STATE EMPLOYMENT RELATIONS BOARD

CONCILIATOR'S REPORT

IN THE MATTER OF:

[Interest Arbitration]

Montgomery Professional Firefighters, IAFF Local 4391
And
The City of Montgomery

Case Number:
05-MED-09-0863

Before Conciliator
N. Eugene Brundige

PRESENTED TO:

Edward E. Turner, Administrator
Bureau of Mediation
State Employment Relations Board
65 East State Street, 12th. Floor
Columbus, Ohio 43215-4213

And

Ben Shapiro, President
IAFF Local 4391
5331 Wheatmore Court
Mason, Ohio 45040

And

William E. Quinn, Jr.
Representative for IAFF Local 4391
650 Alpine Place
Trenton, OH 45067-9660

And

Donald L. Crain, Esq.
For the City of Montgomery
300 North Main Street, Suite 200
Middletown, OH 45402

N. Eugene Brundige was duly appointed by the State Employment Relations Board to serve as Conciliator in this matter, in compliance with Ohio Revised Code Section 4117.14(D)(1) by letter dated August 9, 2006.

A hearing was held September 26, 2006, in the Municipal Building, Montgomery Ohio. The parties timely filed the required pre-hearing statements.

In their pre-hearing filings the parties identified the following issues as being unresolved: [1]

Article 11 – Work Schedules

Article 13 or 12[2] - Wages

Article 15 or 18 – Holidays

Article 16 or 19 – Vacation

Article 17 or 20 – Sick Leave

The parties submitted to the Conciliator all other articles that had been tentative agreed to. The Conciliator agreed to incorporate them by reference into this report.

The Union was represented by Bill Quinn of Ohio Firefighters, Ben Shapiro, Local 4391 President, Dane Williams, Secretary-Treasurer, and George Bracher, Bargaining Team Member.

The Township was represented by Donald L. Crain of Frost, Brown, & Todd who was assisted by Joseph Scholler of the same firm. Also present representing the City were Cheryl Hilvert, City Manager; Paul Wright, Fire Chief;

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[1] The City listed two additional issues that they believed to be open, but at the hearing the Union clarified that they were not.

Tom Wolf, Assistant Fire Chief; and Wayne Davis, Assistant City Manager and Finance Director.

BACKGROUND:

The bargaining unit consists of five (5) full time fire fighters and two vacancies. They are supplemented by thirty (30) non bargaining unit part time fire safety personnel. The City of Montgomery is located northeast of Cincinnati with a population of approximately 10,000 citizens at the time of the 2000 census.

The unit was certified in October 28, 2004, and has been attempting to negotiate its first collective bargaining agreement since October 2005.

The parties bargained hard and with the assistance of SERB mediators, were able to reach a tentative agreement. That tentative agreement was rejected by the Union.

Dr. Ann Wendt was appointed to serve as the Fact Finder in this matter. She conducted a hearing on June 16, 2006, and issued her recommendation on July 17, 2006.

That fact finding report was approved by the City but rejected by the Union. The parties proceeded to conciliation. A hearing was conducted September 26, 2006, after the parties attempted mediation one more time.

The parties elected to make their presentations as a total case and the Union went first.

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[2] Because this will be a first contract, the parties numbered their proposals differently. At the hearing the representatives indicated they would work out the appropriate organization of their

POSITION OF THE UNION:

President Shapiro explained that the full time fire safety personnel had approached the Chief regarding some issues prior to taking action to select an *Exclusive Bargaining Agent.*

Some time thereafter, the employees selected the International Association of Fire Fighters as their exclusive representative and SERB certified them on October 28, 2004.

They originally sought several changes and improvements in their current working conditions through bargaining.

After months of negotiations, the parties met with SERB representatives Edward Turner and Craig Mayton.[3] At the last mediation session the parties were able to reach a tentative agreement. Mr. Shapiro explained that the final settlement was reached after some members of the team had left and only one representative remained.

The tentative agreement was taken back to the membership where it was unanimously rejected.

In an unusual action the Union agreed that the City could make a direct presentation to the members of the bargaining unit regarding the tentative agreement. The Union continued to reject the tentative agreement following that presentation.

The matter went to fact finding and the Fact Finder issued a report that the IAFF felt was unacceptable. That report was also unanimously rejected. Mr.

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agreement.

Shapiro argued that the Fact Finder misunderstood the "direct dealing" scenario and attributed it to the Union rather than the City. The Union felt that this misunderstanding may have resulted in the very unfavorable report.

After the rejection of the fact finding report, the Union decided to try a different approach for conciliation.

The major concern of the Union became protection of the status quo. In order to maintain the current forty eight (48) hour work week, the Union basically decided to seek the current operating procedures regarding the other open items.

The Union proceeded to discuss each of the open Articles.

Article 11 in the Union's last best offer would establish 212 hours of work in a 28 day work cycle and overtime paid for all hours worked over 212. Some other minor sub-issues were proposed in Article 11. The Union stated that the protection of the forty eight (48) hour work week is the first priority of the membership.

The Union notes that the Sycamore Department recently moved from a 48 hour work week to a 42 hour work week.

In the wage article (either Article 13 or 12) the Union proposes a 3.75% increase retroactive to April 1, 2006, with a further increase of 3% in 2007 and 3% in 2008. It notes that this amount is the same provided to other city employees.

In the Holiday Article (15 or 18) the Union's last best offer is simply to memorialize the language of the employee handbook regarding holidays. The

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[3] Both Mr. Turner and Mr. Mayton have changed roles at SERB since they assisted in this case. Mr. Turner is the Administrator of the

Union notes that its original proposals had asked for 1.5 times the rate of pay for Christmas and Thanksgiving similar to what is in the Police Agreement. That proposal has been dropped.

The Union's proposal does ask for an annual payment of unused personal leave.

The Union's holiday proposal is based upon the 48 hour work week.

The Vacation Article (15 or 18) is another proposal on behalf of the Union to incorporate the 48 hour weekly schedule in the new Collective Bargaining Agreement.

The Sick Leave Article (17 or 20) is again an attempt to keep the 48 hour work week. The Union does ask for a one (1) hour call off requirement rather than the two (2) hours the city has asked for. [4]

POSITION OF THE CITY:

The City notes that even prior to unionization, the employees presented their concerns to Chief Paul Wright in a document that listed their first concern as 24/48 hour shifts.

Mr. Crain, on behalf of the City, notes the discussions were always centered on whether the work week would be 53 or 52 hours.

The City notes that if the City's position is granted, the employees would not be able to work the expanded number of hours until the contract is awarded.

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[4] At the conclusion of the hearing the Union offered to withdraw two proposals in the Sick Leave Article so it would truly reflect the status quo as stated in the employee handbook.

It would have made sense for the City to argue that the higher pay rates (for the 52 hours) should take effect when the contract begins.

The City made the decision that it would continue to honor the higher amounts included in the tentative agreement.

The City argues that the tentative agreement should be given great deference and submitted decisions by other arbitrators who upheld tentative agreements after they had been rejected in other jurisdictions.

The City believes that the tentative agreement, even though it is more expensive for the City, best serves the interests of the citizens and the initiative of the City to provide a high performance workplace.

The proposals of the City all incorporate the 52 hour work week. The salary is higher than the Union's proposal in order to compensate bargaining unit members for the longer work week.

The City agrees with the Union that the fact finding report was unfavorable to the Union and notes that the tentative agreement is more favorable than the fact finding report.

The City submitted comparable data that indicates the average work week is 53 hours.

The Employer notes that the tentative agreement costs the City almost $50,000 more than is currently being paid.

The City notes that this money is justified because this plan will provide one additional full time fire safety person during the day and two professionals at

night. The increased safety and operational advantages will better serve the citizens.

The City provided data that illustrates Montgomery fire safety persons are very near the top in pay in comparable jurisdictions and believe that they should work closer to the average number of hours per week in return for that pay.

At hearing the City did amend its last best offer regarding sick leave to make the accrual rate 4.43 hours in a 14 day period in their Article 17.1.

The City Manager, the Chief, and Assistant Chief outlined the management and public services philosophies that they are attempting to implement and explained how the tentative agreement is consistent with their approach.

DISCUSSION:

This is an unusual and unfortunate situation. It appears that bargaining unit employees have felt disappointment in the process and that many of those disappointments may relate to the newness of the bargaining experience.

However, a review of the items previously agreed upon does show a lot of learning, hard work, and some gains for the bargaining unit members.

It is clear to this observer that confusion existed regarding the process and the priorities of the parties.

I am sure that bargaining will be more sophisticated and comfortable in the next round.

Having acknowledged the current situation, I must go on to observe that the job of the Conciliator is defined by the Ohio Revised Code and limits the Conciliator to selecting the last best offer of one or the other of the parties.

Mr. Quinn, on behalf of the Union, observed rightly that I must now choose one or the other.

Mr. Quinn eloquently argued that to award the City's position is to "hold hostage" the bargaining unit and quoted *Parma vs. SERB*.

There is no question that the members of the bargaining unit ***can*** (emphasis added) reject a fact finding report. This is evident from the fact that we are currently involved in the statutory conciliation process.

The more relevant question is what impact the tentative agreement has on this proceeding based upon the statutory criteria.

Specifically those criteria are:

- 4117.14(G)(7)(a) Past collectively bargained agreements, if any, between the Parties;
- 4117.14(G)(7)(b) Comparison of the issues submitted to the 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;
- 4117.14(G)(7)(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;
- 4117.14(G)(7)(d) The lawful authority of the public employer;
- 4117.14(G)(7)(e) The stipulations of the Parties;
- 4117.14(G)(7)(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.

There are no previous collective bargaining agreements so 4117.14(G)(7)(a) does not apply.

4117.14(G)(7)(b) [Comparables] is an appropriate criteria to consider.

While there have been no "ability to pay" arguments raised in this proceeding the rest of 4117.14(G)(7)(c) must be considered.

4117.14(G)(7)(d) speaks to the lawful authority of the Employer. No issues have been raised regarding this criteria so it is not relevant in this matter.

4117.14(G)(7)(e) "Stipulations of the parties" is relevant only to the extent that agreement has already been reached on several articles and the parties have agreed that these should be incorporated by reference into this Conciliation Report.

4117.14(G)(7)(f) directs the Conciliator to consider, "Such other factors,... which are normally or traditionally taken into consideration in the determination of the issues..."

Thus, I am bound in this case to consider (1) comparable data, (2) the impact on the public, and (3) "other factors."

Normally in rendering such decisions I analyze each issue and then pick the final offer that best matches the statutory criteria. In this case the issues are all intertwined.

If I pick the Union's position of a 48 hour work week then salary, sick leave, holidays, and vacation are all reflected in the proposed language.

If I pick the City's position of a 52 hour work week then the salary article reflects the increased amounts to compensate for the additional time worked.

Likewise, the accruals and applications under holidays, vacation, and sick leave are written to reflect the 52 hour week.

It is true that both parties have also included some suggested modifications within these articles that they would like to achieve, but these are clearly sub-issues and I do not have the luxury of selecting and rejecting among them.

In this case, I have chosen to consider all the articles as a package due to their interrelated nature.

Fact Finder David Stanton was faced with a similar situation in which the City Council rejected a tentative agreement entered into between the City of Cincinnati and the FOP, Queen City Lodge 69.

In that case he noted: "*It is important to note that the stability and trust, which are tantamount to any collective bargaining relationship, can diminish and will erode when good faith is factored out of the equation when Tentative Agreements are not honored or supported.*" [5]

IAFF would have me believe that they were somehow "tricked" into the tentative agreement but that simply is not believable. If it was necessary for some members of the bargaining team to leave, they could have insisted on concluding the mediation session.

President Shapiro admitted that he had telephone contact with the remaining members of the team. State Vice President Quinn, an experienced professional negotiator, remained, and I am convinced that the Union willingly entered into a tentative agreement.

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[5] SERB 02-MED-09-0828.

Fact Finder Stanton, in the Cincinnati case, held to the standard espoused and practiced by most Arbitrators that a tentative agreement should be honored unless there is a compelling reason to deviate from it.

In large bargaining units it is possible that the negotiators simply cannot explain adequately the provisions they agreed to, or that they lacked significant knowledge about a subject to properly represent. But in a unit of five bargaining unit members wherein three were members of the bargaining team, it simply cannot be accepted that there was some compelling reason to repudiate a deal reached.

The Union also argued that the tentative agreement was merely an agreement on their part to take the offer back to the membership to see how it would fly.

There are times when negotiators reluctantly agree to take a final offer back to the membership but in those cases it is not a tentative agreement, it is a technique which allows the parties to test where they are in the bargaining process and requires the negotiators to clearly and honestly state their intentions to the other party. Clearly such a technique is unnecessary in a unit of five members.

When negotiators reach a tentative agreement it is incumbent on those who agree, to support that agreement in good faith. This was not an agreement reached between one new negotiator and the City team. This was a tentative agreement made between two bargaining teams whether or not all the team members were physically present at that moment. Thus this tentative agreement

deserves the deference that is due to products that have been the culmination of hard work and effort.

Beyond the question of the tentative agreement, an independent examination of its basic provisions clearly shows that the comparable data from similarly situated fire departments supports a longer work week. (53 hours per week average). The Union failed to produce any data beyond the example of one fire department (Sycamore) that would support the shorter work week. Clearly the criteria listed in 4117.14(G)(7)(b) is best met by the last best offer of the City.

Likewise, the City presented a largely un-refuted argument that the interest of the public would best be served by the new arrangement. The Union disagreed regarding the amount of money that might be saved by such an arrangement, but that is not a major consideration here in that the ability to pay was not argued. Thus the criteria enumerated in 4117.14(G)(7)(c) are best satisfied by the last best offer of the City.

Finally, the question of other factors has already been discussed when considering the relevance of the tentative agreement previously agreed to. The criteria of 4117.14(G)(7)(f) is also best met by the last best offer of the City.

After due consideration to the positions and arguments of the parties and to the criteria enumerated in ORC 4117.14(G)(7), the Conciliator awards the last best offer of the City in each of the open issues with the notation that the City amend the accrual rate for sick leave at the hearing.[6]

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[6] In the interest of paper conservation I have not reproduced the articles in this report, but instead, incorporate by reference Employers Article 11 Hours of Work and Overtime (Employer's

In addition, all agreements previously reached by and between the parties and tentative agreed to, are hereby incorporated by reference into this Conciliation Report, and shall be included in the resulting Collective Bargaining Agreement.

Respectfully submitted and issued at London, Ohio this seventeenth day of November, 2006.

N. Eugene Brundige, Conciliator

Exhibit E), Article 13 Wages and Compensation (Employer Exhibit C), Article 15 Holidays/Personal Time (Employer Exhibit F), Article 16 Vacations (Employer Exhibit G), and Article 17 Sick Leave (Employer Exhibit H) with the accrual rate changed from 3.692 hours to 4.43 hours to reflect the amendment made by the City at the hearing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Conciliator's Report was sent by regular U.S. mail to: Ben Shapiro, President IAFF Local 4391, 5331 Wheatmore Court, Mason, Ohio 45040; and William E. Quinn, Jr., Representative for IAFF Local 4391, 650 Alpine Place, Trenton, OH 45067-9660; and Donald L. Crain, Esq., For the City of Montgomery, ,300 North Main Street, Suite 200, Middletown, OH 45402.; this 17th Day of November, 2006.

N. Eugene Brundige

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Conciliator