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STATE EMPLOYMENT
RELATIONS BOARD

2005 JUL 29 A 11: 56

Arbitrator
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July 27, 2005

S. Randall Weltman, Esq.
Ohio Patrolmen's Benevolent Association
P.O. Box 338003
10147 Royalton Rd. Ste. J
North Royalton, OH 44133

Mr. Tom Grabarczyk
Labor Relations Management, Inc.
6800 West Central Ave. Suite L-2
Toledo, OH 43617

Re: City of Willoughby and OPBA
SERB Case No. 04-MED-07-0721; 04-MED-07-0722

Gentlemen:

Enclosed is a copy of my conciliation award in the above captioned matter, along with the statement for my services and expenses rendered as Conciliator.

I enjoyed working with you and hope I will have the opportunity to do so again in the future.

Sincerely,


Virginia Wallace-Curry, Conciliator

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT
RELATIONS BOARD

2005 JUL 29 A 11: 56

July 27, 2005

In the Matter of the Conciliation Between

THE CITY OF WILLOUGHBY

and

**OHIO PATROLMEN'S BENEVOLENT
ASSOCIATION**

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**Case No.: 04-MED-07-0721
04-MED-07-0722**

APPEARANCES

For the City:

Tom Grabarczyk
Ray Rogowski
Richard Cooper

Labor Relations Consultant
Finance Director
Assistant Chief of Police

For the Union:

S. Randall Weltman, Esq.
Randy Sevel
Charles A. Krensa
David R. Clair
Derrick A. Stewart
David L. Scott

Attorney
Sergeant
Patrol Officer
Lieutenant
Patrol Officer
Patrol Officer

Conciliator:

Virginia Wallace-Curry

INTRODUCTION

This matter concerns the conciliation proceeding between the City of Willoughby (the "City") and the Ohio Patrolmen's Benevolent Association (the "Union"). The Union represents two bargaining units. One unit consists of approximately thirty-five (35) regular full-time Patrol Officers below the rank of Sergeant. The other unit consists of approximately ten (10) full-time Sergeants and Lieutenants. The terms of the parties' expired collective bargaining agreements covered the period from April 1, 2001 through March 31, 2004.

The parties engaged in a full evidentiary fact-finding hearing before Fact-Finder Jonathan Klein on February 22, 2005. Mr. Klein issued his recommendations on March 30, 2005. The Union accepted the Fact-finder's Report, but the City did not. The parties continued to negotiate, but were unable to reach a resolution of all issues.

Virginia Wallace-Curry was appointed conciliator in this matter on April 28, 2005, by the State Employment Relations Board. A conciliation hearing was held on June 29, 2005. The parties were given full opportunity to present their respective positions on the issues. The conciliation proceeding was conducted pursuant to Ohio Collective Bargaining Law and the rules and regulations of the State Employment Relations Board, as amended.

The unresolved issues that were presented at conciliation were:

1. Article 19/Article 18 - Salary Schedule
2. Article 14/Article 13 - Physical Examinations
3. Article 22/Article 21 - Vacation Cash Out
4. Article 34/Article 33 - Firearm Proficiency Allowance

In deciding between the positions of the parties on the unresolved issues, consideration was given to the following criteria listed in Rule 4117-9-06(H) of the State Employment Relations Board:

- (1) Past collectively bargaining 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 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;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, 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 procedure in the public service or in private employment.

BACKGROUND

The City of Willoughby is located on the western edge of Lake County, Ohio, and is considered to be a suburb of Cleveland. The City has a diverse industrial base and growing commercial sector. The City has experienced a slowdown in economic growth, similar to the rest of Ohio. The City argued at Fact-Finding and at Conciliation that it lacks the ability to finance the wage increases sought by the Union.

In the Fact-Finding Report, Mr. Klein set out a detailed description and analysis of the City's financial position and assertions, which will not be repeated in full here. Essentially, the City argued that it has engaged in deficit spending for the last four years and predicts that 2005 will be the same. The City cited increased health care costs, decreased income tax revenues and cuts by the State to local

government funds as negatively impacting the City's financial position.

At the time of the Conciliation hearing, there were new developments regarding these three factors. The parties resolved the issue of health care, which resulted in an increase in the employee's contribution to health care premiums. Employees will pay 8% of the total monthly premiums. Income tax revenues for first half of 2005 are showing a reversal of the downward spiral and are registering positive percentage increases over revenues collected the previous year. Lastly, the State of Ohio recently reinstated the local government funds that it was slated to cut.

Taking into consideration these new developments, the thorough consideration of the issues as discussed in the Fact-Finding Report, and the evidence presented at the hearing, the Conciliator makes the following decisions based on the criteria delineated in the statute.

ISSUES

1. ARTICLE 19/ARTICLE 18 - SALARY SCHEDULE

A. Wages

The Union's final offer mirrors the Fact-Finder's recommendation of a 3.25% increase for each year of the Agreement, effective April 1, 2004. The Union asserts that the City's rationale for its inability to finance raises considers the health of the General Fund only. The General Fund is not the only resource available to the City. The Capital Fund is flush with money, and it is the City Council which decides the percentage of income tax revenues allotted to each fund. It could easily transfer money from one fund to the other or change the ratio of income tax revenues earmarked for each fund.

The Union asserts that City has the ability to finance the wages that are necessary for the police officers to keep their relative standing among comparable suburbs of Cleveland. Eastside suburban

wage increases are averaging 3.6% for 2005, 3.5% for 2005 and 3.5% for 2006. The Union's proposal of 3.25% is below this average and reasonable given the City's financial situation.

The City argues that it cannot finance the Union's wage package and proposes increases of 2%; 2.5% and 3% over for the three years of the Agreement. The City asserts that it will experience its fifth year of deficit spending in 2005. The City's carry over has been dwindling each year, from \$6.3 million in 2001 to \$3 million in 2005; the City cannot continue to live off its reserves. The Fact-Finder in the case between City and the fire department recognized the City's financial situation and recommended 2%; 2.5% and 3% for the their contract term.

The City's police officers are among the highest paid in this region and the Union's proposed increase is excessive given the City's financial position. Under the City's wage proposal, the police officers would still remain among the highest paid units.

B. Retroactivity

The City argues that any wage increase awarded by the Conciliator should be effective April 1, 2005 "*for all employees employed upon execution of this Agreement.*" This language restricts the wage increases to current employees only, not to employees retired or no longer working for the City. It is identical to the language in the prior contracts.

The Union argues that retroactive increases should benefit all employees. There is no reason to penalize employees who have departed or retired since the expiration of the prior contract. The wage increase would be less than \$2000 for retired employees, but represents a significant difference in future pension earnings.

AWARD

The Union's final offer on wages is selected, and the City's final offer on retroactivity is selected. The Patrol Officers' Article 19 and the Sergeants' and Lieutenants' Article 18 shall reflect a **3.25% wage increase each year of their Agreements, effective April 1, 2005, "for all employees employed upon execution of this Agreement."**

The Conciliator's conclusion that a 3.25% increase for each year of the Agreement is appropriate is based on the evidence presented at the hearing, which is consistent with the rationale and analysis of the Fact-Finder's report. The Conciliator does not agree with the Union that she must follow the Fact-Finder's report unless it is found to be in error. The statutory criteria that a conciliator must consider does not specifically include the fact-finding report. But a fact-finding report, if based on sound rationale that follows the statutory criteria, can be given significant weight. In this case, Fact-Finder Klein's Report carefully analyzes the data presented to him by the same advocates as appeared before this Conciliator. He reached his recommendation based on the City's financial position and his recommendation for increasing the employee's contribution to health care.

Since the issuance of the Fact-Finder's Report, the City's financial position has improved somewhat. The City's income tax revenues are higher than they were for the first six months of last year by an average of 7.86%, ending a downward trend set in the past three years. The State of Ohio had reinstated the proposed cuts to local government funding. The parties settled the health care issue by increasing the employee premium contribution to 8%, as recommended by the Fact-Finder. These factors favorably impact the City's financial situation and confirm the viability of the Fact-Finder's recommendations. The City's argument that a 3.25% increase each year could not be financed is

financed is unpersuasive.

The City argued that Fact-Finder James Mancini, in his Report for the City and the firefighters, recommended the same wage offer that the City recommends here. However, in his Report, Mancini bases his recommendation, in part, on the decreasing income tax revenues and the State cuts to local government funding. As stated, these two factors have changed favorably. He also considered only the revenues available in the General Fund. Although salaries are paid from the General Fund, City Council has discretion over the amount of tax revenues placed in the various funds of the City, and Council can reallocate money going to the already flush Capital Fund to the General Fund to pay for any wage increases not covered by reinstated local government funds and increases in the income tax revenues collected. Because of these factors, the Conciliator does not find the Mancini Report as reliable with regards to the City's current financial health.

As to the issue of retroactivity, the Conciliator chooses to maintain the current contract language concerning which employees benefit from the retroactive wage increase, as proposed by the City. The Union did not present any evidence as to why this language should be changed, other than to state that it penalizes those who retired during that period. There was no evidence as to how or why this language appears in the prior agreement, nor any bargaining history on this issue. Consequently, the Conciliator was not persuaded to change the current language.

2. ARTICLE 14/ARTICLE 13 - PHYSICAL EXAMINATIONS

Article 14/Article 13 requires that employees have an annual physical examination performed by a physician designated and paid by the Employer. The current language of Article 14.2/Article 13.2

states that all results of the physical and testing process are privileged and confidential between the employee and the physician. The City proposes changes to Article 14.2/Article 13.2 whereby “employees shall authorize the release of the results of a medical or psychological exam required by the Employer. Such information may be utilized in administrative proceedings to determine fitness for duty or as permitted by law.” In addition, the City proposes changes to Article 14.3/Article 13.3 regarding HIV/AIDS testing. The changes add the following language: “All results of the testing process are considered to be privileged and confidential between the employee and the physician, and shall become part of the physician’s permanent medical file of the employee. No information may be released from this file to anyone other than the Mayor without the express written consent of the employee.”

The City argues that its proposal is supported by the Ohio Administrative Code Section 123:1-33 which states that employers may require an exam, and failure to appear amounts to insubordination punishable by discipline up to and including discharge. The City asserts that employees get their physicals on City time and paid for by the City. The City should have the right to the information obtained by the physical to ensure the employee is fit for duty. Although the City is allowed medical information under the Sick Leave and Injury Leave provisions, the City may not always know about a condition that would make the employee unfit for duty. The disclosure of the results of the employee’s annual physical would contain that information.

The Union opposes removing the patient/physician privilege for annual physicals. The City has the right under the Sick Leave and Injury Leave provisions to order the employee to submit to a physical examination. The results of such examinations are available to the City. But the City must have evidence of impairment from illness or injury to require such examinations. The annual physical is

intended as a benefit to the employee.

AWARD

The Conciliator chooses to **maintain current contract language**. The language proposed by the City is not supported by the Ohio Administrative Code and is overly broad.

OAC 123:1-33-01, cited by the City, refers not to annual physical exams but to exams in relation to an employee's "disabling illness, injury or condition." The City already has this right in the Sick Leave and Injury Leave provisions. In addition, the Code requires the authority to supply the physician with the requirements of the job (physical and mental), duty statements, job classification specifications and position descriptions. The language proposed by the City puts no parameters on the information requested by the physician or its relationship to the job in question.

The City submitted the language in the City of Eastlake's agreement with its police officers as evidence that its request is not unusual. However, even the Eastlake language is restrictive. It requires that the employee submit to the exam to certify that he is in "sufficient good medical health to perform the duties of a Police Officer;" the employer and the employee receive the results of the exam on a form supplied to the physician by the employer. The language proposed by the City does not propose a form to fill out specific information that relates to the employee's fitness for duty.

With respect to the additions to Article 14.3, the Conciliator does not see why this language is needed. It appears to be covered elsewhere in that section.

3. ARTICLE 22/ARTICLE 21 - VACATION CASH OUT

The City proposed to eliminate the annual vacation cash out language contained in Articles 22

and 21 of the Agreements. The City argues that the vacation cash out language costs the City approximately \$20,000 to \$25,000 a year. Due to its financial condition, the City seeks to delete this language. It argues that employees should take their earned vacation time. There are enough weeks in the year to accommodate all employee taking their full vacation time without incurring overtime costs. The City asserts the Fact Finder misunderstood the City's argument. The City never argued that the vacation cash out language increased overtime work to employees.

The Union argues that the vacation cash out language is a longstanding benefit that has been in the Agreement for a long time. The City presented no adequate reason to remove the language. The City showed no negative impact on the operation of the department because of this language.

AWARD

The Conciliator chooses to **maintain current contract language**. The City argues that eliminating this language would save the City at least \$20,000 a year. Also, it would not result in the City incurring overtime costs, because there are enough weeks in the year to accommodate everyone's earned vacation. However, spreading this vacation time throughout the 52 weeks of the year, without incurring overtime costs, would force some employees to take vacation during the least desirable times of the year. It would be a significant loss, indeed, if employees were required to trade two weeks of pay for two weeks off in January or February. The City's financial condition is not so severe as to warrant eliminating this longstanding and significant benefit to employees.

4. ARTICLE 34/ARTICLE 33 - FIREARM PROFICIENCY ALLOWANCE

The Union proposes that the firearms proficiency allowance for both bargaining units be

increased so that after any deduction for the pension assessment the bargaining unit members receive a net amount equal to \$1,100 or more for Patrol Officers and \$1,200 or more for Sergeants and Lieutenants.

The Union argues that last year, the City unilaterally deducted ten percent from each bargaining unit employee's firearms proficiency allowance because the Ohio Police & Fire Pension Board indicated that such payments were "pensionable." Up until last year, the proficiency allowance remained the same for 10 years. The Union maintains that the bargaining unit members should receive the full benefit of the bargaining when they agreed to accept the current firearms proficiency allowances in lieu of two percent wage rate increases during prior contract negotiations.

The City opposes the increase in firearms proficiency allowance. The current proficiency allowance was put into the contracts in 1996 at their current levels in lieu of a two percent wage increase. It was intended only for employees employed before 1996. The City raised the amount to buy out the firearm proficiency allowance. There is no reason to raise the allowance at this point. Both sides bargained for the amount in the contracts. Neither side realized that the benefit was "pensionable." But the City is still paying employees the amount of the bargain and the amount in the contract.

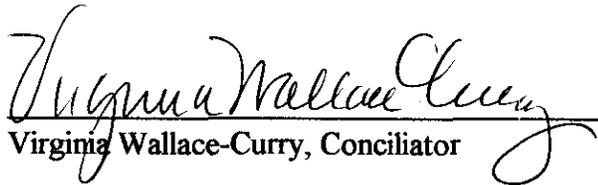
The City also asserts that the Fact Finder's award on this issue is not workable. The amount of the deduction for each employee would differ based on the employee's number of dependents and other deductions. The City cannot set an amount that "nets" an amount as an end result.

AWARD

The Conciliator chooses to **maintain current contract language**. The current language of the

Agreement reflects the amount that the parties bargained for when the firearm proficiency allowance was increased for those employed before 1996. The fact that the allowance is pensionable affects both parties. Employees have money deducted and put into their pension fund. The City must make a contribution to the employee's pension fund, in addition to the amount it is required by the Agreement to pay each employee eligible for proficiency pay. Neither party is really getting the result they anticipated in the original agreement. It is misguided to say that only one party, the employee, should receive the benefit of the bargain. A bargain naturally implies that there is more than one party involved which has an interest to protect. The City, in this case, is certainly not getting what it anticipated in the bargain either. It did not anticipate having to make a pension contribution in addition to the amount paid to the employee. Furthermore, the deduction made from the allowance was not unilaterally made by the City; it was mandated by the Pension Board. The City did not have any choice in the matter. At least the employee does not permanently lose that money. It is placed in the employees pension fund.

Submitted by:


Virginia Wallace-Curry, Conciliator

July 27, 2005
Cuyahoga County, Ohio

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Conciliation Award for the City of Willoughby, Ohio and the Ohio Patrolmen's Benevolent Association was sent to the parties by overnight mail and to the State Employment Relations Board by regular U.S. mail on this day, July 27, 2005. The Conciliation Award was served upon:

S. Randall Weltman, Esq.
Ohio Patrolmen's Benevolent Association
P.O. Box 338003
10147 Royalton Rd. Ste. J
North Royalton, OH 44133

Mr. Tom Grabarczyk
Labor Relations Management, Inc.
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Mr. Dale A. Zimmer
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SERB Case No. 04-MED-07-0721; 04-MED-07-0722

Union: Ohio Patrolmen's Benevolent Association

Employer: City of Willoughby, Ohio

Conciliator Compensation:

Scheduling/Preparation Days	0.25	@ \$550.00	\$ 137.50
Hearing Days (Including Travel)	1.00	@ \$550.00	\$ 550.00
Study and Writing Days	2.25	@ \$550.00	\$1237.50

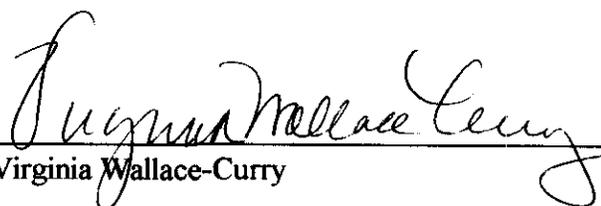
Conciliator Expenses

Mileage (40 mi.)			\$ 10.00
Postage			\$ 35.00

TOTAL \$ 1970.00

Payable by Employer \$ 985.00

Payable by Union \$ 985.00


Virginia Wallace-Curry