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IN THE MATTER OF CONCILIATION BETWEEN

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 1683

AND

THE CITY OF BEDFORD, OHIO

SERB CASE# 10-MED-09-1113

BEFORE WILLIAM C. BINNING PH.D.
SERB CONCILIATOR

APPEARANCES: For IAFF Local:
Thomas Hanculak, Attorney
Chris Neading, Union Presdient
Greg Miller, Local 1683
Dennis Love, Local 1683
Pat Guhde, Local 1683

For the City of Bedford
Kenneth Schuman Law Director
Mike Mallis E.D. Director
Frank Gambosi, Finance Director
Hank Angelo, City Manager

In accordance with SERB procedures this Conciliator was appointed on December 28, 2011 to hear the case between the International Association of Fire Fighters Local 1683 and City of Bedford, Ohio because the Fact-finder's report was rejected by the City.

The parties agreed to hold a conciliation hearing on the above matter on February 14, 2012. In a timely fashion and in accord with SERB guidelines, the parties delivered to the Conciliator their positions on the outstanding issues five (5) days before the hearing date.

The Conciliator is instructed by SERB to "resolve the dispute between the parties by selecting on an issue-by-issue-basis from between each of the party's final settlement offers. "This Conciliator is advised to take into account the following for consideration when making his award:

(1) Past collective bargaining agreements, if any, between the parties;
(2) 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 employers doing comparable work, giving consideration to factors peculiar to the area and classification involved;
(3) The interests 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;
(4) The lawful authority of the public employer;
(5) The stipulations of the parties; and
(6) 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, conciliation or other impasse resolution procedures in the public service or in private employment.

MEDIATION

Prior to opening the hearing the Conciliator offered mediation for the one outstanding issue as he is obliged to do under SERB rules. The parties decided that would not be a fruitful use of time and mediation did not occur.

ISSUE

The issue as stated by the Fact-finder is revised and offered below.

Issue: Article IV Salary:

Union Position: The Union demands that three and one-quarter percent be added to the base pay of Firefighters to recompense them for their acceptance of a modification of a previously negotiated raise. That is, they want parity with the police on base wages.

City Position: The City rejects the Union's demand.

It should be noted that the Fact-finder Dennis M. Byrne in his December 2, 2011 Report awarded the Firefighters the wage increase. That Fact-finder's recommendation was rejected by the City and it is now before this Conciliator.

THE FACTS

The City of Bedford lost $2,700,000 in revenue in 2009. Of course this is explained by the national great recession that began in 2008. In addition to the general erosion of revenue resulting from the severe economic downturn, the City also drew attention to the financial problems of its largest taxpayer which paid $3.6 million in net profit tax in 2006, and is forecasted to pay Zero this fiscal year. At that time, the City proposed to go to the voters for a safety forces property tax levy. As a sign of good faith the City asked the three Unions to accept concessions. They asked them to forego their 2010 wage increase, which had already been negotiated. This is a give back. The service union and the Fire-fighters accepted the request and gave the concessions. The Police Union rejected the request for the concession.

This particular dispute arose over a difference of opinion of what was told to the various unions about the number of layoffs each unit would be subjected to if the concessions were not agreed to.

That dispute is impacted by the assertion of the Union that there has long been parity between the safety forces and that had been breached with the wage concession and they want it repaired.

The City argues that a deal is a deal and the Firefighters now want to back out of a deal they agreed to.

THE POSITION OF THE CITY

The Conciliator put forward the standard procedure that the party that wants the contract change should go first, which infers they have the burden. The Conciliator assumed that would be the Union. The Union argued that since the Union accepted the Fact-finder's report, the City should go first inferring they had the burden. The City reluctantly agreed to go first.

The City of Bedford argues that it made a good faith effort to balance the City's budget and preserve jobs by passing an 8.9 mill levy and asking for wage concessions. The City went on to present additional financial data citing the forecasted loss of revenue from the new State of Ohio budget which cut the local government fund, the C.A.T. tax and the eventual elimination of the estate tax, which local governments in Ohio receive a share of. Those cuts along with the sluggish economic recovery means there will be difficult fiscal challenges ahead for Bedford, Ohio. The City projects a deficit of $63, 688 for 2012. This information was supported by various exhibits introduced by the City.

Beyond the financial challenges, the City argues that it did not lay off any Firefighters because that Union accepted the requested concession. That was the deal. The City argues "It is patently unfair to forego a raise to save jobs and at the next bargaining session request the foregone raise."[1]

The City made an effort at the Conciliation to repair the damage it created in its testimony at the Fact-finding hearing. The City attempted to establish that it did not say that two Firefighters would be laid off as the Union asserts. The defense at the Fact-Finding by the City's legal counsel was " I don't remember" how many I threatened to layoff if the concessions were not accepted. At this hearing an effort was made through introduction of evidence such as a spreadsheet to show that the calculation on that sheet inferred that it would only be one Firefighter. [2] They also introduced the layoff notice to Police Officer Kehl.[3] With regard to the two officer threat he said " I don't remember saying that." And later said " I do not remember telling them two officers." He also pointed out his respect for parity between the safety forces claiming he was the one who brought them back to parity in 2001. He said " I brought them back to parity." The inference is that he is a proponent of parity and would not threaten the Firefighters with a different number of laid off employees than the number laid off in the Police Department, which was buttressed by the Officer Kehl layoff notice. For the Police, who did not give the concession, one officer was laid off. The City Manager argued that the concession was a deal between the City and the Firefighters and should not be broken. The Firefighters are attempting to renege on an agreement.

In the closing arguments the Chief Negotiator for the City now said he did remember that he had asserted that only one Firefighter was to be laid off, if there was not a wage concession. He said he

[1] Kenneth Schuman "City of Bedford Ohio Position Statement" February 9, 2012. Marked as Joint Exhibit 5.
[2] See City 2
[3] See City 4 dated August 24, 2009

now remembered because of the new evidence that was introduced, which was the spreadsheet (City 2).

POSITION OF THE UNION

The Union opened with a great deal of attention to the Fact-finder's Report[4] issued by Dennis M. Byrne on December 2, 2011, which addressed this same issue as stated above and found in favor of the Union on the issue. Counsel for the Union asserts that "Where a party rejects a fact-finder's report, the burden of proof is on the party seeking to overturn the fact-finder's recommendation."[5] In the Final Position Report and at the hearing, Counsel for the Union argued that "conciliation was not a second bite at the apple" deference must be given to the Fact-finding report. He wrote "Further, **the fact-finder's recommendation** is entitled to respect and **is to be given great weight.** *Id.* Moreover, "[t]here is a clear bias in interest arbitration proceedings to defer to the Factfinder if either of the parties embrace it."[6]

He cites the well known and highly respected Ohio Arbitrator, Harry Graham. The Advocate for the Union gave a great amount of attention to this line of argument. That the Conciliator must give respect to the Fact-finder's report.

The Advocate for the Union gave his thesis on what the role of Conciliation is relative to Fact-finding. He argued that it was necessary to prove that Dr Byrne's award was either not well reasoned and/or based on error for it to be overturned by the Conciliator.

Furthermore, and more to the point, the Advocate maintains that the new evidence presented by the City: the spreadsheet, the layoff notice to the Police, the Contract Amendment of October 5, 2009 (City 4), which the City purports to be a deal with the Union can be admitted but should be given little weight since they existed at the time of the Fact-finding and were not presented to Byrne. He infers that perhaps they did not actually exist but does not go that far in his argument. He argues the Contract Amendment of October 5th was not a deal, it was the result of a threat.

The Union does offer evidence, that was offered to Fact-finder Byrne, the notes of the Union negotiating team show in exhibit (F F 2) in the fourth bullet point that the number of threatened layoffs was two Firefighters not one. They argue this weighed heavily on Dr Byrne since two layoffs would be too many and would impact Fire station staffing levels. They cite page 8 of Dr. Byrne's report where he gives attention to the problem of staffing levels if two Firefighters were laid off. Also, if the Firefighters were told there would only be one layoff, they claim they would have done what the police union did and take the layoff because like the police, the Firefighters knew they would soon have a retirement and

[4] Dennis Byrne "Fact-Finding Report SERB Case No. 10-MED-09-1113.
[5] Thomas M. Hanculak, "Firefighters IAFF Local 1683 Position Statement" February 9, 2012. Marked as Joint Exhibit 6
[6] Id.

the laid off Firefighter would be called back to work, and they would only be down one person, and it would not have the negative impact on staffing levels that would occur if there were two laid off.

The final argument is that when concessions were requested by the City, the Union maintains that the Firefighters were told that if they did not give the concession two Firefighters would be laid off. The Advocate wrote "At the same time, the Police were told that if they did not accept the 2010 wage freeze, one officer would be laid off." The Police knew that a senior officer was soon to retire and that the laid off officer would be called back so they rejected the concession proposal and took the one layoff, and the laid off Police Union member was eventually reinstated. The Firefighter Advocate wrote that "Knowing that one of its senior members was retiring soon, if the threat of a layoff was one firefighter, the Local would have rejected the wage freeze."[7] This goes back to the issue of parity. The Firefighters maintain they were treated differently than the Police on the number of threatened layoffs by the City, and if the threat was the same, that is, if only one person was to be laid off they would have rejected the requested concession. This alleged lack of parity on the layoff threat is to be remedied by restoring the 3.25% pay concession.

The second line of argument offered by the Union Advocate is the Parity argument. He argues that "the concept of base pay parity between Fire and Police extends back to at least 1983, if not beyond."[8] Skipping through some of the history the most significant point for the Union is that "in 1998, 1999, 2000 base pay adjustments were made to obtain base pay parity."[9] The parity existed until 2010 when it was broken due to the concession accepted by the Firefighters but not the Police Union. The Advocate for the City pointed out that he was the one that brought back the parity lost in 1989 because the Fire Union traded for a cut in hours. In the late 90s pay parity was reinstated.

There was extensive evidence provided showing parity between the Safety Forces in a number of areas. The Firefighters cited examples where they accepted a reduction in the Fire Medic bonus to have it equal to the Police Fire Arms Proficiency bonus.

The Union Advocate also pointed out in the current tentative agreed to contract (Joint 7) that the Firefighters agreed to extend the period in which a paramedic would reach the highest pay grade in order to match the Police contract. This is simply more evidence of the Firefighters Union constantly seeking parity with the Police.

The Firefighters argue this concession was not the result of a deal, it was a "threat" and the City was well aware that the Firefighters would be back seeking parity with the Police base wage and have their pay concession restored in the future. They offered into evidence a list of "Parity Items Fire and Police". (FF 3) They presented evidence of other concessions the Firefighters recently offered in an effort to have their wages restored to parity with the Police.

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[7] Id.
[8] Id.
[9] Id.

In their closing argument, the Firefighters Union pointed out that the City's new evidence needed clarification. The Firefighters Union produced its meeting minutes in May of 2009, which was a special meeting where they agreed to the concessions based on the threat of two person layoff. This was introduced to mitigate the new evidence presented by the City of Officer Kehl's layoff in August and the City Council resolution of October 5th. The Union which had agreed to the concession under the threat of two layoffs later realized that the Police Department was only threatened with one layoff. The view of the Firefighters Union was that this was a breach of the long standing parity between the two safety forces by the City.

DISCUSSION

First, while the City of Bedford projects difficult financial challenges in the years ahead, it did not make an inability to pay claim either to the Fact-finder or to this Conciliator. The Union did enter into the record expert financial analysis of the City of Bedford's finances. Mary Schultz of Sargent & Associates wrote in her summary "The City of Bedford is fortunate to have extremely healthy carryover balances in the General Fund and the General Fund Reserve Fund." [10] Later she wrote "City Council chose not to use the Reserve Funds and instead enacted budget cuts that directly affected employees. It appears the city is now in a period of recovery as Income Tax revenues increase."[11] The City did not challenge her very recent report on its financial conditions. There was also a much more extensive report by the same party dated October 27, 2011 entered on the record as FF4. This was likely what the Fact-finder was presented with. In this report she directly rebuts the claims by the City on the impact of the State of Ohio budget cuts.[12] The City did not challenge the findings of this document at the hearing when it was placed on the record. Mary Schultz relies heavily on the carry over balance in the Fire Medic Levy Fund and the "carryover balance in the Safety Forces Levy Fund."[13] She wrote in support of the requested wage adjustment.

Fact-finder Byrne, who is a professional economist, reviewed some of this financial information and reported that "Without going into a long and unwarranted discussion of the City's finances because the city is not claiming an inability to pay, the Fact-finder has examined the financial records and agrees with the Union expert's report. Therefore the Fact-finder finds that the City has the ability to pay the Union's demand. The question is not the ability to pay, but the willingness to pay."[14] However, the ability to pay does not in itself justify payment of the Union's demand.

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[10] Sargent & Associates February 10, 2012 entered as FF 5.
[11] Id.
[12] Sargent & Associates October 27, 2011 p.5.
[13] Id.
[14] Byrne p.6.

Before taking up Dr. Byrne's award, this Conciliator would like to take up the argument of the Union about the role of the Conciliator as to whether this is a second bite of the apple or whether the Conciliator must uphold the Fact-finder unless he finds an error in fact or find it is not a well reasoned award. This Conciliator has read various opinions by Conciliators on this matter and there is no consensus. This Conciliator has overturned Fact-finders' awards on very few occasions primarily because conditions had changed, usually the financial condition of the political subdivision due to the severe national economic downturn. I am sympathetic also to the question of how much weight should be given new evidence. Especially evidence that existed at the time of the Fact finding but was now introduced to rebut what the Fact-finder gave great weight to--the threat to the Firefighters-- was the threatened layoff to be one or two members? Conciliators are advised by SERB not to take in new issues and restrain their awards to the issues considered by Fact-finding. There is not a prohibition against taking into account new evidence. However, the Union Advocate is correct in questioning the weight that should be given to newly introduced evidence that apparently existed at the time of the Fact-finding hearing but was not brought forward.

There is extraordinary pattern bargaining with the safety forces in Bedford or as they put it - parity between the Police Union and Firefighters Union. The parties pointed out that in the current tentative agreement the Fire unit accepted terms of the agreement made in the recent Police Contract Fact-finding.

Fact-finder Byrne gives some weight to the parity argument in his award he wrote "However in light of the difference in the parties' perceptions, the long history of parity between the two bargaining units, and the emphasis put on parity by both units as exemplified by the police union attempting to add a "Me Too" clause to its contract, the Fact-finder believes parity, in this instance base pay parity, should be maintained at this time."[15] Byrne goes on to say that "the current City Administration does not wish to maintain strict parity between its bargaining units. If that is the situation, then that position should be made clear to both units in future negotiations…" [16] This Conciliator supports Byrne's recommendation, however, it appears that the City is still pursuing parity given the recent offer by the City to the Firefighters of the Police Union's most recent contract terms. The continuation of parity supports the notion that the Firefighters should regain their past pay concession.

The key issue faced by this Conciliator and by Fact-finder Byrne is what were the Firefighters told about the number of layoffs that would occur, if they did not make the concession? The new evidence offered by the City, which is given full weight by this Conciliator, does not clear this up. The spread sheet shows what the savings of one laid off Firefighter would be at that time –it does not tell us what the Firefighters were told or as they say "threatened with". The other evidence offered: which showed the timing of the layoff of the one police officer, and when the local government voted to accept the agreement is muddled by the Union meeting notes that show that the threat of the layoff of two Firefighters was made much earlier than these newly introduced pieces of evidence and documents were dated.

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[15] Id. p. 11.
[16] Id.

The change in testimony by the City over the course of this case is not helpful. Byrne reports "The City's negotiator stated that he did not remember stating that two positions were at stake."[17] The City seemed to change from did not remember to, at the end of the Conciliation hearing, remembering that it threatened the Firefighters with only one layoff, if they did not make the concession. The Fire - fighters never changed their story and offered only their own notes and minutes as evidence but at least stuck to the same story throughout the Fact-finding and Conciliation.

This Conciliator agrees with Fact Finder Dennis Byrne who wrote:

"Finding of Fact: The evidence in the record shows the parties had different understandings about the terms of the City's proposed tradeoff between a pay freeze and job security." [18]

The award is made to the Firefighter Union on this issue.

Proposed language: The parties shall amend their agreement to show an increase of 3.25%. It shall be added to the base pay over a three year period in the proposed agreement: Year one: 1.%, Year two: 1.%, Year three: 1.25% . It is a catch-up wage increase to maintain parity between the police contract and the fire contract.

This Conciliator supports Byrne's language ,who wrote in his recommendation, that: "This is not a new or expanded benefit, and it is not an extra wage increment that is to be covered by any "Me Too" language in any other contract."[19]

Summary of Award: The Award is made to the Union on this issue.

Signed and dated February 24, 2012

William C. Binning Ph.D.
Conciliator

[17] Id. p. p
[18] Id. p 12.
[19] Id. p.12.