

STATE EMPLOYMENT RELATIONS BOARD
STATE OF OHIO

2007 DEC 10 P 1:25

In the Matter of Conciliation Proceedings between:

The City of Middletown	:	Case Nos. 07-MED-02-0095
Middletown, Ohio	:	07-MED-02-0096
	:	
And	:	Conciliation Award
	:	
The Fraternal Order of Police	:	Margaret Nancy Johnson
Lodge No. 36	:	Conciliator

Appearances

For the City:
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Statement of the Case

Procedural Propriety

Pursuant to Ohio Revised Code Section 4117.14(D)(1), the Ohio State Employment Relations Board appointed Margaret Nancy Johnson to serve as Conciliator in the pending bargaining impasse between the parties. On October 26, 2007 the matter came on for hearing, with both parties having the opportunity to introduce into the record sworn testimony subject to cross-examination as well as documentary evidence supportive of their respective positions. In compliance with Ohio Administrative Rule 4117-9-06(E), five days prior to the hearing the parties timely submitted to the conciliator position statements on the contractual issues in contention. Upon a thorough review of the evidence and considering the factors set forth in Ohio Revised Code Section 4117.14(G)(7), the Conciliator herein issues a final offer settlement award.

Background Information

Located in southwestern Ohio, the City of Middletown, hereinafter "City," employs about sixty-four (64) Police Officers and thirteen (13) supervisors to provide law enforcement services for its businesses and approximately 51,605 residents. Since 1985 these employees have engaged in collective bargaining with the City to determine wages as well as terms and conditions of employment. Currently, the Patrol Officers unit and the Police Supervisors unit are represented by the Fraternal Order of Police, hereinafter "FOP," or "Union." Two of eight bargaining units within the City, the Police Officers and the Supervisors units have almost identical labor contracts except for wage rates.

On September 8, 2006, pending contract negotiations the parties agreed to extend and continue all the terms and conditions of the labor agreements about to expire on October 31, 2006. In addition, the parties agreed upon retroactivity of economic provisions. Thereafter, the parties mutually agreed upon two additional extensions including retroactivity while they engaged in the statutory procedures of fact-finding and conciliation. As the City rejected the recommendations of the fact-finder issued on June 29, 2007, the parties proceeded to conciliation. By agreement dated October 2, 2007, the period for conciliation has been extended to December 15, 2007.

Issues

Contractual issues upon which the parties remain at impasse include the following: Grievance Procedures; Wages; Shift Differential; Overtime; Court Time; Call-out Pay; Mandatory Time; Off-duty Action; Insurance; Uniforms.

Positions of the Parties

I Non-Economic Issues: Grievance Procedure

1. Article VI - Section B.2

Position of the City The City proposes modifying the current contract provision by additional language which would limit the authority of an arbitrator in disciplinary cases **“to making a determination on the issue of cause, and as such the arbitrator may not modify the nature or extent of the penalty imposed.”** Contending that it is the prerogative of the City, not the arbitrator, to determine the appropriate level of discipline, the City seeks to preclude an arbitral reduction of a penalty when just cause has been found. Issues of negligent retention, civil liability, and public opinion mandate that if cause be found for discipline, then the discipline assessed by the City ought not to be set aside.

Position of the Union Seeking to retain current contract language, the FOP maintains that the propriety of the level of discipline is an inherent aspect of just cause and due process. A prohibition upon the exercise of such a review by an arbitrator lacks both internal and external comparability. Assessing a penalty commensurate with an offence is an integral component of labor jurisprudence.

2. Article VI - Section B.4

Position of the City An additional modification to Grievance Procedure language proposed by the City would require the Union to **“bear the entire cost of the withdrawal or cancellation in cases in which the union withdraws a grievance from the arbitral forum or cancels an arbitration.”** If the Union or employee decides not to proceed with arbitration after initiating the process, the City should not have to bear the cost of that decision.

Position of the Union Withdrawals having occurred only twice in the long bargaining history of the parties, the Union maintains the proposal is both unnecessary and has a minimal economic impact. Moreover, the proposed language is a disincentive to settlement discussion.

3. Article VI - Section B.7

Position of the Union The Union proposes deletion of the current language in Article VI, Section B.7 which imposes limitations upon considering seniority or the City's condoning of past infractions for purposes of mitigation. When assessing the propriety of discipline, disparity and length of service of an employee are frequently cited as criteria. The prohibition presently in place precludes such a consideration and it should be removed.

Position of the City This provision has been in the Collective Bargaining Agreement since its inception and the fact-finder did not recommend the proposed removal. Inclusion of the language ensures focus upon the misconduct rather than extraneous considerations.

4. Article VI - Section I

Position of the Union The Union proposes extensive new language concerning expunging of discipline from the discipline record of an employee. After a period of time free of discipline for comparable misconduct, an employee ought to be able to move forward without a disciplinary cloud. Similar retention language may be found in comparable jurisdictions.

Position of the City The fact finder did not recommend inclusion of the cumbersome and unnecessary revisions proposed by the FOP. Because suspensions are much more serious than written reprimands, such discipline should remain in an officer's personnel file. Removing discipline severely restricts the ability of the City to take appropriate action against officers in the future.

5. Article VI - Section K

Position of the Union The FOP proposes new language which would provide for Letters of counselling to be kept in a member's personnel file for up to six (6) months. If, after six months, no further disciplinary action of a similar nature has been taken against the employee, the letter of counselling is to be removed from the personnel file and not be used by the employer for any purpose.

Position of the City While it is not opposed to the concept included in the new language, the City proposes deletion of the word "similar," which is certain to generate dispute.

B. Economic Issues

1. Article VII - Section 1. Wages

Position of the City The City proposes a 3% increase in each year of a three year contract. Struggling financially, the City contends that a wage increase greater than its proposal will result in more reductions in municipal services. Since 2003, the Police Department has eliminated twenty-two positions, seven (7) of which have been within the ranks of the Police Officers. To avoid further reductions, it is essential that the City be circumspect with its expenditures.

The 3% proposed by the City is fair and reasonable given its economic condition. Evidence establishes a declining tax base and a substantial loss of income generating

jobs. Expenditures in excess of revenue and the past failure of the taxpayers to approve a safety levy must be considered when determining a reasonable wage increase.

In addition to a 4% decrease in income tax revenue, the city has experienced a 5.8% decline in property tax and a 2.8% loss in intergovernmental fund monies. Due to a lack of reinvestment within the City, the Auditor estimates further decline in property tax revenues for 2008. Given the decrease in revenues, the City is anticipating a shortfall well in excess of two million dollars, an amount that will substantially diminish the carry-over in the general operating funds. The City is confronting, like many older industrial cities in the State of Ohio, a decline in its economic base.

When proposing a 3% wage increase for the police bargaining units, the City has considered internal as well as external comparables. The intent of the City is to provide wage increases of 3% for City employees across the board. A 3% increase for the Police Department is quite consistent with wages paid to Police Officers of cities in the area having a similar socio-economic composition. While Middletown has fallen slightly behind the City of Hamilton, its most comparable city, it should be noted that Hamilton has a public safety levy, a revenue producing public utility, and an income tax rate of 2% compared to the 1.5% assessed by the City.

Because the City has an income tax based economy as compared to a property based economy, it is essential to maintain an operating fund balance for contingencies. Taking into account the financial situation of the City as well as the economic climate throughout the region, the City submits that its proposal on wages is reasonable.

Position of the Union For its wage proposal, the FOP seeks a 4% increase effective November 1, 2006, a 4.5% increase effective November 1, 2007 and a wage re-opener to commence 60 days prior to November 1, 2008. This proposal is the same as the recommendations of the Fact-finder.

Based upon wages paid to Police Officers in comparable cities, the wages paid to City Police Officers ought to be substantially increased. A review of police contracts in effect in 2007 in similar cities indicates that the Middletown Police Officers are currently paid 6.31% less in wages than the average paid in comparable police departments. These figures do not include other wage benefits that, if included, would even widen the wage disparity between the Police Officers of the City and their comparables. If the comparable cities used are those of the City, the evidence still establishes that the City falls behind in terms of wages paid to its Police Officers.

The issue of wages can not be viewed in isolation but must take into account the increase in costs which the members of the bargaining units are going to incur with insurance modifications including increased co-pays and employee contributions to premiums. Indeed, if the city were to prevail, its Police Officers would incur a reduction of almost 2% in their salaries.

In spite of its protestations, the City has funds available to pay a fair wage increase. Consistently, the economic forecasting of the City has been conservative, indeed, pessimistic. As a consequence, in the past the City has projected declines in the General Fund that have not materialized. Moreover, the actual dollars spent by the City routinely fall short of the budgeted amounts. Indeed, the Police Department has spent under its budget and returned monies to the City.

In addition to its cautious projections, the City is conservative in maintaining a fund balance. In its Report for the 2007 Budget, the City indicates that it “will enter and end the year with balances in excess of the 15% carryover target.” Yet, a fund balance of 5% has been deemed “prudent” by *Moody’s on Municipals*. The City’s General Fund Carryover far exceeds Moody’s recommended 5%.

Since 2002, income from investments has consistently grown. In 2006, the average yield was almost 4%, realizing additional money of \$1,273,009.70. And the City has entered into income generating agreements such as with PEEK and with JEDD, which realize income. A new hospital and school evidence other growth in the city, and future plans include expansion of Quaker Chemical.

While the number of Police Officers has been reduced, workload in the Department has increased. Crime has significantly risen in recent years, with the Police Department operating below authorized strength. Compared with the Fire Department, the Police Department has disproportionately borne the burden of reductions. These inequities must be remedied.

2. Article VII – Section F. Insurance

Position of the City Because the issue of insurance is so closely co-related to wages, it ought to be considered in the context of the wage increase and is, therefore, now reviewed. In spite of the fact that Anthem, the insurance carrier for the City, provides excellent network discounts, still, the increasing cost of health insurance has challenged the City as it has many other employers. Since health insurance was last negotiated in 2003, the City has experienced a 56% increase in its budgeted health insurance cost. To address the rising cost, the City initiated a task force consisting of members of management, non-management employees, and representatives from bargaining units, to address and make recommendations about health insurance. The Union elected not participate in the process even though participation by other unions has been positive.

For fiscal year 2007, using the services of a consultant, the Committee made several recommendations on adjusting the health insurance plan provided by the City. Recently, the committee has hired an insurance broker to assist in managing health insurance issues and in controlling insurance costs. Cost containment practices, such as an eligibility audit, have been initiated, and the broker is in the process of negotiating with the insurance carrier to decrease administrative costs in the renewal agreement.

Working with the broker, the City has developed a plan for the duration of the agreement, which, though not ideal, addresses some of the financial concerns. As proposed by the City, the plan allows employees to choose between two options, a Premium Plan or a Standard Plan. The premium plan provides 2007 benefits at an increased monthly contribution, and the Standard Plan provides reduced benefits and coverage for a lower contribution.

Position of the Union Because increased health insurance costs for employees result in a decrease in earnings, it is important to consider these two wage issues in tandem. The proposal put forth by the FOP is intended to make appropriate adjustments in insurance, but not to make them at the expense of the members of the unit nor to remove insurance from the realm of collective bargaining where it has been since 1985. The

proposal the FOP now puts forth is language recommended by the fact-finder in these proceedings.

In its proposal the FOP essentially adopts the recommendations of the Committee that provides for a 4 tiered health insurance system, adding employee plus spouse and employee plus children to the single and family coverage already in place. Per month calculations are based upon a 7.5% cost sharing formula, as compared to the current 5% formula. Additionally, the proposal provides for an increase in co-pays, again adopted from the committee's recommendations. For example, physician visit co-pays increase from \$10.00 to \$15.00. Similarly, prescription co-pays increase based upon a 3 tiered system and depending upon retail or mail order purchases, brand name or generic drug.

The FOP proposes, and the factfinder recommended, a \$4,000 opt out provision for members who can obtain medical coverage through a spouse. When an employee is not dependent upon the City for insurance coverage, the City saves money. The opt out amount is less than the cost to the City for either family or single coverage per employee.

Finally, the proposal of the Union provides for a reopener on insurance to start sixty days prior to November 30, 2008. While the Union is willing to voluntarily participate in a standing committee on medical benefits, said participation ought not to be precedent setting and the FOP ought to be able to withdraw at any time. Accordingly, the FOP adopts and proposes the language providing that "The FOP shall immediately begin to participate in the health Insurance Standing Committee process where its participation will not set a precedent regarding any future fact-finding or conciliation."

3. Article VII – Section C. Shift Differential

Position of the Union Contending that this proposal will have a minimal financial impact, the FOP seeks to modify the shift differential provisions from a fixed dollar amount to a fixed percentage for each of two tiers. Thus, for shifts starting after 2:45 p.m. but before 7:44 p.m., the FOP proposes "**shift differential compensation equal to three percent (3%) of the top step of a Police Officer's hourly rate of pay per hour in addition to his regular rate of pay for all time worked on that shift.**" Similar language providing for a two (2%) percent differential is proposed for shifts starting after 7:45 p.m. but before 6:44 a.m. Comparable cities have higher shift differentials than that provided by the City.

Position of the City As recommended by the factfinder, current contract language adequately compensates bargaining unit members. Since most Officers work preferred shifts, the increased cost to the City for the proposal is not justified.

4. Article VII – Sections D.1 and D.12 Eight (8) hour day

Position of the Union The FOP proposal for Section D.1 changes current language providing for a 40 hour work week and initiates an "8 hour day." In Section D.12 the FOP seeks to eliminate language establishing that when compensatory time is used, it shall not count as hours worked for the purposes of determining overtime. Arguing that the City is out of line with comparable cities, the request is intended to afford Middletown officers with a benefit received by all comparable cities but Kettering, which does not have an exclusion for compensatory or sick time usage in their hours worked calculation and which compensates its police officers at a more substantial rate.

Position of the City Overtime is always a budgetary concern to the City and this proposal would undoubtedly significantly add to overtime calculations. The proposal ignores the City's financial condition in an attempt to increase compensation for employees. Accordingly, the City is opposed to the modification put forth by the Union.

5. Article VII - Section D.3 Court Time

Position of the City Suggesting a modification to Section D.3, the City proposes a reduction in the minimum hours for Court time from three (3) to one(1). Court time contributes substantially to overtime costs in the patrol division. In 2006, the average time a police officer spent in court was only 1.23 hours. Accordingly, the reduction from three hours to one is justified. Additionally, the City seeks language providing that court time be paid as straight time rather than automatic time and a half unless the employee qualifies for overtime having worked the 40 hours in a pay period prior to his/her court appearance.

Position of the Union Although the FOP initially proposed modifying current contract language to provide members with five (5) hours of pay, rather than three (3) for court appearances while off duty, its proposal was withdrawn at fact-finding and the FOP seeks current contract language.

6. Article VII – Section D.4; D.5; D.6 and D.11 Call-out; Mandatory Time; Off-duty Service; Overtime

Position of the City As a cost-cutting measure, the City proposes reducing call-out pay to one (1) hour rather than the current three (3) hours. Additionally, the City proposes a minimum of one (1), rather the current two (2) hours for any mandatory job assignment scheduled outside the normal hours of an employee. Finally, the City proposes the elimination of pay for off-duty incidents, presently paid at a minimum of three (3) hours. The City proposal relative to call-out and mandatory time more accurately reflects the actual time worked. Since off-duty incidents usually result in the Police Officer calling-in the incident without performing law enforcement services, elimination of the provision is justified. Given the fiscal restraints of the City, it ought not to be required to pay officers for time not actually worked. Since it ought not to be required to pay for such time at overtime rates, City proposes the elimination of Article VII, Section D.6 by which overtime is provided for the services previously referenced.

Position of the Union The Union seeks current contract language for these provisions. When an officer provides a service for the city, he should be paid for his time. Comparable jurisdictions recognize the need to fairly compensate employees for such time worked. The proposal of the City appears to be retaliatory rather than rational.

7. Article VII. - D.8 Sellback Time

Position of the Union Proposing changes to the sell back language currently in the agreement, the FOP contends modifications are beneficial to both the City and the FOP. The proposal is coincidental with either anticipation of the retirement of a member and/or his/her entry into the DROP program. Thus, a member could obtain credit for sellback time for the purposes of pension which is paid by Ohio Police and Fire Pension Fund and which has no financial impact upon the City during retirement or while in the DROP

program. Because the compensatory bank liability of the City is lessened by not having to pay a large lump sum payment upon retirement, the City is benefited by this proposal.

Position of the City The City seeks current language in so far as it is seeking to curtail increased financial liability in this round of negotiations.

8. Article VII – Section G. 2, Section G.3 – Uniforms

Position of the Union Modifications sought by the FOP include an increased uniform allowance for clothing and maintenance from \$250 twice a year to \$450 paid twice a year and non-uniformed officers maximum allowance to be increased from \$800 to \$1,250. Of comparable cities, Middletown is the lowest in terms of the uniform allowance provided its officers. Even with the proposal of the FOP, the City remains low in comparison to other cities.

Position of the City Since this benefit was increased during the last round of negotiations, the City believes it is not warranted at this time when the City is striving to curtail costs and operate within a balanced budget. The fact-finder did not recommend this modification which would add to City costs more than \$125,000 over the term of the contract.

Discussion

Criteria

While ten (10) economic and six (6) non-economic proposals have been presented to the Conciliator for resolution, the underlying differences between the parties involve insurance and wages. Because an increased employee cost for insurance precipitates a demand for a corresponding increase in wages, proposed modifications to the insurance and wage/benefits provisions of the contract appear inextricable. Both parties acknowledge the inter-relatedness of these two economic proposals. Yet, the two contractual items are, in fact, independent and severable. Accordingly, considering the statutory standards, the Conciliator must analyse each proposal separately and render an award based upon applicable criteria.

Some considerable discussion concerning the deference if any, which should be afforded to the June 29, 2007 recommendations of the fact-finder occurred at the conciliation proceeding. In general the Conciliator concurs with those who confer considerable weight upon the recommendations previously issued. Nonetheless, bargaining history and the extent to which the parties engaged in further modifications to their positions will have an impact upon the degree to which deference is appropriate. Furthermore, last offer proposals usually emanate from the fact-finding process and the Conciliator is typically reviewing the same terms and data using the same statutory criteria. Deference is diminished, however, when additional evidence is elicited or when the fact-finding recommendations are issued without a rationale for the same and the Conciliator is not able to discern the basis for the recommendations. In the absence of any reference to applicable criteria or to evidence supportive of conclusions reached by the fact-finder, his or her recommendations are less persuasive for the Conciliator.

In rendering an award, the Conciliator must take into account the six statutory criteria set forth in Section 4117.14(G)(7) Ohio Revised Code Section. These are obligatory standards for the rendering of a Conciliation Award. Not only should these criteria be considered, but they should also be addressed in the award.

A. Non-economic Issues: Grievance Procedure

Between the parties five (5) proposals for amendments to the Grievance Procedure provisions of the Agreement have been presented for consideration as non-economic issues. While three of the proposals concern modifications to existing language on the arbitration process, two proposals involve new provisions to be added to existing terms.

1. Article VI – Section B.2

Language proposed by the City would restrict the authority of the Arbitrator and prohibit modification of discipline assessed for employee wrong-going. Relying upon the well-established precept that a review of “just cause” includes the appropriateness of the penalty for misconduct, the fact-finder recommended retention of current contract language. Concerns identified by the City at conciliation include potential liability for negligent retention and public opinion in the event of a reinstatement of an employee terminated by the City. Insofar as an arbitration award that is contrary to “public policy” may be appealed, the Conciliator finds the City can address its concerns without a contractual revision that both changes ingrained concepts and also contravenes internal and external comparability. Previously negotiated language that is consistent with arbitral jurisprudence and community standards should be retained. Accordingly, the Conciliator awards the position of the Union and sustains current contract language.

2. Article VI - Section B.4

The City seeks to shift to the Union the cost of the cancellation of a scheduled arbitration. In the absence of evidence of abuse of the grievance procedure or of comparable language in other jurisdictions, the fact-finder recommended current contract language. Concurring with the analysis of the fact-finder, the Conciliator also notes that such language may have the unintended effect of “chilling” settlement discussions. Negotiated steps of the grievance procedure are designed to encourage resolution and not to penalize a party for doing so. Accordingly, the Conciliator awards current contract language as proposed by the Union.

3. Article VI – Section B.7

While the Conciliator recognizes that current language limits arbitral consideration of disparate treatment when assessing just cause, she concurs with the fact-finder that the statutory criterion of prior collective bargaining agreements cannot be overlooked. As noted by the fact-finder the disputed provision has been in the labor Agreement since 1985. There is no evidence that within the past twenty years discipline has been inequitably imposed by reason of this provision. Thus, the Conciliator awards the position of the City and the retention of current language.

4. Article VI – Section I

New language proposed by the Union would provide for the expunging of discipline from personnel records of employees after a period of time. In rejecting the proposal of the Union, the fact-finder opined that personnel matters of this nature are best left to negotiations. The Conciliator agrees and, therefore, awards the position of the City and the retention of current contract language. In the absence of an over-riding reason to implement change, the language, upon which the parties have bilaterally agreed and with which they have operated for some considerable time, should be retained and not be unilaterally modified.

5. Article VI – Section K

There does not appear to be significant disagreement about the proposal of the Union with the exception that the City proposes elimination of the word “similar” from the contract modification. Agreeing with the City that “similar” is unnecessary verbiage that will generate disagreement, the Conciliator awards City language on the expunging of letters of counselling from personnel files.

B. Economic Issues

1. Article VII – Section 1. Wages

Four statutory criteria which are applicable in determining the issue of wages include 1) ability to pay; 2) impact upon City operations; 3) comparability; and 4) prior collective bargaining agreements. Considering these factors and the extensive evidence presented thereon, the Conciliator must award the position of the City in regard to wages. Insofar as the fact-finder provided little analysis on his wage recommendations, the Conciliator deviates from his suggested resolution of this economic issue.

Ability to pay

It is important to note that the City is not alleging an inability to pay some wage increase for these units. Rather, the City asserts that due to uncertainties in its financial condition, the wage increase must be circumspect, a position with which the Conciliator concurs. Recognizing that presently the City has a General Fund carry-over sufficient to assist in paying wages as well as other expenditures, the Conciliator also observes the decline in revenue and the rise in personnel costs. Imbalances between income and expenditures warrant concern. While the City can satisfy budgeted obligations, its financial picture is not sanguine.

Analysing the finances of any city for the purpose of wage resolution is always a challenge. This is partly due to the fact that in financial budgeting, municipalities work with projections and estimates. As is to be anticipated, in making such forecasts, City planners tend to be fiscally conservative. Thus, in making projections for the General Fund balance for 2006, the City estimated a 2005 ending balance of \$3,313,055 (FOP Attachment 6). In fact, however, the actual 2006 General Fund beginning balance was \$5,973,138.

Moreover, the figures used in different reports can vary substantially. Thus, pursuant to the CAFR Reports submitted by the FOP, the unreserved general fund balance for the year ending December 31, 2005 was \$6,527,000. Usually due to accounting or accrual differences, these discrepancies are difficult for a neutral to reconcile. The Conciliator does note, however, that as stated in the Strategic Plan and 2007 budget (FOP Attachment 7), it is advantageous to the City to present a healthy General Fund carry-over for bond rating purposes. These are the financial figures that will attract future investment and development in the City.

In general the Conciliator can conclude, using the four most recent Comprehensive Annual Financial Reports, that General Fund reserves have remained relatively constant. For the year ending December 31, 2003, the unreserved General Fund balance was \$7,118,967; for the year ending December 31, 2004, the unreserved General Fund balance was \$6,007,000; for the year ending December 31, 2005, the unreserved General Fund balance was \$6,527,000; and for the year ending December 31, 2006, the

unreserved General Fund balance was \$6,791,745. But constancy is not financial growth, and economic growth is crucial to urban stability.

While the General Fund reserves remain level, an award for a wage increase must take into account income losses experienced by the City. These are well documented in the financial data submitted by the administration. The number of income producing jobs lost in the City totals 1354. An anticipated move of the headquarters of AK Steel out of the City will result in additional losses. Such job losses translate into diminished income tax.

Income tax revenues for 2006 were \$17,356,177 as compared with \$17,949,152 in 2005. As income tax constitutes the revenue source for almost one-half of the General Fund from which personnel costs are paid, the loss means a \$592,975 reduction in the funds available for salaries.

Finally, the loss in revenue must be viewed in the context of rising expenditures. In 2006, total expenditures of \$26,556,218 exceeded total income of \$26,434,142. Though this is not an extraordinary difference, still, when one takes into account the personnel reductions that the City has implemented in order to contain expenditures, these figures warrant consideration. These personnel reductions have a direct affect upon governmental services.

Evidence elicited at the hearing establishes that the Police Department has, indeed, sustained most of the staffing cuts and the FOP asks the neutral to remedy such inequities. Internal comparability, especially between police and fire departments, is certainly a criterion that may be reviewed in determining a fair wage increase. In doing so, the Conciliator may review increases afforded other bargaining units within the City. It is not, however, the prerogative of the Conciliator to delve into decisions pertaining to policy or how the City determines to manage its services.

Police Department Operations

The impact of the economic challenges confronting the City upon services rendered is readily apparent. Through attrition, the Police Department is currently operating with fifteen fewer officers than five years ago. Among other reductions, there are fewer patrol cars and a D.A.R.E officer has been returned to street patrol. In a memo from the former Police Chief to his Department dated April 4, 2007, the Chief summarized the reductions his Department is facing. These include the elimination of nine positions for the 2007 budget. In a newspaper article on April 10, 2007, the Chief explained that "proactive policing," including bike patrols, police at special events, and neighborhood officers, has been eliminated. A detective and a special operations officer have been assigned to community patrol. These reductions considerably add to the pressure experienced by Officers in a stressful career.

As the City has reduced the number of police officers on the workforce, crime has increased and the number of calls for service has gone up. The FOP argues that the Police force should be compensated for the extraordinary conditions under which they perform. There is merit to this argument. Nonetheless, the only way to alleviate these burdensome work conditions and to enhance law enforcement services to the community is to reduce the demands on a challenged Police Department and to restore workforce levels. By circumspect *controlling* of costs rather than *increasing* wages, the City is better able to accomplish this end.

Comparability

In impasse proceedings, administrations and bargaining units consistently select cities within the State of Ohio that support their respective arguments on wage increases. The use of these external comparables presents unique issues for the neutral. It must be ascertained, first, which cities are truly appropriate comparisons, and second, how comparability is to be measured. Just as no two cities are identical, so labor agreements differ greatly in the “wage package” contained therein, and a genuine comparison requires more than a look at wages.

Addressing, first, which cities to consider in a comparison, the neutral finds that while geographic location may not necessarily be a determinative quality, certainly characteristics of the community are important—its demographics, economic base, population. Thus, when looking at the comparable data submitted for review, the Conciliator selected from cities which both parties presented, those that were close to the City in terms of population, median household income and median house value. These include Hamilton, Newark, Springfield and Mansfield. Inclusion of cities such as Kettering or Mentor with median incomes and property values higher than those of the City, tend to distort the data, especially if one is using average wage rather than a negotiated percentage increase. While Euclid appears comparable, the Conciliator finds that using the “inner ring” suburbs of Cleveland—Cleveland Heights, Euclid, Lakewood—is inappropriate. Unlike Middletown, these cities share a border with a major metropolitan area with all of the advantages and disadvantages that entails. These cities share few characteristics with Middletown and have very differing law enforcement requirements.

Considering the 2007 top base Police Officer salary paid by the cities referenced above, the average salary is \$49,468 which is actually *less* than the \$51,862.72 top base police officer salary paid by Middletown in 2006.¹ Mansfield and Newark pay less while Hamilton and Springfield pay more. Rather than striving to maintain uniformity in the public sector, the criterion of comparability is intended to establish ranges within which the municipalities are positioned. Middletown is in the middle of its comparable cities.

As previously mentioned, comparability ought to look at more than the negotiated wage increase. Total compensation includes benefits in addition to salaries. While the FOP has endeavoured to do so, some of the comparable cities that it used have been found by the Conciliator to be inapt (FOP Attachment 2). Two, however, Newark and Mansfield, have been cited by the Conciliator. Adding Elyria, closer to Middletown in terms of demographics and characteristics than the more affluent cities cited by the FOP, confirms the finding of comparability. Even when taking into account pension pick-up, longevity and uniform allowance, the total compensation paid by the City of Middletown to its top step police officers exceeds that paid by Elyria, Newark or Mansfield.²

When analysing comparability, it is also important to take into account the percentage increases that have been negotiated by similarly situated cities and bargaining units, as well as the wage increase negotiated for other units within the City. In looking at

¹ These figures were derived from Attachments 1, 2 and 3 submitted by the FOP and City Exhibit 16 .

² The Conciliator has carefully looked at Attachment 2 submitted by the FOP even though she finds some of the cities listed thereon are quite different from Middletown. In order to use the figures set forth on the Chart, it would really be necessary to make reference to the contract language.

negotiated wage adjustments for 2006, the Conciliator finds that Police units in Ohio reported by SERB averaged a 3.23% increase and that bargaining units in southwestern Ohio (Cincinnati region) averaged a 3.03% increase, less than the 4% and 4.5% increase now sought by the FOP.

Internally, the City proposal is consistent with increases budgeted for the Fire Department as well as with increases already negotiated with other units. Accordingly, internal and external comparison would sustain a negotiated increase closer to that offered by the City to its Police Units.

Past Collective Bargaining Agreements

Bargaining history is the final criteria to be analysed by the Conciliator. Historically, the City has negotiated an increase in excess of 4% for a bargaining unit only when a unit had experienced a wage freeze the preceding year. Consistently, wage increases negotiated by the City have been less than 4%. Looking specifically at the increases for the Fire Department, the Conciliator observes that the negotiated increases have remained relatively comparable to those of the Police Department since contract year 2000.

For the past decade, the City has negotiated a wage increase for all its units in the three percent range. The only time the same did not occur for the FOP was through an unusual circumstance that resulted in an unintended wage freeze in 2005. This was remedied with a 6.5% increase in 2006. Accordingly, the bargaining history of the police units as well as other units within the City sustains an increase less than that sought by the FOP.

In reviewing the evidence submitted and in considering the statutory criteria, the Conciliator finds that the 3%, 3% and 3% increase sought by the City is justified.

2. Article VII – Section F. Insurance

In its final offer on Insurance language, the City has adopted an entirely new approach from that discussed during prior negotiations. As indicated by the FOP, insurance was the most contentious issue upon which the parties were bargaining. From the documentation submitted, the Conciliator discerns that at fact-finding FOP participation in the Health Care Committee was a principle objective of the City.

Similar to a growing number of service entities, in 2005 the City initiated a task force comprised of management, non-management and union representatives to address the rising cost of health care for City employees. As a result of the task force, a health care committee was established for the purpose of making “advisory recommendations to the City Manager and City Council regarding the use of City dollars devoted to employee health care” (City Exhibit 12). Consisting of fifteen members from both participating bargaining units and management, the Committee began meeting bi-weekly in July 2006, with a charge to “find ways to save approximately \$400,000-600,000 in the next calendar year” (Id.).

In reaching recommendations submitted to the City on November 8, 2006, the Committee strove “to reach a balance between reducing the overall cost of health care to the city while accounting for the impact such changes may have on employees.” After a “considerable amount of discussion and research,” the Committee presented six (6) recommendations which the Committee estimated would save the City \$483,611, as “these changes are negotiated with the City’s bargaining units” (Id.). In reviewing health

care costs and in making its recommendations, the Committee used data from comparable jurisdictions. These recommendations are set forth in full in City Exhibit 12.

In analysing the FOP proposal at Conciliation, the neutral finds that it mirrors the cost savings recommendations of the health care committee. For example, the Committee recommended modifying the employee contribution formula from 5% of the prior year plan costs (prorated by the number of covered employees), to 7.5% of the prior year plan costs (prorated by the number of covered employees) and rebalancing the contribution structure from two rate tiers to four- single, employee and spouse, employee and children, and family. Additionally, the Committee recommended a three (3) tier prescription drug co-pay, which “with minimum cost shift to employees” could result in savings of \$264, 005 to the City. Other committee recommendations adopted by the FOP include an increase in emergency room co-pay to \$75.00 and a 70/30% out of network co-insurance provision.

Rather than building upon the cost savings recommendations of the Committee it initiated, the City has now completely revamped its insurance proposal and for the first time at Conciliation it offered two insurance plans, a Standard Plan and a Premium Plan, from which employees could chose coverage. The “Standard Plan” is reduced benefits at reduced prices and the Premium Plan is the current health insurance plan at significantly higher employee cost.

In reviewing the insurance proposals presented by the parties, the Conciliator cannot ignore the bargaining history. Conciliation is intended to be the culmination of collective bargaining and not a continuation thereof. Only after negotiation, mediation, and fact-finding have been exhausted, may a non-strike force and a public employer continue to a procedure that is, in essence, final offer binding arbitration. The Collective Bargaining Act contemplates and intends that by the time of statutory conciliation, the parties have mutually examined and explored all available opportunities for resolving issues in contention. Thus, it is the opinion of this Conciliator that she ought not to issue an award implementing terms that have *never* been discussed in negotiation.

For its final offer on insurance, the City presents a proposal totally different from any terms previously discussed and over which the parties have not bargained. A Conciliation award in favour of the City proposal on health insurance would, in effect, be an abrogation of the bargaining process. Initially, the City sought obligatory participation on the health insurance committee. Conceding to participate and accepting the fact-finder’s recommendation, the FOP now proposes modifying provisions previously agreed upon by the parties and adding non-precedent setting participation in a multi-party health insurance committee. The FOP proposal is more consistent with bargaining history than the unilateral imposition of a two plan insurance provision now presented by the City.

Recently “opt-out” has become an issue in impasse proceedings. While the Conciliator concurs with the City that the “opt-out” provision proposed by the FOP is high in comparison with opt-outs provided by other cities, this alone is not a cause for rejection of the FOP proposal, and the Conciliator clearly has no authority to modify its substantive terms or to remove it from the FOP proposal. In the absence of evidence on the number of employees affected by the measure, the opt-out should not be determinative of this issue.

Except for the Opt-out, the Conciliator finds that the FOP proposal is relatively consistent with comparable data, not surprising since the health insurance committee had

utilized benchmark jurisdictions in performing its commission. Of the comparable cities cited by the Conciliator in the wage discussion, only Hamilton has the “buy-up” insurance option. While there is no data on employee costs in comparable cities for 2008 and 2009, City Exhibit 21 would indicate that in terms of out of pocket expenditures for Police Officers, the FOP insurance plan is consistent with the out of pocket expenditures in comparables used, again with the exception of Hamilton.

Finally, the Conciliator notes that in terms of internal comparability, the City proposal must be rejected. No other employee or bargaining unit has the new plan now presented by the City for the first time at the FOP conciliation proceedings. This contractual provision must be discussed, negotiated and considered by all units rather than unilaterally imposed without the benefit of bargaining.

The Conciliator awards the position of the FOP on Insurance.

3. Article VII - Section C. Shift Differential

By proposing a fixed percentage rather than a fixed monetary figure, the Union seeks to significantly modify the manner in which the shift differential is calculated. In the absence of a justification for the change, the Conciliator concurs with the City that the current contract language is an adequate and appropriate compensation. Consistent with the criteria of past collective bargaining agreements, the fact-finder also recommended retention of previously negotiated language. Accordingly, in sustaining the position of the City on shift differentials, the Conciliator awards current contract language.

4. Article VII – Section D.1 and D.12

FOP proposals for Article VII, Sections D.1 and D. 12 are to initiate an eight (8) hour work day, modifying current language providing for a forty hour work week. Citing inevitable overtime costs, the City opposes the proposal. Although the Conciliator notes consistency in the Union proposal with comparable cities, yet, in the absence of evidence justifying a unilaterally imposed change to contract language, the Conciliator awards the contract language previously negotiated and upon which the parties have previously agreed.

5. Article VII –Section D.3

In awarding current contract language, the Conciliator notes that the language is consistent with comparable communities, with prior collective bargaining agreements, and with equitable considerations. Not only do Police Officers on the average spend *more* than one hour in court per court visit (City data), but also they also lose “off time” in preparation and transit. The three-hour pay is recognized as a proper and reasonable compensation for this encroachment on the Officers’ personal time. Current contract language is awarded.

6. Article VII Sections D.4, D.5, D.6 and D.11.

City proposals relating to compensation for call-out and off duty services paid at overtime seek a reduction in hours paid to Officers. Although the City justifies these proposals as “cost-saving” measures, there is absolutely no evidence that the City is unable to pay for these services as it has in the past. Moreover, the previously negotiated

contract language is entirely consistent with comparable jurisdictions. Based upon statutory criteria, the language should be maintained and the position of the FOP awarded.

7. Article VII – D.8

In presenting its proposal, the FOP has not elicited any evidence that would justify a change to current contract language. Considering this language was previously negotiated by the parties and the lack of evidence that it is inconsistent with contracts for other police units, the Conciliator awards the position of the City.

8. Article VII – Sections G.2 and G.3

Citing comparable cities, the FOP contends that its uniform allowance is inadequate. Although the Fact-finder rejected the proposal of the FOP in regard to Uniform Allowance, he did not provide any rationale for doing so. In support of current language, the City argues the additional cost and the fact that the uniform allowance was increased in the last round of contract negotiations.

Unlike contract provisions concerning call-out pay, work week or court time which may remain unmodified for multiple contract years, uniform allowance is a benefit prone to change because the costs thereof change. Thus, reliance on prior the collective bargaining agreement is not as persuasive for uniform allowance as it may be for other issues. Rather, the Conciliator finds that comparability and the ability of the City to afford an adjustment are more determinative of the matter.

Clearly, the parties are not engaged in concessionary bargaining. Nor has the City sought a wage freeze. The financial data submitted for consideration supports the ability of the City to provide some adjustments to the compensation for Police Officers and Supervisors. Moreover, the evidence is fairly conclusive that the uniform allowance provided by the City is substantially less than that in comparable jurisdictions. Although the City points out that unlike comparable cities, it provides to its offices five (5) new uniforms with full repair and replacement, the cost under consideration is not for purchasing of new uniforms but for maintenance of current uniforms, such as dry cleaning and tailoring.

Taking into consideration comparable jurisdictions and the ability of the city to pay, the Conciliator awards the position of the Union on Uniform Allowance.

Conclusions

The Conciliator awards for each of the bargaining units as follows:


I ARTICLE VI

- A. Section B.2: Current contract language (Position of the FOP)
- B. Section B.4: Current contract language (Position of the FOP)
- C. Section B.7: Current contract language (Position of the City)
- D. Section I: Current contract language (Position of the City)
- E. Section K: Position of the City

II ARTICLE VII


- A. Section 1: a 3%, 3%, 3% wage increase (Position of the City)
- B. Section C: Current contract language (Position of the City)
- C. Section D.1 and D.12: Current contract language (Position of the City)
- D. Section D.3: Current contract language (Position of the FOP)
- E. Section D.4;D.5;D.6;D.11: Current contract language (Position of the FOP)
- F. Section D.8 Current contract language (Position of the City)
- G. Section F: Position of the FOP
- H. Section G.2 and G.3: Position of the FOP

Respectfully Submitted,


Margaret Nancy Johnson
December 6, 2007

Service

A copy of the foregoing Conciliation Award has been served by overnight mail this 6th day of December, 2007, upon Stephen S. Lazarus, Esq., Hardin, Lazarus, Lewis & Marks, 915 Cincinnati Club Building, 30 Garfield Place, Cincinnati, Ohio 45202-4322; Leslie S. Landen, Law Director, Sara E. Mills, Assistant Law Director, One Donham Plaza, Middletown, Ohio 45042; and Edward E. Turner, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213.


Margaret Nancy Johnson