Received Electronically @ SERB Mar 5, 2012 9:32am

STATE EMPLOYMENT RELATIONS BOARD

CONCILIATION REPORT

March 2, 2012

In the Matter of:	)	
	)	
	)	
	)	
The City of Toledo	)	
	)	
	)	
and	)	SERB Case Nos., 11-MED-03-0501
	)	and 11-MED-04-0563
	)	
American Federation of State	)	
County and Municipal Employees	)	
Local 7, AFL-CIO	)	
	)	

Appearances

For Local 7:

Steve Kwoalik, Bargaining Representative AFSCME Local 7
Donald Czerniak, President Local 7
Tonya Gosselin, City of Toledo Fire Communications Operator
Chris Rettit, City of Toledo Police Communications Operator

For the City of Toledo:

Michael Niedzielski, Attorney for the City of Toledo
Miranda Vollmer, Labor Relations Department City of Toledo
Stephen Herwat, Deputy Mayor City of Toledo

Conciliator: Dennis M. Byrne, Ph.D.

Introduction:

The City of Toledo (City/Employer) and American Federation of State, County, and Municipal Employees (AFSCME/Union) began negotiations on a successor agreement to their 2005 contract on May 25, 2011. The 2005 contract expired on June 30, 2008; but a Memorandum of Understanding signed on April 20, 2010 extended that agreement for three years retroactive to July 1, 2008. Therefore, the prospective contract will be the successor agreement to the 2005 contract as amended by the Memorandum of Understanding.

The parties held six negotiating sessions, and the City made its final offer on June 30, 2011. The Union rejected that offer; and after some further communications between the parties, an impasse was declared. A two-day Fact Finding Hearing was completed on September 29, 201; and the Fact Finder issued his report November 7, 2011. The Union rejected the report. Because the report had been rejected, the City did not vote on the matter.

The Union membership voted down the report in its entirety, including all of the tentative agreements reached by the parties during negotiations. Consequently, a Conciliation Hearing was scheduled for January 11, 2012. The Hearing commenced at 9: A.M. in the morning and finished at approximately 3:00 P.M. Before the formal hearing began, the Conciliator attempted to mediate a settlement; but that effort was unsuccessful.

Criteria:

The Ohio Revised Code specifies that a Conciliator shall select from the parties' final offers on an issue-by-issue basis (ORC 4117.14 G (7).) The same section of the Ohio Revised Code also states the criteria that a Conciliator is to consider when making his recommendations.

(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 sector employees 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 adjustment of the normal standard of public service.
(4) The lawful authority of the public employer.
(5) The stipulations of the parties.
(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.

The Conciliator hopes that the following discussion is sufficiently clear to the parties. Should either party have any questions regarding this Report, the Conciliator would be glad to meet with the parties to discuss any remaining questions.

Procedural Issue:

Before any analysis of the issue(s) that lie at the heart of this Conciliation can be undertaken, a discussion of a procedural issue is necessary. The Employer argues that the Conciliator has no authority to hear any issue related to the

prospective contract between the Communications Operators (AFSCME, Local 7) and the City of Toledo. In their pre-conciliation position statements both parties agreed with the Fact Finder's recommendations on the seven issues heard by the Fact Finder. The Employer believes that the parties' acceptance of the Fact Finder's Report ended any impasse between the parties. Consequently, the City argues that a new contract existed as of the date that the parties submitted their position statements. However, the Employer's position statement contained a footnote that stated that the City was aware that the Union membership did not agree with some of the tentative agreements contained in the Fact Finder's report by reference (City Exhibit 2 and Union Exhibit 1).

Some background is necessary to understand the City's position. The parties held six negotiating sessions and came to a tentative agreement on a number of issues, including the issues related to work rules. Unfortunately, the parties were unable to come to a final agreement and certified seven issues for fact-finding; and after a hearing, the Fact Finder issued a report. In that report, the Fact Finder identified the parties' tentative agreements by contract section, and he included all of these tentative agreements into his report by reference.

The parties voted on the Fact Finder's report within the time lines specified in ORC 4117. The Union overwhelmingly rejected the proposed agreement. Following the Union's negative vote, the Toledo City Council chose not to vote on the Fact Finding Report (City Pre-Hearing statement). Subsequently, the parties scheduled a conciliation hearing.

The Union contacted the City after its membership rejected the Fact Finder's report and asked to resume negotiations on the issue of work rules. The City rejected the Union's request to reopen negotiations, and the parties proceeded to prepare for a conciliation hearing. According to ORC 4117, the parties must have their position statements to the Conciliator one week before the hearing. Both parties were timely with their prehearing statements, and both reluctantly agreed to the Fact Finder's recommendations on the seven issues that were contested at the fact-finding hearing.

At that time, the City stated that there was no reason for a conciliation hearing and that the parties had a valid contract. On the other hand, the Union claimed that the Fact Finder's report had been rejected and that the conciliation hearing had to take place. A conciliation date was set, and the Conciliator held an evidentiary hearing. At the time of the hearing, the City continued to object to the proceedings claiming that the Conciliator had no standing and that he was exceeding his authority by holding a hearing. The City maintained that position throughout the hearing, and it is clear that the City was an unwilling participant in the conciliation. The City also stated numerous times that it was not forfeiting its right to appeal to the Courts for relief because the conciliation hearing was improper.

The Conciliator allowed both parties to make a statement to put their positions on this issue into the record. The Employer's representative made a statement , and a portion of that statement appears below:

> "… And the statute, by the way, that gives rise to this rule doesn't use the word unresolved. It uses the word(s) not in agreement. 4117.14(G) (1),

> which is the enabling statute for conciliation, says that a conciliator must hear those issues that the parties are, quote, not in agreement or any other issues mutually agreed to by the parties unquote.
>
> The only issues not in agreement are the ones that both the city and union recognize are the seven I just enumerated. The city does not agree to any other issue(s) before the conciliator. … But, I will say this the work rules that were made part of the contract were extensively negotiated. There was give and take there. … This was bargaining, good faith bargaining..
>
> … If the union is permitted to proceed in this fashion, if the conciliator is will to reopen resolved issues, then either party can ambush the other. They can go at the position statement stage of conciliation and say hey, you know what, we're going to object to everything. We're going to reopen the entire contract.
>
> … the effect of what the union is trying to do here is to erode all respect for agreements, for all bargaining (City prehearing opening statement: Tr. pp.3 – 15). "

The City's position is that if a tentative agreement is reached on an issue, and that agreement is made part of a Fact Finder's report by the words "all tentative agreements are included in this report by reference," then that issue becomes part of the contract regardless of whether or not the union membership or the City Council votes to reject the tentative agreement. That is, the City argues that when good faith negotiations lead to a tentative agreement on any issue, then that issue is settled and *must (emphasis added)* become part of the final agreement.

This is a unique position. Some background on good faith negotiations is necessary to understand the issue. With the passage of the Wagner Act in 1935 collective bargaining became the preferred way of solving industrial disputes. The Wagner Act required that the parties make a good faith effort to reach an agreement. However, the absence of an agreement was not necessarily a sign of bad faith. That is, the parties had to try to reach an agreement; but there was no requirement that they actually agree.

The question became how to determine if the parties were making a good faith effort to reach an agreement. Over a twenty year period, a set of guideposts grew up that indicated whether or not the parties were actually trying to find an agreement. Give and take, the process that the City cites as a sign of its good faith effort to reach agreement with Local 7, is one of those guideposts.[1]

A lack of good faith is an unfair labor practice (ULP). If one party believes that the other party is not negotiating in good faith, it files an ULP charging bad faith bargaining with the Administrative Agency that enforces the collective bargaining process. In this case the Administrative Agency is the State Employment Relations Board (SERB). If SERB finds that there is a lack of good faith bargaining, it issues a bargaining order. If the party that is acting in bad faith does not change its behavior, then SERB will petition the courts for enforcement of its order. In other words the penalty for bargaining in bad faith is usually a court order to negotiate in good faith. However, there is no evidence that either side bargained in bad faith in the present dispute.

The presence of good faith bargaining has nothing to do with the right of the union membership or the city council to ratify the agreement. Good faith bargaining is the way that the parties reach a tentative agreement. The way that the tentative agreement becomes a valid contract is through the ratification procedure. Ratification is the way that the affected parties express approval to the work done by their negotiators. In a very fundamental way, ratification is the single most

---

[1] See Cox, Archibald *The Duty to Bargain in Good Faith,* The Harvard Law Review, Vol. 71, No 8 (June 1958), pp. 1401-1442. This article is dated, but the concept of good faith was developed over the twenty years after the passage of the Wagner Act and it has become a "common rule" of industrial relations.

important step in the entire bargaining process. Therefore, ratification is conceptually different than good faith.

The fact that employees, in both private and public sectors, do not ratify a tentative agreement is so common that it elicits no surprise. It is an everyday occurrence. In this case, the union membership was dissatisfied with the work of their negotiating team. The failure to ratify the tentative agreement is not a sign of anything sinister. The membership did not agree with the work rule language that was included in the tentative agreement. Consequently, the membership rejected the entire tentative agreement even though they accepted the Fact Finder's recommendations on the issues presented at the fact-finding hearing. This is the membership's right. In effect, the membership said to the bargaining committee, "You did a bad job" when you negotiated the new work rules.

If the City's position is correct, then there exists a never-never land in Ohio labor relations. Both parties followed the applicable law set out in ORC 4117 and the rules set out in the Ohio Administrative Code (OAC). There is nothing in either ORC 4117 or the OAC that allows an employer to impose its last offer on a conciliation unit. The cost of labor peace for conciliation units is the right to have a conciliation hearing. If one side rejects the Fact Finder's report and there is no conciliation hearing, then there is no closure to the process.

The doomsday scenario that the City fears is held in check by the very nature of the final offer conciliation process. No conciliator would ever allow a one party to "ambush" the other by changing most of a negotiated, tentative agreement. All

conciliators would recommend the parties' original positions (tentative agreements) on all or most of the issues in dispute.

The Conciliator also asked the parties to give some precedents for their respective positions. The parties submitted *Erie County Care Facility,* SERB 88-002 (3-14-88). The fact pattern in that matter is materially different than the facts in this case. In *Erie County* the issue was does both parties' acceptance or deemed acceptance of a fact-finder's report preclude re-opening of issues on which the parties had tentatively agreed prior to fact-finding? In that case the employer passed an ordinance that modified the accepted agreement because the legislative body did not agree with the report after the report was accepted. SERB found that to be an unfair labor practice on part of the employer. Also *Erie County* involved a non-conciliation unit.

In this case, the union membership refused to ratify an agreement, i.e., there is no agreement, the first time that they voted on the issues. Again, ratification is different than a lack of good faith. The City's post-hearing brief implies that it agrees that the bargaining committee did not know that the membership would reject the tentative agreement when it states, "Rather, the Union rejects only the agreements its own leadership and representatives made" (City Post-hearing Brief p. 4).

Conceptually, the City's position devolves to a contention that the union negotiating committee is the same as the union membership. If that were the case, then any contract reached during good faith negotiations would not have to be

ratified.[2] However, all labor agreements must ultimately be accepted or rejected by the membership. The ratification process is what makes a tentative agreement a contract.

Therefore, this Conciliator finds that the City's position with respect to the conciliator's jurisdiction in this matter is not in accord with either Ohio law or common sense. The Union membership and the City Council must have the right to examine the work of their negotiating teams. The parties to the agreement are the City of Toledo and the communications operators. The bargaining committees are simply representatives of the groups agreeing on a contract. Therefore, since no contract exists because it was not ratified by a secret vote of the membership of a conciliation unit, the only way for the parties to finalize their agreement is either by 1) following the conciliation procedure found in ORC 4117, or 2) a negotiated agreement on the work rules issue. However, the City refused the Union's request to reopen negotiations. Therefore, conciliation is the only avenue left for the parties to finalize their agreement.

Introduction:

The issue before the Conciliator is related to work rules. The City has two different communications staffs: a police dispatch unit and a fire dispatch unit. Historically, the two units had different work rules, and it is not clear why the City demanded that both units have the same rules because staffing levels and job

[2] A careful examination of ORC.4117 and the OAC lists the words "good faith" once in ORC 4117.01 (G). The law uses some of the "tests" outlined in footnote. 1 above to spell out the way the parties must bargain with each other. On the other hand, entire sections of ORC 4117 are devoted to ratification.

demands differ. Moreover, work rules are usually considered an issue covered by the Management's Rights clause of a contract and not a mandatory issue of bargaining. But, the City raised the issue and demanded that a uniform set of work rules for both units be inserted into the contract. The Union attempted to meet the City's demand and negotiated over the issue. However, at the time of the ratification vote, the fire operators made it clear to both the negotiating team and their fellow Union members that they believe that the unified work rules did not meet their needs. The police dispatchers also voted down the new contract because they also believe that the new rules are defective.

The Union President, Don Czerniak, testified that after the contract was rejected he asked the membership why and the answer was that an overwhelming majority disagreed with the work rules. He stated that he originally believed that the reason was that the economic concessions were too large for the membership to accept. However, the membership stated that they were willing to make more monetary concessions to get an agreement on the work rules issues (Tr. p. 40-44).

After they voted to reject the Fact Finder's report, the members of Local 7 decided to establish a committee to study the issue. At the same time, the Union also asked the City to return to the table and discuss the work rule issue. The City rejected this offer even though the Union was willing to put some further concessions on the table as an inducement to the City to reopen negotiations (Tr. p. 44). The City responded that the tentative agreement was reached in good faith; and, as far as the City was concerned, that ended the negotiations over work rules.

The City does not believe that the Union's position has merit, but it also made an argument in its Post-Hearing Brief that the Conciliator should give deference to the Fact Finder's report, i.e., incorporate the tentative agreement into the contract. The City argues that the issue was a) bargained in good faith, and b) the Fact Finder ruled on the issue. The City's position is that the Conciliator should not rule on the issue; but if he does, he should find for the City and find that the new rules are referenced in the Fact Finder's report and that report should control on the issue. The City argued that the Conciliator should not overturn the Fact Finder's decision without justification, and the City maintains that there is no justification for the Conciliator to reexamine the work rule issue.

The Conciliator philosophically agrees with the City's position and believes that any conciliator must give deference to a fact finder. This means that a conciliator should not change a fact finder's recommendation simply because he/she may have made a different recommendation. In order for a conciliator to overturn a fact finder's recommendation at least one of three factors should be present: 1) new evidence is placed into the record, 2) it can be demonstrated that the fact finder made a mistake, or 3) conditions have changed since the fact finding hearing and the fact finder's recommendation(s) no longer fits the needs of the parties. As a general rule, a fact finder's recommendation(s) should not be overturned without a valid reason. This does not mean that a fact finder's report is sacrosanct, but it should be a major factor in a conciliator's deliberations.

However in the present case, the Fact Finder never heard any testimony on the issue in dispute. Therefore, with the exception of the blanket statement that his

report incorporated all of the parties' tentative agreements there is no indication of his views on the work rules issue. Therefore, the Conciliator believes that the Fact Finder's report is in not a controlling factor in this particular situation.

The Union designated two members of the work rule committee as their witnesses (spokespersons) to explain the membership's position on the issue. Tonya Gosselin spoke for the fire dispatchers, and Chris Rettit represented the police dispatchers. The City's only witness was Captain Leo Eggert, Communications Commander for the City of Toledo.

Note: The work rule(s) issue will be discussed as an either/or issue. The Union desires to have the old work rules with some minor changes. The City's position is that the new, tentatively agreed upon, rules should be part of the contract. That is, both sides desire a package settlement.

Issues(s): Fire Work Rules:

2115.70 Breaks and Lunch Hour
2115.82 Compensatory Time
2115.xx Trade Days
2115.76 Overtime Rotating List
2115.67 Work Week
2115.81 Assignments- Inequality
2115.105 Vacation
2115.64 Work Schedules
2115.89 Working out of Classification

Union Position: The Union demands the status quo, i.e., current contract language.

City Position: The City demands that the Fact Finder's recommendation be added to the contract.

Discussion: Tonya Gosselin testified that she had been on the Union's negotiating committee and recommended acceptance of the tentative contract in spite of some misgivings. She stated that she believed that the tentative agreement on work rules

was applicable to the police dispatch unit but did not meet the needs of the fire dispatchers. She said that she thought that the parties would open negotiations on the fire operators' work rules when the police rules were agreed upon, but there was never any discussion of the fire work rules (Tr. Pp. 108-109).

Gosselin discussed the work rules in detail (Tr. Pp. 95-103). She stated that the fire dispatch unit and the police dispatch unit were different entities and that "one size does not fit all." Gosselin discussed all of the rules in general, but she stated specifically that the lunch language, the break time language, the comp time language, and the "pay back" language applies to the police dispatch operation, but that the new rules do not fit the parameters of the fire dispatch job.

Gosslien and all other witnesses agreed that dispatching can be a very stressful occupation and that all dispatchers need some time away from the console. To allow the operators to get some time off, the new work rules allow a dispatcher to have thirty minutes off every ninety minutes. She testified that there are only three fire dispatchers on duty at any time, and it is not possible to guarantee that each operator can take a thirty minutes break every ninety minutes because in some cases that might leave only one operator on duty to dispatch for the entire fire department, which might lead to unintended and dangerous consequences. The thrust of her testimony is that some of the new work rules cannot work with a three-person work force.

Gooselin further testified that the old work rules worked well and that the fire dispatchers did not understand why a "one size fits all" policy made any sense. She testified that the new work rules worked much better for the larger police

dispatch unit (Tr. pp. 47 -112). Her testimony shows that the new work rules are not a good fit for the fire dispatchers. During her cross-examination, Gosselin did admit that the new language with regard to scheduling, especially the "pull back" language could apply to the fire department, but she made no other concessions (Tr. p. 107). She finally summed up her testimony with the statement:

> "… we've had these work rules in effect since 2002, that's when they were signed. However, most of this stuff (work rules) was in effect when we were hired, and it's not even that – I mean, most of this is about 13 years old and it has worked well for all of us, yeah, so I definitely (think) that there's a huge difference and it just doesn't fit us at all (Tr. p. 103).

The City did not present any evidence on the fire operators' work rules. The Commander of the fire dispatch unit was present at the hearing but did not testify. Gosselin was a credible witness, and her testimony must be taken at face value.

In addition, Chris Rettit who testified on behalf of the police dispatchers was asked about the differences between the police dispatch job and the fire dispatch position. He stated that he had worked "both sides," and that the jobs were entirely different. His testimony showed that the police and fire dispatch units do not operate the same way. This reinforced the testimony of Gosselin (Tr. Pp. 51 – 52).

On the other hand, the City presented no information on the need for massive changes in current language. The testimony showed that the police and fire dispatch units were separate units until 2007 then they were combined and operated as a single unit until 2010 when the two units were separated again. Therefore, the evidence from the history of the Toledo dispatch center implies that the two units work better as separate, stand-alone entities. Gosselin's and Rettit's

testimony and the other information in the record convinces the Conciliator that there is reason to examine the issue and make a recommendation (Tr. p. 96).

One of the rules that the law, arbitrators, and the general public believe is that "equals should be treated equally." However, the converse is also true. Unequals should not be treated equally. In this instance there seems to be little reason to believe that the police and fire dispatch units should have the same work rules outside of the fact that the operators are all employed by the City of Toledo. Based on the evidence in the record, the Conciliator finds that current contract language with regard to the fire dispatchers is reasonable.

The Union also asked that Section 2115.76 Overtime Rotating List be added to the contract. The testimony was that this Section was current practice. The Conciliator is not recommending that the Section be added to the agreement. Current practice can change overtime and adding rules to a contract often causes as many problems as it cures. If the current practice is working, then there is no reason to change it.

Issue(s): Police Work Rules

2115.70 (Police) Breaks and Lunch Hour
2115.82 Compensatory Time
2115.xx Trade Days (New Section)
2115.76 Overtime Rotating List
2115.67 Work Week
2115.81 Assignments – Inequality
2115.105 Vacation
2115.64 Work Schedules
2115.89 Working Out of Classification

Union Position: The Union demands the status quo, i.e., current contract language.

City Position: The City demands that the Fact Finder's recommendations be added to the contract.

Discussion: Chris Rettit testified about the membership's concerns over the new work rules. He cited some specific problems with a few issues, but the thrust of his testimony was that the police dispatchers needed to be able to get more time off. He discussed the pressures that the dispatchers faced on a daily basis and said that they had to have some time away from their jobs in order to relieve stress. He said that the problems the dispatchers faced were exacerbated by the fact that the department was understaffed, and this meant that the operators were often forced to work overtime (Tr. Pp. 47-85).

Rettit went on to discuss the problems that the staff had using their accumulated comp time. He suggested that the dispatchers have a 10% rule inserted into their contract. This would mirror the police department rule that allows up to 10% of the police officers to be off on any given day. This means that the officers can use vacations time, sick leave, and/or comp time, etc. on a more or less regular basis. Rettit argued that the operators were forced to come into work and that their schedules, overtime, and forced time meant that the dispatchers were working too many hours. Therefore, the general thrust of Rettit's testimony was that the new work rules did not meet the major concern of the police dispatchers, i.e., a need for time away from work.

The City's only witness was Captain Leo Eggert, who is the commander of the communications center. He was also the City's chief negotiator on the work rules issue. Eggert's testimony was intended to rebut Rettit's (Gosselin) testimony.

Eggert testified that the City did make a good faith effort to negotiate work rules with the Union. He testified that the City wanted to have the work rules inserted into the contract so that there would be uniformity in rules and application of the rules. Presumably the old work rules were creating some problems, and putting the new work rules into the contract would help the communications department run more efficiently, but no testimony was proffered on that issue (Tr. p. 118). That is, it is not clear from the testimony why the City wants to change the current system and add a work rules section(s) to the contract.

Eggert testified that the City had examined some of the Union's suggestions for increasing the amount of time the operators could take off (a 10% rule), but rejected this idea(s) because it would cause the City to "backfill" (pay overtime) for any operator who took a day off. Eggert stated that this would have cost the City approximately $670,000.00 during 2011(City Exhibit #49), and that this was more than the City could afford. He further testified that vacation leave was always granted and sick leave (illness) is a fact of life. The implication was that the communications operators would have to take their earned time especially comp time off in a way that the City could afford. Practically, this means that comp time can only be used rarely, if at all (Tr. pp. 113-164).

Some explanation is needed at this point. According to the testimony in the record, the main reason that the communications operators turned down the tentative agreement was that they wanted more time off. Both the City and the Union agreed that dispatching could be an extremely stressful job and that communications operators need time off. To get away from their jobs, the

operators have vacation time, and they can call off sick. In addition, they can earn compensatory (comp) time. However, Eggert must approve the use of comp time, and he does not usually allow the operators to take comp time off because it almost always causes an overtime situation.

Eggert repeatedly testified that he was against the Union's position on work rules (time off) for two reasons: 1) that it would lead to the Communications management team having less say over schedules, and 2) that any mandatory use of comp time would cause an overtime situation, and that was not in the City's best interest. Moreover, Eggert maintained that there were good employees who should be rewarded and that there were bad employees who abused sick leave, etc., and that management would be ham strung with respect to allowing "good employees" to take time off if compensatory time use rules were written into the contract (Tr. Pp. 149-152).

The testimony in the record shows that one of the main uses of comp time is to pay for "pull days" or "call back" days. The operators work a "4+2" schedule. That is, they work four days and are off two days. This causes the operators' days off to rotate so that each operator gets the usual weekend days off a certain number of times per year. However, the schedule also causes the operators to have some pay periods where they are not scheduled for work a full schedule. "Pull days" are the days that the communications operators are scheduled to work in order to pay for the days missed because of their work schedules. In general, each operator "owes" four or five pull days per year (Tr. p. 67).

The City allows the operators to pay for two of their "pull days" with comp time. In other words, the operators cannot even pay for all of their "pull days" with comp time because Eggert testified that he does not believe in using comp time to pay for all "pull days". However, with the exception of using accumulated comp time to pay for the "pull (call back) days" comp time is almost never authorized by Eggert. According to his testimony it costs too much to backfill a position to replace a person who is excused from work, and consequently he will not authorize the use of comp time.

There is a serious problem with the way that comp time is authorized and used in the communications department. The Appeals Court of the 6th Circuit has ruled on that issue in Beck v. The *City of Cleveland. The Court held that a valid request for comp time use cannot be turned down solely because it causes an overtime situation (emphasis added)*.[3] In this case the City presented the issue as one determined by cost. The Beck Court stated that an employee had the right to use his/her comp time. That right is not unfettered. The use of comp time is conditioned by the needs of the employer. The Court wrote:

> "… that an agency may not turn down a request for an employee for compensatory time off unless it would impose an unreasonable burden on the agency' ability to provide service of acceptable quality and quantity for the public during the time requested without the use of the employee's services."

This means that an employee cannot always get time off on the day he/she wishes. However, if comp time is earned, there must be times when it can be used. That is, if an employee requests to use his/her accumulated comp time, the employer cannot

[3] *Beck v. The City of Cleveland,* No. 02:3669 39 OF Court of Appeals, 6th Circuit 2004

deny that request simply to keep from paying overtime. In general, a person must have some probability of using his/her accumulated comp time if another employee can perform the same job in a reasonable manner.

The City presented this as a money issue. The City does not want (cannot afford) to pay overtime when an employee is using accumulated comp time. However, the fact that comp time would cause overtime is not. in and of itself, an acceptable reason for denying the use of comp time.[4]

Therefore, the Conciliator believes that the City's denial of a request for time off because of the need to "backfill" the position is of questionable legality. If the case were contested in court and the City lost, the offending Sections would be declared null and void via Section 2115.127, the Savings Clause. The result is that the parties' work rules, or at least some of the rules, would not be part of the contract and the parties would have to devise new operating procedures, i.e., negotiate over the issue.

However, the Conciliator does not believe that he should rewrite the parties' agreement according to the Union's final offer. The Conciliator is not an expert in communications departments' scheduling and work rules. The imposition of a 10% rule might not be workable in the Toledo communication's department setting. This is also true for many other work rules. Therefore, the Conciliator believes that this issue should be discussed and decided by the parties themselves.

---

[4] Arbitrators have also found that a benefit that cannot be used is not a real benefit. If an employee accumulates comp time, he/she has the right to enjoy the benefit. Other citations: See also Heaton v. Moore, 43 F.3d 1176, Whcases2d 801 and Christensen V. Harris Co., 529 U.S. 576, 120 S. Ct. 655 (2000).

Unfortunately, this is final offer conciliation; and the Conciliator must find for one side or the other on an issue-by-issue basis. In the case of the police work rules, the parties have negotiated over the issue and come to a tentative agreement. This means that the parties who are experts in communications department scheduling have at least discussed the pros and cons of the issue. The Union membership did not ratify the agreement, but it was discussed, and a tentative agreement was signed. The Conciliator is loathe to make an award that might do more harm than good. Therefore, the Conciliator is recommending the City's position with regard to the police work rules issue. However, there is a proviso, the employees must have some ability to schedule their accumulated comp time. The current system that denies comp time use simply because it causes overtime is not in conformity with applicable federal law.

There is one final matter to be discussed. The City's philosophical position with regard to the conciliation hearing led to a position where it did not make a final detailed proposal prior to the hearing. The Union claimed that this precluded the City from 1) presenting evidence and 2) that the Conciliator must accept the Union's position on the issues. The Union presented a case, FOP Lodge 69 v. the City of Cincinnati to buttress its position (168 Ohio App. 3r 537; 2006 Ohio 4598; 860 N.E. 2d 1073; 2006 Ohio). The preceding report makes clear that the Conciliator does not agree with the Union's position in this instance.

Without going into great detail, the facts of the Cincinnati case differ from this matter. In this case, the City did not present any witnesses who testified for its position. The only City witness was a rebuttal witness. Also, different from the

Cincinnati case, the City's position was well understood by all parties. The City wanted the Fact Finder's recommendations upheld. Both sides presented documentary evidence of their positions. The Conciliator found the submissions to be timely and complete. This is materially different from the cited case where the Conciliator wrote that the City of Cincinnati's submission was flawed. Therefore, the Conciliator does not find that he is bound to accept the Union's position with regard to the issue is question.[5]

[5] The Conciliator would urge the parties to meet and negotiate a settlement to the work rule issues even after the publication of this report. The Conciliator believes that the issue was not ripe for conciliation and that the parties are the ones best able to find some resolution to their dispute.

Award:

1) The record proves that the contested work rules do not address the reality of the fire dispatcher job and, therefore, the Conciliator finds that current practice within the fire department (contract language) should remain in effect.

2) The record proves that the main disagreement between the parties with respect to the new work rules for the Police Department is over the amount of time off that can be used by the police dispatchers. The dispatchers are allowed to earn comp time, but have little ability to use that time. The City's policy with regard to the use of comp time is at variance with applicable federal law that states that the use of comp time cannot be denied simply because it causes an overtime situation. The Conciliator finds that the parties did agree on a set of work rules and that those rules should be included in the contract with the understanding that the employees must have some ability to use their earned comp time.

Signed this _____ day of March 2010 at Munroe Falls, Ohio

Dennis M. Byrne
Conciliator

List of Exhibits

City Exhibits:

1. Employer's Position Statement dated January 6, 2012.
2. Employer's Post-Hearing Brief dated January 27, 2012.
3. Current Collective Bargaining Agreement
4. Fact Finder's Rubin's Report and Recommendation dated 11/07/11.
   (a) Tentative Agreements between the City of Toledo and AFSCME Local 7, Communications Operators, and City of Toledo's Final Offer.
   (b) City's response vial Email Local 7's letter dated 12/21/11.
   (c) Letter from AFSCME Local 7 dated 12/21/11.
5. Fact Finder Lewis Report and Recommendations dated 12/29/11.
   (a) Fact Finder Zeiser's Report and Recommendations dated 8/24/11.
6. Local 7 Communication Operators new employee and terminations.
7. City of Toledo 2012 projected General Fund Revenue Estimate
8. Department of Finance Report to Finance Committee dated 12/21/11.
   (a) City of Toledo UTAX Collections, Cash Basis 2011 v. 2010
   (b) City of Toledo UTAX Basis Pro Forma w/o stock Option 2011 v. 2010
   (c) City of Toledo Income Tax Collections for top 75 Taxpayers
   (d) City of Toledo General Fund Revenue Analysis through 11/30/11.
   (e) City of Toledo General Fund Expense Survey (Char) through 11/30/11.
   (f) City of Toledo General Fund Expense Survey through 11/30/11.
9. Income Tax Revenue 2001-2011 graph.
10. General Fund Revenue 2001-2012 graph.
11. Comparison of Income Tax to State Revenue Receipts
12. General Fund Year-End Balance and "Rainy Day" Fund 2001-2010.
13. Historical Medical Care Costs Per FTE 2002-2010 graph.
14. State of Ohio Operating Appropriation Bill; Adjust to local government
15. Metropolitan Policy Program, "MetroMonitor" dated 6/11.
16. Metropolitan Policy Program dated 2011.
17. Toledo Income Tax Revenue Forecast for 2011 U of T Economics Dept.
18. City of Toledo unemployment rate 2007-2011
19. Net Effect of Contractual Increases from 2010-2011.
20. Department of Development Memo 11/29/11 re. Chrysler
49. Cost of applying a 10% rule to the police and fire dispatch units.

Note: City Exhibits 20 through 48 were fact-finding exhibits that did not relate to the issue(s) presented at Conciliation.

Union Exhibits:

1. Current Collective Bargaining Agreement
2. Union Position Statement dated January 6, 2012.
3. Union Written Closing Statement dated January 27, 2012.
4. Ground Rules
    a.) Fact Finder Rubin's Report dated 11/07/11.

The Union also put a large loose binder of exhibits into the record. However, most of the exhibits referred to the issues before Fact Finder Rubin and were never referenced during the conciliation.

Witnesses

For the City:

1. Captain Leo Eggert, Commander of the City of Toledo Communications Division.

For the Union:

1. Donald Czerniak, President of Local 7
2. Chris Rettit, Police Dispatcher
3. Tonya Gosselin, Fire Dispatcher