

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

In the matter of	*	Case No(s). 10-MED-08-1001
	*	10-MED-11-1760
	*	10-MED-11-1761
Conciliation between:	*	
	*	
	*	Conciliator:
City of Trenton	*	
	*	Martin R. Fitts
and	*	
	*	
Ohio Patrolmen's Benevolent Association	*	November 4, 2011
	*	
	*	
	*	

AWARD OF THE CONCILIATOR

APPEARANCES

For the City of Trenton (the Employer):

- Marc A. Fishel, Attorney for the City
- John J. Jones, City Manager
- Timothy L Traud, Chief of Police
- Michael E. Engel, City Treasurer

For the OPBA (the Union):

- Mark Volcheck, OPBA Attorney
- Jamy Chaney, Patrol Representative
- Kathy Allen, Dispatch Representative
- David Rosenfelder, Sergeant Representative

PRELIMINARY COMMENTS

The Conciliation proceeding encompasses three bargaining units. One consists of all full-time Patrol Officers, with approximately ten employees. A second consists of all full-time Sergeants, with approximately two employees. The third consists of all full-time Dispatchers, with approximately two employees. Each bargaining unit had a predecessor collective bargaining agreement, each having been between the City and FOP/OLC. The parties used those predecessor agreements as templates for new agreements between the City and the Ohio Patrolmen's Benevolent Association (OPBA) which now represents each of the three units.

The parties began negotiations in January 2011 and reached impasse, proceeding to Fact-finding. Fact-finder Sarah Cole issued her Report on July 5, 2011. That report was rejected by the City. Since that time the parties continued to negotiate and reached tentative agreements on many issues previously at impasse.

The undersigned was appointed to serve as Conciliator on July 28, 2011. A Conciliation hearing was held on October 11, 2011 at the City's offices in Trenton, Ohio. Both parties attended the hearing, presented written positions, and elaborated upon their respective positions. The parties executed a written agreement to waive having the hearing recorded. The following issues were submitted for Conciliation: Article 3 – Dues Deduction; Article 11 – Wages; and Article 20 (Dispatchers)/21(Patrol & Sergeants) – Insurance.

In rendering the recommendations in this Conciliation Award, the Conciliator has given full consideration to all testimony and exhibits presented by the parties. In compliance with Ohio Revised Code, Section 4117.14 (G) (7) and Ohio Administrative Code Rule 4117-9-06 (H), the Conciliator considered the following criteria in making the findings and recommendations contained in this Report:

1. Past collectively bargained agreements, if any, between the parties;
2. Comparison of 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;
3. 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;
4. The lawful authority of the public employer;
5. Any stipulations of the parties; and
6. Such other factors, not confined to those listed above, 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 AND AWARDS

Issue: Article 3 – Dues Deduction

Positions of the Parties

The Union proposed that a provision be included in the new contracts to require bargaining unit members who are not members of the Union to pay a fair-share fee. Its argument is that comparable contracts include such provisions, and that a fair-share fee provision precludes bargaining unit members from receiving the benefits of the Union's representation without being required to pay for the representation.

The Union argued that while the Fact-finder's Report recommended against this proposal, the Fact-finder relied on an error of fact in reaching this conclusion. It noted that the Fact-finder found no need for the inclusion of the fair share fee provision because "all current employees are union members." The Union argued that, in fact, none of the bargaining unit members are currently members of OPBA, and it is unknown which bargaining unit members will actually decide to become dues-paying OPBA members upon the execution of the new contracts.

The Employer proposed that no fair-share fee requirement be provided for in the new contracts. It argued that the prior collective bargaining agreements (with FOP) did not contain such a provision. It argued that the employees should have a choice in whether or not to financially support the Union and that the Employer should not be required to deduct a fair share fee from an employee's wages against their wishes.

Discussion

The Conciliator notes the Employer's argument that despite the Union's exhibits showing that many comparable collective bargaining agreements do have fair-share fee provisions, there was no fair share fee provision in the prior collective bargaining agreements with FOP/OLC. Further noted is the argument that the employees are not currently dues-paying members of OPBA because there is no new collective bargaining agreement in place. In fact, there is no way of knowing at this time how many of the bargaining unit employees will voluntarily become dues-paying OPBA members. The argument that some bargaining unit members could get a "free ride" is at this time pure speculation.

Despite the Union's argument that the Fact-finder's recommendation was made in part by assuming facts that were not in evidence or were unclear, the Conciliator finds the Employer's logic is reasonable at this time. There is simply no evidence at this time that

the OPBA will not have 100% success with voluntary membership, nor could there be. Clearly the employees were dissatisfied with their previous representation and turned to OPBA as a preferred alternative. Further, there is evidence that despite the existence of fair share fee provisions in comparable contracts, the prior contracts with these bargaining units have not contained such provisions. Given that, and without clear evidence that the OPBA has suffered from a lack of financial support in the form of the dues payments, there is simply no compelling reason to award the Union's proposal in these first Agreements with OPBA.

Award

The Conciliator believes that the Employer's proposal is more reasonable, due to the absence of compelling evidence at this time.

Therefore, the Conciliator awards the Employer's proposal for no fair-share fee provision.

Issue: Article 11 – Wages

Positions of the Parties

The Union proposes that on January 1, 2012 the Patrol Officers and Sergeants receive across the board increases equaling two successive two percent (2%) wage increases, and it proposes that for wages effective January 1, 2013 there be a wage re-opener. The Union proposes that on January 1, 2012 the Dispatchers receive across the board increases equaling two successive two percent (2%) wage increases, and it proposes that for wages effective January 1, 2013 there be a wage re-opener.

The Employer proposal for Patrol Officers, Sergeants and Dispatchers is that there be a wage freeze for 2011, a one percent (1%) increase effective January 1, 2012, an additional one percent (1%) wage increase effective July 1, 2012, and a wage re-opener in November 2012 for wages effective January 1, 2013.

Discussion

The Union argued that its proposal is less expensive than what was recommended by Fact-finder Cole. As statutory restrictions preclude the Conciliator awarding retroactive

wage increases, the Union proposal would not provide wage increases until January 1, 2012, well after the across the board wage increases the Fact-finder had recommended. In fact, the Fact-finder's recommendations for the Patrol Officers and Sergeants included a 2% wage increase effective September 1, 2010 and another 2% wage increase effective September 1, 2011; for the Dispatchers the recommendations included a 2% wage increase effective June 1, 2011, another 2% wage increase effective September 1, 2012. The Fact-finder recommended a wage re-opener for January 1, 2013 for all three bargaining units.

The Conciliator notes that a number of months have passed since the Fact-finding Hearing was held, providing a much more accurate look at the actual revenues and expenditures for 2011. The outlook for the final 2011 revenue is that it will decline for the second straight year, while expenditures will exceed revenues for the third straight year. As the police department budget represents approximately 2/3 of the City's total expenditures, even a modest increase in police expenditures has a significant impact on the City.

It is also noted that the City's efforts to improve its revenue have not been successful in recent years, and that the City's 100% tax credit for those working in other municipalities but living in Trenton puts it at a significant disadvantage when it comes to funding City services such as police.

The Conciliator respects the fact that while the 100% tax credit severely hinders the City's financial picture and puts it in a great disadvantage compared to surrounding communities with respect to its ability to provide and pay for city services such as law enforcement, it does reflect the will of the City's residents.

Having stated that, and in consideration of the award below with regard to the health insurance weekly payment, the Conciliator believes that the fairest and most reasonable proposal is the Employer's for a 1% increase in January 2012, another 1% in July 2012, and a wage reopener for 2013. The nearly immediate 1% increase, coupled with the elimination of the weekly \$10 health insurance payment as awarded below, provides the employee with a nearly immediate boost in wages and take-home pay, which will be supplemented in mid-2012 by the second 1% wage increase. Additionally, should the City's financial picture brighten over the next 12 months, the bargaining unit members would be able to bargain for a greater increase for 2013.

Award

Therefore, the Conciliator awards the Employer's proposal for all three bargaining units: a wage freeze for 2011, a one percent (1%) increase effective January 1, 2012; an additional one percent (1%) wage increase effective July 1, 2012; and a wage re-opener beginning November 2012 for wages effective January 1, 2013.

Issue: Article 20 (Dispatchers)/21(Patrol & Sergeants) – Insurance

Positions of the Parties

The Union proposed that the additional \$10 per week that is currently paid by each of the employee's toward their health insurance premiums be eliminated effective January 1, 2012.

The Employer proposal is for the additional \$10 per week employee payment to be maintained and memorialized in the new collective bargaining agreements.

Discussion

The Union argued that the origin of the \$10/week payment was an agreement by the employees to pay the additional amount so that the healthcare benefits in place at that time could be maintained. The Union further argued that since there was no dispute that the benefits were, in fact, not maintained, then the employees in these bargaining units should no longer be paying the \$10/week. It noted that while the individual employees in the bargaining units had in fact signed a sheet indicating their support at that time (see City Exhibit 14) the agreement was not reached with the Union nor was it memorialized as a side letter to the collective bargaining agreements. Lastly, it noted that Fact-finder Cole had recommended that the \$10/week additional payment should cease.

The Employer argued that the concept of a \$10/week additional payment was an attempt by the Insurance Committee to retain the benefit levels that were in place at that time, and that all of the City's employees now have that payment deducted from their pay each week, not just the members of these bargaining units. It also noted that all of the City's employees are invited to participate on the Insurance Committee that made the recommendation. Further, it argued that the issue was never grieved by the FOP/OLC, the union that represented the bargaining unit at that time, nor was an unfair labor practice filed.

The Conciliator notes that the Fact-finder found that removing the \$10/week payment was warranted. The Conciliator further notes that the former collective bargaining agreements specifically provided for the amount that the employees would contribute toward their health insurance premiums. The payment of the additional \$10 was an unwritten "custom and past practice" and as such is subject to the arbitral standards for same. There are several that provide insight into the instant circumstance.

First, for a past practice to exist there must be mutuality. That is, there must be an implied mutual agreement. Additionally, a practice is subject to termination when one party gives due notice that its intent is that the practice not continue into the next agreement. Clearly the Union's proposal in contract negotiations demonstrates that there is no longer a mutual agreement and is adequate notice that it does not want the practice to continue in the new collective bargaining agreements. The lack of a grievance or unfair labor practice being filed by the former union under the predecessor contracts does not preclude this issue from properly being part of the instant negotiations. It is entirely proper for the Union now to argue that it is no longer in agreement with the practice. Lastly, there is a standard that a past practice may be modified or eliminated when the underlying basis for the practice has changed, as is clearly the case here since the benefit levels were not maintained.

As such, it is the Conciliator's opinion that should this issue be raised in a grievance and proceed to arbitration, it would be an arbitrator's ruling that the practice of the \$10/week payment has no contractual foundation and also no continued validity as a past practice and thus would be a violation of the collective bargaining agreement.

Given that, and in consideration of the Award above for Wages, the Conciliator believes that the Union's proposal for the elimination of the \$10/week payment effective January 1, 2012 is justified.

Award

Therefore, the Conciliator awards the Union's proposal that the \$10/week employee payment toward health care cease on January 1, 2012 and not be included in the new collective bargaining agreements.

Additional Award of the Conciliator

The parties expressed to the Conciliator that they had reached agreement on a number of other issues during their negotiations, including negotiations conducted following Fact-finding prior to the Conciliation Hearing. Included in those tentatively agreed-upon items is the Union proposal that all references to "FOP" throughout the entire contract be changed to "OPBA" in the new agreement. The Sections of the proposed Agreement that are in dispute and part of this Conciliation Award also contain the references to the "FOP" and the parties have mutually agreed that all such references in Articles 3, 11 & 20/21 should be changed to "OPBA."

Therefore, the Conciliator orders that all references to "FOP" in Articles 3, 11 & 20/21 should be changed to "OPBA."

The above represents in total my Award in this matter.



Martin R. Fitts, Conciliator
November 4, 2011