

STATE EMPLOYMENT
RELATIONS BOARD

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STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

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IN THE MATTER OF: *

OHIO PATROLMEN'S BENEVOLENT *
ASSOCIATION *

AND *

CASE NO. 03-MED-10-1172

CITY OF WARREN *

* * * * *

REPORT AND AWARD OF THE CONCILIATOR

DATED AT SOLON, OHIO

MARCH 10, 2005

I. BERNARD TROMBETTA
CONCILIATOR
P.O. BOX 391403
SOLON, OHIO 44139
[440] 349-2110

CONCILIATOR'S REPORT AND AWARD

I. PLACE AND DATE OF HEARING

This hearing was held on the 3rd day of March 2005 in Warren, Ohio

II. HEARING BACKGROUND

This contract dispute is between the Ohio Patrolmen's Benevolent Association, hereinafter referred to herein as the "Union" or "OPBA", and the City of Warren, hereinafter referred to as the "City".

The Union is the sole bargaining agent for the 12 communications coordinators of this unit.

The City is located in Trumbull County. It is a mix of residential, commercial and industrial structures. The Communications Coordinators have been unionized for an extended period of time. The current contract expired on December 31, 2003. The parties bargained in good faith and were able to resolve all outstanding issues, save 4 that were then submitted to fact-finding. As evidence of the good faith of the parties, they managed to resolve two of the 4 outstanding issues. Two issues were submitted to Fact-Finder Edward Pereles on November 3, 2004, who issued his report on November 17, 2004.

The fact Finder's report was accepted by the Union and rejected by the City.

The unresolved issues are as follows:

1. Pay Rates; Article 24; and
2. Term of Agreement; Article 40

III. APPEARANCES

On Behalf Of The Union:

Mark Volcheck, OPBA Staff Attorney
Linda Braich, OPBA Representative
Sandra Frazeskos, OPBA Representative

On Behalf Of The City:

Gary C. Cicero, Director of Human Resources
Brian Massucci, Personnel Supervisor

IV. WITNESSES

ON BEHALF OF THE CITY

David N. Griffing, City Auditor

Thomas Gaffney, Tax Administrator

V. CRITERIA

The criteria used by the Conciliator in making his report and award in this matter are found in R.C. 4117.14[G][7][a] through [f] and OAC 4117.14(G)(7)(a) through (f) and include the following: past collectively bargained agreements between the parties, comparison of issues between the affected employees with those issues

related to other public and private employees doing comparable work, the interest and welfare of the public, the ability of the County to finance and administer the issues proposed and the effect of the adjustments on the normal standard of public service.

While the Fact Finder can make recommendations different from those advanced by either side, the Conciliator must choose between the final offers of the parties and has no other discretion to craft his own terms or conditions.

The criteria used in conciliation are included in the criteria used in fact finding. [R.C. 4117.14[C][4][e]]. Most conciliators, however, employ a standard requiring a finding of clear error on the part of the Fact Finder before a recommendation will be overturned. This standard, though not statutory, appears to have been followed by most conciliators since first advanced by Professor Drotning during the early stages of the Ohio collective bargaining laws. Conciliation is not a de novo proceeding unless error is established

The standard employed in this conciliation, possibly not as exacting as the "Clear Error Standard", is more than a simple difference of opinion with the Fact Finder.

Conciliators usually will not substitute their view for that of the Fact Finder.

VI. EXHIBITS

Joint Exhibits

No. 1: Section 4117.14 Ohio Revised Code

Union Exhibits

No. A Collective Bargaining Agreement
No. B FOP Conciliation
No. C OPBA/ Warren Fact Finding Report
No. D Fact Finder Pereles Report herein
No. E OPBA/ Warren Conciliation Award
No. F Sample Conciliator Awards

City Exhibits

No. 1 Wage Comparables
No. 2 Pension Comparables

V. ISSUES SUBMITTED TO CONCILIATION

ISSUE NO. 1 PAY RATES (Art. 24)

CITY FINAL POSITION: The City offered wage increase of 3.5%, 3.5% and 2%.

UNION FINAL POSITION: The Union demanded a lump sum payment equal to 3.5% of 2003 wages and increases of 7% effective January 1, 2005 and 3.5% effective January 1, 2006.

DISCUSSION: This issue can really be broken into two sub-issues. The first being the effective date of the payment of the wage increases. The second issue is the amount of the wage increases.

Though the duration of the agreement was raised as an issue in the position statement of the Union, it appears that matter was raised to test the effective date of the wage increases.

Sec. 4117.14(G)(11) prevents the Conciliator from awarding an increase in compensation effective prior to January 1, 2005, the start of the new fiscal year. The parties, however, have the power to alter or modify this prohibition by their mutual agreement. There was no indication that the parties were prepared to do so.

The Union's final position statement demanded a lump sum payment in the same percentage (3.5%) that had been recommended by the Fact Finder as a wage increase for 2004. On the other hand, the City final offer contained increases effective January 1, 2004, 2005 and 2006, followed by a footnote that stated "The City shall apply any conciliator's final offer settlement award as required by ORC Section

4117.14(G)(11) wherein increases in rates of compensation and other matters with cost implications . . . will be effective only . . . commencing in 1-1-2005 . . ." (See City's position statement). Thus, the City's final position offer did not contain a wage increase for 2004. The City's offer appears to have incorporated a wage increase that was never received. (See Article 24- Pay Rates in position statement compared to Article 24- Pay Rates contained in the expired collective bargaining agreement)

The City's witnesses, the City Auditor and the Tax Administrator, outlined the City's declining finances, but agreed that "ability to pay" was not at issue. The final offer of the Union when compared against the final offer of the City did not result in such a prohibitive increase so as to impair the City's ability to pay.

The City also argued against the payment of a lump sum on the dual grounds that such a request was a veiled wage increase barred by law and that it was not a bargained issue.

In support of its position, the City relied upon the Fairborn decision. (Both sides submitted post-hearing briefs that were not discussed at the hearing, nor requested by the Conciliator). The Court determined that R.C. 4117.14 was silent as to the structure of the final settlement offer. "Clearly substance is superior to form in the statute."

(Fairborn Professional Fire Fighters Assoc. v. City of Fairborn, 90 Ohio St.3d 170, 736 N.E.2d 5 (2000).

In that case, as in the instant case, the City argued that the Union subverted the bargaining process by submitting a wholly new item (i.e. lump sum payment) for the first time as disputed issues in the final-offer statement. The Court concluded that introduction of a new issue as part of a final-offer settlement contravenes the spirit of the Collective Bargaining Act. In drawing a distinction, the Court found that the Union, one week prior to filing its final-offer settlement, sent the City a proposal that was practically identical to the Union's final-offer settlement proposal which was sufficient to take the matter outside of the purview of the statute.

This Conciliator finds that the Union's proposal for a lump sum payment equal to 3.5% of the gross 2004 wages is simply based upon the now lost wage increase for 2004 and that the 7% wage increase was simply the 3.5% increase for 2004 (which the members did not receive) and the 3.5% for 2005 that is not barred. The final offer demand of a 3.5% lump sum payment is substantially similar to the recommendation of the Fact Finder of a 3.5% wage increase in 2004 that cannot be paid because of the statute. The fact that the percentages were the same and that the City's final

offer acknowledged a 3.5% wage increase that could not be paid, took the matter of a lump sum payment from without the "arbitration by ambush" and "surprise attack" tactic referred to by the Court in Fairborn.

Neither the statutory language nor the Court's decision prevents the Conciliator from awarding a lump sum based upon a percentage of the wage scale. Had the City not rejected the fact finder's recommendation, this would have been a non-issue.

The second part of this issue, the percentage of wage increases, differs only in the third year with the Union demanding 3.5% and the City offering 2%. The Fact Finder carefully analyzed wage structures prevailing in the area for communications coordinators and concluded that 3.5% was both reasonable and within the ability of the City to pay. The City's offer of 2% is substantially less than the offer and/or settlement with both the City's Blue and Gold Units, both a part of the safety forces. Admittedly, this unit has enjoyed a pension pick-up when other members of the safety forces did not or experienced a lesser pick-up. The Fact Finder, however, carefully considered those matters in his recommendation and there was no new evidence submitted that would cause the Conciliator to alter the recommendation.

AWARD: The Conciliator adopts the Union final-offer position and orders a lump sum payment equal to 3.5% of 2004

gross wages to be paid within 30 days of this order, and, commencing January 1, 2005, a wage increase of 3.5% of the wage rate in effect on January 1, 2004, and another 3.5% wage increase commencing January 1, 2006.

Additionally, the balance of the Union's final offer position regarding Article 24 is hereby granted since the City did not oppose the language contained therein nor submit a counter final position offer.

ISSUE NO. 2

TERMINATION OF AGREEMENT- ARTICLE 40

DISCUSSION: The Union raised the length of the contract in its final-offer position. The City did not address the issue.

During the hearing, it was obvious that the parties agreed upon a 3-year contract commencing January 1, 2004.

The apparent reason for raising the termination date as an issue concerned the effective dates of the requested wage increases.

The Conciliator, although having disposed of the issues regarding the lump sum payment and wage increase, grants the Union's proposal on Article 40 as contained in its final-offer position. The language in the final offer and the now

expired collective bargaining agreement is the same with the exception of the termination date.

AWARD: The Conciliator adopts the final-offer position of the Union as contained in its statement and orders that the new collective bargaining agreement be for a period of 3-years, beginning January 1, 2004.

Respectfully Submitted,

I. Bernard Trombetta,
Conciliator

VII. CERTIFICATE OF SERVICE

A copy of the foregoing report and award was served upon Gary C. Cicero, Human Resources Director, City of Warren, 391 Mahoning Ave., N.W., Warren, OH 44483-4634 and Mark J. Volcheck, OPBA Staff Attorney, P.O. Box 338003, North Royalton, OH 44133 and Dale Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, by ordinary U.S. Mail this 10th day of March 2005.