

STATE EMPLOYMENT RELATIONS BOARD

CONCILIATOR'S AWARD

IN THE MATTER OF:

SANDUSKY COUNTY SHERIFF

AND

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

Case Number 2013-MED-02-0087

Before Conciliator: Thomas J. Nowel
March 7, 2014

PRESENTED TO:

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INTRODUCTION

Thomas J. Nowel was appointed to serve as Conciliator in the case as captioned on the cover page by the State Employment Relations Board on December 6, 2013 in accordance with Ohio Revised Code Section 4117.14 (D) (1). Hearing was conducted on February 20, 2014 at the offices of the Sandusky County Sheriff which is located in Fremont, Ohio.

The collective bargaining agreement between the parties expired on June 1, 2013. Following bargaining sessions on July 23, 2013 and August 28, 2013, impasse was reached on a number of issues, and fact finding was scheduled between the parties. Fact Finding hearing was conducted on October 15, 2013 and Report and Recommendation was issued on November 15, 2013. The Report and Recommendation was rejected by the Employer, and the parties proceeded to Conciliation. Issues at impasse were narrowed and modified prior to Conciliation. On the scheduled day of hearing, the parties, in good faith, engaged in mediation of outstanding issues with the Conciliator, and, while a number of options for settlement were discussed between the parties, resolution of the negotiations was not achieved. The evidentiary hearing was therefore convened at noon.

The bargaining unit includes approximately nine full-time sergeants and captains employed by the Sandusky County Sheriff.

OUTSTANDING ISSUES:

Article VI, Hours of Work/Overtime, Section 6.4

Article XII, Drug/Alcohol Testing, Section 12.7 and Section 12.8

Article XXIV, Compensation and PERS Pickup

Those participating at hearing for the Employer included the following:

Patrick Hire, Clemans, Nelson & Associates
Kyle A. Overmyer, Sandusky County Sheriff
Bruce N. Hirt, Chief Deputy
Thomas Riser, Major

Those participating at hearing for the Union included the following:

Jackie Wegman, FOP Staff Representative
Kay Cremeans, FOP General Counsel
Jamison Rose, Sergeant
Sean O'Connell, Captain

BACKGROUND

In analyzing the positions of the parties regarding each issue at impasse and then selecting one or the other final offer of the parties, the Conciliator is guided by the principles which are outlined in ORC Section 4117.14 (G) (7) (a-f).

1. The past collectively bargained agreement between the parties.
2. Comparison of the issues submitted to fact finding relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.
3. The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service.
4. The lawful authority of the public employer.
5. The stipulations of the parties.
6. Other factors, not confined to those listed above, which are normally or traditionally taken into consideration in determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact

finding, or other impasse resolution procedures in the public service or in private employment.

In addition to the above guidelines, the Report and Recommendation of the Fact Finder in this matter is given consideration in the development of an Award regarding the outstanding issues at Conciliation.

During the course of the hearing, the parties had full opportunity to advocate for their positions, submit exhibits, present testimony and discussion and engage in rebuttal of the submissions and arguments of the other party. The Conciliator will transmit, by way of electronic mail, the Award in this matter on March 7, 2014.

A discussion of each issue at impasse and Award of the Conciliator is as follows.

1. Article VI, Hours of Work/Overtime, Section 6.4

The Union proposes a modification to the overtime section of the Agreement which would add military leave to “hours required to work” for purposes of determining overtime eligibility. Bargaining unit employees are required to work more than eighty hours in a fourteen day work period in order to be eligible for overtime pay at the rate of one and one-half times regular hourly rate of pay. The Employer rejects the proposal and wishes to maintain status quo.

UNION POSITION: The Union believes that the original intent of the parties, when this section of Article VI was negotiated, was to include military leave as time worked based on other provisions of the Agreement which ensure no loss of pay for

time away from the Employer due to military service. In addition, the Union argues that this impacts only one employee in the bargaining who, when he works in excess of eighty hours during the established work period, is paid from grant monies as opposed to general fund resources (Union Exb. 6.2). The Union states that an email from Fiscal Officer Amy Little to Don Binkley of Clemons, Nelson & Associates confirms that grant funding pays for the work of the impacted employee when working in excess of eighty hours. The Union states that Section 5923.05 of the Ohio Revised Code provides for no loss of pay for employees, who are members of the military, for periods of up to one month. Its proposal is made in the spirit of the statute. The Union states that the Fact Finder in this case rejected a more comprehensive Article VI proposal but was sympathetic of the military leave portion of the issue. The Union requests the Conciliator to accept its proposal.

EMPLOYER POSITION: The Employer states that no other Sandusky County collective bargaining agreement provides for military leave as worked time for purposes of overtime calculation. The Employer states further that the intent of the Ohio Revised Code is no loss of regular pay, and the overtime benefit is premium pay and not regular pay. In its list of comparable regional Sheriff Departments, only Ottawa County provides for a benefit which matches the Union's proposal. The Employer goes on to state that the Union accepted the Fact Finder's Report and Recommendation which did not include its proposal regarding military leave. The Employer requests the Conciliator to accept its proposal to maintain status quo regarding Article VI.

AWARD: The Union makes an important argument that the source of any overtime payment to the single bargaining unit employee, who is impacted, is grant funding. But the inclusion of the Union's proposed language applies to the entire bargaining unit. Additional bargaining unit employees, who may engage in military service in the future, may not and probably would not be paid from grant monies but instead from general fund sources. It is important that internal comparables at the Sheriff's Department do not include this proposed benefit, and external comparables likewise are not sympathetic to the Union's position regarding its proposal. While the Union suggests that the Fact Finder was sympathetic to its proposal, a reading of the Report and Recommendation does not support this assertion. The Employer's proposal is awarded. There will be no modification of Article VI in the new collective bargaining agreement.

2. Article XII, Drug/Alcohol Testing, Sections 12.7 and 12.8

The Employer proposes to modify the Drug and Alcohol Testing provision of the Agreement in a number of areas. The proposal also adds the abuse of legally prescribed medications. The Employer's comprehensive proposal includes the mandatory termination of any bargaining unit employee who tests positive for illegal drugs. In the event an employee is arrested regarding the possession, use of, distribution or manufacture of illegal drugs, the involved member of the bargaining unit will be placed on an unpaid administrative leave of absence until resolution of the criminal arrest. If found not guilty, an employee may be made whole for lost pay

although disciplinary action may occur based upon department policy violations. A conviction will result in the termination of the employee. The Employer proposes a zero tolerance provision in the Agreement. An employee may appeal any such disciplinary action through the grievance procedure.

The Union proposes to include language regarding the abuse of legally prescribed medication but rejects the remainder of the Employer's proposal.

EMPLOYER POSITION: The Employer states that its proposal is a public policy issue, and admits that it seeks zero tolerance for such violations. This proposal ensures the termination of an employee who pleads guilty, is granted intervention, and whose record is later expunged. The Employer argues that this is not excessive or arbitrary in light of police officers being held to a higher standard by the public and the courts. The Employer states that the courts in Ohio do not generally vacate arbitration awards which reinstate law enforcement officers who are terminated for testing positive for an illegal controlled substance. Therefore it is important that the collective bargaining agreement include a zero tolerance provision which would preclude reinstatement. The Employer argues further that its proposal is especially relevant regarding this bargaining unit of command officers, and the Union representing deputies has agreed to incorporate this provision in its collective bargaining agreement. Additionally the Agreement between the City of Fremont, the Sandusky County seat, and its police officers includes this provision as well. The Employer cites a number of other county jurisdictions which include this provision. Finally the Employer states that the Fact Finder, in this matter, erred when he did

not recommend the proposal as he felt that the Sheriff would lose discretion. The Employer requests that the Conciliator accept its comprehensive proposal.

UNION POSITION: The Union agrees to the language which includes the abuse of legally prescribed drugs, but otherwise rejects the proposal of the Employer. The Union argues that the Employer's proposal eliminates just cause in the case of a positive drug/alcohol test and other drug related issues. The Union states that the just cause standard must be maintained. The Union states further that, in recognition of the composition of the bargaining unit – law enforcement officers, disciplinary cases of this nature rarely result in arbitration but are instead resolved by the parties. The Employer's proposal would eliminate this collaboration between the parties. The Employer's proposal also eliminates the consideration of extenuating circumstances. Finally the Union states that the Fact Finder's Report and Recommendation did not support the Employer's proposal. The Union requests the Conciliator to accept its proposal which rejects the Employer's comprehensive proposal but includes the language regarding abuse of legally prescribed medication.

AWARD: The Conciliator takes note that the collective bargaining agreement for deputies in the department now includes what is the Employer's proposal in these negotiations. There is no evidence that this was an award of a conciliator, but it appears the parties may have voluntarily arrived at this agreement. Neither party in the instant matter provided external comparable data with the exception of the City of Fremont. The Employer's information and argument regarding court decisions,

which uphold arbitration awards which reinstate law enforcement officers, are duly noted. Although the instant proposal contains a right of appeal through the grievance procedure, it is difficult to determine the question before the arbitrator as the just cause standard would not be at issue. Although the courts have generally confirmed arbitration decisions regarding positive drug and alcohol tests for law enforcement personnel, there was no evidence at hearing that the courts or legislature have considered or imposed a zero tolerance policy or elimination of just cause from collective bargaining agreements or civil service statutes in Ohio. The Employer argues that the Fact Finder erred when he rejected its proposal based on a theory of loss of discretion. But the Fact Finder inferred that the Sheriff would be forced to terminate every employee in the bargaining unit who tested positive for drugs or alcohol and would therefore lose his discretion to impose a less severe penalty based on extenuating circumstances. The analysis of the Fact Finder is accurate and compelling, and there have been no new revelations or evidence at conciliation. The Union's argument, that disciplinary cases of this nature often do not result in arbitration but instead are resolved through negotiated settlements, is meritorious as the courts and numerous arbitration awards have clearly stated that law enforcement officers are held to a higher standard. This therefore compels settlement as opposed to appeal through the final steps of the grievance procedure. As the Union argues, the Employer's proposal would eliminate the possibility of "collective bargaining" in the case of drug and alcohol disciplines. Additionally, there was no evidence at hearing that members of the bargaining unit have ever been accused of failed drug or alcohol tests or other drug related offenses. Evidence

indicates that a department dispatcher, in another bargaining unit, was charged with a violation of the drug/alcohol policy. The employee immediately resigned as opposed to appealing the matter through the grievance procedure. There is no evidence that drug/alcohol problems have been an issue in this bargaining unit or others at the Sheriff's Department. While the parties in other negotiations agreed to provisions which mirror the Employer's proposal in the instant matter, it appears they did so voluntarily. The Employer's proposal represents a limitation in the just cause principle contained in the collective bargaining agreement, and such significant change should result from negotiations between the parties and not by imposition by a neutral. The Union's proposal is awarded and language is as follows.

Article XII, Drug/Alcohol Testing
Sections 12.1 – 12.6, Retain current language.

Section 12.7. If after the testing required above has produced a positive result of legal drugs including the abuse of legally prescribed medication and/or illegal drugs the Employer may take disciplinary action and/or require the employee to participate in any rehabilitation or detoxification program that is covered by the employee's health insurance. An employee who participates in a rehabilitation or detoxification program shall be allowed to use sick leave, compensatory days, and vacation leave for the period of the rehabilitation or detoxification program. If no such leave credits are available, the employee shall be placed on medical leave of absence without pay for the period of the rehabilitation or detoxification program. Upon completion of such program, and upon receiving results from a retest demonstrating that the employee is no longer abusing a controlled substance, the employee may be returned to his former position. Such employee may be subject to periodic retesting upon his return to his position. Any employee in a rehabilitation or detoxification program in accordance with this Article will not lose any seniority or benefits, should it be necessary for the employee to be placed on medical leave of absence without pay for a period not to exceed ninety (90) days.

Sections 12.8 – 12.9, Retain current language.

3. Article XXIV, Compensation and PERS Pickup

Both parties submitted wage proposals at conciliation. The Union proposes increases in wages as follows. 2% effective the first full pay period that includes January 1, 2014; 2.5% effective the first full pay period that includes January 1, 2015; 2.5% effective the first full pay period that includes January 1, 2016.

The Employer proposes increases in wages as follows. 0% for the first year of the new Agreement, June 1, 2013; 3% effective the first full pay period that includes June 1, 2014; 3% effective the first full pay period that includes June 1, 2015.

The effective date of the new Agreement is June 1, 2013 through June 1, 2016. The parties did not enter into a "(G) (11) waiver".

UNION POSITION: The Union states that members of the bargaining unit are behind in pay, and the differential compared to deputies is substandard compared to similar jurisdictions. The goal of the Union during negotiations was a 12% differential, but this has been reduced at conciliation to 7% based on its wage proposal. The Union states that the Sheriff has eliminated one Sergeant position which has saved the Employer \$43,344.00. The difference between the Union's proposal and that of the Employer would utilize only a small amount of these savings. In a comparison of regional counties, Erie, Hancock, Huron, Seneca, Ottawa and Wood, Sandusky County bargaining unit wages are less than the average. The differential between command personnel and deputies are generally the lowest

among regional peers. The State Employment Relations Board Clearinghouse data illustrates that bargaining unit wages are on the low end of the state-wide scale. The Union argues that the Sandusky County General Fund is not only healthy, but revenue has increased by \$862,851.00 in 2013. The Budget Commission report of county finances on October 1, 2013 estimated the Unencumbered balance on January 1, 2014 would be \$1,090,000.00. Sales tax revenues have increased and the county has realized new revenue from the state-wide casino tax. The Union states that the Sheriff returned unused funding to the General Fund. In addition, the Union states that employment in Sandusky County is on the upswing and points to a media report regarding expanded employment at H. J. Heinz Co facilities in the county. The Union argues that the difference in its proposal, compared to that of the Employer, is small, but it is important in respect to the differential between bargaining unit command employees and deputies. The Union argues further that funds are available in the Sheriff's Office budget to meet the Union's demands without tapping additional general fund sources. The Union cites the differential between command and patrol at the City of Fremont, a 14% differential between Sergeants and Patrol and a 24% differential between Captains and Patrol. The Union requests the Conciliator to accept its proposal.

EMPLOYER POSITION: The Employer states that the Sheriff receives funding from the county general fund, but not all monies are available for personnel costs as a portion are earmarked. Funds, which were returned to the Commission, were earmarked monies which were not available for wages. The Employer argues that

many private sector employees who work in Sandusky County do not reside in the county, and the increase in employment at Heinz is reported to be only twenty new workers. The Employer argues further that comparing county to city is apples to oranges as funding sources are completely different. The Employer argues that the Union's wage proposal at conciliation is a change in format from what was presented during negotiations and at fact finding and urges the Conciliator to take note that start dates changed from June 1 to January 1 of the affected years. The Employer states that the County Commissioners have approved a six percent wage increase to be applied to the new three year agreement. The Employer states further that the Fact Finder recommended a 6% wage increase spread over the three years of the new collective bargaining agreement, and its proposal at conciliation is consistent with this recommendation. The Employer argues that there are no new facts at conciliation regarding wages and the financial condition of the county, and, therefore, the Conciliator should not deviate from the 6% recommendation of the Fact Finder. The Employer states that, while bargaining unit employees continued to receive wage increases in most years, non bargaining unit employees did not receive increases in 2009, 2010, 2011 or 2013. The Union representing Sandusky County Sheriff Department deputies agreed to the wage package which has been proposed at conciliation in the instant matter. Employees in the bargaining unit continued to receive wage increases during the previous five years, with the exception of 2010, while many employees in regional sheriff departments received no increases during this period. The Employer states that the county pays 8.5% of the employee share of pension contribution (PERS). When this

is factored into wages paid department employees, bargaining unit members compare well with their peers in regional counties. The Employer states that its wage proposal is only \$2,693.02 less than that proposed by the Union over the life of the new Agreement. The Employer reminds the Conciliator that Sandusky County, like other public sector jurisdictions in Ohio, has lost considerable revenue due to the reduction or elimination of state funding sources over the past few years. The Employer is critical of the Union's proposal to change start dates of wage increases to January 1. June 1 has been the effective date of wage increases since 1992, and the Employer states that the Conciliator must not support this change in the pattern of collective bargaining. The Employer requests the Conciliator to accept its proposal for wage increases for the bargaining unit.

AWARD: The Union and Employer presented compelling facts and arguments for their respective positions, and the difference in total cost over the remainder of the Agreement is small. The Union's concern regarding pay differential is valid. The economy in Sandusky County has improved and appears to have weathered the recession storm better than other jurisdictions. The bargaining unit experienced only one wage freeze during this time. Employment appears to be on the increase in Sandusky County, but, as the Employer suggests, it is unknown how this might immediately impact county revenue sources. The Union presented comparable wages rates from regional counties which suggest that bargaining unit pay lags behind the averages, but the Employer correctly states that the payment of 8.5% of the employee share of pension contribution (PERS Pickup) makes bargaining unit

wages competitive in the region. PERS pickup will continue through the term of the new collective bargaining agreement. The Union's proposal to change the dates of wage increases to January 1 is understandable based on the lack of a (G) (11) waiver. The Employer's argument is equally meritorious, that these dates should not be modified due to the historic pattern of bargaining. Data provided by the Employer indicates that every wage increase since 1992 has been negotiated effective June 1. The statute suggests that the history of bargaining between the parties is a factor neutrals must consider in fact finding and conciliation. The Employer's argument to maintain June 1 as effective dates for wage increases is meritorious and compelling. The fact finder issued his Report and Recommendation irrespective of the (G) (11) issue. The report recommended three wage increases totaling 6% over three years beginning in 2013. The Employer's proposal at conciliation includes wage increases totaling 6% over the last two years of the Agreement, and this mirrors the Fact Finders's recommendation for the new collective bargaining agreement. In addition, the Employer's proposal mirrors the wage settlement of other unionized employees in the department. No new facts regarding the economic condition of the Employer or members of the bargaining unit, since the hearing at Fact Finding, have come to the attention of the Conciliator. There is no compelling reason to deviate from the basic conclusions reached by the Fact Finder. The Employer's proposal regarding Article 24, Compensation and PERS Pickup, is hereby awarded. This provision of the Agreement will read as follows.

Article 24, Compensation and PERS Pickup

Section 24.1. Effective the first full pay period that includes June 1, 2013, the wage rates of all bargaining unit employees shall be increased by zero percent (0%). (Appendix A).

Section 24.2. Effective the first full pay period that includes June 1, 2014, the wage rates of all bargaining unit employees shall be increased by three percent (3.0%). (Appendix A).

Section 24.3. Effective the first full pay period that includes June 1, 2015, the wage rates of all bargaining unit employees shall be increased by three percent (3.0%). (Appendix A).

Section 24.4. Current language.

Section 24.5. Current language.

CONCLUSION

The Conciliator has reviewed the pre-hearing statements of the parties, all facts presented at hearing and the exhibits presented during the evidentiary hearing. In addition, the Conciliator has considered the positions and arguments presented by the parties regarding each issue at impasse; the Report and Recommendation of the Fact Finder; and the criteria enumerated in Ohio Revised Code Section 4117.14 (G) (7) (a-f).

In addition to the decisions contained in this Award, all tentative agreements reached by the parties and all unopened articles of the Agreement are hereby incorporated in this Award by reference.

Respectfully submitted and issued at Cleveland, Ohio this 7th Day of March, 2014.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel
Conciliator

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th Day of March, 2014, a copy of the foregoing Award of the Conciliator was served by electronic mail upon Jackie Wegman, representing the Fraternal Order of Police, Ohio Labor Council, Inc.; Patrick Hire (Clemans, Nelson & Associates), representing the Sandusky County Sheriff; and Donald M. Collins, General Counsel, State Employment Relations Board.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas J. Nowel
Conciliator