

State of Ohio
STATE EMPLOYMENT RELATIONS BOARD
Final Offer Settlement Procedures

In the matter of the conciliation between)
) SERB Case No.: 2012-MED-08-0759
City of Bexley) (Sergeants Unit)
Public Employer)
) GREGORY P. SZUTER, CONCILIATOR
and)
) **REPORT AND AWARD**
Fraternal Order of Police, Capital City Lodge) [Interest Arbitration]
No. 9)
Labor Organization)

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Also in attendance (*Sworn and testifying):

* Sgt. Ronald P. Kenefick
* Sgt. Ken Gough
Jason Pappas, Lodge 9 President

Also in attendance (*Sworn and testifying):

*Ben Kessler, Mayor
Chief Larry Rinehart

Hearing : August 8, 2013
Award Issued : August 23, 2013

INTRODUCTION

The City of Bexley (herein also "Employer" or "City") and Fraternal Order of Police, Capital City Lodge No. 9, (herein "Union" or "Lodge 9") are parties to this final offer settlement procedure ("conciliation") under Ohio R. C. 4117 which is a form of interest arbitration relating to establishing new terms for a collective bargaining agreement. This conciliation relates to a wage re-opener provision of the collective bargaining agreement ("CBA" or "Agreement") between the Union and the Employer and effective January 1, 2012 through December 31, 2014.

UNIT FOR BARGAINING

The unit for collective bargaining consists of all police sergeants. There are 5 employees in the unit. One, Sgt. Gough, is with the detective bureau, three are shift sergeants and one, Sgt. Kenefick, rotates shifts. The unit of 21 police department patrol officers is also represented by the Lodge 9. The only other sworn officers in the police department are excluded from the units. the Chief and Captain. Also excluded from the two units are the dispatchers and animal control employees which are represented by different affiliate of the FOP (FOP-OLC).

The two Lodge 9 units have traditionally bargained together and have reached a unified agreement covering the terms and conditions of employment for both. The parties met in negotiation for the terms of the wage re-opener in accord with their Agreement. As per their tradition, the patrol unit and the sergeant unit represented by Lodge 9 participated together in negotiations with the City. Matters still at impasse between the City and the two units were submitted to statutory fact finding hearing on April 29, 2013. The Fact Finder's Report and Recommendation ("FFR") was issued on May 24, 2013. The two units voted separately on the Fact Finder's Report and Recommendation. The patrol unit voted in the majority to reject but failed to meet the 60% threshold thereby deeming

the FFR accepted under the statute. The sergeant unit voted 3-2 for rejection which is 60%. Consequently the issues of at impasse moved to conciliation in the sergeant unit.

The undersigned was appointed conciliator in this dispute by the State Employment Relations Board (SERB) by letter of June 18, 2013, pursuant to R.C. 4117.14(D)(1).

HEARING

Pre-hearing statements of the issues were submitted by August 5, 2013 by agreement, with final proposals and exhibits in conformity with R.C. 4117.14(G)(3) and O.A.C 4117-9-06(E). The Conciliation evidentiary hearing commenced on August 8, 2013, at Bexley, Ohio. Both parties attended and elaborated upon their positions regarding the issue remaining at impasse through their witnesses and representatives listed on the cover. In addition, documents were marked and received in evidence although exhibits offered by each included some of the same documents as offered by the other.¹ Four Joint Exhibits were marked and received in evidence. (JX)² The Union presented nine exhibits which were received into evidence. (marked "FOP" but herein "UX")³ The Employer

¹ Duplicate exhibits of parties offered separately (*).

² JX 1 Collective Bargaining Agreement between the Union and the Employer and effective January 1, 2012 through December 31, 2014.
JX 2* In the Matter of the Factfinding between City of Bexley and FOP Capital City Lodge #9, Fact-Finder (4/ 29/ 2013 E. William Lewis) SERB No. 12 MED 08-0758, 0759.
JX 3 Conciliation Agreement. See Appendix A
JX 4 Emails between counsel and conciliator dated July. See Appendix B.

³ UX 1 "Issue 24 on minds of Bexley voters, city officials," THIS WEEK COMMUNITY NEWS, (internet edition) November 2, 2011.
UX 2 Ohio Police and Fire Pension Fund (<http://www.op-f.org>) Contribution Rates
UX 3 2011 Wage Rankings - Sergeant (Top Step) February 13, 2012.
UX 4 2012 Wage Rankings - Sergeant (Top Step) December 5, 2012
UX 5 Summary of Wage Increases for Agencies represented by FOP, Capital City Lodge No. 9 in Franklin County, Ohio 2013, 2014, 2015.
UX 6 City of Bexley's Historical and Projected Carryover Balance.
UX 7 City of Bexley General Fund December 2012 Budget vs Actual.
UX 8* Memo to Bexley City Council from Beecher Hale, Finance Director, March 23, 2013.
UX 9* City of Bexly General Fund June 30 2013 Budget vs Actual.

presented nineteen exhibits that were received into evidence. (EX).⁴ The parties entered stipulations to extend the timing of the conciliation hearing and to waive a stenographic transcript of the hearing and to submit prehearing conciliation statements by August 5, 2013 electronically.⁵

ISSUES

The Fact Finder's Report and Recommendation of April 25, 2011, made recommendations on the two re-opener issues, insurance and wages. By the time of the conciliation only the wage issue remained un-agreed by the parties: Article 15 Wages⁶

MEDIATION

The Ohio law encourages fact finders and conciliators to mediate disputes when practical. R.C. 4117.14 (G)(1). The Parties agreed inasmuch as there is only one issue, a re-opener on wages

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- EX 1* Memo to City Council from Finance Director Re: Report of Activity March 23, 2013
 - EX 2 2003-2013 General Fund Revenue and Financing Sources; Breakdown of Revenue Sources
 - EX 3 Estate Tax Revenue as a Percentage of Total General Fund Revenue, 2010-2012
 - EX 4 Comprehensive Tax Rate Comparisons
 - EX 5 2011 Carryover Balance Charts — External Comparables
 - EX 6 2012 Carryover Balance Charts — External Comparables
 - EX 7 2013 Carryover Balance Charts — External Comparables
 - EX 8 Historical and Projected General Fund Carryover Balance (revised)
 - EX 9 GFOA Best Practices on Unrestricted Fund Balances and Replenishing General Fund Balance
 - EX 10 Bexley Police Department Expenditures
 - EX 11 Historical Wage Settlements for Union and Non-Union Employees in City of Bexley
 - EX 12 Wage Rates for Sergeants in Comparable Jurisdictions
 - EX 13 City of Bexley Amended Ordinance No. 53-11
 - EX 14* In the Matter of the Factfinding between City of Bexley and FOP Capital City Lodge #9, Fact-Finder (4/ 29/ 2013 E. William Lewis) SERB No. 12 MED 08-0758, 0759.
 - EX 15 In the Matter of the Conciliation between the City of Chillicothe, Ohio and FOP First Capital Lodge 59 (8/4/2009, Howard Silver) SERB Nos. 08 MED 09-0947, 0948, 0949.
 - EX 16 2013-2015 Collective Bargaining Agreement Between City of Bexley and FOP/OLC, Inc -Radio Dispatchers and Animal Control Officers
 - EX 17 2013-2015 Collective Bargaining Agreement Between City of Bexley and AFSCME Local 3838
 - EX 18* City of Bexley General Fund June 30 2013 Budget vs Actual.
 - EX 19 Employer's proposed Memorandum of Understanding : Wage Reopener (arithmetic corrected)

⁵ See Appendix A and B.

⁶ See Appendix C and D.

that been bargained without result for about a year before the fact finding that mediation could be dispensed with.

CRITERIA

The conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the parties' final settlement offers. R.C. 4117.14(G)(7). Absent a waiver by the parties, increases in rates of compensation and other matters with cost implications awarded by the conciliator are restricted as to retroactivity. See O.R.C. Section 4117.14(G)(11).

In compliance with Ohio Revised Code § 4117.14G(7), the Conciliator considered the following in making the opinion and order contained in this report:

- (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 s 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 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.

In as much as this proceeding is a final offer interest arbitration, the general standards of interest arbitration are part of what the sixth criteria refers to. Those are located in ELKOURI & ELKOURI HOW ARBITRATION WORKS (Sixth Edition, Ruben, Editor. BNA, 2003) at pp. 1358-1364.

As quoted therein, note:

". . . [interest arbitration] calls for a determination, upon considerations of policy, fairness, and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their negotiations – they have left it to this board to determine what they should, by negotiation, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntarily agreed to?" *Twin City Rapid Transit Co.* 7 LA 845 at 848 (McCoy *et al.* 1947)

What reasonable parties would voluntarily agree to is a matter of prudence. The advisory fact finding, which is the first of the two-step dispute resolution process for safety forces under Ohio's public bargaining law, answers the question of what would reasonable parties agree to. The Fact Finder's Report on an issue is given deference in the final offer arbitration (conciliation).⁷

In any public sector statutory proceeding the interest of the public is a criterion. ELKOURI at p. 1361. In Ohio it is listed third. The part of the public interest criterion advanced by both parties is the ability of the City to finance and administer the issue proposed without impairment of service. On this criterion the Union offered a number of exhibits chiefly from City sources. The Employer offered exhibits and the testimony by the Mayor Kessler.

External comparison, which is the second criterion, was primarily through exhibits relating to nearby bargaining units having agreements with the local police agencies. This was also addressed by testimony of Sgt. Kenefick and Sgt. Gough. The bargaining history and internal

⁷ Only when there is a showing of error or when substantial changes have occurred since the fact finding hearing resulting in new evidence shall a conciliator alter the Fact Finder's recommendation. *City of Warren and OPBA*, (Graham) Case 2006-MED-10-1267. Following *Warren*, are *IAFF Local 2860 and City of Eastlake*, (Meredith) Case No. 2007-MED-09-1004, *City of Lakewood and IAFF*, Case No. 2000-MED-04-0952; and *City of Medina and OPBA*, Case No. 2005-MED-08-0785. A conciliator need not defer to the Fact Finder's recommendation where the Fact Finder never discussed his rationale or the competing considerations or where it is unclear the Fact Finder was presented with the same information. In *City of Sheffield Lake and OPBA*, (Nelson) Case Nos. 2007-MED-10-1075, 2007-MED-10-1076, 2007-MED-10-1077. The City cited the *City of Chillicothe, Ohio and FOP First Capital Lodge 59* (Silver) SERB Nos. 08 MED 09-0947, 0948, 0949 which did not expressly address this concept. It rejected the FFR because there was insufficient evidence that the FOP should be treated differently than other city employees. Implicitly the FFR there did not consider the lack of evidence on the external comparisons [criteria #1 or #6].

comparisons was addressed by testimony of Mayor Kessler and through exhibits. This is relevant to a number criterion, chiefly the first, third and sixth.

FINDING OF FACTS

The factual contentions that were repeated throughout the evidence on the wage issue by the parties are summarized here. The sequence of the following discussion on the criteria is chosen to serve the context.

THE LAWFUL AUTHORITY OF THE PUBLIC EMPLOYER [4]

There are no disputed issues under this head. The police service is a function of local government and is 100% supported by the General Fund of the City.

THE INTERESTS AND WELFARE OF THE PUBLIC; THE ABILITY OF THE PUBLIC TO FINANCE AND ADMINISTER THE ISSUES PROPOSED; THE EFFECT ON NORMAL STANDARDS OF PUBLIC SERVICE [3]

The interests and welfare of the public is largely and traditionally defined by the other listed factors, but not exclusively. Those are the administration's concerns for any adverse operational and financial adjustments and the public's expectation of maintaining services. While other factors may be raised, they are not present here.

A great deal of evidence addressed the City's finances here and before the Fact Finder. It is not that the City is unable to afford any changes but whether given the unusual set of financial circumstances, prudence permits the proposed changes. No diminution of service to the public has been claimed as a result of the financial outlook even with the proposed changes.

The City is an affluent suburb of Columbus, Ohio and is in fact bordered by Columbus on three sides and one side by Whitehall. The adjacent areas of Columbus are relatively high crime areas. As a result of necessity and public support the City has maintained an excellent police department but a small one. Because it is small, the opportunities for career advancement are more

highly limited than in larger agencies. The police department has three bargaining units as noted above. The City employs 78 full time employees. In addition to the three police department units, there are the City's service workers, represented by AFSCME, and the non bargaining unit employees. The City does not maintain a fire department but procures fire service from Columbus under a contract.

The General Fund of the City which supports the police department has had upward tending operating revenues from 2003 to 2009, ie \$8.1M to \$12.5M respectively. Beginning in 2008 several financial developments have altered the trend. The recession beginning in the 4Q2008 impaired tax receipts, both income and real estate taxes, beginning in 2009. Also beginning in 2009 the State of Ohio began to curtail the amount of local government funds distributed to municipalities including the City. The amount of local government funds was cut 50% by the State.

On the other hand while revenues increased generally to 2009, and then declined, expenditures continued to increase.

| | 2009 | 2010 | 2011 | 2012 | 2013* |
|---------|-------|-------|-------|-------|-----------------|
| Revenue | 12.5M | 10.5M | 9.5M | 10.7M | 9.3M from 10.5M |
| Expense | 10.5M | 11.3M | 10.9M | 10.7M | 10.6M |

* Adjusted. See infra.

Typical of municipalities compensation constitutes about 70% of the expenditures. The police department has consistently represented about 1/3 of the expenditures and is in a similar range as to revenues varying in percent on account of the greater variation in revenues.

Efforts were made to curtail spending in the wake of the tightening of the budget. The City eliminated seven full time and two part time positions between 2008 and 2012, none of which were sworn peace officers. In bargaining with representatives of the employees, the City obtained some concessions. Lodge 9 took the lead in agreeing to a wage freeze for 2012 and several measures that

suspended some costs for that year for wages, health insurance, fitness pay, wellness incentive, uniform allowance and holidays. Lodge 9 also agreed to forgo a negotiated increase in out years of their Agreement by accepting a reopener for wages, insurance and other issues for contract years 2013 and 2014. Lodge 9 represented two units and the other two units represented by other bargaining agents followed the pattern set by the Lodge 9 .

In December 2011 the City by Ordinance No. 53-11 imposed similar alterations of the benefits and terms and conditions of employment of non-bargaining unit employees of the City affecting a wide range of topics including a wage freeze. In 2012 the City and Lodge 9 finalized their Agreement for 2012-14. The other police department unit came to an agreement in December 2012 for the same term and the AFSCME unit came to an agreement in 2013 for 2013-15.

Another legislative change was the repeal of the State estate tax that was adopted to be effective FY 2013. Unlike most cities where the estate tax is found money, in Bexley it was a budgeted source of revenue. In Franklin County, the suburbs relied on the estate tax for 3.00% or less, most under 1% of revenues. In the last three years of the estate tax, only Bexley and Upper Arlington were consistently above 3.00% of revenue, both typically more than 8.00%.

| Estate Tax % of Revenue | 2010 | 2011 | 2012 |
|-------------------------|--------|--------|---------|
| Bexley | 18.74% | 8.00% | 4.16 %* |
| Upper Arlington | 9.62% | 10.32% | 22.43% |

* Would have been 7% if an estate closing after repeal (2013) closed in 2012.

With the repeal of the estate tax set for 2013, the budgeted amount would become 0% thus eliminating something above 10% of the City revenue. The Mayor testified that since it is variable, the estate tax had been counted upon in budgeting for the carry over balance of the General Fund. It was budgeted as \$1.5M with the actual experience varying widely.

To address the onslaught of the multiple changes in revenue, an income tax issue was submitted to the ballot in November 2011. It increased the income tax rate from 2.0% to 2.5% and reduced the income tax credit for residents working elsewhere from 80% to 65%. The Mayor testified that for residents affected by the credit, the combination of changes could double their taxes. The case made for the increase was the State's reductions of the local government funds and the repeal of the estate tax. It was clearly described that failure of the issue would result in cuts of services including leaf collection, snow plowing, recreation and police staffing. Lodge 9 again took a lead position. It actively supported the issue which was adopted narrowly.

The revenue from the tax issue began in 2012. As the first year of the new rates, it was a green year, one where the expected experience would not produce the projected results due to implementation friction. Businesses had to change withholding tables timely and anticipate the effect of the credit. Self employed persons needed to budget for greater estimated tax. It was anticipated that the true revenue would not be observable until 2013.

While the financial squeeze represented by narrowing the gap of revenues and expenditures is a result of the 2008 recession and State legislative changes, the City faced another more unique hardship in 2013, an outlier tax refund. The perfect storm for 2013 was completed by the discovery that a large tax refund was owed to a resident for multiple years of over payment of his municipal income taxes. He had paid City income tax on corporate income which was not owed. The amount the City was obligated to refund within the statute of limitations was \$2M. The first payment was made from the General Fund in the amount of \$1.2M in May/June 2013 with annual payments of 0.2M plus interest to be paid annually until 2017. The first payment was "booked" by netting the payment against revenues thus understating the revenues rather than by entering it as an expense.

Hence the 2013 revenues listed per the budget, whether actual or projected, is in every case 1.2M less than the monies received.

The year 2013 was also the year that the one year measures adopted for non-bargaining and bargaining unit employees were generally removed as to wages, health insurance, fitness pay, wellness incentive, uniform allowance and holidays. Costs were about to address an increase trend. Lodge 9 commenced bargaining over the re-opener provisions of the Agreement in November 2012 which culminated in a fact finding hearing in April 2013 and the report that issued in May 2013.

At the time of the fact finding the financial picture of the City was improving but had headwinds. This was represented in the (then) projections of the carry over balance of the General Fund. At the end of 1Q2013 it appeared the carry over would be 2.3M in 2013 and 0.6M in 2014. (UX 9) The data available was the FY2012 year end General Fund report. The June 30, 2013 data allowed revision of the projection to \$1.4 M as a result of certain positive experience.

| General Fund Carry Over | 2011 | 2012 | 2013 | 2014 |
|---------------------------|--------|--------|--------|----------|
| % of prior year revenue | 66.0% | 31.95% | 21.9 % | 14.91%* |
| Project amount (millions) | 6.698M | 3.060M | 2.361M | 1.439M** |

* calculated as % of 2013 budgeted revenues of 9.646M. **prior projection \$600,000

The GFOA recommendation is that carry over balances be tailored to particular circumstances but that it be "no less than two months of regular General Fund operating revenues or regular General Fund operating expenditures." (CX 9) This is stated as a minimum and in the alternative as a measure of revenue or expenditures. Hence a rule of thumb has been observed by the Conciliator in many other jurisdictions of a quarter year (3 months) as the most prudent term for the carry over. The median among the 14 Franklin County suburbs for 2012 is 33.33% or 4 months.

The silver lining that began to appear in 2Q2013 was the result of more unique happenings. One was that the City actually received \$300,000 in estate tax revenue that was due under the former law but was not received until a late closing estate paid it in 2013. Another was that the income tax revenues were producing more than projected revenue. The projections for 2013 were conservatively based on 2012. With full compliance in swing during 2013, the tax revenue was outdoing the 2012 green year by \$125,000 by June 30. The Mayor's renegotiation of the fire contract with Columbus permitted more even payments which assisted cash flow. Most significant is that the refund payment of \$2.0M does not appear to have impaired the budget since the projections have increased from \$600,000 to \$1.4M after the first installment of \$1.2M. Before the offset for the refund installment the budget for revenue was \$10.846M and became \$9.646. However, the June 30 results shows actual YTD revenues of \$5.716M, for half year. While some large payments such as for debt service can become due in the last half, and year end presents typical higher expenditures, this represents a comfortable percentage of revenue for the half year.

The 2014 carry over balance projection improved but not sufficiently to the 25% level (or even to 16.6% level). To demonstrate the abilities inherent in the City's budgeting the City put the carry over balance in context of 14 Franklin County suburbs. The City has the highest effective tax rate when the credit is considered, and higher yet when the school income tax is included. It is fourth when property tax is included. Its carry over balances in comparison to other suburbs as a percentage of revenues ranked it third in 2011 to third last in 2013.

PAST COLLECTIVE BARGAINING AGREEMENTS OF THE PARTIES [1]

The two Lodge 9 units have bargained together historically and agreed to the same collective bargaining agreement subject to their separate ratification processes. (JX 1) In addition the City

demonstrated that as for wages, the two units agreed to identical increases since 2003 and at the same times. For example, for 2004, 2005 and 2006 the increases were in January and October while all others since 2003 and before the 2013 reopener were in January only. The amounts of percentage increase were identical in all cases. The rate increase was consistently 4% until the 2008 recession when it became 3% in 2009 and after until the wage freeze of 0% in 2012.

Also of significance is the fact that the unified Agreement does not make provision for a rank differential for the sergeant unit. Rather the pay difference is incorporated into the wage scale and not separately calculated. Historically the rank differential has been 16%.

The leadership of the Lodge 9 units is apparent in the historic settlements of the City with other employees. The rates and timing have been identical to the Lodge 9 units since 2003 for the dispatcher unit and service unit and non-bargaining unit employees.

The trends of the historic settlements of the parties has been consistently above state averages on any scale, statewide, Columbus, cities, and police departments. The variance has been a few basis points above 1% over state levels from 2003 to 2009 when it contracted to less than 1% above. In the hardest hit years statewide, 2010 and 2011, the City's settlements were 1.75% and 2.25% above state settlements, slightly less on the police scale.

This does not represent profligacy by on the part of the City in the teeth of the recession and legislative changes but a consistent application of policy. The City compensates its police force with such premiums for a number of reasons. First it is a mature and affluent community as the reliance on the estate tax betrays. It is proximate to high crime areas of a large central city that, in such a context, increases its security risks. The citizens insist upon top police service as result. This in turn pushes the performance, equipment and training for its force and its participation in task forces with

adjoining communities such for drug enforcement and special tactical teams. In addition it is small. The force is 28 persons, 21 patrol, two management and 5 supervisors (sergeants). Recruitment and retention alone in a small community justifies some premium as well. The City and Lodge 9 have applied these goals such that the historic trends of their settlements have been both uniformly consistent as among the units of the department and otherwise and have applied a reasoned premium to police service.⁸ Attesting to this is the evidence that the expenditures for the police department overall has consistently been in the range of 1/3 of the City's budget consistently for years notwithstanding the adversity of the recession and legislative changes.

OTHER PUBLIC EMPLOYEES DOING COMPARABLE WORK, CONSIDERING FACTORS PECULIAR TO THE AREA AND CLASSIFICATION INVOLVED [2]

Both parties presented material on external comparisons of police department sergeants. Lodge 9 emphasized the units of Columbus, the Franklin County Sheriff, and the Ohio State University. The City focused on the Franklin County suburbs. The Fact Finder did not emphasize this material but observed the Union used "area police units" that included the suburbs. It strikes the Conciliator that the large units in the Union's evidence here, while of interest, are not the standard that this criteria requires. While is it comparable work and job classification, it does not consider factors peculiar to the City, especially that it is small suburb and a small department. The Union's data included four townships.⁹ Townships are distinguishable in form of government and revenue sources and so are not properly in the external comparator group.

⁸ Since the Lodge 9 settlements are patterns for other units over a long period, this is not to disparage the other services. They are also obviously the beneficiaries of premium pay scales for reasons unique to their service in the community.

⁹ The City's data on revenue sources, particularly the estate tax and carry over comparisons included one township (Powell) cited by the Union. However its comparisons on wages did not.

The City and Lodge 9 had striven for the City's police force to be in the top five of the county suburbs. (JX 2 p. 7) The wage rankings presented by the Union showed the respective salary in dollar values which included the pension pickup (PPU) for the communities providing that. That material (ex-townships, ex-large agencies) showed Bexley as ranking third in 2011 in the County's suburbs. After taking a wage freeze in 2012 (i.e. 0%) it ranked 8th among the suburbs. The City completed the comparison in its evidence that after including the 2% agreed by the patrol unit and recommended by the Fact Finder for the sergeants, the City would rank 3rd by July 1, 2013.¹⁰

The 2012 amount is near but below the average settlement of ten Lodge 9 units for 2013 (2.68%), particularly considering it is a mid-year increase. The trend of settlements for ten Lodge 9 units settled to date for 2014 is 2.85% and for 2015, five units settled to date, is 2.75%.¹¹

The Union's testimony delved into the functions of the sergeant classification in a small department. There are three shift sergeants, one relief patrol sergeant who rotates shifts to avoid unnecessary overtime, and one detective bureau sergeant. The upper command structure above sergeant is compressed, being only a captain and chief, no lieutenants. Neither are there corporals or special officers that assist in other agencies. The compressed command structure imposes greater responsibility on the City's sergeants day to day than in other cities, particularly larger ones, and also in terms of special assignments that are sustained in larger agencies with deeper staffing.

Often for most of two shifts, the sergeant on duty is the chief law enforcement officer in the City. While superiors are available for call on the 2nd and 3rd shifts, it is the sergeant that has the responsibility for initial response, assignments and stabilizing and control of the scene. It could be

¹⁰ The City's list differs but the additions are communities below the City on the ranking. Also it is not clear that amounts were adjusted for PPU. If they were not, the relative rank would not change since not all cities participate in that benefit. The only city that might significantly change on the list near the City is Hilliard (6th) which would have to move 3 ranks.

¹¹ The Lodge 9 data is all ex-township, adjusted for PPU but undetermined as to large agencies.

any of them, including the detective sergeant, deflecting him from assigned investigations.

Sgt. Kekefick, the relief patrol sergeant, described the added responsibilities for special assignments. He manages the fire arm qualifications of the patrol, maintaining records, ammunition, and arms inventory. He maintains and inspects the first aid kits and portable AED devices. He is the City representative on several task forces such as the OVI Taskforce with Columbus and other cities, the Drug Recognition Experts. He is also the field training officer who must structure and oversee the orientation of recruits to the department when there are trainees. Other sergeants have special assignments also. The Reserve Officer Program is overseen by a sergeant, as are the Special Duty assignments and invoicing, fitness program, Blockwatch, and bike patrol to mention some.

The City did not dispute the functions required of the sergeant unit. Rather it demonstrated that the rank differential as of 2013 with the most recommended 2% increase placed the City's sergeant unit 4th among the County suburbs in terms of dollar difference over the top patrol officer salary. Translating it to a rank differential, it is 16.0% which is 5th in percentage.

2013 (7/1) Sergeant Rank Differential

| | | |
|----------------|-------------|------------|
| 1. Dublin | 13.5k | 16.5 |
| 2. Westerville | 13.2k | 17.7 |
| 3. Hilliard | 12.9k | 16.8 |
| 4. Bexley | 12.4k | 16.0 |
| 5. Whitehall | 12.2k | 16.9 |
| 9 others | \$11.8k ave | 15.7 % ave |

OTHER FACTORS, NOT LISTED, NORMALLY TRADITIONALLY CONSIDERED [6]

Under the heading of "other factors" the Union submits the contribution rates for Ohio Police and Fire Pensions which changed legislatively in 2012. The employer share of pension contributions remained the same, 19.5%. The employee-member contribution increased in 0.75% increments

beginning July 2013 through 2015. The result is the payments which are out of pocket for the members has changed from 10% in 2012 to become eventually 12.25% in 2014. Currently in 2013 they are 10.75% and 0.75% more in 2014. The City pointed out that the reduction in take home pay affects the patrol officers also.

Under "other factors" might be placed the City's \$1M rainy day fund which has existed rather long term. This, as the Fact Finder observed, is an asset that many municipalities do not have. Although it is General Fund monies set aside for the emergency purposes implicit in its name, it does not appear in the General Fund budget but in a separate fund account. The City hastened to mention that current liabilities like wages is not in its purpose. The Union agrees but clarified that it referred to its existence to demonstrate that the City's cash flow is not dire in the big picture. Hence it is treated here in criteria 6, not 3. Being a long standing community asset, the citizens must expect that it continue for its purposes, so it has little to add to the considerations in this matter beyond the flavor that this is an affluent community.

Chief of the "other factors" where Ohio's statutory conciliation is involved is the Fact Finder's Recommendation. (*supra* pg. 5) The Fact Finder's recommendation was 2% wage increase for both units for July 1, 2013 under the reopener. For 2014, the Fact Finder's recommendation was 1% (1/1), 1% (7/1) and 1% (12/1) wage increase for both units under the reopener. The Fact Finder's rationale was that long term steps have been taken to address the losses of revenue but there is a current short term cash flow issue over the tax refund. "In recognition of the cash flow issue" the recommendation was made. (JX 2 p. 7)

THE STIPULATIONS OF THE PARTIES [5]

The parties agreed on the interpretation of the issue being only a change in the amount of increase, if any, with all other terms, in particular the earliest effective date in positions being July

1, 2013, and the wage table, having been otherwise agreed to in the collective-bargaining agreement. Therefore, no retroactivity agreement under O.R.C. 4117.14(G)(11) was necessary.

The parties entered stipulations on the timing of the hearing and report and award, the waiver of the record and the filing of the pre-hearing position statements. Cf. Appendix A and B. In addition although not written as such, the parties have stipulated that the FFR recommendations on insurance being unchallenged may proceed into effect as well as the July 1, 2013 2% increase.

OPINION AND ORDER

ISSUE: No. 1

CONTRACT : **Article 15: Wages**

Fact Finder RECOMMENDATION: 5%

2013 2% (7/1)

2014 1% (1/1), 1% (7/1) and 1% (12/1) = 3%

POSITIONS: The Employer's Final Offer : FFR Appendix D

POSITIONS: The Union's Final Offer: 6% Appendix C

2013 2% (7/1)

2014 1% (1/1), 1% (7/1) and 3% (12/1) = 4%

OPINION AND ORDER:

In fact finding for 2013 the Union had proposed 3.0% (1/1) and City proposed 1.5% (7/1). For 2014 the Union had proposed 3.0% (1/1) and City proposed 2.0% (7/1). Hence the Union's two year proposal was 6% and the City's was 3.5%. The Fact Finder settled on 5% in gross but recognizing that the delay of the increases past January made for a slightly less actual increase. He calculated it on a three year scale to account for the wage freeze rendering the improvement at 1.66%. The stated motivating factor was the prospective cash flow issue from the tax refund.

The Fact Finder heard and reported on the recent financial history in the City. However, the ultimate recommendation was colored more by the late discovered tax refund causing a

forthcoming cash flow issue. The fact finding hearing was held in April, a month after the Auditor's memo highlighting the initial installment of \$1.2M on the tax refund and a month before it was to begin. In light of the 2013 installment of the refund the Fact Finder recommended the wage rate increase by compromising the 1.5% and 3.0% at 2.0%, slightly in the City's favor in amount and with a delay past January to July. Both units accepted this adjustment, the patrol unit by deeming the recommendation accepted under the statute and acceptance by the sergeant unit through not contesting it in its final offer.

For 2014 the Fact Finder recommended the Union's 3% not the City's 2%, but spread it over the entire year to allow the City to catch up in its cash flow. The arrangements made for future installments of \$200,000 plus interest on the balance of the tax refund began in 2014 and through 2017. The 2014 recommendation of the FFR was deemed accepted by the patrol unit but rejected by the sergeant unit. The final offer of the sergeant unit proposes 4% for 2014. That proposal with the 2% of 2013 would restore the arithmetic 6% rate increase as first proposed (i.e. 3% and 3%).

Challenging a Fact Finder's recommendation requires demonstration that the Fact Finder failed to consider some material or that circumstances changed. The Union concentrated on the unavailable financial information and also non-considered comparison data.

The changes in circumstances that the Union itemized are the unexpected improvements in the financial picture in 2013: Income tax revenue was ahead even after the recognition of the first refund installment, there was found money in the form of a late estate tax receipt, cash flow improved with the installment payment plan for the fire contract, and the carry over balances were improving. Juxtaposed to that is that the cost of its final offer for the 5 man unit above the City's final offer is \$500.00 in total for the one month in 2014 and about \$5000.00 in 2015.

While these facts became evident from the June 30 General Fund report that was not available to the Fact Finder, it must be said that they do not impeach his recommendation. The estate tax receipt will not repeat and the fire contract effect on cash flow is marginal. The 2013 income tax returns represent the first mature year of the new rates since 2012 was the green year. That might be repeated in 2014. It is anticipated the 2014 carry over balance will be 15% after the continuing installments on the tax refund. Even given the developing stability, that is well below optimal 25%+ (three months). The GFOA "minimum" is 16.6% (two months). Given the nature of this community, it is expected that the minimum is not sufficient. The median carry over balances among the suburban peers is 33.3% (four months). Thus the cash flow headwinds appear to prevail into 2014. That makes the Fact Finder's recommendation the most prudent.

It might be necessary to add as to criteria #3 that this was never an "ability to pay" issue. The amount of the increase can be funded without impairment of service no doubt. However, the size of the increase does not alone compel contract changes. Rather it is the overall prudence of what reasonable parties would agree to which is what the criteria #6 demands. (See ELKOURI at *supra* pg. 5)

The City countered with great emphasis on criteria #2, the past settlements of the parties. The two units had always agreed in tandem and as the Fact Finder found, they set the pattern for the rest of the City as to amount and timing. Deviation from the FFR would undermine that history. This factor, available to the Fact Finder, was strongly in favor of the City.

Some comparison data was before the Fact Finder but was not highlighted as a major consideration beyond the objective of the parties to maintain a "Top 5" standing for City employees. With data unavailable to the Fact Finder, the ranking for the City slipped from 3rd to 8th as a result of the 2012 freeze but was restored to 3rd by July 2013 with the 2% increase. His recommendation

for 2013 accomplished the "Top 5" mission.

The Union concentrated on two other comparative facts, the trend of local police settlements since fact finding and the rank differential which was not considered previously.

The Franklin County police units represented by Lodge 9 have settled generally above 2.5% and closer to 3.0% in both 2013 and 2014 and is trending that way for 2015. This is not big support for a 4% final offer for 2014. What the Union failed to appreciate was that the Fact Finder had agreed to its proposal for 3% for 2014, albeit in an altered form as to timing to allow for the cash flow issue. The FFR is in line with the other police settlements for 2014.

The rank differential for this unit was not considered by the Fact Finder. In fairness it was not raised since the proposals were for both units and their unified contract. However, since then the ratification process made it relevant and so it is grist for review of the FFR.

There is no specific contract term for rank differential. The difference in compensation is built into the wage table. It has been 16% for a very long time. The history of constant increases applicable to both units left the wage table's difference for rank untouched. The Union's proposal would make it 17% for the first time. On a data comparison basis that would place it 2nd among the suburban peers. It is now 5th in percentage difference. The City notes that in dollar values, the unit is 4th with the cities sharing 3rd 4th and 5th all being "tied" since they are all within \$700.00.

The Union presented testimony on the necessity for a differential. The compressed command structure with only two management posts leaves the sergeants with many more responsibilities than would normally be shouldered by sergeants in other departments, particularly the larger and more highly compensated ones. The comparison was made to Columbus, Franklin County Sheriff Office and the Ohio State University police. No comparison was made to the other suburbs. The City interposed that this is a small City and small department so the flexibility of having multiple

responsibilities is a necessity. To finish the City's thought, the Conciliator notes that in a small department the added responsibilities are not as onerous as a mere listing might suggest. The annual fire arms qualification is necessary for 28 sworn officers. That is not a large group. If evenly scheduled it is 2 per month and those could be done simultaneously. Field training officer duty also has a small class and must be intermittent, only when there are trainees. This point can be carried out in other examples. Most significant is the fact that these are not new responsibilities. The same programs have, if not all then nearly all, existed since the sergeants had been promoted. The same programs have, if not all then nearly all, existed over the period in which there has been a unified settlement pattern maintaining the 16% differential. The Union has not made a case for a rank differential.

Understanding criteria #6 as preeminent in evaluating an FFR, the Union's final offer sought to set it aside because it did not address certain circumstances that were not available or were not relevant at the time. Those were the City's developing financial picture [#3] and the comparisons of the area sergeant units and differentials. [#2]. These were not persuasive that the FFR was flawed. On the other hand the past settlements [#1] supported the FFR as did to some extent the stipulations of the parties [#5] that the 2013 recommendation was reasonable. The authority of the City [#4] was not operative here. The Fact Finder's resolution is the most prudent given the record before him, and here.[#6]

In the statutory process certain amount of deference is owed the Fact Finder Report and Recommendation. The "other factor" criteria (i.e. the FFR) favors 1.00% (12/1) increase. It deserves deference or at least significant weight and is not rebutted by a slight improvement in cash flow or by other evidence. The statute requires that the conciliation opinion and order choose as among the final offers of each of the party and not to craft a different solution. Within those constraints the

Conciliator is convinced on this record that the City's final offer adopting the Fact Finder's recommendation is the more reasonable. The Union's final offer of a 2.00% (12/1) wage increase effective December 1, 2014 is denied.

ISSUE 1 Order:

As to Article 15, the City's final offer is ordered into effect. See attached Appendix D.

Made and entered at Cuyhoga County, Ohio
August 23, 2013



Gregory P. Szuter, Conciliator

PROOF OF SERVICE:

The foregoing has been sent by electronic mail via the internet on August 23, 2011, to Fraternal Order of Police, Capital City Lodge No. 9, c/o Russell Carnahan, Esq. and City of Bexley, c/o Marc A. Fishel per addresses shown on the cover and filed with the State Employment Relations Board in the same manner.

APPENDIX A

**CONCILIATION AGREEMENT
BETWEEN
CITY OF BEXLEY AND FOP CAPITAL CITY LODGE NO. 9**

The undersigned parties agree to extend the Conciliation in Case No. 2012-MED-08-0759 beyond the July 13, 2013 deadline. The parties agree to extend the deadline until August 31, 2013. In addition, the parties agree to waive the requirement for a transcript of the conciliation hearing.

FOR FOP CAPITAL CITY LODGE NO. 9

*Anna Carahan by [Signature] per
telephone authorization*

CITY OF BEXLEY

[Signature]

APPENDIX B



Gregory Szuter <gpszuter@gmail.com>

2012-MED-08-0759

2 messages

Marc Fishel <MFishel@fishelhass.com>

Thu, Jul 18, 2013 at 2:28 PM

To: "gpszuter@gmail.com" <gpszuter@gmail.com>

Cc: Russell Carnahan <rcarnahan@hcands.com>, Matt Whitman <MWhitman@fishelhass.com>

Mr. Szuter,

The parties have agreed to exchange conciliation statements and file them with SERB and you on August 5, 2013 instead of five days prior to the hearing. Please let us know if this is acceptable.



Follow Fishel Hass Kim Albrecht  

CONFIDENTIALITY NOTICE: This e-mail message (including any attachments) is intended only for the person to whom or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy/delete this message.

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Fri, 23 Aug 2013 09:31:28 AM - SERB

you, please remember that Internet e-mail is not secure and you may wish to consider other means of sharing the information.

Gregory Szuter <gpszuter@gmail.com>
To: Marc Fishel <MFishel@fishelhass.com>
Cc: Russell Carnahan <rcarnahan@hcands.com>

Sun, Jul 21, 2013 at 9:45 AM

Counsel:

The timing presents no difficulty for me. You probably need to have it covered in a stipulation at least because as my June 24 email said:

<<<< Russ has asked if the POS filing could be on July 5. The Conciliation Guidebook states concerning the POS date;

"On occasion, the parties will stipulate to a waiver of the rule requirement regarding the filing of position statements. The parties exercise such an option at their own risk. No precedent exists to support or oppose the ability of the parties to stipulate to a waiver.">>>>

[Quoted text hidden]

Gregory P. Szuter
8934 Brecksville Rd. #432
Cleveland, OH 44141
T. 440-526-1505
F. 440-526-4650

APPENDIX C

ARTICLE 15 – WAGES

Section 15.1. Wages. The following wage rates for members in the rank of Sergeant shall be paid as set forth below:

A. Effective January 1, 2012

| | |
|----------|-----------|
| | SGT. |
| HOURLY | 42.54 |
| BIWEEKLY | 3,403.20 |
| ANNUAL | 88,483.20 |

B. Effective July 1, 2013 (2%)

| | |
|----------|-----------|
| | SGT. |
| HOURLY | 43.39 |
| BIWEEKLY | 3,471.20 |
| ANNUAL | 90,251.20 |

C. Effective January 1, 2014 (1%)

| | |
|----------|-----------|
| | SGT. |
| HOURLY | 43.82 |
| BIWEEKLY | 3,505.60 |
| ANNUAL | 91,145.60 |

D. Effective July 1, 2014 (1%)

| | |
|----------|-----------|
| | SGT. |
| HOURLY | 44.26 |
| BIWEEKLY | 3,540.80 |
| ANNUAL | 92,060.80 |

E. Effective December 1, 2014 (2%)

| | |
|----------|-----------|
| | SGT. |
| HOURLY | 45.15 |
| BIWEEKLY | 3,612.00 |
| ANNUAL | 93,912.00 |

APPENDIX D

Employer Proposal
8/8/13

MEMORANDUM OF UNDERSTANDING

WAGE REOPENER

This memorandum of understanding is entered into between the City of Bexley and the Fraternal Order of Police, Capital City Lodge No. 9. This memorandum resolves the reopener provision set forth in the collective bargaining agreement.

The following wage scales shall apply to bargaining unit members in the rank of Sergeant for years 2013 and 2014:

| January 1, 2012 Current Wage Scale | | July 1, 2013 2% Wage Increase | | January 1, 2014 1% Wage Increase | | July 1, 2014 1% Wage Increase | | December 1, 2014 1% Wage Increase | |
|---------------------------------------|-------------|----------------------------------|-------------|-------------------------------------|-------------|----------------------------------|-------------|--------------------------------------|-------------|
| Sergeants | | Sergeants | | Sergeants | | Sergeants | | Sergeants | |
| Hourly | \$42.54 | Hourly | \$43.39 | Hourly | \$43.82 | Hourly | \$44.26 | Hourly | \$44.70 |
| Biweekly | \$3,403.19 | Biweekly | \$3,471.20 | Biweekly | \$3,505.60 | Biweekly | \$3,540.80 | Biweekly | \$3,576.00 |
| Annual | \$88,482.91 | Annual | \$90,252.86 | Annual | \$91,145.60 | Annual | \$92,060.80 | Annual | \$92,976.00 |

Signed and dated at Bexley, Ohio, on this _____ day of _____, 2013.

FOR THE CITY OF BEXLEY:

FOR THE FRATERNAL ORDER OF
POLICE, CAPITAL CITY LODGE NO 9

Ben Kessler
Mayor, City of Bexley

Russ Carnahan
Fraternal Order of Police
Capital City Lodge No. 9

Larry Rinehart
Chief of Police

Bargaining Unit Member

Marc Fishel, Esq.
Labor Counsel

Bargaining Unit Member

Ex 19