

2007 NOV -1 A 11: 29

CONCILIATION REPORT  
STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
October 31, 2007

In the Matter of: )  
 )  
The City of Marietta )  
 )  
and ) 06-MED-12-1424  
 )  
Local 442 )  
International Association of )  
Fire Fighters )  
 )

APPEARANCES

For Local 442:

Dennis Haines, Attorney for Local 442  
Tim Casto, Local 442 Bargaining Unit Representative  
Richard Stewart, Local 442 Bargaining Unit Representative  
Kyle Talbott, Local 442 Bargaining Unit Representative  
Bruce Weckbacher, Local 442 Bargaining Unit Representative

For the City of Marietta:

Cheri Hass, Attorney for the City  
Frank Hatfield, Attorney for the City  
Bill Danber, Assistant Safety Service Director, City of Marietta  
Tom Dempsey, Fire Chief City of Marietta  
David Sands, Safety Service Director, City of Marietta

Conciliator: Dennis M. Byrne

**Background:**

The parties to this Conciliation are the employees of the Marietta Fire Department represented by the International Association of Fire Fighters Local 442 and the City of Marietta. Prior to the Conciliation, the parties held numerous negotiating sessions and participated in a Fact Finding over a wage re-opener. The Union accepted the Fact Finder's report, but the City rejected the report because it claimed that the recommended wage increase was excessive. Consequently, the only issue before the Conciliator is wages.

The Conciliation Hearing was held on October 11, 2007, at the Marietta City Annex Building located at 304 Putnam Street. The hearing was convened at approximately 10:00 AM and adjourned at 2:30 PM.

The Ohio Public Employee Bargaining Statute sets forth the criteria a conciliator is to consider in making recommendations. The criteria, which are set forth in Rule 4117.14(G)(7), are:

- (1) Past collectively bargained agreements, if any, between the parties.
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit 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 interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards 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 procedures in the public service or private employment.

**Introduction:**

The Conciliator was presented with a different situation than the one faced by the Fact Finder. At the fact finding the City proposed a one (1.0%) percent wage increase retroactive to January 2007 and an additional one and one-half (1.5%) percent increase in January 2008. The City argued that it had an "inability to pay" more than that amount. The Union demanded a four and three-tenths (4.3%) percent raise in January 2007 and a four and three-tenths (4.3%) percent raise January 2008. In addition, the Union also demanded that the City pickup one and one-half (1.5%) percent of the firefighters' Public Employee Retirement System (PERS) payment over the next two years, i.e., a three (3.0%) percent PERS pick-up.

The Fact Finder convincingly found against the City's position with respect to the "inability to pay" argument. As a result he recommended that the firefighters receive a three and one-half (3.5%) percent wage increase retroactive to the first pay period of 2007, a one (1.0%) percent wage increase on July 1, 2007, a three and one-half (3.5%) percent wage increase on November 1, 2007, and a three (3.0%) percent PERS pick-up also payable on November 1, 2007. A little arithmetic shows that the Fact Finder recommended that the firefighters receive pay and benefit increases of approximately five and one-fifth (5.2%) percent for calendar year 2007 and approximately six (5.95%) percent for calendar year 2008. The Union demanded eleven and three fifths (11.6%) percent over two years, and the Fact Finder recommended slightly less than this amount or eleven and one tenth (11.1%) percent. Given the fact that it offered

two and one-half (2.5%) percent, the City rejected the Fact Finder's report.<sup>1</sup>

In the interim between the firefighters' fact finding and conciliation, the City completed wage negotiations with a number of other City bargaining units, and it settled with these units for three (3.0%) percent for each of the remaining two contract years and a seven hundred and fifty (\$750.00) dollar signing bonus. It made the same offer to the firefighters.

Implicitly, the City is making an internal parity argument and is arguing that a pattern wage settlement exists in Marietta and that there is no justification for the firefighters to be paid more than the pattern. Therefore, the City's offer to the firefighters mirrors its settlement with other City bargaining units. For a firefighter at the top end of the pay scale, a seven hundred and fifty (\$750.00) dollar signing bonus amounts to just over one and three quarters (1.75%) percent. Therefore, the City is offering approximately seven and three quarters (7.75%) percent over the next two years. This is a significant increase from the two and one-half (2.5%) percent that the City offered the firefighters during fact finding. It appears that Fact Finder was correct in his assessment that the City did not have an "inability to pay" more than a minimal wage increase to its employees.

It is settled that absent some formal agreement on coalition bargaining each bargaining unit must be allowed to make demands based on its own unique needs. In this instance the firefighters did not join any coalition to negotiate an across the board wage increase for all City workers. In addition, the firefighters contend that they have fallen behind other comparably situated firefighters and that inequity means that they need a significant increase in their wages. ORC

---

<sup>1</sup> The calculations for these percentages are shown in Appendix 1 of this report.

4117 requires that the City bargain with the firefighters on their demands.

Internal comparability is only one factor that a Neutral is to consider when making a recommendation. Often it is a deciding factor, but sometimes it is not even a major consideration.

The Fact Finder made his recommendations based on a number of factors. First, he considered the evidence from other comparable jurisdictions to Marietta in order to determine what other similarly situated municipalities paid their firefighters. The parties presented evidence from different jurisdictions. The City claimed that Cambridge, Coshocton, Chillicothe, Circleville, Ironton, New Philadelphia, Portsmouth, Steubenville, and Washington Court House are the group of cities that are the most like Marietta; and therefore the City presented these cities as the best comparables. The Union presented evidence from Lancaster, Cambridge, Portsmouth, Athens, Chillicothe and Zanesville.

The Fact Finder found that the Union's comparables were a better comparison group than the comparables cited by the City. The main reason seems to be that the Union's comparables are the group of cities that have been historically used as a comparison group. Therefore, the Union's comparables allow a Neutral to see how wages and benefits in Marietta have changed vis-à-vis the same comparable jurisdictions over time. If the City's group of comparables is used as the comparison group, then there is no base line data on the comparable jurisdictions. Therefore no time trend of wages and benefits can be computed.

The City argued that its comparables offer a better view of the situation in other jurisdictions because of changes in the historic comparable cities over time. That is, the City argued that it has changed since the late nineteen eighties and so have the other jurisdictions on the Union's list. The City believes that using a group of cities that were comparable to Marietta twenty plus years ago is now comparing apples to oranges. The City stated that the current economic climate, population (growth), income, etc., must be considered when deciding which jurisdictions are comparable to Marietta, and that some of the historically comparable cities no longer bear any relationship to it. In other words, the City is arguing that it is time to define a new set of comparables.

The Conciliator agrees up to a point. Conditions have changed for the better and the worse in all Ohio cities over the past decades. Some cities have prospered and some have declined. The idea behind comparables is that the Neutral and the parties can use data from similar jurisdictions to get an idea of what other *similarly situated* (emphasis added) jurisdictions pay. The City argues that based on a number of factors, its list of comparables is a better comparison group than the historic comparables. The Union presented data on the historically agreed upon comparables. The Union believes that these jurisdictions still give a valid picture of what other *similarly situated* (emphasis added) pay.

In particular, the City disagreed with the inclusion of Lancaster and Zanesville on a list of cities comparable to Marietta. The City argued that Lancaster has become a bedroom suburb of Columbus and that Zanesville is

now much larger than Marietta. The Conciliator researched information from these two cities and found that Lancaster is much larger than Marietta. Moreover, its financial condition is in no way similar to the situation in Marietta. Consequently, the Conciliator finds Lancaster is not comparable to Marietta. The data is less compelling in the case of Zanesville; and the Conciliator believes that in many ways Zanesville is still comparable to Marietta. Therefore, the Conciliator will compare Marietta to Athens, Cambridge, Chillicothe, Portsmouth, and Zanesville.<sup>2</sup>

Using the data presented by the firefighters in their presentation to the Fact Finder and reintroduced during the conciliation, the Conciliator finds that the average base hourly rate for the comparable cities taken as a whole is \$15.48. The base hourly rate in Marietta is \$14.72. That is, Marietta firefighters lag behind other comparable jurisdictions in terms of their wages. The gap is \$.76 per hour or approximately five (5.0%) percent.

A second difference in the parties' presentations is the Union's use of Fair Labor Standards Act (FLSA) overtime in its calculations of wage rates. The FLSA mandates that a jurisdiction pay mandatory overtime to its firefighters if they work in excess of two hundred and twelve (212) hours in a twenty-eight day cycle. This is the so-called 7(K) exemption. In the Union's presentations FLSA 7(K) pay is calculated as part of earnings. This makes the earnings of some

---

<sup>2</sup> The Conciliator believes that the parties have made a compelling point about comparables. After the passage of ORC 4117, the parties usually picked comparables that supported their bargaining positions. Neutrals often made the final determination about what the comparables lists should be and these lists became the ones used by the parties. However, the idea of which jurisdictions are comparable may have to be revisited. Over time different cities have changed in different ways. This may mean that a city that was once comparable to another city no longer is. All parties should try to agree on a comparables list or Neutrals may be forced to return to the early years of ORC 4117 and make a new judgment about what constitutes a comparable jurisdiction.

jurisdictions higher than would otherwise be the case and makes Marietta firefighters appear to earn less than their counterparts in other cities.

The Conciliator understands why the Union calculations include FLSA overtime. However, the Conciliator has never been involved in a case where firefighters have argued for more scheduled work hours during negotiations. Rather, almost all fire departments argue for fewer scheduled hours and overtime paid on a forty- hour base. This increases take home pay if the firefighter has to work overtime. Moreover, fewer scheduled work hours leave the firefighter more time off and that has some value in and of itself. Therefore, the Conciliator believes the inclusion of FLSA overtime in base wage rates tends to confuse rather than clarify the issue.

There are two other issues that the parties discussed at the conciliation hearing. The first is the change in medical insurance carriers. The Union argued that this change saved the City a significant amount and that money was available to fund the wage and benefit increases recommended by the Fact Finder. The City argued that the Union was overstating the savings and understating the benefit of the new plan to the employees. What is clear is that the new plan will cost less in the next few years and will give the City a five-year guaranteed rate for health insurance costs. The new insurance does provide the City with some relief compared to the old plan, but it is not a panacea, and medical insurance costs will continue to rise for the next five years. However, the implementation of the new plan does free up some money for other uses,



including wage increases. Any discussion about the new plan's impact on the employees is beside the point.

The second fact debated at the hearing was the impact of the PERS pension pick-up. The Union argued that many other City employees get a pick-up and that equity considerations demand that they also get the benefit. The City countered this argument with the fact that other employees took a wage freeze in a year when the firefighters got a wage increase and that the other employees, in effect, paid for the pick-up. The City believes that the firefighters are trying to claim an inequity exists where none does. The City argued that if the firefighters want the PERS pick-up, then they should negotiate a wage freeze as a tradeoff for the pick-up and that this would be a fair resolution of the seeming inequity that currently exists.

The City also argued that the Conciliator was precluded from awarding a pension pick-up in this case. The City cited the language of the collective bargaining agreement as the basis for its assertion. The wage re-opener is covered under the language of Article 14 of the current contract. The re-opener language states:

The parties agree to re-open negotiations on or after January 1, 2007, as to the pay rates set forth above. The re-opener is subject to the provisions of ORC 4117. The parties further agree that any pay rate increases negotiated on or after January 1, 2007, will be retroactive to January 1, 2007.

The City argued that this language is precise and that the meaning is not open to interpretation. In this instance, the City strongly maintains that the words say exactly what they mean.

The current impasse is the result of specific wage re-opener language. The parties negotiated a wage freeze for the first year of their current contract, but they also agreed to a wage re-opener in the second and third contract years. However, they could not come to an agreement on second and third year wage rates and on the *medical insurance* (emphasis added) plan; consequently, they availed themselves of the dispute resolution procedures of ORC 4117. They went to fact finding, and the Fact Finder made a recommendation on wage rates and the implementation of a pension pickup. The City testified that it made the same argument to the Fact Finder, i.e., that he could not recommend a PERS pick-up, and he disagreed. That is, he took an expansive view of wages (wage rates). The City stated that in its opinion a Fact Finder has more leeway than a Conciliator because the Fact Finder can 1) craft a recommendation that he/she believes is reasonable whereas a Conciliator must pick a final offer, and 2) the Fact Finder's recommendation is not binding. In the case of a final offer conciliation award, the City argued that the re-opener language of Article 14 means wage rates and nothing more. The City placed a number of legal opinions into the record in support of its position.

The Union disagreed with this analysis. The Union also cited a number of cases and made the argument that the case law cited by the Employer was not on point in this matter. The Union argued that the Fact Finder heard the debate and issued an award containing a PERS pick-up. However, the Union does agree with the City that under the final offer language of ORC 4117 the Conciliator must select one of the final offers without change.

The Conciliator is bound by the language of ORC 4117. He cannot pick and choose or “divide the baby.” Rather, the law mandates that a Conciliator select one of the parties’ final offers as submitted with no changes. Therefore, if the Conciliator agrees with the Union position, he must award a PERS pick-up.

According to the language quoted by the City, the parties can only discuss wage rates. However, according to the Fact Finding report, both medical insurance and wages were discussed. The Fact Finder used the fact that the City was saving money on health insurance as a reason for his wage recommendation and his report states that the parties started with two issues and settled one during discussions at the fact finding.

The Fact Finder took an expansive view of the term “wage rates.” This is the way that most labor relations practitioners view the term wages. Wage bargaining comes from the National Labor Relations Act phrase, “wages, hours, terms and other conditions of employment.” The term wages has been expanded beyond the original meaning that the framers of the NLRA intended, and it now covers not only wages but also benefits, tuition payments, country club memberships, pensions, etc. Therefore, the Fact Finder’s recommendation was within the standard industrial relations meaning of the term “wage rates.”

Moreover, if the City were to be consistent in its argument about the meaning of the phraseology of Article 14, it would not have discussed health care, i.e., a benefit covered under the “wages, hours, terms and other conditions of employment” language as part of the re-opener negotiations. Health benefits are not wages in the technical sense of the words. Therefore, given the facts of

the matter, the Conciliator is forced to conclude that the City's own actions undercut their position on this issue and that a pension pick-up is a legitimate issue for the Conciliator to consider in this matter.

**Union Position:**

The Union demands that the Fact Finder's Report be accepted as its final offer.

**City Position:** The City is offering three (3.0%) percent in 2007 and three (3.0%) percent in 2008 and a seven hundred (\$750.00) signing bonus payable when the new contract goes into effect.

**Discussion:** The parties' positions are widely divergent. The City is offering approximately seven and three-quarter (7.75%) percent over the next two years and the Union is demanding over eleven (11.19%) percent over the same period. The parties were originally approximately nine (9.0%) percent apart. That is, the City was offering two and one-half (2.5%) percent and the Union was demanding eleven and three-fifths (11.6%) percent over two years. The Fact Finder recommended a wage increase of over eleven (11.19%) percent. It is apparent that the Fact Finding Report caused the parties, especially the City, to reconsider their positions.

Final offer arbitration is intended to put pressure on the parties to modify their demands and come to some compromise position because a Neutral must pick one or the other of the final offers. That is, there is a winner and a loser. In an attempt to minimize their risk of losing at conciliation, the parties are

supposed to come to some middle ground. In this case the parties did modify their original positions, but a spread of almost three and three fifths (3.6%) percent remains. This spread is substantial and represents a very large range of disagreement between parties' final positions

The Conciliator has written a number of times in previous reports that a fact-finding report should carry great weight at a conciliation hearing. If a conciliator ignores the fact finder's recommendations without reasonable cause, then the fact-finding process becomes an exercise in futility. That statement, however, cannot be taken to mean that a conciliator must always accept the fact finder's recommendations. If either party can show some reason why the fact-finding report should be modified, then the conciliator must take that evidence into account when he/she decides the issue.

In this instance the Conciliator has found that the comparables relied upon by the Fact Finder contain an inappropriate jurisdiction. This jurisdiction pays much higher wages than any other jurisdiction in the comparables, and its *inclusion in the analysis makes the Marietta firefighters appear worse off vis-à-vis* other comparable fire departments than is warranted. In a similar vein, the Conciliator also has questions about the total savings to the City from changing health insurance plans. There is no doubt that there is a saving, but it is hard to calculate the exact amount of any future saving because the actual cost of the old plan in the out years cannot be known with certainty; and this impacts the City's ability to fund current wage increases.

The City also presented new and different evidence at the hearing. The Fact Finder was aware that the Ohio State Auditor's office was conducting a performance audit of Marietta, but the Auditor's report was not issued before the Fact Finder issued his report. However, the entire Performance Audit was issued and placed into the record at the conciliation hearing. The City argued that this new evidence gave strong support for its position. The City believes that the Auditor's projections make clear the fact that the City will face a budget deficit in 2011. Moreover, the Auditor recommended that the City try to hold the line on the payment of a PERS pick-up and minimize wage negotiated wage increases in the coming years.

The Conciliator has read the Auditor's Report a number of times and finds that the report does not make a strong case for its conclusions. The report makes a number of assumptions that appear to be counterfactual, e.g., the estimate of funds coming to the City via the inheritance tax. Moreover, the report's authors make clear that most of their income projections are based on conservative estimates of future revenues. This is reasonable given the goals of the report, but it limits the usefulness of the report as a basis for deciding current wage increases.

The Conciliator understands that the City cannot be forced into granting wage/benefit increases that would lead to bankruptcy. However, even if the Fact Finder's recommendations were accepted, the resulting wage bill would hardly bankrupt the City.

The Union's presentation was also flawed. The Union made a strong presentation to the Fact Finder and convinced him to recommend a significantly higher wage package than the City was offering. That is, the Union proved that the City did not have an "inability to pay." However, the City modified its offer after the issuance of the Fact Finding Report and offered significantly more at the Conciliation hearing than it offered at Fact Finding. Furthermore, the City never made any statements that could be construed as an "inability to pay" argument. Rather the City, relying on the State Auditor's Report, argued that it had to take steps now to head off problems in the future. The Union's presentation was similar to the one that it made at Fact Finding, but it did not really address the changed situation caused by the issuance of the Fact Finder's report.

Given the entire record, the Conciliator believes that the Fact Finder's wage recommendation without the PERS pick-up is the most reasonable settlement. However, the Conciliator is precluded from making this his final award. The PERS pick-up adds to the take home pay of the firefighters and is a wage increase by another name. In this instance, the firefighters are basing their demand on equity considerations; but other City bargaining units "bought the pick-up" by accepting a wage freeze in a year where the firefighters negotiated a wage increase.

On the other hand, the City's offer is somewhat low given the fact that the firefighters have fallen behind other comparable departments, regardless of the composition of the comparables list. Moreover, the payment of a bonus as

opposed to the inclusion of the same amount of money in the base rate is worth less over time to the firefighters than the same dollars in their base rate.

Given the facts in the record, a three (3.0%) percent wage increase may be in the vicinity of the raises negotiated throughout the State, but a raise of this magnitude does not address the fact that there was a wage freeze in the first year of the current contract, the Emergency Medical Technician payment notwithstanding; and it does not close the gap between Marietta and other comparable departments. This is especially true given the current financial condition of the City. Marietta may face financial problems in the future, but currently the City can fund the raises recommended by the Fact Finder.

Given all of the information presented at the hearing, the Conciliator believes that the City's offer is less realistic than the Union's demand. The City's actual offer is six (6%) percent with a bonus. The bonus is about one and three-quarters (1.75%) percent of the wage of a firefighter based on a current average firefighter top wage of \$40,568.00. Therefore, the City is offering a reasonable increase in the range of four (4.0%) percent per year. Unfortunately, the offer only raises the base rate six (6.0%) percent. If the City offered eight (8.0%) across the board, the Conciliator believes that this would be a reasonable offer given all the data in the record.

The Conciliator believes that the Fact Finder's wage recommendation is somewhat high. However, it must be remembered that the City only offered two and one-half (2.5%) percent at fact-finding. The Fact Finder was correct in his assessment that the City was able to afford a more realistic wage offer, and his



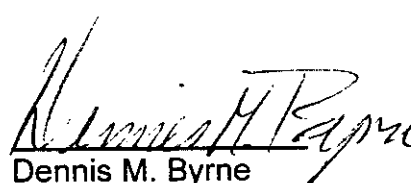
recommendations were the catalyst that forced the City to come to the table with a more reasonable offer for all of its employees.

Consequently, the Conciliator believes that the Union demand is somewhat high and the City offer is somewhat low. However, given all the information in the record, the Conciliator believes that the Union's position is somewhat stronger. Regardless of any other factor, the Marietta firefighters have fallen behind other comparable jurisdictions with respect to wage rates; and the City's base rate offer of six (6.0%) percent would not close this gap, instead it would probably widen the difference between Marietta's firefighter and their peers.

**AWARD:**

The Fact Finder's recommendations shall be implemented.

Signed this 31<sup>st</sup> day of October, 2007 at Munroe Falls, Ohio

  
Dennis M. Byrne  
Conciliator

## Appendix 1

### **Wage Calculations**

#### Fact Finder Wage Rates:

The following example will assume a firefighter makes \$1,000.00 per month. This will facilitate the calculations and not affect the calculated percentages.

January 2007, three and one-half (3.5%) percent.  
 $\$1,000.00 \times 1.035 = \$1035.00$  for six months

July 2007, one (1.0%) percent.  
 $\$1035.00 \times 1.01 = \$1045.35$  for four months

November 2007, three and one-half (3.5%) percent.  
 $\$1045.00 \times 1.035 = \$1082.00$  for two months

November 2007, three (3.0%) percent.  
 $\$1082 \times 1.03 = \$1114.00$  for two months

Total wage payment for 2007.	
$\$1035.00 \times 6 =$	$\$6,210.00$
$\$1045.00 \times 4 =$	$\$4,180.00$
$\$1114.00 \times 2 =$	<u><math>\\$2,228.00</math></u>
Total	$\$12,620.00$

#### Percentage Increase:

YR.1	$\$12,630.00/\$12,000.00 = 1.052\%$
Yr. 2	$\$13,368.00 (\$1114.00 \times 12) / \$12,620.00 = 1.059\%$