenants' salary or total compensation. While salary and total compensation are obviously an important consideration, an appropriate relation between the salaries and total compensation of patrol officers and sergeants and lieutenants is also important. Internal equity requires that there be a proper salary differential between the patrol officers and sergeants and lieutenants reflecting their additional duties and responsibilities.

The fact that the city's sergeants' and lieutenants' salary and total compensation compare favorably with other cities in the county does not undermine the union's request for an increase in the rank differential. Logic suggests that if the salary and total compensation of sergeants ranks 5th and 4th in the county and lieutenants rank 8th and 7th, despite their substandard rank differential, the patrol officers must compare even more favorably with other cities in the country. Internal equity suggests that the sergeants and lieutenants should enjoy the same rank in the county as the patrol officers.

While the Conciliator understands the city's concern about appearing to break the pattern of settlements by increasing the rank differential, the facts require the adjustment be made. As indicated above, nearly all sergeants and lieutenants in Cuyahoga County enjoy a rank differential of 12%. The only way for the city to remedy this situation is to give them a larger increase than other employees. It should be noted, however, that although the sergeants' and lieutenants' salaries will increase by 3.6% in 2004 rather than

by the 3% received by other employees, they will get the same 3% salary increases as other employees in 2005 and 2006.

While the Conciliator's conclusion that the rank differential ought to be increased to 12% is identical to the Factfinder's recommendation, he disagrees with the union's argument that the Conciliator should follow the Factfinder's recommendation unless he finds an error. There is nothing in the statute to suggest that conciliation was intended to be nothing more than a review of the Factfinder's recommendations. Furthermore, the criteria and procedures for conciliation contained in Chapter 4117 of the Ohio Revised Code imply that the parties are entitled to have the Conciliator take an independent look at the issues they have submitted.

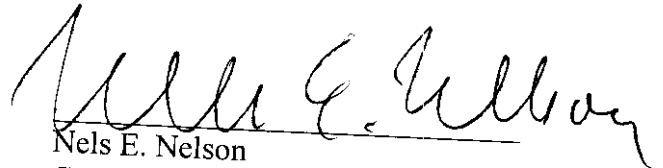
The Conciliator believes that the effect of a Factfinder's recommendations on a Conciliator's award is a matter of the proper weight to attach to them. The proper weight depends on many factors, including the experience and expertise of the Factfinder, the persuasiveness of the report, and the quality of the parties' representation at the factfinding hearing.

In the instant case, the Factfinder's report is entitled to significant weight. Wallace-Curry is an experienced Factfinder and, in fact, was the Factfinder in the 2001 dispute between the city and the patrolmen and the advocates are seasoned negotiators. Most important, Wallace-Curry's recommendation is accompanied by a careful and well-reasoned rationale.

Based on the above analysis, the Conciliator concludes that the union's final offer is more reasonable and must be awarded.

Award – The Conciliator selects the union's final offer for Article VIII – Salaries and Other Compensation, Section 1 – Annual Base Pay. It states:

For employees appointed to such classification, there shall exist a differential between the rank of the top paid Patrol Officer and Sergeant and between the rank of Lieutenant and Sergeant of twelve (12%) percent.


Nels E. Nelson
Conciliator

April 2, 2005
Russell Township
Geauga County, Ohio