

BEFORE

ALAN M. WOLK
IMPARTIAL CONCILIATOR
STATE EMPLOYMENT RELATIONS BOARD

2011 JAN 20 P 2:00

STATE EMPLOYMENT
RELATIONS BOARD

IN THE MATTER BETWEEN:)
)
THE CITY OF NORTON, OHIO)
)
EMPLOYER)
)
and)
)
NORTON PROFESSIONAL FIREFIGHTERS)
LOCAL #4219)
)
UNION)

SERB NO. 09-MED-10-1316
CONCILIATION

Appearances:

FOR THE EMPLOYER:
Paul L. Jackson, Esq.
Roetzel & Andress, LPA
222 South Main Street
Akron, Ohio 44308

FOR THE UNION:
Ryan J. Lemmerbrock, Esq.
Muskovitz & Lemmerbrock
820 W. Superior Avenue 8th Floor
Cleveland, Ohio 44113

History of the Proceedings

On October 15, 2010, fact-finder Richard P. Gortz issued a Report and Recommendations with respect to a contractual issue at impasse. There was no transcript. Upon due consideration, the Fact-Finder rejected the Union position and recommended in favor of the employer's position.

Thereafter, pursuant to Ohio Revised Code*, and by letter dated November 16, 2010 issued by SERB, the undersigned was selected to serve as impartial conciliator to conduct an interest arbitration hearing, and consider evidence and arguments so as to conciliate the dispute.

In compliance with Ohio Administrative Regulations** position statements, including required copies of the previous Collective Bargaining Agreement, were submitted at least five (5) days prior to the hearing to the opposing parties and to the conciliator within the prescribed time.

Upon mutual agreement, on Thursday January 6, 2011 hearing was held commencing at 10 a. m at 4060 Columbia Woods Drive, Norton, Ohio 44203, and thereafter concluded. A court reporter was *not* present and not provided by either party.

*Chapter 4117, Section 4117.14(D) 1

** [as required by Section 4117.14(G) (3), 4117.14(C) (3), and OAC Rule 4117-9-08 (E) (4), and 4117-9-05 (F)]

Opening statements were presented. Testimony and exhibits were offered and admitted. These include City exhibits A thru E and Union Tabulated exhibits 1-12. The sole reservation to admission was by the City seeking verification of the calculations in Tab 8 and Tab 3 of the Union exhibit. Two witnesses were presented by the City and one witness was presented by the Union. All were first sworn. Closing arguments were permitted but waived. Briefs were not desired by either party.

SUBMISSION

I. PARTIES

The Union is Norton Professional Firefighters Local 4219

The Union's principal representative is Ryan J. Lemmerbrock, Esq., Muskovitz & Lemmerbrock, LLC, 820 W. Superior Avenue, 8th Floor, Cleveland, OH 44113, lemmerbrock@mllabor.com

The Employer is The City of Norton, Ohio

The Employer's representative is Paul L. Jackson, Esq. Roetzel & Andress, LPA, 222 South Main Street, Akron, OH 44308, pjackson@ralaw.com

II. Description of the Bargaining Unit

All full-time employees of the City of Norton Fire Department, including probationary employees, occupy positions of full-time Firefighter and full-time Firefighter/Medic.

There are two (2) members of the bargaining unit.

[Note: Some 34 part-time Firefighters are members of a separate bargaining unit and not at issue here].

II. Current Collective Bargaining Agreement

The previous Collective Bargaining Agreement commenced January 1, 2007 and expired December 31, 2009.

ISSUE

All other issues had been resolved. The remaining issue in conflict is language contained in Article 26 providing specific "Compensation." The parties were and are unable to resolve a difference of one (1%) percent as an increase in the compensation of the two (2) and only members of this Union for the year 2010.

The dispute before the fact-finder was whether the bargaining unit members should receive an increase of one (1%) percent or two (2%) for the year 2010. As this is now being decided in 2011, without any agreement for retroactive effect prior to 1/1/11, the parties voluntarily stipulated that the conciliator here is to decide whether the bargaining unit members should receive an increase of two (2%) percent as proposed by the City solely for the year 2011 as of 1/1/11, or three (3%) as sought by the Union solely for the year 2011 as of 1/1/11. The difference between the parties remains one (1%) percent Precedent is not involved.

CRITERIA

In making recommendations, full consideration to the statutory criteria pursuant to O.R.C. 4117.14G (7) (a)-(f) and O.A.C. 4117-9-6-(H) (I) (1)-(6) served as the guidelines.

"The conciliator shall take into consideration all reliable information relevant to the issues, including, but not limited to:

- (a) Past collective bargaining agreements, if any, between the parties;
- (b) Comparison of unresolved 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, and 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) Any stipulations of the parties; and
- (f) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agree upon dispute settlement procedures in the public service, or in private employment."

Under 4117.14(H) this decision is subject to judicial review.

BACKGROUND

The 2007-2009 past collective bargaining agreement, between parties expired December 31, 2009. At issue is ARTICLE 26 Compensation.

The City final offer is a one (1 %) percent increase thru 2012 "at the status quo with the cost of living." However, as 2010 has passed, the City's proposal at conciliation offered a two (2%) increase solely for the year 2011.

The Union's proposal at conciliation seeks a three (3%) increase effective January 1, 2011, solely for the year 2011.

CITY POSITION

The City budget is based on county guidelines and requirements. Norton's anticipated net revenues minus expenses are trending downward. Somewhat convoluted funding [in and out] operational allocations include 106-Fire/EMS Levy Fund Non Capital 70%; 107- Fire/EMS Levy Fund Capital 30%; 108-Fire/ Levy Fund; 109 EMS Levy fund [EX-D].

It is noted that tax receipts and other revenue future projections trend downward.

Projected revenues for 2011, 2012 and 2013, are significantly lower than actual 2010, and projected disbursements in several areas are quite modest. A deficit is likely.

Part of the decline in revenue arises from uncertain property taxes caused, in part, by increased foreclosures resulting in budget and actual deficits. The City needs cash on hand, however the cash flow from property tax changes every six months.

To counter potential difficulties the City income tax was increased by lowering the income tax credit for residents i.e. residents out of pocket increased [CX-D]. Norton household median household income [\$55,356 in September 2010] is lower than surrounding communities of Bath and Copley and similar to Wadsworth [EX A; see also: 5-county comparison on Exhibit B]. Expenses have been reduced and four employees have been laid-off.

At the end of 2010, Norton closed Station 2 which had been located just outside the city limits, because it required more hours, overtime and insurance adding to a likely deficit.

It is noted that part-time Firefighters work differing shifts; i.e. 105 six (6) hours shifts. These are typically 24 hours on and 48 hours off, possibly 52 hours. The full-time Firefighters basically work 10 shifts each week.

Norton part-timers were being paid the least in the county based on phone inquiries of neighboring fire chiefs. Because historically part-timers leave after Norton pays to train them, their compensation was increased thru collective bargaining to reduce the high turnover.

It is noted that the City's comparables with surrounding cities (via telephone to various fire chiefs), full-time Firefighters in Norton are well paid and earn more per hour working for Norton [CX-A] than full-time Firefighters working in surrounding communities (Barberton, Copley, New Franklin and Wadsworth [CX-B]. It provided evidence that Firefighters in Fairlawn have agreed to a pay freeze for the period under discussion [CX-E].

The City agrees that the other bargaining units took a wage freeze in 2009, not 2010. However the effect of increasing two full-time Firefighters in the amount of \$550.00 each also generates multiple increases for taxes, insurance and benefits. These costs will continue annually.

The City suggests that the Union position is based on the members desire to correct an unwarranted but perceived inequity in 2006.

Regarding the idea of "parity" as a City intention, it was expressed in Ordinance # 75-2000 [UX-Tab 9]* when there was no full-time Firefighters bargaining unit in existence. According to the City, "parity" was never intended by the current mayor and council.

It is argued that once the full-time Firefighters became a bargaining unit in 2003 under ORC 4117, *all* terms and conditions became the subject of bargaining, and were no longer governed by the prior ordinance. The intention of a former mayor and council no longer applies. If there was parity in the 2003-2006 it was not because of Ordinance # 75-2000, rather it was negotiated pursuant to R.C. 4117.

In light of all of the circumstances and the 1.1% inflation rate reported by the Bureau of Labor Statistics CPI-U, the City position is justified and reasonable.

UNION POSITION

The Union notes that the City's improperly depended on unconfirmed phone conversations with fire chiefs in surrounding communities. The City relied only on those unofficially reported pay rates without verification of actual *comparability*, such as hours worked, shifts schedules, benefits and total compensation.

Evidence provided by the Union shows the City's full-time Firefighters were in *parity* with the full-time Police Officers from 2000 until they accepted concessions in 2006 for reasons they believed would help pass a fire levy. In 2009 they were back in parity.

However, all bargaining units except the full-time Firefighters received at least a 2% for 2010, and the part-time Firefighters received annual increases of 3.4%, as well as doubling their uniform allowance [CX-C].* The Union believes the Fact-finder did not consider the significance of these increases.

According to Union, the Fact-finder committed prejudicial error by relying, in part, on his mistaken understanding that the other bargaining units accepted a freeze in 2010, rather than in 2009. The fact-finder failed to give any importance to the wage freeze accepted in 2006 by the full-time Firefighters nor their 2009 concessions.

In addition to the foregoing, the Union believes it is entitled to parity with the full-time police officers based on Norton Ordinance #75-2000 [UX-Tab 9] . [This was adopted August 28, 2000 and was made retroactive to May 8, 2000 in order to modify Ordinance #75-46].

Ordinance #75-2000 [UX -Tab 9] *specifically enacted into law the City's intent to maintain equalization of compensation among safety forces:*

"It is this Administration's intention to treat all employees of the Department of Public Safety fairly and equally. [Emphasis added].

Furthermore, Ordinance # 75-2000 states, in Section 1:

The base wage schedule and longevity pay of full-time firefighter/EMTs' shall *match* the base wage schedule and longevity pay of full-time police officers' as negotiated in the Collective Bargaining Agreement between the City of Norton and police officers represented by the O.P.B.A., and any present and/or future amendments thereto. [Emphasis added].

*[CX-C] The current 2010-2012 Agreement with EMT'S and Paramedics R7-26 [EX – C] the classifications of /EMT-P, Lieutenants and Captains agreed to hourly increases of 0.50/hour for each year: 2010-2011 an 2012. THIS calculates to increases of 103.4% each year.

DISCUSSION

Normally great weight is given to the recommendations of the fact-finder who hears all of the evidence. (Without a transcript, neutrals rely on their memory as refreshed by whatever notes they take). Moreover some may believe there is even a presumption of validity of any fact-finder's report. This is somewhat analogous to appellate courts which normally consider a jury's factual determination as binding. Accordingly, overruling decisions by a fact-finder should be carefully reasoned.

Furthermore, bargaining units that perform different duties and have different schedules do not necessarily require matching compensation that is equal or in parity.

It must be noted that when appearing before the Fact-finder in this matter, the Union was limited to cross-examine, due to its failure to comply with a mandatory jurisdictional rule requiring the timely submission of its pre- hearing statement.

At the outset it must be stated that the evidence is material, relevant and significantly supports some of the findings by the fact-finder as well as the positions of both parties.

One question is the applications of an ordinance specifically expressing the City's intent to match or equalize compensation between full-time police officers and full-time Firefighters. There is also an ongoing supporting history that the compensation of full-time Firefighters was at parity with full-time police officers from 2000 to 2006, returning again in 2009.

The Norton fire safety forces consist of some 36 Norton fire-fighters. Two are the only members of the bargaining unit herein [Local 4219]. One is a full-time Firefighter and the other is a full-time Firefighter/Medic. There are currently no probationary employees in this unit. The dollar amount sought is \$550 per year for each of the two full-time Firefighters, or \$1,100 annually. This amount expands according to overtime, and calculations for pension contributions, workers compensation insurance as well as the City's share of income taxes, benefits, e.g. and longevity pay.

All others Norton union employees are members of one of four other bargaining units; part-time Firefighters and EMT-Ps, Lieutenants, Captains, Inspectors, Dispatchers, Paramedics, Service and Maintenance, Office and Clerical. All four of these units agreed to a two (2%) percent increase effective in 2010. Local #4219 is effectively seeking the same percentage increase effective January 1, 2011 to equalize increases to the other employees for 2010. By mutual agreement of the parties, this percentage is three (3%) percent effective January 1, 2011, while the City offers two (2%) for effective January 1, 2011.

No doubt the parties are aware of an early landmark decision fully validating the constitutionality of R.C.4117. See: Ohio Constitution Article II, Section 34:

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." [Emphasis added].

[See appendix for highlights from Supreme Court Justice Andrew Douglas' rationale in: ***City of Rocky River [IV] v S.E.R.B.***, 43 OS 3rd 1, 539 N.E.2d 103 (Ohio 1989)

Ordinance # 75-2000 (see appendix) is relied upon by the Union as requiring compensation "parity" with full-time police officers. Note that the word "parity" does not appear but does state in the preamble that it intended to "equalize" such compensation, a term commonly used in dictionary definitions of "parity."

The City contends that, *after* the full-time Firefighters became a bargaining unit in 2003 under ORC 4117, Ordinance #75-2000 was no longer effective. One key provision is:

§ 4117.08. Matters subject to collective bargaining:

(A) *All matters* pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement *are subject to collective bargaining* between the public employer and the exclusive representative, except as otherwise specified in this section and division (E) of section 4117.03 of the Revised Code. [*Emphasis added*].

The City thus contends as axiomatic that wages negotiated within the provisions of the collective bargaining law (R. C. 4117) need not consider the City's prior expressions of intent, as provided in the preamble of #75-2000 and its specific language in Section 1 to *equalize the pay of safety forces*.

It is noteworthy that the ordinance was adopted *after* R.C. 4117 became state law.

Most important, the ordinance, in declaring its stated goal of public employment peace and intent to equalize the compensation among safety forces, does nothing whatsoever to "impair or limit" the "comfort, health, safety and general welfare of all employees" as required by Ohio Constitution Article II, Section 34 [*See appendix*].

All City employees, *except for the members of Local #4219*, have already been paid increases of two percent during 2010. However, the City final proposal for the members of Local #4219, is to increase the pay of its two members by one percent rather than two percent

All City labor agreements, including the proposal to Local #4219, provide one (1%) percent increases, effective for 2011 and again for 2012. Local #4219 agrees conditioned upon an allocation of two percent equal to that already received by the other employees.

Because it is now 2011, the parties mutually agreed the City's final proposal is two percent solely for 2011 (by adding its one percent offer for 2011 to the one percent it would have paid in 2010) in contrast to the Union final proposal which seeks three percent solely for 2011 (by adding its acceptance of a one percent increase for 2011 its proposal seeking a two percent increase for 2010).

ANALYSIS

[1] Ability and financial capacity

The \$1,100+ impact, solely for 2011, is less intrusive upon the City budget than claimed. Despite cash flow concerns and possible projected budget shortfalls, there are multiple fund accounts [CX-D]. The City of Norton has the ability and financial capacity to administer *this particular increase*, and to make the adjustments following the normal standard of public service.

[2] Parity

Equalizing or providing compensation parity for safety forces arises from Ordinance. #75-2000. The Ordinance, which governs any *present and/or future amendments thereto*, is not in conflict with R.C. 4117 and remains enforceable unless or until repealed or modified.

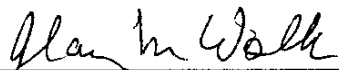
[3] Insufficient support for City position

The one percent sought is the identical percentage increase that has already been paid to most if not all other employees. There was insufficient persuasive evidence of compensation or performance, past or present, to justify withholding one percent of the increase granted the other employees.

AWARD

After a full review of the fact-finding proceedings, the evidence in this conciliation, and based on the foregoing reasons, the position of the Union is deemed justified, fair and reasonable and is therefore sustained.

Effective January 1, 2011, the two members of the Norton Full-time Professional Firefighters Local #4219, shall receive a three (3%) percent increase in their compensation solely for the year 2011.


1/18/11
ALAN M. WOLK, J.D.
CONCILIATOR

Witnesses/Attendance:

Richard Ryland, City Administrator
John Moss, City Finance Director
Carl Housley, Union President
Also in attendance:
David J. Davis, Union Secretary (did not testify)

APPENDIX A

EXHIBITS

CITY

- EX =A Barberton, Bath, Copley, New Franklin, Wadsworth [comps]
EX -B based on Sperling's Best Places to Live
EX -C, page 7 EMT-P Current 2010-2012 Agreement with EMT'S and Paramedics R7-26 @\$0.50/hr
EX - D revenue and disbursement calculations actual and projected
EX - E Fairlawn Firefighters agreed to forgo pay raises

UNION

- Tab 1 Prior 2007-2009 Agreement Norton and FULL TIME FIREFIGHTERS
Tab 2 Fact Finder's Report and Recommendations now subject to conciliation
Tab 3 Current 2010-2012 Agreement Norton and part-time Firefighters,
- providing increases; calculation of runs created by Union, subject to verification
Tab 4 Prior 2007-2009 Agreement Norton and EMT'S and Paramedics R7-26
Tab 5 Current 2010-2012 Norton Agreement with OPBA police units
Tab 6 Current 2010-2012 Norton Agreement with AFSCME Local 256
- service maintenance units
Tab 7 Current 2010-2012 Norton Agreement with AFSCME Ohio Council 8
- City employees
Tab 8 Calculation of runs created by Union, subject to verification
Tab 9 Norton Ordinance 75-2000 referring to 46-2000 and related documentation
Tab 10 Norton Ord. 94-2010 for non-bargaining units
Tab 11 Norton Committee work session 5/3/10 including discuss and motion
- regarding part-time Fire Fighters Contract

APPENDIX B

Contentions regarding the Fact-finder's report:

There is mutual agreement that *the Fact-finder relied, in part, on materially incorrect information in the third last line of page 4 of his Report* stating that:

"All non-bargaining employees of the City have taken a wage freeze effective January 1, 2010." In truth the year was 2009.

Furthermore, according to the un-rebutted evidence:

On page 5, paragraph 2, line 1 police did not agree to a one year freeze in 2006. This is not factual;

On page 6 Par. 1, line 2 the finding that full-time Firefighters also may work 48 or 52 hours schedules. While they may work overtime, they do not work 48 or 52 hour schedules. This is not factual;

On page 7, in the last paragraph, the repeated reference to a wage freeze must be read in conjunction with the incorrect year 2010 instead of 2009 as noted (page 4) above.

APPENDIX C

City of Rocky River [IV] v S.E.R.B., 43 OS 3rd 1, 539 N.E.2d 103 (Ohio 1989).
[Highlights added].

R.C. 4117 is not an unlawful delegation of municipal legislative authority even though Ohio Constitution [1912] Article XVIII, Section 3 grants municipalities home rule i.e. all powers of self-government *when not in conflict* with general laws of the state; [See also: Section 7 granting the power to determine municipal safety employee compensation] [Emphasis added]

This decision determined the foregoing does not abrogate R.C. 4117 relying on Ohio Constitution Article II, Section 34 which provides:

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and *no other provision of the constitution shall impair or limit this power.*" [Emphasis added]

This decision rejected assertions that R.C. allows "the alleged power of the conciliator to bankrupt a municipality by adopting a union salary demand which the employer cannot afford."

Furthermore, the decision declares as "compelling"

"the inclusion by the General Assembly of R.C. 4117.14(l) filling the need for "some mechanism (other than the strike option) to bring about final resolution of an impasse in bargaining between a public employer and its safety forces."

The court held that

"R.C. 4117.14(l) is not an unlawful delegation of legislative authority as it serves the purpose of promoting orderly public sector relations, contains sufficient procedural standards and safeguards and provides for effective judicial review."

APPENDIX D

Ordinance # 75-2000 [UX -Tab 9] states, in Section 1:

The base wage schedule and longevity pay of full-time firefighter/EMTs' shall match the base wage schedule and longevity pay of full-time police officers' as negotiated in the Collective Bargaining Agreement between the City of Norton and police officers represented by the O.P.B.A., *and any present and/or future amendments thereto.* [Emphasis added].

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ALAN M. WOLK

ARBITRATOR MEDIATOR CONCILIATOR FACT-FINDER

09-557

JANUARY 18, 2011

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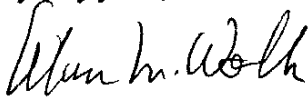
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RE: SERB 09-MED 10 1316
Employee Org: Norton Professional Firefighters, Local 4219
Employer: City of Norton, Ohio

To the parties:

Enclosed please find the conciliators award in the above matter together with my statement for services.

Very truly yours,

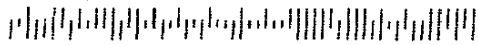


ALAN M. WOLK, J.D. CONCILIATOR
amw: bbs
cc: SERB

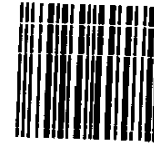
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