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STATE EMPLOYMENT
RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD
STATE OF OHIO

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In the Matter of the Conciliation Proceedings Between:

The City of Medina, Ohio : Case NO. 07-MED-08-0777
and : Conciliation Award
Medina City Police Sergeants : Margaret Nancy Johnson
Conciliator

For the Union:
Daniel J. Leffler, Esq.
Ohio Patrolmen's Benevolent Association

For the City:
Jon Dileno, Esq.
Zashin & Rich, LPA

This matter came on for hearing on October 14, 2008, in a conference room at the Medina City Hall, Medina, Ohio. In accordance with Ohio Revised Code Section 4117.14(D)(1), the State Employment Relations Board, hereinafter "SERB," appointed Margaret Nancy Johnson to serve as Conciliator for the purpose of rendering a final and binding award relative to those issues upon which the parties had bargained to impasse. Prior to the hearing the parties submitted to the Conciliator their final offer statements. As a written record of the proceedings at the Conciliation hearing was waived by the parties, this opinion and award and the documents submitted into evidence constitute the entire record of the proceedings.

Background

The Ohio Patrolmen's Benevolent Association, hereinafter "OPBA" or "Union," is the bargaining agent for approximately six (6) Sergeants serving in the Police Department of the City of Medina, hereinafter "City." In addition to patrol duties, Sergeants perform supervisory and administrative tasks as assigned. A Collective Bargaining Agreement between the parties expired on October 31, 2007, and the parties engaged in negotiations for a successor contract. Unable to reach an agreement on the issues of health care and rank differentials, those two issues were presented to a fact-finder on June 30, 2008. Recommendations submitted by the fact-finder on August 14, 2008, were accepted by the City but rejected by the Union, thereby giving rise to the Conciliation Order of September 2, 2008.

Prior to the Conciliation hearing, the parties reached agreement on health care provisions to be incorporated into their Collective Bargaining Agreement. Thus, an appropriate rank differential is the sole issue presented to the Conciliator for final and binding resolution. At the hearing, the parties concurred upon the retroactivity of the wage determination.

Positions of the Parties

While the City seeks to maintain the current rank differential of 13%, effective January 1, 2008, the Union proposes increasing the differential to 14%. In support of its proposal, the OPBA cites the rank differential paid to sergeants in comparable communities. Sergeants in the neighboring municipalities of Brunswick and Wadsworth receive a 14% differential above the top patrol rate. In the absence of the adjustment now sought, the Union maintains pay for Sergeants in Medina will fall below that paid to similarly situated Sergeants. Intended to correct this disparity, the proposal of the Union is both reasonable and well within the fiscal ability of the City.

Additionally, the Union contends that its proposed increase is consistent with bargaining history. Wage increases negotiated by the City have not in the past precluded adjustments in the rank differential. For example, in 2003, the differential increased from 12% to 12.5% and, again, in 2005, the parties accepted a differential increase from 12.5% to 13% for 2007. Wage increases for the patrol unit have not historically been determinative of the rank differential for Sergeants.

Testimony elicited from Sergeants establishes that the administration had in the past assured its Sergeants that in exchange for unit participation in passage of an income tax increase, members of the bargaining unit would be appropriately compensated. The Union deems an increase in the rank differential to be a promise upon which the City has reneged.

The Union also contends that the Conciliator is not bound by the recommendations of the fact-finder in this case. Absent any analysis of the wage issue and considering erroneous conclusions on comparables made by the fact-finder, the Union argues the Conciliator should make an independent review taking into account the statutory criteria set forth in the Ohio Collective Bargaining Act.

Although a Conciliator is not bound by the recommendations of the fact-finder, the City asserts that considerable deference should be given to recommendations issued in the prior proceeding. In this instance, the City contends the evidence presented to the Conciliator is the same as the evidence reviewed by the fact-finder. Nothing has transpired in the interim to alter arguments, nor does the Union cite newly discovered data. Moreover, the Union cannot cite error in the prior proceedings. When the factual material is the same as that considered previously by a fact-finder, the prevailing view among Conciliators is that the party rejecting the recommendations of the fact-finder has the burden of justifying its proposed modification.

In analyzing comparable units, consideration must be given to the entire wage package and not to rank differentials in isolation. Taking into account the economic package paid to the Sergeants, they rank quite well compared to Sergeants in other municipalities. Indeed, Sergeants in the City rank second in Medina County in terms of overall compensation. Rate increases negotiated for Sergeants in the City have been equal to or greater than increases negotiated by other municipalities in Medina County.

In addition to external comparability, the City contends that internal parity supports its position in this matter. Absent compelling distinguishing evidence, there is no justification for this unit to receive preferential treatment in the form of an increase in the rank differential paid to Sergeants. Accordingly, the City contends that the current rank differential of 13% be maintained, as was recommended by the fact-finder.

Statutory Criteria

Not only does the Ohio Collective Bargaining Act delineate a process by which final and binding resolution in a bargaining impasse involving safety forces is to be achieved, but it also specifies those factors which ought to be utilized in determining contract issues at conciliation. In this analysis and award, the Conciliator has considered the following factors enumerated in Ohio Revised Code Section 4117.14(G)(7):

- (a) past collectively bargained agreements, if any, between the parties;
- (b) comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (c) the interest and welfare of the public, the ability of the public employer to finance and administer the issues propose, and the effect of the adjustments on the normal standard of public service;
- (d) the lawful authority of the public employer;
- (e) the stipulations of the parties;
- (f) such other facts, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution proceedings in the public service or private employment.

Discussion and Analysis

A. Collective Bargaining History

As the parties have reached agreement on the issue of health care, the sole matter now to be considered by the Conciliator is the Union proposal to increase the rank differential paid to Sergeants from the current 13% to 14%. Pursuant to the Agreement between the parties, the Sergeants' wages are based upon a differential percentage above the top rate for Patrol Officers. Upon the conclusion of fact-finding, the City and the Patrol Officers' unit accepted a 3.25%, 3% and 3% increase for the three years of the current Agreement. Accordingly, whatever rank differential is implemented for Sergeants will be calculated using those increases agreed upon by the City and its Patrol Officers.

"Absent compelling distinguishing evidence," the City contends Sergeants are not entitled to a larger increase in wages than has already been bargained by the Patrol Officers. At the Conciliation hearing the City presented this argument in terms of "internal comparability." Citing the most recent fact-finding recommendations for both the Patrol Officers and the Sergeants, the City asserts both units should receive the same rate increase.

Bargaining history with its law enforcement units, however, does not sustain the position of the City relative to the issue of rank differential. For the two most recent contracts, the parties herein have effected increases in rank differentials for Sergeants based upon wage increases provided to Patrol Officers. Concurring with the Union, the Conciliator notes that wage increases negotiated by its Patrol Officers have not historically prevented the City from also adjusting the rank differential for Sergeants. Thus, the Conciliator finds that in this proceeding the wage increase negotiated by the Patrol Officers unit does not preclude modification to the rank differential for Sergeants and that such an adjustment should not be viewed as "preferential treatment."

Rank differentials recognize those tasks rendered by Sergeants supplementing the law enforcement duties shared with Patrol Officers. In contention in this proceeding is how the additional supervisory and administrative services rendered by the Sergeants should be valued. To resolve this controversy and address the valuation issue, reference must be made to the statutory criteria mandated in the Ohio Revised Code, as set forth above.

B. Deference to the Recommendations of the Fact-Finder

A question which inevitably arises at impasse is the weight to be afforded the Recommendations of the Fact-finder issued prior to the Conciliation proceedings. Although the Recommendations are not

specifically listed among the statutory criteria, the prevailing view subscribed to by most Conciliators is that the Recommendations of the Fact-Finder should be afforded considerable weight. Deemed a factor “normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement,” Recommendations of Fact-finders are frequently but not always implemented at Conciliation.

Insofar as last offers submitted at Conciliation are not necessarily the same as proposals submitted at fact-finding, a Conciliator is not required to conform the conciliation award to the Recommendations of the Fact-finder. In issuing his Report in this instance, the Fact-finder recommended the Union position on Hospitalization and the City position on Wages. While in his opening statement Counsel for the City posited that the evidence submitted at conciliation was going to be the same heard by the Fact-finder, actually at conciliation the sole issue argued and for which evidence was presented has been the matter of rank differential. Prior to the conciliation hearing, the parties agreed upon and removed hospitalization from consideration and no evidence on that issue was introduced at conciliation. The case before the Conciliator is, therefore, not identical to the matter heard by the Fact-finder.

Nor does the evidence considered by the Fact-finder on the issue of wages appear to be the same as that presented at conciliation. Asserting the “weight given comparables is limited by the degree of the accuracy of the facts applied” and citing absence of detail as to the “quality of and degree of the local healthcare plan,” the Fact-finder rejected the comparability argument made by the Union, finding that the evidence was “not in total.” Even though evidence on comparability before the Conciliator lacks reference to healthcare provisions, it does, nonetheless, address the issue of wages as a package rather than in a “piecemeal” approach. Moreover, the data on wages submitted by both parties to the Conciliator appears to be accurate and complete. Since the specific economic information upon which the Fact-finder relied cannot be discerned from the Report, the Recommendation issued therein pertaining to wages is less compelling than had such information been identified.

While acknowledging that the Recommendations are not determinative of the issue in dispute, the City herein has submitted for review several Conciliation Awards involving safety forces in which deference to the Report of the Fact-finder was both discussed and accepted. These have been carefully reviewed and considered. Indeed, this Conciliator is quite mindful of the observation that “only a foolish or naive conciliator will change the fact-finder’s recommendations” (Dennis M. Byrne, City of Lakewood and Local 382, IAFF, SERB 00-MED-09-0952, May 1, 2002, p.4). Nonetheless, codified criteria and *not* the recommendations of the fact-finder are determinative of public sector impasse proceedings. Only to the extent a Conciliator is able to discern the factual and statutory underpinnings upon which recommendations have been made, should the Conciliator defer to the same.

In each of the conciliation awards submitted by the City, while giving deference to the fact-finder, the Conciliator reviews and discusses the criteria upon which the conciliation award is based. In the 2006 Conciliation proceeding involving this unit, observing that fact-finders reach their conclusions after careful evaluation of the respective positions of the parties and the available data, taking into account all relevant factors, Conciliator Ruben then proceeds to analyze, in considerable detail, the criterion of comparability. He writes, “the Conciliator therefore looks to the total compensation available to Sergeants in the Medina Police Department and tests that against total compensation of their counterparts in other jurisdictions the parties deem comparable.” (Alan Miles Ruben, City of Medina and Ohio Patrolmen’s Benevolent Association, Sergeants Unit, SERB 05-MED-08-0785, October 27, 2006, p. 16). Reviewing the issue in contention *de novo* and in an endeavor to “assure comparability,” (*Ibid.*, p. 7), Ruben requested the parties to submit supplemental information on comparables including per capita revenue statistics, the size of the Police Departments in comparable communities, a comprehensive compensation schedule for Patrol Officers and Sergeants at the ten year service level in comparable communities, and adjustments in the compensation statistics in

jurisdictions which fully fund pension pick-ups. While Ruben¹ arrived at the same conclusion as the fact-finder in that instance, he most certainly did so by analysis rather than deference.

Similarly, this Conciliator ought not simply to review the Report and Recommendations of the Fact-finder, but must examine the factual evidence submitted taking into account the criteria mandated by the State. Having reasoned that the Recommendations of the Fact-finder and prior collective bargaining agreements do not preclude a rank differential adjustment in this case, the Conciliator now addresses the determinative elements of comparability and ability to pay.

C. Ability to Pay

Although the City asserts ability to pay is not in contention in this proceeding, yet “the ability of the public employer to finance and administer the issues proposed” remains a factor to be considered when issuing a conciliation award. As suggested by the City, evidence of the financial status of a municipality is certainly more determinative in hardship cases, but the statute does not limit consideration of economic factors to situations in which the City is in fiscal distress. Rather, the criterion addresses the ability of the employer to finance the proposal.

Clearly the increase in rank differential sought by the Union will neither create hardship for the City nor adversely affect City operations. While the City suggests in its position statement that continued growth for the City is not anticipated, yet, the undisputed financial data indicates the cost of the Union proposal is an expenditure the City can afford to pay. These figures indicate the cost of the Union proposal per Sergeant over the three years of the contract is \$1,561.44 and the three year cost to the City for the bargaining unit is \$9,368.65, or approximately \$3,122.80 each year. This is an economic cost the City can well afford for the services rendered by this law enforcement unit. Financial impact and ability to pay favor the Union in this instance.

D. Comparability

Similarly, the Conciliator finds that the criterion of comparability sustains the position of the Union. While in many disputes involving wages, the parties differ as to jurisdictions to be deemed comparable, in this case the parties consistently focus on neighboring municipalities, specifically the cities of Brunswick and Wadsworth. Nonetheless, the City contends that the total package rather than the rank differential ought to determine comparability.

In the comparability analysis which follows, the Conciliator has again carefully reviewed and been persuaded by the findings and conclusions of Conciliator Ruben in the conciliation award he issued for these parties in 2006. Expressing the opinion that “it is the complete compensation package which is the appropriate foundation for comparability determinations,” Conciliator Ruben then analyzes the “complete package” paid Sergeants in Brunswick and Wadsworth, opining the absence of anything “in the evidentiary records which provides a compelling reason to alter the status quo and *change the relative rankings.*” In so doing, Conciliator Ruben observes that historically “Medina Sergeants have earned more than their fellow officers in Wadsworth...but less than their colleagues in Brunswick.”

While Medina remains between Brunswick and Wadsworth in total compensation paid to Sergeants in these contract negotiations, it is apparent that the proposal of the Union would not change the status quo or alter the rankings of the three cities. Even with the additional rank differential, Medina Sergeants would still remain behind Sergeants in Brunswick and slightly ahead of Wadsworth

¹ In each of the conciliation awards submitted by the City, the hearing officers similarly engage in thorough and detailed scrutiny of facts relative to the issues in dispute with reference to statutory criteria. Not one of the conciliation awards relies solely upon the prior findings and recommendations. Even Dennis Byrne who has set a high bar for challenging recommendations of a fact-finder in his previously cited case involving the City of Lakewood and the IAFF differed from the fact-finder relying upon “the weight of the evidence” (p.7).

Sergeants in terms of total compensation, maintaining the relative rankings upon which Conciliator Ruben relied.

As previously indicated, at issue in this proceeding is not the percentage wage increase negotiated for Patrol Officers but the value to be ascribed the added law enforcement services rendered by the Sergeants. Both Wadsworth and Brunswick have agreed that the additional administrative and supervisory responsibilities assumed by Sergeants warrant a 14% rank differential above the negotiated wage rate for Patrol Officers. Indeed, at least a 14% rank differential for Sergeants appears consistent with that paid in jurisdictions having geographic proximity to the City of Medina. For example, Strongsville pays a 14% differential and North Royalton pays a 16% differential. Even taking into account the total wage package, the Conciliator finds that the additional services warrant the adjustment sought by the Union.

Consideration has also been given to the argument made by the City and expressed by Conciliator Ruben that a rank differential increase “is likely to cause the City future problems with its other similarly situated units.” Counsel for the City of Medina phrases the argument in terms on internal parity. In the opinion of this Conciliator, however, recognition of and pay for additional services rendered to the employer and to the community is inherent in Collective Bargaining. Rank differentials are what the term implies, additional pay for additional service. In this regard the parties are not introducing a new concept into the Collective Bargaining Agreement. Rather, the Union is proposing adjustments to the existing rank differential to bring compensation for services rendered by Sergeants more in line with compensation paid in neighboring jurisdictions for similar work.

In the Conciliation awards submitted by the City, the hearing officers examined issues such as Paramedic Pay and EMT Pay—stipends above the negotiated wage rate for added duties. Although the Conciliator acknowledges that in the cited examples specific training is required for the additional pay, still, the underlying principle remains that compensation should be commensurate with the service provided. Such stipends have long been regarded not only as enticements to progress within ranks but as appropriate compensation for particular services rendered. Moreover, such additional compensation has been viewed as a mechanism to enhance the entire wage package for a particular job classification. Accordingly, the Conciliator is not persuaded by the contention that an increase in the rank differential will cause workplace unrest or create a disparate situation.

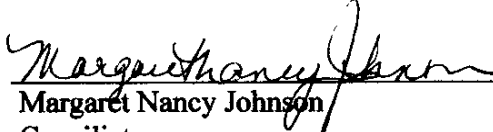
On the contrary as discussed by Ruben, the impact of negotiations on “the long term relationship” between the City and and its Sergeants is a factor to be recognized. Although the Conciliator can not be persuaded by verbal promises presented as hearsay at conciliation, the impact of negotiations upon the relationship between the parties is a consideration. Rank differential has been a contentious issue between the parties in the course of several contract negotiations and it is time to bring resolution to this matter.

Summary

The conciliator has carefully reviewed the evidence submitted for her consideration and taken into account the criteria set forth in the Ohio Revised Code, including ability to pay, comparability, and past agreements. Moreover, she has read and reread the Recommendations of the Fact-finder on the issue now before her. Rather than a piecemeal consideration of the issue as apparently presented at fact-finding in which health care was also in dispute, taking guidance from Professor Alan Miles Ruben, this Conciliator has analyzed the issue of wages as a complete package. In doing so, she has determined that the position of the Union is both a reasonable and equitable resolution of a rank differential for Sergeants.

Award

The Conciliator awards the position of the Union in the matter of Rank Differential, and effective January 1, 2008, Sergeants having one (1) or more years of service as a Sergeant in Medina City Police Department shall be paid an hourly rate fourteen (14%) above the effective top step of Patrol Officers' pay. On appointment to Sergeant, the employee shall serve a 12 month probationary period, during which time the Sergeant shall be paid an hourly rate of six (6%) percent above the top step of Patrol Officer's Pay.


Margaret Nancy Johnson
Conciliator

Certificate of Service

This award has been served this 10th day of November, 2008, by Express Mail upon Daniel J. Leffler, Esq., Ohio Patrolmen's Benevolent Association, 10147 Royalton Road, Suite J, North Royalton, Ohio 44133 and on Jon Dileo, Esq., Zashin & Rich, 55 Public Square, Cleveland, Ohio 44113; and by regular mail upon Edward E. Turner, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215.

STATE EMPLOYMENT
RELATIONS BOARD

2008 NOV 13 P 12: 05

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November 10, 2008

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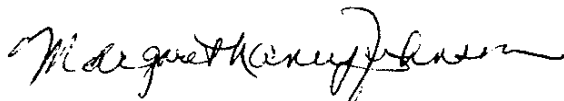
Re: 07 MED 08 0777
Medina City Police Sergeants and the city of Medina

Dear Gentlemen:

Enclosed please find a copy of the Conciliation Award issued in the above referenced impasse.
Also enclosed is a copy of the an invoice for services rendered.

Thank you for this opportunity to work with the parties.

Very truly yours,



Margaret Nancy Johnson