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.