

CONCILIATION DECISION

STATE EMPLOYMENT RELATIONS BOARD

STATE OF OHIO

November 4, 2011

In the Matter of:

Cuyahoga County Sheriff's Office)	
)	Case No. 10-MED-03-0374
and)	Deputy Lieutenants
)	
Ohio Patrolmen's Benevolent Association)	

APPEARANCES

For the County:

Christopher J. Russ, Assistant Law Director
Majeed G. Makhlof, County Law Director
Ed Morales, Assistant Law Director
Wade Steen, Fiscal Officer

For the Union:

Max Rieker, OPBA Attorney
Richard Peters, Deputy Lieutenant
Bryan Smith, Deputy Lieutenant

Conciliator:

Nels E. Nelson

BACKGROUND

The instant case involves the Cuyahoga County Sheriff's Office and the Ohio Patrolmen's Benevolent Association. The county provides a broad range of law enforcement services. The union represents a number of bargaining units in the sheriff's department, including the four Lieutenants involved in this dispute. The Lieutenants supervise 14 Sergeants and report to one of the two Captains.

The union was certified as the bargaining agent for the Lieutenants in 2010 and filed a notice to negotiate on March 19, 2010. While the parties were able to agree on a majority of the terms of an initial agreement, they were unable to reach an overall settlement. As a result, on November 23, 2010, they agreed to extend the time limits for fact-finding and to waive the restrictions on a Conciliator awarding retroactive wage and benefit increases.

A fact-finding hearing was held on June 21, 2011, and Fact-Finder Burt Griffin issued his report on July 24, 2011. When the county rejected his recommendations for the six issues at impasse, the dispute proceeded to conciliation.

The Conciliator was informed of his selection on August 11, 2011. A hearing was held on October 27, 2011. At that time, the union agreed to accept the county's final offers for on-duty injury leave and vacations, which were identical to the provisions in the Sergeants' contract.

The conciliation process requires the Conciliator to select the most reasonable final offer for each issue without modification. The selection is based on the criteria set forth in Section 4117.14(G)(7) of the Ohio Revised Code. They are:

- (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 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, 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) 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 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.

ISSUES

The parties submitted four issues to the Conciliator. For each issue, he will set forth the positions of the parties and summarize the arguments and evidence they presented in support of their positions. The Conciliator will then offer his analysis for each issue, followed by his award.

1) Article 14 - Wages – The Lieutenants currently earn \$32.5154 per hour or \$67,632, per year and Sergeants receive \$30.1809 per hour or \$62,775, annually. This results in a rank differential of 7.7%. The union demands a 12% rank differential retroactive to January 1, 2011. The county offers a wage freeze for 2011 followed by a 1% increase effective January 1, 2012.

Union Position - The union argues that its final offer should be selected. It points out that in 2010 the average salary for Lieutenants in Butler, Delaware, Franklin, Hamilton, Lake, Lorain, Medina, Montgomery, Summit, and Warren Counties was \$77,824 compared to \$67,620 in Cuyahoga County. (Union Exhibit 6) The union notes that average total compensation, including uniform allowance, shift differential, longevity, and other items, was \$79,531 compared to \$67,620 in Cuyahoga County. (Ibid.)

The union contends that the Lieutenants are paid “shockingly less” than Lieutenants in cities in Cuyahoga County even though their jobs are more complicated. It reports that the average pay for Lieutenants in 18 county cities is \$82,988 or 19% more than in the Sheriff’s department. (Union Exhibit 7) The union observes that in terms of total compensation, the average for 18 cities is \$88,207 or 23% more than in Cuyahoga County. (Ibid.)

The union maintains that the Lieutenants’ rank differential is less than in other sheriffs’ departments. It reports that in 2009 the average rank differential for Lake, Lorain, Medina, Portage, and Summit Counties was 15.46% while the differential in Cuyahoga County was 7.69%. (Union Exhibit 5) It notes that on December 27, 2006, the differential was 11.69%. (Union Exhibit 4)

The union argues that the county’s proposed wage freeze is unacceptable even in the “unique bargaining climate.” It points out that the Lieutenants have not received a wage increase for the past several years. The union insists that the unit “needs to exceed wage gains made by other bargaining units in order to make up for several years of lost time.” (Union Pre-Hearing Statement, page 5)

The union rejects the employer’s inability to pay argument. It claims that the county bears a “substantial burden of proof regarding such an assertion [and that] the Employer will not be able to demonstrate any actual reasons justifying its extraordinary final offer of a zero wage increase.” (Union Pre-Hearing Statement, page 4) The union adds that in recent fact-findings and conciliations involving other bargaining units the county’s inability to pay argument was rejected. (Union Exhibit 17)

The union contends that the economic environment is improving. It points out that the county’s 2011 Second Quarter Report shows an estimated General Fund surplus of \$6.4 million,

which has since grown to \$10.9 million. (Union Exhibit 8, page I-3) The union notes that on an All Funds basis, the Approved Budget showed a \$44.2 million deficit but the Second Quarter Report shows a \$19.0 million surplus. (Ibid.)

The union suggests that the improving budget situation is in part the result of increasing sales tax collections. It observes that 2011 sales tax revenue is estimated to be \$212.2 million, which is equal to the amount collected before the economic crisis began. It reports that sales tax revenue is projected to increase to \$222.9 million by 2013. (Ibid., page I-4)

The union maintains that the county has made significant reductions in staffing. It states that in 2008 the total FTE was 9,523 but by 2010 it was reduced to 7,982. (Ibid., I-10) The union adds that the total FTE is projected to decrease to 7,772 in 2011 and to increase only modestly in 2012. (Ibid.)

The union argues that the Executive's Recommended Budget for 2012-2013 shows the county's favorable situation. It points out that it projects General Fund carryover balances of 28.8% in 2011, 31.3% in 2012, and 30.8% in 2013. (Union Exhibit 8, page I-11 and Union Exhibit 11, page I-2) The union notes that the Recommended Budget indicates that county salary levels are projected to decline from \$360.8 million in 2010 to \$358.4 in 2011 and to remain below the 2007-2009 levels through 2014. (Ibid., page I-20)

The union contends that bond rating agencies have recognized the county's strong financial position. It reports that on December 10, 2009, Standard and Poor's gave the county's general obligation and variable purpose bonds AA+ ratings. (Union Exhibit 14) The union observes that Fitch Ratings gave the same ratings to the bonds. (Union Exhibit 13)

The union maintains that recent sales tax collections demonstrate the improving situation. It points out the 2011 monthly sales tax receipts have exceeded collections in every

corresponding month in 2010. (Union Exhibit 15) It notes that September sales tax collections were \$16,451,124 compared to \$14,777,152 in the previous year. (Ibid.)

The union indicates that Fact Finders and Conciliators have recommended or granted wage increases for a number of bargaining units in the sheriff's department. It states that the groups receiving wage increases include the Deputy Sheriffs, Registered Nurses, CO Corporals, Deputy Sergeants, and Correction Officers. (Union Exhibit 17) The union stresses that Griffin recommended that the Lieutenants' rank differential be increased to 16%. (Joint Exhibit 3)

County Position - The city argues that its final offer should be selected. It claims that its ability to pay precludes granting the union's offer. The county claims that it is "still mired in the economic doldrums." (County Pre-Hearing Statement, page 3)

The county contends that tentative agreements have already resulted in a significant increase in compensation for the Lieutenants. It indicates that the agreements call for the Lieutenants to receive an annual \$1400 uniform allowance and longevity pay of \$375 after five years, which increases by \$75 per year. The county stresses that this means a 4.7% increase for the Lieutenants over their previous non-bargaining unit compensation.

The county maintains that the concept of "shared sacrifice" is at the heart of its position on economic items. It points out that for the third straight year, non-bargaining unit employees in the sheriff's department and throughout Cuyahoga County did not receive an increase in compensation. The county notes that instead those employees, who took three unpaid furlough days in 2009 and five days in 2010, were required to take an additional five days in the first half of 2011.

The county argues that its Approved Budget for 2011 supports its position. It reports that the 2011 budget is \$11.0 million or 3.4% less than the 2010 actual budget. (County Pre-Hearing

Statement, page 4) The county observes that the sheriff's department's 2011 budget was reduced by \$780,000 or 1.5% on top of reductions in 2009 and 2010. (Ibid.) It adds that the Protective Services Division, which was transferred to the Sheriff's Department in March 2010, had its budget reduced by \$429,000 or 7.5%. (Ibid.)

The county contends that its financial situation will not improve in the near future. It indicates that state funding will be cut \$16.5 million in 2011, \$32.2 million in 2012, and \$39.7 million in 2013. (County Exhibits, Tab 13, page 12) The county complains that while sales tax collections have increased, they are not close to pre-2008 levels. It states that property tax receipts are forecast to decrease as a result of foreclosures and declining property values. It adds that the NBA lockout will also have an impact on its revenues.

The county maintains that Cuyahoga County, Ohio, Cuyahoga County Sheriff's Office and Ohio Patrolmen's Benevolent Association; SERB Case No. 09-MED-1-1112; October 21, 2011, supports its position. (County Exhibits, Tab 9) It points out that in that case, Conciliator Howard Silver rejected the union's demand for 2% wage increases for 2010 and 2011 and awarded its offer calling for wage freezes in both years. The county notes that he stated:

The Conciliator is not persuaded that the Cuyahoga County, Ohio economy in 2010, 2011, or 2012 indicates increasing revenues for the county or decreasing expenses for the county. A preponderance of the evidence presented to the hearing record describes an economy that has suffered the loss of its manufacturing base beginning in 2001, and in 2008 experienced a severe national recession. Cuyahoga County must now accommodate the loss of millions of dollars redirected from Cuyahoga County to the state of Ohio's biennial budget ... The Conciliator does recognize, however, the substantial reduction in revenue for Cuyahoga County caused by the reduction in funding from the state of Ohio, a substantial contraction in the wherewithal available to the government of Cuyahoga County, Ohio to meet its obligations, operational and otherwise. (Page 8)

The county argues that its recent settlement with AFSCME, Local 1746, which covers various classifications in the Department of Health and Human Services, supports its position. It

observes that the AFSCME bargaining unit is its largest unit and includes approximately 1300 employees. (County Pre-Hearing Statement, page 5) The county stresses that the agreement calls for no wage increase on July 1, 2011, and 1% effective on July 1, 2012.¹ (Ibid.)

The county rejects any suggestion that it should grant the union's demand because it can afford to do so. It acknowledges that the union's demand will not "break the bank" but claims that it would result in "whipsawing" by other bargaining units. It adds that the union's offer "will completely throw any semblance of 'parity' between law enforcement supervisory units into complete disarray." (County Pre-Hearing Statement, page 5)

The county contends that the cuts in the 2012-2013 state budget poses a significant threat. It indicates that the cuts, which began in 2011 and take full effect in 2012, will result in the loss of more than \$68 million in revenue over the two years. (County Exhibits, Tab 13, page 5) The county claims that "the operating outlook in the General Fund and the HHS Levy Fund, becomes unstable in 2012 mostly due to the State cuts." (Ibid.)

The county offers the 2011-2013 budget update in support of its position. It points out that the update shows that the General Fund budget is just in balance and does not include any additional funding for operations. The county notes that both General Fund and the HHS Levy Fund revenues will decrease in 2013 due to cuts in state funds and a drop in property values.

The county maintains that the economy remains weak. It reports that the county unemployment rate is 7.9% and the state rate is 9.1%. (Ibid., page 14) The county indicates that new claims for unemployment insurance benefits remain 20% above the job-growth level. (Ibid.) It adds that the foreclose rate increased to 13,700 in 2010 and the growth of sales tax revenue is expected to subside in 2012. (Ibid.)

¹ The agreement also provides for a 2% wage increase effective July 1, 2013.

Analysis – One of the important criteria governing the selection of a final offer for wages is comparisons to wages paid to similar employees of other employers. The data supplied by the union show that the Lieutenants in Cuyahoga County are paid significantly less than Lieutenants in other large counties in Ohio and Lieutenants in cities in Cuyahoga County. (Union Exhibits 6 and 7) While differences in the duties and responsibilities of Lieutenants in the sheriff's department and in city police departments make that comparison difficult, there is no reason for the wages of the Lieutenants in Cuyahoga County to remain so far below Lieutenants in other counties.

Internal comparisons also support the union's final offer. The most obvious comparison is to the Sergeants. In December 27, 2006, the Lieutenants earned 11.69% more than the Sergeants. (Union Exhibit 4) However, in succeeding years the Sergeants received wage increases while the Lieutenants' wages did not increase. As a result, the Lieutenants' rank differential declined to 7.69%. (Ibid.) The county offered no justification for the decline in the Lieutenants' wages relative to that of the Sergeants.

The ability to pay is another important criterion. While the financial information provided by both parties reveals that the county has suffered through a severe recession, it has survived the worse of the downturn. The record indicates the General Fund carryover is projected to be 28.8% in 2011, 31.3% in 2012, and 30.8% in 2013. (Union Exhibit 8, page I-2 and Union Exhibit 11, page I-2) This exceeds the county's goal of maintaining General Fund reserves equal to 25% of operating expenditures. (Union Exhibit 11, page I-4) In addition, the latest data indicates that sales tax collections are continuing to rise so that receipts for 2011 should reach \$170 million compared to \$155 million in 2010. (Union Exhibit 15 and testimony

of Wade Steen) The county's favorable outcome is confirmed by the AA+ bond ratings from Fitch and Standard and Poor's. (Union Exhibits 13 and 14)

National economic data suggests that the county's financial condition should continue to improve. Gross Domestic Product increased in the third quarter of 2011 at an annual rate of 2.5%, which may be less than in some other recoveries, but it eases concerns about the possibility of a double-dip recession.² In addition, September consumer spending, which is a primary driver of the economy, rose 1.1% from the previous month.³

The Conciliator recognizes that the county faces a number of challenges. The state is expected to cut funding by \$16.5 million in 2011, \$37.2 million in 2012, and \$39.7 million in 2013. (County Exhibits, Tab 13, page 12) In addition, property tax collections are apt to decline due to lower property values and perhaps increasing delinquencies.

Despite these problems, the county's finances should continue to improve. In addition to the points noted above, the county has reduced FTEs from 9,523 in 2008 to 7,772 in 2011. (Union Exhibit 8, I-10) The county has also undertaken a number of longer term projects, including the Medical Mart, to increase employment and incomes, which will result in higher tax collections.

The Conciliator understands the county's concern that although the cost of the union's wage offer for the Lieutenants is quite small, it could have an impact on other bargaining units. However, it is important to recognize that the union's offer simply restores the Lieutenants' wage differential to where it was in the past. It is difficult to see how another bargaining unit

² See the October 27, 2011, press release posted on the website of the Bureau of Economic Analysis in the US Department of Commerce.

³ See the October 28, 2011, press release posted on the website of the Bureau of Economic Analysis in the US Department of Commerce.

could successfully argue that restoring the Lieutenants' rank differential justifies an increase in its wage schedule.

The Conciliator also recognizes that the Lieutenants were granted longevity and a uniform allowance earlier in negotiations. While this increased their compensation, it only eliminated an inequity since both deputies and sergeants as well as other county employees were already receiving these benefits. Like the restoration of the Lieutenants' rank differential, it is hard to see why this action should trigger demands by bargaining units which were already receiving uniform allowances and longevity.

The Conciliator is aware that awarding the union's final offer reduces the differential between the four Lieutenants and the two Captains. The Captains, however, are not members of any bargaining unit and their compensation is determined by the county. If it feels that the Captains are paid too little compared to the Lieutenants, it can increase their wages. In any event, it makes no sense to deny the Lieutenants a wage adjustment to preserve a degree of equity between the Lieutenants and the Captains at the cost of continuing one between the Sergeants and Lieutenants.

Award - The Conciliator selects the union's final offer. It is as follows:

Beginning January 1, 2011 and thereafter, there shall, at all times, be a minimum base pay rank differential of 12.00% between the rank of Deputy Sheriff Sergeant and the rank of Deputy Sheriff Lieutenant, in addition to longevity pay and uniform allowance as articulated in this Agreement. If at any time, the base pay difference between a Deputy Sheriff Sergeant(s) and a Deputy Sheriff Lieutenant(s) is less than 12.00%, then the Employer shall immediately remedy the situation by raising the rate of pay of the affected Deputy Sheriff Lieutenant(s) to 12.00% greater than the rate of pay of the highest paid Deputy Sheriff Sergeant(s). Members of the Bargaining Unit shall be paid in accordance with this Article, retroactively back to January 1, 2011.

2) Article 30 – Promotion Examinations – Lieutenants are classified employees and are appointed to their positions pursuant to competitive exams while Captains are unclassified, fiduciary employees who are appointed without competitive examinations. The union proposes that a promotional examination be conducted for Captain and that at least one year of service as a Lieutenant be required to take the test for Captain. The county opposes the union’s demand and presented no final offer.

Union Position – The union argues that Captains’ positions ought to be filled by competitive exams. It claims that testing is a “good government practice” and will promote continuity in the promotion process. The union indicates that its final offer is similar to the provision in the Sergeants’ contract dealing with promotion to Lieutenant.

County Position – The county argues that the union’s final offer should be rejected. It contends that under Sections 124.11(A)(9) and (28) of the Ohio Revised Code, Captains are unclassified employees and as such, are exempt from civil services exams. The county maintains that under Article 9, Section 9.02, of the Charter, it has the right to determine if the position of Captain should be a classified position and subject to Section 5.10 of the Personnel Policies and Procedures of the Office of Human Resources, which requires competitive exams to determine merit and fitness for a position.

Analysis – The Conciliator cannot award the union’s final offer. He does not have sufficient evidence regarding the responsibilities of the Captains and the extent to which they have policy-making responsibilities to determine whether they should be filled by competitive exams or appointed by the County Executive. The Conciliator agrees with Fact-Finder Griffin that it would be irresponsible to grant the union’s demand without further evidence. (Joint Exhibit 3, pages 8-9)

Award – The Conciliator awards the county’s final offer of no contract provision dealing with promotion to Captain.

3) Article 36 – Layoff and Recall - The parties agree on most of the points regarding layoff and recall but they differ in a number of respects. First, the union’s final offer limits reductions in the work force to the reasons listed in Section 124.321 of the Ohio Revised Code while under the county’s offer, it can determine when a layoff will take place. Second, the union proposes that employees who are displaced to a lower classification retain their reinstatement rights for seven years while the county would restrict reinstatement to five years. Third, the union’s offer prohibits employees who did not take a civil service exam for Lieutenant from displacing a Lieutenant who took a civil service exam either prior to employment or prior to promotion.

Union Position – The union argues that its offer should be selected. It points out that its proposal will prevent non-tested Captains from bumping tested Lieutenants. The union observes that the Fact Finder recommended its position.

County Position – The county argues that the union’s proposal is unnecessary. It claims that Section 124.324 of the ORC bars a Captain from replacing a Lieutenant. The county adds that there is a linkage between the union’s promotion and layoff proposals so that if one of the union’s proposals is rejected, both should be rejected.

Analysis – The Conciliator must award the union’s final offer. Since Captains are appointed and may have duties and responsibilities significantly different from Lieutenants, it is inappropriate to assume that they are qualified to bump into a Lieutenant’s position. The decision to award the union’s final offer is consistent with Griffin’s recommendation.

Award – The Conciliator award the union’s final offer.

Section 1. When the Employer determines that a layoff or job abolishment is necessary, the Employer shall notify the affected Employee(s) and the Union at least fourteen (14) days in advance of the effective date of such layoff or job abolishment. If the Union requests, the parties shall meet to discuss the Employer’s action. Employees whose jobs are abolished shall have the same rights as a laid-off Employee, in accordance with the provisions of this Article.

Section 2. Whenever it becomes necessary to reduce the workforce, the Employer shall lay off Employees or abolish their positions only for reasons provided in Section 124.321 of the Ohio Revised Code. The Employer shall determine when a layoff or reduction will occur. The Employer’s decision shall be subject to the grievance procedure herein and shall be filed directly to arbitration.

Section 3. Bargaining unit Employee(s) with the least time in rank of Lieutenant will be laid off first. In the event that more than one employee has the same date of promotion to Lieutenant, the established seniority list will be used to determine the most senior Employee.

Section 4. Laid off Employees shall have the right to displace employees within the classification the Employee held immediately prior to holding the classification from which the Employee was laid off. Employees shall notify the appointing authority of their intention to exercise their displacement rights within five (5) days after receiving notice of layoff. Laid off Employees who have been displaced to a lower classification retain their reinstatement rights for seven (7) years. Employees shall exercise their reinstatement rights in the inverse order of layoff.

Section 5. The Employer shall post an up-to-date seniority list annually. Said list shall remain posted for a fourteen (14) day calendar period and shall include Employees’ names and initial dates of hire. After posting the list, any errors which are brought to the attention of the Employer within thirty (30) days of posting shall be corrected. It is the Employee’s responsibility to check these lists for accuracy and request correction of errors in a timely manner. Otherwise, the Employer may rely upon the information in such lists.

Section 6. If a Lieutenant is reduced or the subject of lay-off or job abolishment, he shall be placed in the deputy sheriff sergeant classification. In no situation shall an Employee who took a civil service exam prior to employment or prior to promotion be displaced by an Employee who did not take a valid civil service exam for the position of Lieutenant.

Section 7. Notice of recall shall be sent to the Employee by certified or registered mail. The Employer shall be deemed to have fulfilled its obligation by completing each of the following:

- a) Sending the recall notice by certified mail, return receipt requested, to the last mailing address provided by the Employee;
- b) Hand delivery to the President of the Union, or his designated Representative;
- c) Posting said notice on the bulletin board.

Section 8. The recalled Employee shall have five (5) calendar days, following the date of receipt of the recall notice, to notify the Employer of his intention to return to work and shall have seven (7) calendar days, following the date of receipt of the recall notice, to report for duty, unless a different date for returning to work is specified in the notice.

4) Article 55 – Miscellaneous – Pension Pick-Up – Lieutenants currently do not have the ability to make their pension contributions on a tax-deferred basis. Both of the parties' amended final offers allow Lieutenants to make their pension contributions with pre-tax dollars.

Union Position – The union argues that its language should be adopted. It indicates that it is the language in the Sergeants' contract.

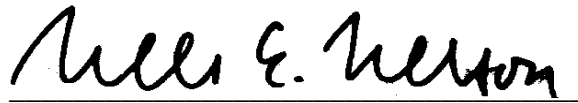
County Position – The county argues that its suggested language should be awarded. It points out that its proposed language was recently accepted by AFSCME, Local 1746, which represents employees in the Department of Health and Human Services. The county states that it wishes to have uniform language regarding the pension pick-up in all of its contracts.

Analysis – The parties agree that the Lieutenants ought to be able to make their required pension contributions on a pre-tax basis just as other employees have been able to do for a number of years. Even though the parties cannot point to any meaningful difference in their proposals, neither side will accept the other's proposed contract language. Since the union accepted the employer's proposals for vacation and on-duty injury leave taken from the Sergeants' contract, there is logic to granting the union's demand for the Sergeants' contract language for the pension pick-up. It is worth noting that even if the county's final offer were

accepted, there would not be uniformity with respect to pension pick-up language in county contracts.

Award – The Conciliator selects the union’s final offer.

Employees shall receive the retirement plan governed by the Public Employees Retirement System (PERS) as is currently in effect and amended hereafter. The Employer shall continue the current salary reduction plan pursuant to PERS rules and Section 401(A) and 501(A) of the Internal Revenue Code, which provides for public employee pension plans to receive tax deferred status.



Nels E. Nelson
Conciliator

November 4, 2011
Russell Township
Geauga County, Ohio