

**STATE OF OHIO
BEFORE THE OHIO STATE EMPLOYMENT RELATIONS BOARD**

IN THE MATTER OF CONCILIATION : **SERB CASE # 09-MED-09-0943**
 :
 BETWEEN THE :
 :
 CITY OF WYOMING :
 Employer :
 AND THE :
 :
 FRATERNAL ORDER OF POLICE :
 OHIO LABOR COUNCIL, Inc. :
 Union

: Date of Hearing: October 27, 2010
 :
 : E. William Lewis, Conciliator
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CONCILIATOR'S FINDINGS AND AWARD

APPEARANCES:

For the Employer:

 Daniel G. Rosenthal, Esq.
 Denlinger, Rosenthal & Greenberg
 425 Walnut Street, Suite 2300
 Cincinnati, Ohio 45202

For the Union:

 Mr. Barry L. Gray, Staff Rep.
 FOP/OLC, Inc.
 5752 Cheviot Road, Suite D
 Cincinnati, Ohio 45247-7009

2010 DEC - 1 P 4: 03
 STATE EMPLOYMENT
 RELATIONS BOARD

AUTHORITY

This matter was brought before Conciliator E. William Lewis, in keeping with applicable provisions of the Ohio Revised Code 4117 and related rules and regulations of the Ohio State Employment Board. The parties have complied in a timely manner with all procedural filings. The matter before the Conciliator is for consideration and directive based on merit and fact according to the provisions of Ohio Revised Code 4117, particular those that apply to Safety Forces and mutual directives of the parties.

In attendance:

For the Union:

Mr. Barry Gray Staff Representative, FOP/OLC

Mr. Dale Hahn Police Officer

Mr. Eric Kirkland Police Officer

For the City:

Mr. Daniel Rosenthal Lawyer

Mr. Gary Baldauf Chief of Police

Ms. Marylou Kurtz Provisional Finance Director

Ms. Lynn Tetley Acting City Manager

BACKGROUND

The City of Wyoming, hereinafter known as the City/Employer, provides municipal and safety services to their approximately 8300 citizens. The Fraternal Order of Police/Ohio Labor Council, Inc., hereinafter known as the Union/FOP, represents the bargaining unit of thirteen full-time Police Officers.

The parties Agreement expired on December 31, 2009, and they have been bargaining on a successor Agreement. They have executed the necessary extensions and waivers of 4117.14(G)(11), postponing their process until a Fact Finding Hearing held on May 13, 2010. The Fact-Finder's Report was issued on June 17, 2010.

The Fact-Finder's Report was not accepted, and they proceeded to Conciliation. With some glitches in communications, the date of October 27, 2010 was mutually agreed to as the Hearing date.

The FOP and City have also been bargaining on two other "sister" contracts for their Sergeants and Police Clerks, bargaining units of four and two respectively. Evidence of the other two bargaining units' progress was submitted by the Employer and Union. The evidence includes two new signed collective bargaining Agreements(CBA), and relative Fact Finder and Conciliation Reports(EE-1, 2;UE-E-F-G).

Difficult times have beset this City as it has others. The have experienced a drop of income tax receipts from 2008 through three quarters of 2010, of 22 per cent. The Police Division is funded by the General Fund, and income taxes are the primary source of revenue for this fund.

As a result of the Fact Finding Report and a Conciliation Report for the Sergeants, a number of issues have been resolved. These include the amount of wage increase over three years, except for the implementation date for the first year. Therefore, the issues being brought before this conciliator are as follows:

Article 14 - Corrective Action and Records
Section 14.1, 14.2, and new 14.3

Article 16 - Overtime
Section 16.6(new) "Kelly Time"

Article 21 - Longevity
Section 21.1

Article 22 - Health Insurance
Section 22.2

Article 30 - Duration
Section 30.1

At the commencement of the Hearing, the conciliator, having reviewed the parties' pre-submittals, offered them the opportunity to mediate (4117.14(G)(1)). After a short while, it was determined that mediation would be unsuccessful, and the Evidentiary Hearing was convened at 11:30am.

In determination of the Conciliation Award, and in compliance with Ohio Revised Code 4117.14(G)(7), and related rules and regulations of SERB, the following were taken into consideration in making this Award:

- (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 proposed, 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 factors not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

The conciliator will address the issues in this Report in order of their Agreement location, and where appropriate, the Agreement language will be included.

ISSUES:

Article 14 - Corrective Action and Records

Union Position:

Section 14.1--Change second paragraph to read as follows:

Upon written request to the Chief of Police, all employees shall be allowed to review any part of, or all of, their individual personnel files, **supervisor's**

log as well as any other file kept concerning the employee, including the availability of copies of any such entries, with such request remaining as part of that file. Such review shall be made in the presence of the Chief of Police or his designate. Unsubstantiated complaints or unfounded allegations will be removed and/or not placed in the employee's personnel file.

Section 14.2-- Change to read as follows:

An employee shall have the right to permanently attach a written position statement to any document in his/her personnel file, **supervisor's log as well as any other file kept concerning the employee.**

Section 14.3 (new)--Add to the Agreement:

In assessing prior levels of discipline, the Employer will take into account the length of time since any previous offenses have occurred. Records of counseling or verbal admonishment will not be used as a basis for further discipline one (1) year or more after issuance, and records of a written reprimand will not be used as a basis for further discipline two (2) years or more after issuance providing there are no intervening disciplinary actions taken during the time period. Loss of Vacation or Suspensions without pay will not be used for further discipline three (3) years or more after issuance providing there are no intervening disciplinary actions taken during the time period. Reduction in pay or position will not be used for further discipline for five (5) years or more after issuance providing there are no intervening disciplinary actions taken during the time period. All forms of discipline shall be removed from the personnel file upon request of the employee after the effective time limits have expired and placed in an inactive discipline file. Files shall be removed and destroyed as allowed by law.

Employer Position: Current language

Discussion:

The changing of Section 14.1 & 14.2, to include review and comment of and on any file, was not recommended by the Fact Finder. She did include the "supervisor's log", however, the Union did not accept her recommendation. There was no evidence submitted to justify expanding the "witch hunt", to any file. Language of this overly general nature (any), only

raises the opportunity for unnecessary relationship problems and disputes, in the conciliator's opinion. Good CBA language addresses real and specific problems between the parties, and not potential concerns. Article 22, Labor Management Meetings, is an agreed upon forum to address a potential problem, if it occurs(UE-C).

Section 14.3(new)--The Union has submitted a large number of time limit corrective action provisions. It is more common than not to have these time limits. However, the Union's most important concern for corrective action (discipline), is addressed in this Agreement, requiring just cause for discipline. Once just cause is established as a criteria for discipline the burden of proof lies with the Employer to meet the seven tests. Arbitrator's, in their application of just cause generally discount an unreasonable "look-back". Furthermore, Article 12 Discipline, does provide for the use of progressive discipline as the means for corrective action, as argued by the Union in their pre-submittal. Additionally, Section 12.4, a corrective action provision, time limits oral reprimands to two years unless a repeat violation occurs.

There was no evidence submitted to show any current or recent problems of alleged misuse of discipline or corrective action, by the City. Furthermore, "sister" FOP units CBA's currently in effect do not contain the Union's proposed provision.

AWARD:

For all the reasons outlined above, and in accordance with the Fact Finder's Report, Article 14, Section 14.1, 14.2 and 14.3, current language.

Article 16 Overtime

Union Position: Add new provision Section 16.6, reflecting current practice, to read as follows:

"During the time which the City maintains Bargaining Unit Employees on a twelve (12) hour work schedule, the City shall grant four (4) hours of "Kelly Time" every two weeks to each Bargaining Unit member on a twelve (12) hour work schedule."

After the previous CBA expired, the City went to twelve (12) hour shifts, versus the then eight (8) to eight and one-half (8.5) hour shifts. The City offered this four hours “Kelly Time” to save overtime. The twelve (12) hour shift is no real benefit to the Police Officers, argues the Union. As long as Police Officers are working twelve (12) hour shifts, the “Kelly Time” should be maintained in the CBA. This same proposed provision is in the new Sergeants’ CBA, notes the FOP(EE-1).

Employer Position:

These four hours of paid time off, every two weeks, to Police officers, working twelve (12) hour shifts is Policy, and should not be contractual, argues the City. They granted this four (4) hours “Kelly Time” voluntarily, through an MOU, to help the Police Officers settle into their twelve (12) hour shifts. It should not be a contractual mandate.

Discussion:

Two Fact Finders and a Conciliator have found the “Kelly Time” MOU, to be compelling. Thus, the Union’s proposed position is included in the recent Sergeants’ CBA. Both parties acknowledged that the shift change kept more officers on the street for a longer time, and it was working ok. However, when implemented mid-term, it created some officers’ problems(UE-16). Although there was no copy of the MOU submitted as evidence, it being a MOU, exemplifies that the parties bargained on the issue. To now withdraw the “Kelly Time” without a quid-pro-quo, would be disingenuous, in the Conciliator’s opinion.

AWARD: Union’s last best offer(see the language under Union Position in this Article 16, Section 16.6 above)

Article 21 - Longevity

Current language, **Section 21.1 Establish**--The City Manager, upon evidence of merit, will authorize longevity pay for all employees in the bargaining unit with three (3) or more years of continuous service. When such merit has been determined by the City Manager, longevity pay shall be

paid at the rates set forth below, for each year of service, after the third year, up to a maximum of twenty eight (28) years of service (i.e. twenty five (25) years maximum longevity pay).

Union Position:

The Union states that longevity is usually based on seniority. However, in this CBA it is based on merit, determined by the City Manager. The City Manager, according to the FOP, doesn't work with the Police Division, and the City does not do regular performance reviews. Since they do not regularly review performances, those bargaining unit members who received corrective action or discipline, in a calendar year, were denied longevity(UE-21). The City's use of this provision is just another form of discipline, not longevity, declares the Union. The merit wording should be removed, and longevity should be based on years of service, and automatic after three years.

Employer Position:

The Employer states that all employees receive merit under the same rules. This is a merit provision. Over the years there have only been four bargaining unit employees not paid longevity, and the denial is grievable, per the City. The FOP's contracts with the Sergeants and Police Clerks have the same provision, and the Fact Finder recommended no change. There is a history in this City with all employees to handle merit pay in this manner, and from the beginning, this pay has been based on merit, claims the City.

Discussion:

Although the Article is titled Longevity, the current language clearly states that eligibility is based on merit. This is a unique provision, to be titled as such. The identical provision exists in the Sergeant's and Police Clerk's Agreements, and they were not challenged their(EE-1,2;UE-F,G). It appears to the conciliator, that the administration of this provision has been automatic "evidence of merit", unless otherwise shown. Denials of merit have been rare, with only four over the years, according to testimony. Although this is a unique use of the titled provision, the conciliator does not find the Employer being capricious or unreasonable, in the application.

Internal comparables and past CBA's favor the City. If this were such a controversial problem to the FOP, the collective bargaining process allows for quid-pro-quo proposals to be made to address their concerns.

AWARD: Employer's last best offer--Current language

Article 22 - Health Insurance

Section 22.2 Other Benefits (i.e. Dental and Optical stipend)

Union Position:

All this Article is agreed to, except for their proposal to increase the Dental/Optical annual stipend from \$400 to \$500. The FOP's position is the same as other City employees, except for Sergeants and Police Clerks. A City Ordinance was passed in 2008, giving other City employees \$500/year for dental and optical services.

Employer Position:

No change to current language. The City points out that non-union and non-management employees get \$500, but coupled with a 1.5% wage increase, in 2010 versus a 2% FOP increase. Those getting the \$500/year may not apply the stipend for anything but optical/dental benefits, and the FOP stipend is not limited to optical/dental.

Discussion:

Fact Finder Cole, determined that the Union's proposed increase to the dental/optical benefit was not supported by internal comparables, external comparables, or any statements that the current benefit was inadequate(UE-E; EE-5). Although some City employees receive a \$500 stipend, their average wage increase is less than this bargaining unit(EE-4). Current language does allow use of this stipend for benefits other than dental/optical. The two other FOP/City signed Agreements through 2012 contain the identical \$400 optical/dental stipend(EE-1,2).

AWARD: Section 22.2 Other Benefits--Current language

Article 30 Duration
(Article 15 Wages-effective date for agreed
to 2010 wage increase)

Union Position:

The 2010 wage increase of two percent (2%) is to be effective January 1, 2010. The Fact Finder recommended the effective date of January 1, 2010, and both other FOP units increases are effective January 1, 2010. Five extensions with waivers were agreed to between the parties(UE-H). The City wants Health Care premium increases retro to 1/1/10, but not wages!

Employer Position:

They referred the conciliator to their Exhibit #7. The City claimed that the Union unreasonably delayed this process.

Discussion:

There may have been a computer or communication glitch with the Union, in getting to this conciliator. However, in reviewing the evidence, I do not find any nefarious act on the Union's part(UE-H;EE-7). All the neutrals involved, in this case and the FOP Sergeant's case, recommended or awarded retro activity for wages and health care. The expired Agreement had the first year wage increase effective January 1(UE-C). Additionally, by the Police Officers waiting on the Sergeant's Conciliation Report, they withdrew or modified positions, resolving a number of open issues. It is not uncommon, when multiple units are bargaining concurrently for the process to get extended. Someone has to be the last one.

AWARD: Union's last best offer. Article 30.1 to read as follows:

Wage increases and increased insurance premiums are effective January 1, 2010. Otherwise, this Agreement shall be effective upon signing and shall remain in full force and effect until December 31, 2012.

SUMMARY

The Conciliation awards contained herein were arrived at after giving consideration to the positions of and arguments of the parties, and the Criteria enumerated in ORC 4117.14(G)(7). In addition, I also incorporate by reference into this Report, the tentative agreements of the parties reached through negotiations or the Fact Finding Report, and the language of the expired Agreement which remains unchanged by the parties.

This concludes the Conciliation Report.

Respectfully submitted and issued at Columbus, Ohio this 30th day of November 2010.

A handwritten signature in cursive script that reads "E. William Lewis".

E. William Lewis
Conciliator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this Conciliator's Report was served by regular U. S. Mail upon Mr. Barry L. Gray, Staff Representative, for the Fraternal Order of Police, Ohio Labor Council, 5752 Cheviot Road, Suite D, Cincinnati, Ohio 45247; and Daniel G. Rosenthal, Esq., for the City of Wyoming, Denlinger, Rosenthal & Greenberg, 425 Walnut Street, Suite 2300, Cincinnati, Ohio 45202; and to J. Russell Keith, Assistant Executive Director, State Employment Relations Board, 65 East State Street, 12th floor, Columbus, Ohio 43215, this 30th day of November, 2010.

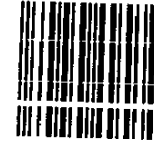
A handwritten signature in black ink, appearing to read "E. William Lewis". The signature is written in a cursive, flowing style.

E. William Lewis
Conciliator

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