OHIO STATE EMPLOYMENT RELATIONS BOARD
CONCILIATION REPORT
JULY 6, 2006

FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL	)	
Union	)	
-and-	)	**CASE NOS. 05 MED-09-0947**
	)	**05 MED 09 0948**
CITY OF DOVER, OHIO	)	
Employer	)	

APPEARANCES FOR THE UNION:

Mark E. Drum, Staff Representative
Marc Lautenschlizer, Patrolman
Brett D. Swigert, Captain
Jason C. Edwards, Patrolman

APPEARANCES FOR THE CITY:

Zachary T. Space, Law Director
Richard Homughausen, Mayor
Tweed Vorhees, Safety Director
Mary Fox, Auditor

CONCILIATOR:

JOSEPH W. GARDNER, Reg. No. 0033400
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INTRODUCTION

A fact-finding report was issued on or about March 28, 2006. Subsequently, the fact-finding report was rejected by one of the parties. SERB appointed this conciliator. The parties and this conciliator agreed to a conciliation date of on May 26, 2006, at the city offices in Dover, Ohio.

The parties met and mediation was offered to the parties. The Union representative rejected mediation and requested that the conciliation hearing be opened. Before opening statements, the union representative stated that the City violated Ohio Revised Code §4117.14(G)(3). The union representative stated that the City failed to both submit to the Union and to SERB, a timely written report, summarizing unresolved issues, the parties' final offer as to the issues, and the rational for that position. The remedy and/or sanction for failure to timely submit the written statement as set forth in Ohio Administrative Codes §4117-9-06: "A failure to submit such written statement to the conciliator and the other party prior to the day of the hearing shall require the conciliator to take evidence only in support of matters raised in the written statement that was submitted prior to the hearing."

It is undisputed that the date of the hearing was May 26, 2006. Further stipulated is that the City's statement was received by all appropriate parties on May 24, 2006. The City's statement was mailed to this conciliator on May 22, 2006. The City stipulated that its submission was untimely. The City argues that both parties were well aware of the one issue. In other words, the City claims that there were neither surprises nor prejudice to either party. The City argues that the case should be heard on the merits since there was no surprise or prejudice.

The City violated ORC 4117.14(G)(3). *Union Twp. Bd. of Trustees v. FOP, Ohio Valley*

Lodge No. 112, 146 Ohio App. 3d. 456 (2001). The City failed to submit its statement to SERB and to the Union at least five calendar days before the conciliation hearing.

The City then raised the issue that the Union also violated ORC §4117.14(G)(3) and that the Union should also suffer the penalty described in OAC §4117-9-06.

The City argues that the Union was not timely with the submission of the Union's position statement. The City then argued that because both sides are untimely, the case should be heard on its merits. The City cites *the Greenville Patrol Officers Case*; Case No: 99 ULP 06-0349; SERB Opinion 2000-005. In *Greenville*, the Union *transmitted* its position statement to the employer and the conciliator two days before the conciliation hearing. In *Greenville*, the Union did not "file" its statement to SERB until one day before the conciliation. The employer, the City of Greenville, did not receive the Union's statement until one day before the conciliation hearing.

SERB states in *Greenville* that although the Administrative Rule 4117-9-06(E) has no specific time period to "submit" statements to SERB and to the opposing side, an unambiguous state statute, ORC 4117.14(G)(3), "plainly requires the employer and employee organization to *file* their position statements no later than five days before the conciliation proceeding." *Greenville*, supra, (Emphasis added). The Union in *Greenville* violated ORC 4117.14 (G)(3). The sanction and remedy in *Greenville* is as follows:

> "Under O.A.C. Rule 4117-9-06(E), the failure to submit timely a position statement will result in the conciliator taking evidence only in support of matters raised in the written statement that was timely submitted. While the *violation* that was committed was the untimely filing of the position statement, *the error that was committed was the conciliator's acceptance of the position statement*. Thus, to carry out both O.R.C.§4117.14(G)(3) and O.A.C. Rule 4117-9-06(E), the remedy must be imposed at the

> point in the conciliation process where the conciliator's procedural error occurred. If the conciliator had not allowed the untimely submission, he would have taken evidence only in support of the matters raised in the City's position statement. Therefore, when the new conciliator is appointed, the new conciliator can take evidence only in support of matters raised in the City's written statement. The Association will not be permitted to submit a written statement or present evidence pursuant to O.A.C. Rule 4117-9-06(E). In addition, a cease-and-desist order will be issued, and the Association will be ordered to post a notice to employees as a part of this remedy." Id.

Under *Greenville*, a conciliator in not even permitted to accept a position statement unless it is timely filed. If the conciliator does not accept a position statement from a party, the conciliator has no last offer from that party.

ORC §4117.14(G)(3) states:

> "Not later than five calendar days before the hearing, each of the parties shall submit to the conciliator, to the opposing party, and to the Board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and the rational for that position."

In *Greenville*, the Association (Union) failed to "file" its position statement with SERB as well as failing to timely send its position statement to the City. In this case, the Union mailed its position statement on May 19, 2006. The mailing was seven days before the hearing. However, both parties knew that the City offices would have been closed on Saturday and Sunday. Delivery and receipt of the position statement wasn't until Monday, May 22, 2006, four days before the hearing.

In the case at bar, the Union timely filed its statement with SERB five days before the conciliation hearing, May 19, 2006.

The City argues that the Union did not "file" its statement with the City until May 22,

2006. Therefore, according to the City, the Union's statement was also untimely and in violation of ORC.4117.14(G)(3).

The Union mailed its brief to the City on May 19, 2006, which would have been seven days prior to the conciliation date. There was an attempted delivery on the May 20, 2006, which was a Saturday. Both parties recognized that city offices are closed on Saturday, so the delivery would not have actually been made until Monday, May 22, 2006. Usual postal procedure is that there is a notice left at the premises that there was an attempt to make a delivery on the 20th. The Union introduced evidence that the post office attempted to deliver the statement on Saturday but could not deliver same. The city actually received the Union's brief on May 22, 2006, which would be four days prior to the conciliation hearing.

Since actual delivery was not made until the May 22, 2006, the city moved that the Union should also suffer the sanctions as set forth in Ohio Administrative Code 4117-9-06 (E). The issue rests on the definition of the word "submit." If "submit" means mailing, then the position statement is timely. If "submit" means delivery or receipt, then the position statement is untimely.

At that point in time the conciliator requested some time to review the motions and the case law presented by the parties. While reviewing the case law both parties entered into a stipulation that this conciliator was to take in all the evidence. This conciliator was to make a ruling on the procedural motions. If the conciliator sustained either or both of the procedural motions of either of the parties, then the appropriate evidence would be disregarded by the conciliator in making the final conciliation report.

Evidence and arguments were taken from both sides on the one issue, wages.

During the proceedings, and in the preparation of this conciliation, the undersigned considered all of the following factors pursuant to Ohio Revised Code §4117.14:

(a) **Past Bargaining Agreements, if any, between the parties;**

(b) **Comparison of Issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other pubic and private employees doing in comparable work, giving consideration to factors peculiar to the area and classification involved;**

(c) **The interest in 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 standards of pubic service;**

(d) **The lawful authority if 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.**

The fact-finding report was made an exhibit and introduced into evidence, and was considered by this conciliator as set forth below.

This conciliator gave both parties an additional period of time to submit cases and authorities on the procedural issue. Both parties made timely submissions.

PROCEDURAL ISSUE

The Union relies heavily on *Union Township Board of Trustees v. FOP*, 146 Ohio App 3rd 456 (12th Dist. 2001) (Clermont County). In the *Union Township* case both parties "*filed* their final offers for the final settlement conciliation hearing five days before the hearing pursuit to RC 4117. 14 (G) (3)." *Union Township*, supra, at paragraph 38.

The Union, in that case, amended its final offer on the wage issue, with the permission of the conciliator, one day before the hearing. The conciliator accepted the amended final offer and stated that he was doing so pursuant to administrative regulations, which permitted amendments of final offers after mediation between the parties. In the *Union Township* case, the amendment of the final offer took place before mediation. Id.

The Court of Appeals held that the conciliator erred in permitting the Union to amend its last and final offer. The union amended its last and final offer one day before the conciliation hearing but before mediation. The administrative rules allow amendments after mediation. The Court of Appeals reversed the conciliation award and remanded the case for a new conciliation hearing on the timely position statements. Id. In Union Township, the Court of Appeals ordered the conciliator to consider only those position statements that were untimely submitted.

The language in the statute states that each party shall "submit" their final offers to the other side. The Court of Appeals in the *Union Township* case also uses the word "submitted."

In *Union Twp.*, the Court of Appeals stated in paragraph 38 of its opinion that "the FOP and the Township *filed* their final offers for final offer settlement conciliation five days before the hearing pursuit to RC 4117. 14 (G) (3)." *Union Township Board of Trustees v. FOP Ohio Valley Lodge No. 112* supra at paragraph 38. (Emphasis added). However, the basis for the statutory violation was the conciliator permitting an amendment one day before the conciliation hearing and before mediation. Id., at Paragraph 38 and 39. The issue of "submitting," "filing" and/or "receiving" was not the direct issue of the *Union Township* case.

"The amendment (to the Association's last and best offer) was made only one day before the hearing and before, not after mediation." The Court of Appeals also noted that "filing a

modified offer after time permitted was 'inherently prejudicial.'" Id. at Paragraph 44.

Prejudice to either party could occur if one party made its last and final offer to the other party with knowledge of the other party's final offer. In order words, if one party waits until it obtains the other's position statement and then sent its own, prejudice may occur.

The Union mailed its last and final offer on May 19, 2006. Postal records show that the delivery was attempted by postal officials on May 20, 2006, which was a Saturday. Evidence was taken and the undersigned finds that both parties knew that City offices were closed on Saturday and Sunday. The Union knew that the Union's position statement would not be received by the City until May 22, 2006, which is less than five calendar days before the conciliation hearing. The City, however, had the Union's position statement on May 22, 2006. The City's position statement was mailed on May 22, 2006.

The *Union Township* case ordered a new conciliation with the conciliation taking place using the last and best offers prior to the Union's untimely amendment of its position statement. The Court disallowed the use of the amended position statement.

The Court of Appeals in the *Union Township* case is in the 12th Appellate District. The City of Dover, Ohio is located in Tuscarawas County, the 5th Appellate District.

The Court of Appeals for the 12th District used the words "submit" and "filed" interchangeably.

If the words "submit" and "filed" are used interchangeably, it would he the responsibility of each party to prove that the other party actually received the position statements at least five days before the hearing in order to comply with the statute. 4117. 14 (G)(3). There is a practical problem. SERB has a timestamp which clearly shows the "filing" of a document. Labor unions

are private entities and rarely have a clerk where documents are time stamped.

The city has provided the undersigned with *SERB v. Greenville Patrol Officers Association* Case No. 99-ULP-06-0349. In the *Greenville* case, SERB decided that the Union committed an unfair labor practice in violation of ORC 4117. 11 (G) (3) when it did not *file* its pre-hearing statement with SERB until one day for the conciliation statement, contrary to ORC 4117. 14 (G) (3). *SERB v. Greenville Patrol Officers Association*, Case No. 90-ULP-06-0349.

In the case of *SERB v. Greenville Patrol Officers Association*, the conciliation date was May 12, 1999. On May 7, 1999, the Union and the board *received* the city's position statement which was accompanied by specific language proposals. Therefore, the City of Greenville (employer) complied with the statute (4117.11(B)(3)) with respect to city's statement. However, May, 10, 1999, two days before the hearing, the Union only transmitted to the conciliator and to the City-Employer only, via UPS next day mail, the association's position statement. SERB found that the association did not file a copy of the report with the board. The city and the conciliator received a position statement on May 11, 1999 only one day before the hearing. *SERB v. Greenville Patrol Officers Assoc., supra.*

The conciliator overruled the city's objections to the association's late *filing* to its pre-hearing statement and accepted and considered the Union's pre-hearing statement. SERB reversed the conciliator. A new conciliator was appointed, and the new conciliator was ordered to take evidence only in support of matters raised in the City's written statement. The Association (Union) was not permitted to submit a written statement or present evidence pursuant to OAC Rule 4117-9-06(E).

Under the *Greenville* case, if there is a violation of ORC 4117.14(G)(3), the offending

party was not only prohibited from presenting evidence, which supports deposition statement, the conciliator was not permitted to consider the untimely statement. See OAC 4117-9-06(E)-(4); *SERB v. Greenville*, supra.

This conciliator is bound by the decision of SERB. The language of SERB in the *SERB v. Greenville* case directs the conciliator as follows:

> "The filing of the position statement is a critical step in the conciliation process, which is reinforced by the mandatory language used by the General Assembly. The failure to timely file a position statement constitutes a violation of ORC §4117.11(A)(5) by a public employer and a violation of ORC §4117.11(B)(3) by an employee organization. Therefore, we find that the Association, by not timely filing its position statement in accordance with this statutory requirement, has committed an unfair labor practice in violation of ORC §4117.11(B)(3)."

The issue is whether "submit" means to actually deliver to the opposing party. The Union "attempted" to deliver its statement, however, the evidence introduced at the hearing proved that the Union's statement was not delivered until Monday, May 22, 2006. The opinion of SERB in *Greenville*, requiring the "filing" of the statement to comply with the statute and the administrative rules, supports the proposition that in order to "submit" a position statement, that statement must be actually delivered to the opposing party, the conciliator and SERB "five calendar days before the hearing." ORC §4117.15(G)(3).

In this case, the Union failed to submit its position statement to the City in accordance with ORC §4117.14(G)(3) and must be sanctioned pursuant to 4117-9-06(E). *Greenville*, supra.

Since both parties violated ORC §4117.14(G)(3), both are required to be sanctioned under 4117-9-06(E) because both parties moved for sanctions against the other pursuant to ORC §4117.14(G) and 4117-9-06(E). The sanction or "remedy" according to SERB is to take

"evidence only in support of matters raised in the written statement that was timely submitted." *SERB vs. Greenville Patrol Officers Association*, Case No.: 99-ULP-06-0349 (page 6 of 7). SERB found that the conciliator's acceptance of an untimely position statement was error. Id. The Appellate Court in *Union Township Board of Trustees v. FOP, Ohio Valley Lodge No. 112,* (2001) Ohio App. 3d 456, found that the conciliator exceeded his power in accepting the final offer not submitted at least five days before the hearing. Id. at Paragraph 45-46.

In this case, because both parties have failed to timely submit their position statements to the other, neither position statement (neither last offer) may be considered by this conciliator. Nor may either offending party introduce evidence in support of its position.

Conciliation is a creature of statute and administrative rule. The Ohio Revised Code and the Ohio Administrative Code provisions, as interpreted by the courts and SERB, grant to the conciliator the responsibility to choose final offers from position statements *timely* submitted via strict deadlines.

This conciliator contacted SERB regarding this issue. Representatives of SERB advised a conciliation report, on the merits, pursuant to ORC §4117.22. The officials at SERB advised that the Collective Bargaining laws are to be interpreted to resolve labor disputes. Those officials referred to this conciliator to the following statute:

Ohio Revised Code §4117.22 states as follows:

> "Chapter 4117 of the Ohio Revised Code shall be construed liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees."

This conciliator contacted both parties and informed the representatives that this conciliator had found that both parties' position statements had been untimely "submitted" to the

other side. Therefore, statutory law and case law would prohibit this conciliator from considering the evidence and position statements (which include the last offer) of both parties.

Without waving their objections to the untimeliness of the other's position statement and without waiving the right to justify or contest the untimeliness of their own position statements, the parties directed this conciliator to issue a conciliation report on the merits. Both parties also agreed to an extension of time to submit the conciliation report. Said extension was a mailing date on or before July 7, 2006.

FACTS

The sole issue presented is wages. The Union's final offers are the following increases:

2006	2 ½ %
2007	2 ½%
2008	3%

The City's final offers are the following increases:

2006	2%
2007	2%
2008	3%

The Fact Finder of this case recommended an increase in wages, which is the same as the increases offered by the city in its final position statement for this conciliation. This well written Fact Finding Report is detailed and the Fact Finding Report succinctly explains the facts that supported the positions of each side. After reviewing the Fact Finding Report, this conciliator believes that there were sufficient facts, in the Fact Finding Report, to support a favorable finding for either side. It appeared to this conciliator that each of the parties presented, in Fact Finding, compelling cases to support each party's position.

At conciliation, the Union stated that there was only one issue before the Fact Finder and that issue was wages. At Fact Finding, both parties declined mediation, but the Fact Finder insisted that he meet with both of the parties separately for "informal discussions." In his cover letter that accompanied the Fact Finding Report, the Fact Finder did express certain opinions that he gleaned from facts discovered in these informal discussions. These opinions may have affected the Fact Finding Report by using data discovered outside of the Fact Finding process in rendering the Fact Finding Report.

As to the evidence presented at the conciliation hearing, the Union presented external comparables of police agencies. The Union states that the city of Dover compares favorably in every category including median household income, median house value, per capita income, square miles, unemployment rate and bond ratings. The Union states that the income tax rate of the city of Dover is very low in comparison with other like cities.

The Union states its proposal is less than the average of pay increases for all comparable police departments in SERB's database, and its proposal is less than the average annual pay increase for the last decade.

According to the Union, factoring in the concessions for out of pocket costs for heath benefits substantially decreases the requested pay increase to an increase below the increase offered by the city.

Historically, the commencement date of the contract was effective in November of each year. The parties agreed to a commencement date of January 1, 2006. The Union members will lose two months on their pay increases.

During the conciliation, the City provided the following evidence. The City states that

although it is not raising an inability to pay defense, the increase proposed by the Union would create undue financial hardship on the city. The City states that expenses of the city have been higher than revenues since 2002. The general fund carryover has declined significantly (40%) since 2001. The amount reserved for capital expenditures has decreased so that the City could cover operating expenses. There has been a decline of state funding, a decline of estate tax revenue and a decline of interest on investment. Wages are the highest expenditure being 63.3% of all expenditures.

Of particular note is the transfer of income tax revenues to the general fund. The City was required to lower the amount it set aside for capital improvements from 40% to 20%. Without the reduction, the City claims its finances would be in the negative. The costs of wages, fringes have increased slightly over the past three years.

The City warns that there will be less revenue in the future. The City states that the elimination of the estate tax and the personal property tax will adversely affect revenue for the City. The following state budget items will adversely affect the City's revenue: potential loss of Kwh tax, loss of local government funds, increased unfunded mandates, and elimination of any state subsidies such as fuel tax reimbursement, fuel excise tax, and permitting fees.

The City presented external comparables stating that the union members are the highest paid police department in the area. The City introduced evidence of an internal comparable, the firefighter's union. The City states that the fire fighters of Dover earn less per hour than the police per hour.

DISCUSSION

The administration of the City has done an excellent job monitoring city expenses and

"watching out" on behalf of the taxpayers for possible and probable losses of revenue and increases in expenses. The administration is competently performing its duty of exercising its lawful authority.

Out of pocket payment of health insurance benefits directly and adversely affects the disposable income of the union members. Coupling the direct payment of health costs with the Union's requested income request is not unreasonable nor overly burdensome.

Because the opinion and/or recommendation of the Fact Finder may have been affected by matters gleaned outside of the Fact Finding process, this conciliator has examined the Fact Finding Report in that light.

DECISION

The Collective Bargaining Contract shall contain the following language:

"All employees shall receive wages and appropriate overtime work payments in accordance with the following schedules EFFECTIVE JANUARY 1ST OF EACH YEAR (which represents a two and one-half percent (2 ½%) increase in 2006, a two and one-half percent (2 ½%) increase in 2007 and a three percent (3%) increase in 2008.)

WAGES

Classification	2006	2007	2008
Captain	$23.27	$23.85	$24.56
Captain Detective	$23.27	$23.85	$24.56
Police Officer	$20.58	$21.10	$21.73
Dispatcher	$19.25	$19.73	$20.32

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CERTIFICATION

A copy of the foregoing Conciliation Report was sent this 6th day of July 2006, via Certified U.S. Mail/RRR to: Zachary T. Space, Law Director, City of Dover, 714 N. Wooster Ave., Dover, Ohio 44622 and to Mark E. Drum, Staff Representative, 222 E. Towne Street, Columbus, Ohio 43215 and by regular mail to J. Russell Keith, Administrator, Bureau of Mediation, SERB, 65 E. State Street, 12th Floor, Columbus, Ohio 43215.

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