

IN THE MATTER OF CONCILIATION 2008 APR 30 A II: 33

**BETWEEN**

**FRATERNAL ORDER OF POLICE, OLC, INC.**

**AND**

**CITY OF EAST CLEVELAND**

**SERB CASE # 07-MED-05-0590**

**ADVOCATE FOR THE UNION:**

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**ADVOCATE FOR THE EMPLOYER:**

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## **INTRODUCTION**

The Fraternal Order of Police represents the bargaining unit (hereinafter "Union") and the Employer is the City of East Cleveland (hereinafter "Employer", "City", or "Department"). The bargaining unit involved in this case is comprised of approximately twenty-seven police officers. The Union also represents another unit of higher ranking officers in the City, often referred to as the "gold unit." The patrol officers have had an extended bargaining relationship with the City, being previously represented by another bargaining agent. This is the first contract negotiations where this classification of employees is represented by the Fraternal Order of Police. A mediation/conciliation hearing was held on February 22, 2008 over thirty-five issues:

### **Listing Of Unresolved Issue(s):**

**Agreement Purpose**  
**Applicability to External Law & Separation**  
**Recognition**  
**Union Dues Deduction/Fair Share Fees**  
**Union Activity/Representation**  
**Non-Discrimination**  
**Management Rights**

**Employee Rights**  
**Discipline**  
**Grievance Procedure**  
**Labor Management & Safety Committee**  
**Communicable Diseases**  
**Seniority**  
**Layoff & Recall**  
**Personnel Files**  
**Outside Employment**  
**Probationary Periods & Promotions**  
**Drug & Alcohol Testing**  
**Overtime Compensation/Duty Hours**  
**Sick Leave**  
**Injury Leave**  
**Leaves of Absence**  
**Vacation**  
**Holidays**  
**Clothing Allowance**  
**Wages**  
**Shooting/Training Time**  
**Longevity**  
**Stand-By/On-Call Status**  
**Health, Dental, & Life Insurance**  
**Liability Coverage**  
**Education & Other Benefits**  
**Miscellaneous**  
**Liability Coverage**  
**Duration**

Prior to a formal submission of evidence the conciliator made a concerted effort to bridge the differences between the parties concerning the above referenced issues. Settlement possibilities were assessed with the parties in an effort to find common ground upon which to construct a settlement. Through the concerted efforts of the parties' advocates and with the assistance of the conciliator, the parties were able to reach agreement on thirty-three of

the thirty-five issues listed above. However, complete agreement was unable to be achieved on the issues of residency and outside work necessitating the convening of a hearing to formally address the remaining differences between the parties. During the hearing the Employer informed the conciliator that it had filed a formal objection in the form of an unfair labor practice regarding the two issues that remained unresolved following mediation.

Both Advocates represented their respective parties well and clearly articulated the position of their clients on the issues in dispute. In order to expedite the issuance of this report, the Conciliator shall not restate the actual text of the parties' proposals on each issue, but will instead reference the Position Statement of each party along with a summary discussion.

## CRITERIA

### OHIO REVISED CODE 4117

In the finding of fact, the Ohio Revised Code, Section 4117.14 (G) (7) establishes the criteria to be considered for conciliators. For the purposes of review, the criteria are as follows:

1. Past collective bargaining agreements, if any, between the parties;
2. Comparison of issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employers doing comparable work, giving consideration to factors peculiar to the area and classification involved;
3. The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
4. The lawful authority of the public employer;
5. The stipulations of the parties;
6. Such factors not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of issues submitted to final offer settlement through voluntary collective bargaining, mediation, conciliation, or other impasse resolution procedures in the public service or in private employment.

These criteria provide the basis upon which the following recommendations are made: These criteria are limited in their utility, given the lack of statutory direction in assigning each relative weight. Nevertheless, they provide the basis upon which the following recommendations are made:

## **Issue 1     Residency**

### **Union Position**

In summary, the Union strongly argues there is a bargaining history between the parties that resulted in employees being able to live outside the city limits. The Union desires to continue the language of the previous agreement that existed between the bargaining unit represented by the prior bargaining agent and the City. The Union also points out that such language exists in the Gold Unit represented by the FOP and was recommended by the fact finder.

### **Employer's Position**

In summary, the Employer argues the issue is not properly before the conciliator and has filed a ULP with the State Employment Relations Board objecting to its presence at conciliation (Employer Exh. 1). The Employer also asserts the Union has not sought to bargain over this issue and simply seeks to prohibit it. In anticipation of a definitive court ruling over this matter, the Employer wishes to depart from bargaining with this classification of employees where such a provision had been negotiated and to avoid language in an agreement that would deviate from controlling law. The Employer insists that the Union's attempt to negate the City's residency requirement "creates an unacceptable

amount of uncertainty with respect to the City's FLSA obligations on unscheduled call outs.

## **Discussion**

Both parties expressed serious concerns over this issue. Currently, as articulated by the fact finder in this matter and as generally understood in the field of public sector labor relations, the issue is indeed controversial on several grounds and is currently the subject of lengthy litigation that is still winding its way through the legal process. The arguments made by proponents and opponents of residency in this legal imbroglio are widely known and mirror in part those made by the advocates in the instant proceeding.

What is significant in this matter is the fact that the Employer in a preemptive manner has filed an unfair labor practice charge in which the issue of residency is one of eight (8) issues that the Employer claims should not be part of the collective bargaining process at this stage of impasse. Unfortunately, a decision by the State Employment Relations Board (SERB) that would determine the conciliator's jurisdiction in this matter was not issued by date of the conciliation hearing, and as far as the conciliator knows no such decision has yet to be made by SERB. In response to the Employer's actions the Union strongly argues the Unfair Labor Practice has no merit.

While I appreciate the artful arguments presented by the Employer's advocate, the jurisdiction over an issue is not within the authority of the conciliator. In filing its ULP the Employer has elevated its jurisdictional objection to a higher authority and has removed it from the conciliator's authority. It is now clearly a matter for the State Employment Relations Board to determine. This is in sharp contrast to grievance arbitration where considerable jurisdictional latitude in such matters is regularly relegated to the arbitrator. One can only imagine the nightmare scenario created by a conciliator who substitutes his judgment for SERB and rules that a matter is improperly before him only to have SERB subsequently arrive at the opposite conclusion. What would be the next logical step? The same uncertainty does not exist if SERB rules that an issue is improperly before the conciliator. The division of authority in these matters creates order and avoids absurd outcomes. Finally, SERB has made it crystal clear that it has exclusive jurisdiction to determine unfair labor practices, and therefore it is inappropriate for a conciliator to substitute his or her judgment for that which is the exclusive province of SERB. With this understanding it is clear that the role of the conciliator is to simply perform his duty of choosing between the two positions presented by the parties on the unresolved issues.

Under the circumstances in the instant matter, it is recognized that the decision of the conciliator in having to choose one party's stated position over the other party's position may result in said determination being set aside by SERB. However, absent specific guidance in this area, a conciliator has no authority to



delay or unduly hold a decision in light of a jurisdictional challenge. A conciliator, unlike a fact finder, does not have the latitude to fashion a position that may represent a satisfactory compromise between positions of the parties, which was unable to be achieved in negotiations. He or she can only choose one party's position based upon the statutory criteria stated above.

Citing OAC 4117-9-05(1) the Fact Finder stated that he was required to consider "past collectively bargained agreements." I concur with his finding in this matter. The bargaining history over this issue substantiates the Union's claim that this issue has previously been negotiated between the same classifications of employees for years, albeit with a different union representative. Moreover, internal comparables, both union and non-union, support the continued inclusion of this language. Although the City does have an ordinance regarding residency, which has existed for several years, the evidence is clear that it has never enforced it. In essence, it has remained an "option" for employees, including managerial employees. This history of bargaining and practice seriously undermines the Employer's position in this matter.

It is important to note that what the legal process concludes regarding the validity of the state residency and its relationship to municipal home rule, the parties have agreed upon a "Conflict with Law and Separability" language in the Agreement that may come into play if the language of the collective bargaining relationship conflicts with a ruling by a court of competent jurisdiction. A ruling by said court would cause the parties to negotiate a legal

alternative to any provision that resulted from the conciliation process. The same principle applies to a decision by SERB, which is currently considering the propriety of this issue before the conciliator.

<b>Determination</b>
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<b>The position of the Union is awarded</b>
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## **Issue 2    Outside Employment**

### **Union Position**

The Union strongly urges the conciliator to adopt its position, in that outside employment is an extremely important issue to many bargaining unit members. Although this is the first time the issue would appear in the collective bargaining agreement, the Union asserts it needs to gain more control over a policy that affects the earning of additional income by its members.

### **Employer's Position**

As with residency, the issue of outside employment has been placed before the SERB board as a matter that the Employer argues should not be before the conciliator. The Employer argues the issue is "a permissive subject of bargaining" and is improperly before the conciliator." In terms of the substance of this issue, the Employer opposes any language in the collective bargaining

agreement that restricts its authority to control the extent to which bargaining unit members engage in outside employment.

## **Discussion**

As with the issue of residency, the issue of jurisdiction has been placed before SERB by the Employer. The conciliator is confined to choosing one of the party's stated positions after applying the statutory criteria. The Employer made a persuasive argument that prior to any consideration being given to outside employment that may interfere with their sworn duties, bargaining unit members must first owe their employment loyalty to their positions as police officers with the City of East Cleveland. I concur with this reasoning. City law enforcement work is dynamic and changeable depending upon a variety of factors, including the needs of the citizenry and the unpredictable nature of crime. While I find the interest and possible necessity for law enforcement officers to be able to engage in outside employment as a vital economic issue to them and their families, the City's argument that the primary jobs held by police officers should be given ultimate priority is more compelling, particularly when considering the mission of police officers and the welfare and interest of the public.

<b>Determination</b>
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<b>The position of the Employer is awarded</b>
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## TENTATIVE AGREEMENT

During negotiations and conciliation the parties reached tentative agreement on several issues. These tentative agreements are part of the recommendations contained in this report.

The conciliator respectfully submits the above recommendations to the parties this 25<sup>th</sup> day of April 2008 in Portage County, Ohio.

A handwritten signature in black ink, appearing to read "Robert G. Stein". The signature is written in a cursive style with a large, sweeping initial "R".

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Robert G. Stein, Conciliator

**Article 16**  
**OUTSIDE EMPLOYMENT**

**Section 16.1.** Employees must apply to the Chief of Police and obtain the Chief's written permission prior to engaging in employment outside the Police Department. The granting or denial of such requests shall be governed by the following criteria:

- (a) The outside employment may not be such as it would in any manner adversely affect or interfere with the officer's performance of his duties for the City.
- (b) The outside employment may not create an actual conflict of interest or the appearance of a conflict of interest with the operations of the Police Department.
- (c) The outside employment may not create an appearance of impropriety. In any event, outside employment shall not be considered to create a business relationship between the City and the employee or between the City and the outside employer.
- (d) The outside employment may not be at a place of business where any principal or officer of the business or the business itself has been convicted of or is under investigation for serious criminal conduct.
- (e) When deemed necessary by the Chief of Police, the officer seeking outside employment must provide the City (unless such information is already supplied) with evidence that liability insurance coverage satisfactory to the City has been secured which should hold the Employer, City of East Cleveland and their representatives harmless from any actions or inactions arising out of the officer's outside employment.

Requests must be approved by the Chief of Police prior to the commencement of outside employment. Requests for approval will be acted upon by the City as soon as is practicable. The City shall have the right to rescind previously granted permission for outside employment upon a change of circumstances and in accordance with the criteria set forth above in this Article. The City shall notify the bargaining unit member of such change.

**Article 33**  
**MISCELLANEOUS**

**Section 33.1. Bulletin Board.** The City shall provide the union with a bulletin board, provided that:

1. Such bulletin board shall be used for posting notices bearing the written approval of the Union associate or an official representative of the FOP, and shall be solely for union business; and
2. No notice or other writing may contain anything political, controversial or critical of the City or any other institution or of any employee or other person; and
3. Upon request from an appropriate official of the City, the Union will immediately remove any notice or other writing that the City believes violates sub-paragraphs (1) and (2), but the Union shall have the right to grieve such action through the grievance procedure.

**Section 33.2. Ballot Boxes.** The FOP shall be permitted to place ballot boxes at the facilities for the purpose of collecting members' ballots on approval or disapproval of Union issues and the election of Officers and delegates of the Union.

**Section 33.3.** No employee, as a condition of employment, shall be required to be a resident of the City of East Cleveland.

**Section 33.4.** All employees will be provided a locker at the police department for his personal use, plus a clean and sanitary locker room, restrooms, and a lunch room.

**Section 33.5.** The Employer and the FOP agree that the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances arising under this Agreement. It is the desire of the Employer and the FOP to avoid work stoppages and strikes.

**Section 33.6.** Neither the FOP nor any member of the bargaining unit for the duration of this Agreement shall directly or indirectly call, sanction, encourage, finance, participate, or assist in any way in any strike, slowdown, walkout, concerted "sick leave" or mass resignation, work stoppage or slowdown, or other unlawful interference with the normal operations of the Employer for the duration of this Agreement. A breach of this Section may be grounds for discipline.

**Section 33.7.** The FOP shall, at all times, cooperate with the Employer in continuing operations in a normal manner and shall actively discourage and attempt to prevent any violations of the "no strike" clause. In the event of a violation of the "no-strike" clause, the FOP shall promptly notify all employees in a reasonable manner that the strike, work stoppage or slowdown, or other unlawful interference with normal operations of the Employer is in violation of this Agreement, unlawful and not sanctioned or approved of by the FOP. The FOP shall advise the employees to immediately return to work.