

STATE OF OHIO

STATE EMPLOYMENT
RELATIONS BOARD

BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

2009 SEP 13 A 11:06

In the Matter of Conciliation Between:

City of Trotwood
Employer

and

S.E.R.B. Case No. 04-MED-06-0658

Ohio Patrolmen's Benevolent
Association
Employee Organization

Appearances:

For the Employer:

Robert E. Portune, Esq.
Gottschlich & Portune, LLP
Dayton, Ohio

For the Employee
Organization:

Joseph M. Hegedus, Esq.
Ohio Patrolmen's Benevolent Association
Dublin, Ohio

OPINION AND AWARD OF THE CONCILIATOR

Frank A. Keenan
Conciliator

I. Some Background:

The Conciliation hearing in this matter was heard in Trotwood, Ohio, on January 7, 2005. At the hearing the City elected to present its case in the format of calling witnesses to testify as to relevant facts and to identify and authenticate documents to be received into the record as City Exhibits, coupled with argument by Company Counsel, a format long accepted as appropriate for the presentation of a party's case in a Conciliation hearing under the Act, i.e., Ohio Revised Code (O.R.C.) Chapter 4117. In this regard the City called the following as witnesses to give testimony: Acting City Manager Mike J. Lucking; City Finance Director John Stoops; and Police Chief Mike Etter. These same witnesses also identified and authenticated numerous documents, which were received into the record as City Exhibits. Additionally, Counsel for the City ably argued that the City's "final offer" with respect to the wage increase for the bargaining unit for the two year period of August 1, 2004 through July 31, 2006, is fully supported by applying certain of the applicable statutory factors, directed by the Act to be applied by the undersigned, as Conciliator, namely the factors set forth in O.R.C. Section 4117.14 (G) (7), (all of which statutory factors are reproduced below).

The Union on the other hand elected to present its case in the format of having Union Counsel "represent" the relevant

facts and having Union Counsel identify and authenticate documentary evidence to be received into the record as Union Exhibits, coupled with argument by Union Counsel, a format also long accepted as appropriate for the presentation of a party's case in a Conciliation hearing under O.R.C. 4117.

In this regard Union Counsel represented several relevant facts and also identified and authenticated numerous Union documents, which were received into the record as Union Exhibits. Additionally, Counsel for the Union ably argued that the Union's "final offer" with respect to the wage increase for the bargaining unit for the two year period of August 1, 2004 through July 31, 2006, is fully supported by applying certain of the applicable statutory factors set forth in O.R.C. 4117.14 (G) (7), to the record evidence.

Pursuant to the parties' response, the sole issue before the undersigned as Conciliator concerns the amount of a wage increase for the bargaining unit for the two (2) year period August 1, 2004 through July 31, 2006.

The City's "final offer" is an increase of 2% across-the-board retroactive to August 1, 2004, and a 2% across-the-board effective August 1, 2005.

The Union's "final offer" is an increase of 3-1/2% across-the-board retroactive to August 1, 2004, and a 3-1/2% increase across-the-board, effective August 1, 2005.

II. The Evidence and the Parties' Positions and Contention:

A. In General. Ohio Revised Code Section 4117.14 (D) provides that "if the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel . . . then the: (1) Public employees, who are members of a police department . . . shall submit the matter to a final offer settlement procedure pursuant to a board [i.e., S.E.R.B. Board] order issued . . . to the parties to settle by a conciliator selected by the parties. . . ." O.R.C. 4117.14 (G) provides the guidelines to be applied to the final offer settlement proceedings. O.R.C. 4117.14 (G) (6) provides that "the conciliator shall hear testimony from the parties . . . The board shall submit for inclusion in the record and for consideration by the conciliator the written report and recommendations of the fact-finders. O.R.C. 4117.14 (G) (7) provides:

(7) After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the party's final settlement offers, taking into consideration the following:

(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 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;

(c) 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;

(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 the 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."

In reaching the determination reflected in the Award, the Conciliator has taken into account and weighed all of the factors referenced in O.R.C. 4117.14 (G) (7), where present, and, pursuant to O.R.C. 4117.14 (G) (6) has given consideration to the Fact Finder's Report and Recommendations. In this regard it is noted that the Fact Finder recommended the two 3-1/2 percents that the Union has adopted as its "final offer."

The record reflects that at the time of the hearing herein the City had recently abolished one (1) Captain's and two (2) Sergeant's positions, leaving the City's Police Department with an authorized force level of fifty-one (51) officers, comprised as follows:

Chief of Police	- 1-
Captains	- 2-
Sergeants	- 6-
Patrol Officers & Detectives	<u>-42-</u>
Total	-51-

Of these 51 Officers, 5 Patrol Officers are currently out on long-term sickness or injury absence and one (1) is a rookie patrol officer still in training.

B. The City's Case-in-Chief:

As heretofore noted, the City's "final offer" is for a 2% across-the-board wage increase, retroactive to August 1, 2004, and for an additional 2% across-the-board wage increase effective August 1, 2005. In support of the appropriateness of the City's more modest wage increase offer, the City argues that an Award of the Union's 3-1/2% increases, rather than the City's 2% increases, would be contrary to the interests and welfare of the Public; would adversely impact the ability of the City to finance and administer such a wage increase; and would have a deleterious effect on normal levels of Police Services, an important criteria to be considered by the Conciliator, citing

OAC 4117-09-06 (H) (3). On this latter point the City argues that in light of the fact that, as referenced above, five (5) Patrol Officers are out on long-term sickness and/or injury leave, and one (1) Patrol Officer is still in training, the total active compliment of Patrol Officers and Detectives, and therefore the "effective" work force available for work, is reduced to 36. Moreover, points out the City, the other six (6) officers unavailable for work due to absence or training continue to receive full pay and benefits. Management witnesses testified in effect that the "effective" work force is stretched very thin and that any further reduction in available personnel through layoffs, attrition, or abolishment of positions will have a serious negative impact upon police coverage and ongoing law enforcement efforts.

The City points out that the Union's first 3-1/2% wage increase, including a 29% thereof "roll up" for mandatory OPF, FICA/Medicare, Unemployment, and Worker's Compensation would cost the City \$38,305.28 more than the City's first 2% wage increase. The City also points out that the Union's second 3-1/2% wage increase, using the same "roll up" concept reference above, coupled with an adjustment to reflect the Union's first year wage increase, would result in a cost of some \$79,183.22 more than the City's second 2% wage increase. Thus the total of the Union's "final offer" would exceed that of the City's "final

offer" by some \$117,488.51. The City points out that this additional cost of \$117,488.51 of the Union's "final offer" is roughly equivalent to the cost of two (2) Patrol Officers over the remaining life of the Contract. And as Acting City Manager Lucking testified, the additional costs that would result were the Union's "final offer" awarded will result in the likely abolishment, lay off, or loss-by-attrition, of two (2) Patrol Officer positions.

Acting City Manager Lucking testified concerning several cost cutting measures the City has recently undertaken. Thus he pointed out that among other cost-cutting measures, the City has no street resurfacing scheduled for 2005; and a City-wide hiring freeze for 2005 has been put in place.

Lucking also noted that the Fire Chief was not replaced and that Police Chief Etter now acts as "Safety Director" over both the Police Department and the Fire Department, with the cost of his Safety Director salary, \$89,000.00, split between the Fire Department and the Police Department. Chief Etter's salary as Police Chief only was \$73,000 per annum. Further in this regard, the record reflects that while the Fire Department is funded exclusively by dedicated fire tax levies and that the monies therefrom can be used for operating expenses, the Police Department is funded virtually exclusively from the General Fund. There are no dedicated police tax levies, however, and

the record reflects that City Council does not contemplate seeking any such levy. The General Fund, in turn, relies on property tax millage, which accounts for about 40% of the General Fund revenues, and income taxes, which account for about 60% of the General Fund revenues. The record further reflects that since 2000, expenditures from the General Fund have exceeded revenue in 4 of the last 5 years and that year-end General Fund balances (reserves) have continued to be significantly depleted. In this regard it was Acting City Manager Lucking's testimony that the General Fund's balance should be maintained at 30% to 40% of the City's annual General Fund operating expenses. Here, the General Fund Balance was \$3,391,213.00 effective 1/1/01, but has declined to \$1,253,325.75 effective 1/1/05, inasmuch as, as heretofore noted, expenditures from the General Fund have exceeded revenue in 4 of the last 5 years. The City notes that while the rate of depletion in 2001 and 2002 (average of \$1 million/year) was temporarily reversed in 2003, it "reverted back to form" in 2004 with the loss of approximately \$400,000.00 from the General Fund reserve. It appears therefore, contends the City, that the increase in income tax collections during 2003, due to the City taking over its income tax collections from the City of Dayton, to whom it had been contracted out, was a one-time anomaly. The City argues that if the General Fund reserve continues to be

depleted at the rate of \$400,000.00 per year, the fund will be totally depleted by the end of 2007.

City Exhibit No. 4 reflects, as the City contends, that over the past five years its collections of its 2.25% income tax has essentially been flat. Additionally, the record shows that the City presently has the highest effective property tax in the Miami Valley area at 80.28 mills. It's the City's position that when you couple Trotwood's 80.28 mills property tax rate with the 2.25% income tax rate, it is clear that the City's residents are extraordinarily supportive of public services and are already paying far more than other Miami Valley and Montgomery County residents. The City argues that its taxpayers are "tapped out" and are neither able nor willing to pay more in taxes to support their community.

The City further contends that internal comparables support an Award of the City's "final offer" of 2%, rather than the Union's "final offer" of 3-1/2%; that such will keep Trotwood's Patrol Officers and Detectives at a wage level consistent with other Trotwood employees. The City's 2% final offer would keep the bargaining unit in roughly the same position they are currently, asserts the City. The City submits that from a fairness standpoint, the bargaining unit is being asked to accept the same 2% increase during the remaining two years of their collective bargaining agreement that is being provided to

other Trotwood employees, both union (Fire, Public Works, Police Sergeants) and non-union City employees.

Concerning external comparables, the City contends that an Award of a wage increase of 2%, rather than 3-1/2%, will keep the bargaining unit at a wage level consistent with other public sector employees doing comparable work, giving consideration to factors peculiar to the area and classification involved. In support of this contention the City cites the SERB Benchmark Report of 12/15/04 for Police Officers in the Miami Valley. This Report lists nineteen (19) public employers, mostly municipalities; includes the Montgomery County Sheriff's Department; includes the Statewide average; and includes two townships. Number one (1) at the top step is Kettering at \$58,771.00 per annum; number nineteen (19) is Union at \$31,324.80. With a 2% across-the-board increase, Trotwood's top step would be at number eleven (11) at \$49,462.40. The Statewide average top step is \$48,707.74.

The City also reiterates its argument in Fact Finding to the effect that since the instant impasse involves a reopener of the issue of wages for the second and third years of the parties' current Contract, an evaluation of its wage proposal should properly include all three (3) years of the current Contract and not be limited solely to the second and third years. In this regard, as contended in Fact Finding, during the

first year of the Contract (August 1, 2003 - July 31, 2004) the employees received a lump sum payment of \$1,750.00, which the City has calculated to be a 3.5% increase for top step employees and a 4.6% increase for entry-level employees. The City states that adding the City's 2% and 2% during years 2 and 3, to the year one (1) lump sum, effectively provides for an increase in wages over the life of the Contract between 7.5% and 8.6%. The City asserts that while 30 officers are in Step 6, the remainder are in Steps 1 through 5 and therefore will continue to receive the benefit of Step increases, which is equivalent to an additional 6% increase in their compensation during each of the years of the Contract. In sum, the City argues that in light of the serious financial situation facing the City, awarding the City's "final offer" would yield an increase in compensation that effectively averages close to 2.5% for each year of the Contract. Such compensation "is more than fair" argues the City.

Other matters of note include the fact that the City's proposal in Fact Finding was for a 3% across-the-board wage increase for year two (2) of the Contract (year one of the reopener) and a 2% across-the-board wage increase for years three (3) of the Contract (year two of the wage reopener). Addressing the regression from 3% to 2% for the second year of the Contract (year one of the reopener), Acting City Manager

Lucking explained that the City experienced some unexpected costs after the Fact Finding hearing (October 13, 2004), and that, additionally, the passage of time since the Fact Finding proceeding has allowed the City to make a more accurate projection concerning revenues. In this regard Finance Director Stoops testified that in December 2004, income tax revenues were well below expectations. These factors warranted a reduction of the wage increase offered for year one of the reopener, asserts the City.

Finance Director Stoops also testified that at the present time, the City is experiencing a decrease in its commercial property tax base. The inference left is that improvement in said tax base in the long term is anticipated in light of the City's commercial development plans.

Director Stoops acknowledged on cross-examination that the General Fund reserve of approximately 1.24 million dollars can be used for any municipal function.

Chief Etter noted other cost saving steps the Police Department has undertaken. Thus the Chief testified that by outsourcing the Department's communications to the Montgomery County Sheriff's Department, the City has realized savings of \$400,000.00+. And as previously indicated hereinabove, the Department has abolished some positions. Conference attendance and training has also been cut.

Noting that the City's socio-economic profile creates a "very dangerous atmosphere," and that a work force at current levels is essential, the Chief (Safety Director) testified that in light of all the cuts already undertaken, the only way to maintain the current levels of the workforce is to go forward with the City's 2% "final offer."

Finally it is noted that the Chief testified, without contradiction, that every City Department has been making cuts.

C. The Union's Case-in-Chief:

As heretofore noted, the Union's "final offer" is for a 3.5% across-the-board wage increase, retroactive to August 1, 2004, and for an additional 3.5% across-the-board wage increase, effective August 1, 2005. In support of the appropriateness of its "final offer," the Union notes the work factor that, within Montgomery County, the City's square mileage, and hence the area to be protected by the bargaining unit, is second only to that of the City of Dayton. Similarly, notes the Union, within Montgomery County the City's rate of violent crime is second only to that of the City of Dayton. With respect to its contentions concerning the high crime rate environment the bargaining unit works in, the Union introduced statistical data compiled in "Sperling's Best Places" (Union Exhibit No. G) as back-up. This document sets forth statistics for the following communities geographically near to Trotwood, namely: Englewood;

Huber Heights; Centerville; Kettering; Miamisburg; West Carrollton; Xenia; Clayton; and Dayton. At a violent crime index of 739.2 for Trotwood, only Dayton, as noted above, with an index of 1,063.7, exceeds Trotwood. That these two municipalities have high violent crime rates is made manifest by the fact that, as Sperling reports, the national average is an index of but 446.1. Additionally, among the communities noted above, the next highest violent crime rate is in Miamisburg with an index of 244.8. The Union also notes that the bargaining unit has had no increase in its base wage since 2002.

The Union additionally points out that in the parties' 2003 Contract negotiations the Union stepped up to the plate with respect to the City's financial concerns and granted the City several financial concessions to assist the City with its financial concerns. Thus, as the Union notes, instead of a wage increase for each year of the Contract being negotiated in accord with the pattern of past collectively bargained Contracts, the Union accepted a lump sum increase of \$1750.00 per bargaining unit employee, for the first year and a wage reopener with respect to years two and three of the parties' Contract, namely, with respect to wages effective August 1, 2004, and wages effective August 1, 2005. The Union also notes that in the 2003 negotiations, the Union agreed to several other cost saving concessions, such as: vacation accrual concessions;

sick leave accrual concessions; longevity pay concessions; and new (and presumably lower) training rates of pay. Additionally, the Union agreed to a lower tier of wage rates for new hires. Furthermore, as the Fact Finder succinctly put it, the Union "agreed to allow the City to alter health care plan components, which ultimately cost bargaining unit employees participating in the health care plan more out-of-pocket expenses and co-pay expenses." Additionally, as again the Fact Finder succinctly put it, the Union agreed, "that the bargaining unit employees, for the first time, would pick up a portion (i.e., 90%/10%) of their health care premiums." (Emphasis supplied.) In this regard the Union represented in the conciliation hearing, without contradiction, that "virtually the same evidence" presented in the conciliation hearing was presented to the Fact Finder. The Union, adopting the Fact Finder's Recommendation as its "final offer" perforce subscribes to the Fact Finder's rationale for his "recommendations," which included the observation that the Union's concessions noted above "assisted the City in dealing with its financial predicament" and "such efforts by the OPBA cannot go unnoticed."

In further support of its "final offer" the Union submitted the "City of Trotwood, Ohio Comprehensive Annual Financial Report For The Fiscal Year Ended December 31, 2003," prepared principally by the City's Finance Department, and signed by the

City Manager Frank Myers and Finance Director Stoops, Union Exhibit No. A. The Union relies principally on the last paragraph beginning on page ix, reading as follows:

"In 2003, the City made major strides to strengthen its financial position. One of the ways this was accomplished was by bringing income tax collections in-house resulting in an increase in collections of \$700,000.00 over 2002 figures. The City also developed a five-year financial model to improve its long-range financial planning capacity. Steps were also taken to better control future labor costs by negotiating with the Police Patrol Union a two-tiered benefit plan for new hires and health care cost containment features. These cost control measures have been passed on to non-union personnel and also subject of 2004 negotiating with the Fire and Public Works unions. The City also took advantage of low interest rates by consolidating a significant portion of its debt into one bond issue."

Thus it appears that the Union is contending in effect that the City itself recognizes that the Union's concessions in the parties' last negotiations clearly contributed greatly to the City's "major strides to strengthen its financial position." In this regard it is noted that, as hoped for at the time, the record reflects that the concessionary results of the parties' negotiations were parlayed in subsequent negotiations with the Fire and Public Works bargaining units, where these same or similar concessions were obtained from the Labor Organizations representing these two bargaining units.

The Union asserts that by virtue of the fact that the City's "final offer" consists of two 2% across-the-board

increases, the City implicitly acknowledges its financial ability to pay the cost of same. The Union notes that Fact Finder Slonaker made this same point in his Fact-Finding Report in Ohio Patrolmen's Benevolent Association and The City of Clayton, SERB Case No. 04-MED-05-0596, dated October 19, 2004. In that case Fact Finder Slonaker stated that "[t]he issue of whether the City has the ability to pay the cost of the Fact Finder's recommendation actually is whether the City can pay an additional total cost for the two years of \$16,065 (\$86,315 - \$70,250). The City has already determined that it can afford to pay its proposal with a total cost of \$70,250." Thus the question here really becomes whether the City possesses the ability to pay what the City calculates to be the additional costs of \$117,488.51 of the Union's "final offer." Given the 2004 year and General Fund balance (reserve) of \$1,253,325.75, the Union argues that, self-evidently, the City can afford to pay the additional costs of the Union's "final offer."

Responding to the City's contention to the effect that in light of the fact that the additional cost of the Union's "final offer" is the equivalent of the cost of two bargaining unit employees over the remaining life of the Contract, it could well be that two bargaining unit employees will have to be laid off in order to fund said "final offer" were it to be awarded. The Union in essence asserts that the remaining bargaining unit, who

would have to assume extra work burdens were such layoffs implemented, have nonetheless in effect declared so be it, inasmuch as the bargaining unit is no longer willing to continue to work in the second most dangerous area of Montgomery County at what it believes to be below market rates of pay.

Countering the City's contention that sound fiscal policy for the City requires a 30% General Fund reserve, the Union introduced Union Exhibit No. "B" into evidence, a "Research Bulletin - Research & Analysis on Current Issues," September 1990, presented by Ian J. Allan before the Government Finance Officers Association. In this analysis Mr. Allan noted inter alia in pertinent part for the Union's purposes, as follows:

"Is there a level of unreserved fund balance that is considered to be excessive? An informal standard that is utilized by some governments holds that an unreserved fund balance in excess of 10 percent of annual operating expenditures should be examined carefully . . .

* * *

As a general rule, local governments should maintain an amount equal to 5 percent of annual operating expenditures. This should satisfy some of the credit rating agencies' concerns regarding the adequacy of resources available for contingencies. Those governments facing greater uncertainty should maintain a higher level of unreserved fund balance. Those governments that maintain an unreserved fund balance above 10 percent of annual operating expenditures should be able to provide appropriate justification for maintaining that level. This in turn will satisfy the concerns of those analysts who consider an unreserved fund balance in excess of 10 percent to be unwarranted."

In further support of its "final offer" the Union points to the Contract the parties negotiated for the Sergeants and Detectives bargaining unit, noting that it contained: an increase in the amount of money employees are to receive for their uniform allowance; an added step in their pay scale; and an across-the-board wage increase of 3% effective 8-1-04 and a 2% increase on 8-1-05, and again on 8-1-06. It appears that the Union is contending that these improvements in the Sergeants' and Detectives' Contract are inconsistent with the City's arguments here.

The Union, relying on its Exhibits "H", "I", "J", "K", and "L", which compare the "pay" of external comparables to that of its bargaining unit, correctly contends that: an Award of two 3.5% increases, the Union's "Final offer" will not bring Trotwood to the highest pay in Montgomery County; that the norm in the County is a 3.5% increase; that the United States Government has recently given federal employees a 3.5% increase; and that the Columbus Dispatch reported on June 24, 2004, that a Conference Board study indicated that "U.S. businesses are, on average, increasing their salary budgets by 3.5 percent for 2004"

D. The City's Rebuttal:

In response to the Union's urging that the undersigned, as Conciliator, follow in the footsteps of the Fact Finder, the

City notes that the conciliation forum is not simply an appellant forum, as it were, concerning the Fact Finding Recommendation. At best the Fact Finding Report and Recommendations are only a factor to be considered by the Conciliator. The Conciliator's task, urges the City, is to be guided by the statutory guidelines set forth in O.R.C. 4117.14 (G) (7).

The City also challenges the appropriateness of only a 5% General Fund balance urging that in the City's present financial situation, "a lot more" of a reserve is necessary.

The City, emphasizing the "internal comparables" factor, notes that every other City Department has tightened their budgets in various ways, including accepting a wage increase of but 2%. The City reiterates that in the event the Union's 3-1/2% increase were awarded, lay offs would likely be necessary, and such layoffs would adversely affect the City's ability to supply public security services.

E. The Union's Rebuttal:

The Union argues that the City's "internal comparables" argument is clearly flawed; that in 2003 the bargaining unit took a base wage rate freeze, whereas the Sergeant's unit received an across-the-board wage increase.

The Union also emphasizes the many concessions the Union has made with respect to economic items of benefit to the

bargaining unit, and urges the Conciliator to pay particular attention to the concessions made with respect to the health insurance benefit, especially the direct "economic" concessions vis-à-vis the health insurance benefit.

F. The City's Surrebuttal:

The City contends that the Sergeant's bargaining unit pulled ahead of the Patrol Officers and Detective bargaining unit because of the need for differential rates, given the supervisory status of the Sergeants over the Patrol Officers.

III. Discussion & Opinion:

As the foregoing readily demonstrates, the parties' advocates have done an excellent job of assembling and presenting evidence to back up their respective contentions, and both have argued well as to how the evidence they have produced supports the conclusion that certain of the statutory factors set forth in O.R.C. 4117.14 (G) (7), which must be considered by the undersigned in the course of resolving the parties' dispute, favor the award of their party's "final offer."

With respect to these statutory factors I note that the City argues that an award of the Union's final offer would have an adverse impact:

"[O]n the City's finances and its ability to continue to provide needed levels of police services to the Trotwood community. Such an impact is an important criteria to be considered in formulating a

conciliation award. See OAC 4117-09-06 (H) (3)."
(Emphasis supplied).

In this regard the Ohio Administrative Code (OAC) at 4117-09-06 (H) (3) provides as follows:

"(H) The conciliator shall take the following into consideration in resolving the dispute between the parties:

. . .

(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;"

The City additionally argues that:

"[C]omparison of the effects of the 2% increase proposed by the City demonstrates that it would keep Trotwood's officers in roughly the same position they currently are when compared with other Trotwood employees and area Departments and statewide averages. Such a comparison is an important criteria to be considered in formulating a conciliation award. See OAC 4117-09-06 (H) (2). (Emphasis supplied).

In this regard the OAC at 4117-09-06 (H) (2) provides as follows:

"(H) The conciliator shall take the following into consideration in resolving the dispute 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 employers doing comparable work, giving consideration to factors peculiar to the area and classification involved;"

In light of the City's characterization of the above provisions of the O.A.C. as being "important" criteria, it is unclear whether or not the City is thereby contending that the criteria set forth in said provisions must be given more weight than other criteria; it is unclear whether or not the City is contending that since these provisions set forth "important" criteria, other criteria set forth in the O.A.C. and the Statute are not important or not as important as the criteria set forth in O.A.C. 4117-09-06 (H) (2) and (3). To the extent that the City is arguing that the undersigned, as Conciliator, is required by O.A.C. 4117-09-06 (H) (2) and (3) to give more weight to those criteria than other statutory and O.A.C. criteria in the course of his resolving the dispute between the parties, the City's argument is rejected. This is so because nothing in the O.A.C. or the Statute dictates the weight to be given to any one of the enumerated factors in O.R.C. 4117.14 (G) (7) to be taken into consideration by the Conciliator (if present) in resolving the parties' dispute.

As has been seen, the City seeks to support the appropriateness of its final offer, and diminish the appropriateness of the Union's final offer, by urging that any evaluation of its final offer should properly include all three (3) years of the current Contract. In this regard, as has been seen, the City values the \$1,750.00 lump sum payment received by

all bargaining unit employees in year one of the Contract as the equivalent of a 3.5% wage increase at the top step, and a 4.6% wage increase at the entry level, resulting in a 7.5% increase at the top step over the life of the parties' Contract. This same rationale was made by the City in the fact-finding hearing. The Union on the other hand gave zero value to the first year lump sum payment of \$1,750.00 in the fact finding hearing. However, the Union does not put forth this rationale in the instant conciliation hearing. At fact finding the Union was seeking a 5% across-the-board wage increase in year (2) of the Contract (the first-reopener year) and a 4% across-the-board wage increase in year three (3) of the Contract (the second reopener year). And, as previously noted, the City was seeking a 3% across-the-board wage increase for year (2) of the contract (year one of the reopener) and a 2% across-the-board wage increase for year three (3) of the Contract (year one of the reopener) and a 2% across-the-board wage increase for year three (3) of the Contract (year two of the reopener).

The Fact Finder rejected the analysis and rationale of both parties, cogently observing as follows:

"Neither the OPBA's assertion, nor the City's assertion, with respect to the lump sum payment, resonates with the undersigned. Notwithstanding the Union's position, the \$1,750 lump sum payment in

August 2003 has value as compensation received in the first year of the Contract. It constitutes money received over and above the hourly base rate of the Contract.

The \$1,750 lump sum, however, is not the equivalent of a percentage base rate increase as suggested by the City. It does not serve to grow the base and the bargaining unit does not realize the impact on the overtime rate with the lump sum. . . . By accepting the lump sum in 2003, the bargaining unit did not realize the full potential of the fruits of its labor in serving the community.

While the lump sum cannot be totally ignored (as suggested by the OPBA), it cannot be given full credit as a percentage base rate increase (as suggested by the City). It is a component that must be taken into account when assessing the wage increase to be provided to the bargaining unit employees in the second and third years of the contract. . . ."

I concur in the Fact-Finder's analysis. Accordingly, I find without merit the City's contention to the effect that because in the first year of the parties' Contract the City granted in effect a 3.5% to 4.6% wage increase, its final offer

of 2% in both year one and again in year two of the reopener is especially appropriate.

Turning to the ability-to-pay issue raised by the City, there can be no doubt but that the record shows that the City is still facing some difficult financial circumstances. More precisely, and as both parties' arguments recognize, since the City, in making a "final offer" of two 2% increases, implicitly acknowledges that it has the ability to pay its "final offer," the issue becomes whether or not the City has the ability to pay the additional cost of \$117,448.51, which an award of the Union's "final offer" would entail. As noted hereinabove, with a General Fund Balance (reserve) of \$1,293,276.67 there simply is no question but that the City is "able to pay" the \$117,448.51 additional cost that an award of the Union's "final offer" would entail. Moreover, even if the Union's "final offer" were awarded, the City would still be able to maintain an unreserved fund balance of 10% or more of its annual operating expenses, as described in Union Exhibit No. "B." In this regard the City failed to spell out and establish why it was that, as it claimed, its circumstances required it to maintain an unreserved fund balance of 30% - 40% of annual operating expenses.

In my judgment, the fact that the City possesses the "ability to pay" the Union's final offer clearly undermines the

City's contention to the effect that police officer layoffs, and/or the abolishment of police officer positions, and/or the need to leave vacant any positions vacated by retirements or voluntary quits are necessary and/or highly likely. And it further follows that in the absence of any layoffs, job abolishments, etc., it cannot be found that an award of the Union's "final offer" would have a negative impact on the normal standard of service and safety rendered by the Police Department. This being so it can likewise not be found that an award of the Union's final offer would adversely impact the interest and welfare of the public. In sum, in light of these conclusions, I find the City's reliance on the factors set forth in O.A.C. 4117-09-06 (H) (3) is not persuasive.

Turning to the evidence on "external comparables" statutory factor, as has been seen, the City defends the appropriateness of its final offer on the basis that the bargaining unit will roughly maintain the same standing it has presently vis-à-vis comparable contiguous and countywide comparable jurisdictions. And the Union defends the appropriateness of its final offer on the grounds that while its offer would improve the bargaining unit's standing among comparable jurisdictions, such improvement is warranted in light of the dangerous work environment due to exceptionally high violent crime rates. No comparable jurisdiction but Dayton has as high a violent crime rate, or as

many square miles of territory to cover and protect. And whereas Dayton's violent crime index exceeds that of Trotwood by 324.5 points, Trotwood's crime rate exceeds that of the next highest violent crime rate among comparable jurisdictions, namely, Miamisburg, by 494.4 points. It is noted that this gap alone exceeds the national average of 446.1 points.

Additionally, while the Union's final offer would improve the bargaining unit, it would not bring them to the very top. Moreover, the 3.5% of the Union's final offer matches the norm of increases granted in Montgomery County, the federal government employee pay raise, and the average increases being granted in the private sector nationally. In sum it must be found that with respect to the statutory factor of external comparables, the Union has the better case.

As noted by the undersigned in the past, and most recently in City of Oakwood and FOP Oakwood Lodge No. 107, December 30, 2003 and apropos here:

"O.R.C. 4117.14 (G) (7) (f), the "other factors" criterion of the statute, has, since the inception of the Statute, embraced the notion that if, for example, the Union seeks a significant matter, such as fair share fee provisions, especially in early days of the Statute, it needs to be prepared to "pay for it," with, for example, a wage demand less than what other statutory factors might

support. This course was frequently followed by AFSCME bargaining units in the early days of the Statute.

Conversely, where the employer seeks a matter of significance to it, departing from the pattern of successive collective bargaining contracts, as is the situation here, given the City's desire to have the bargaining unit participate in the basic health care premium, to achieve its goal, it needs to pay for it."

This is especially so with respect to safety bargaining units which have held out the longest against participation in health insurance premium payments; were the last to do so; and in many instances, participate in premium payments at lower levels than other municipal or county bargaining units. In my view this statutory factor is clearly present here and must be given considerable weight. Unless in this Contract the bargaining unit is paid for the break with the past, which their sharing in the cost of the health insurance premium, and indeed, at the same level as all other City employees, represents, the bargaining unit is not likely to be paid for it at all. In these circumstances considerable weight must be given to this statutory factor. In my view, at the very least this statutory factor serves to neutralize the internal comparables statutory factor, which concededly favors the City's case.

By way of conclusion, I find that the Union has the stronger case in terms of the statutory factors that must be, and have been, considered by the undersigned. Accordingly, the Conciliator will award the Union's final offer.

IV. Award:

For the reasons more fully set forth above, the Union's final offer is awarded.

Dated: April 6, 2005



Frank A. Keenan
Conciliator