STATE EMPLOYMENT RELATIONS BOARD
State of Ohio

In the matter of Conciliation between:	)	SERB No. 2013-MED-10-1321
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 4286,	)	Hearing: April 24, 2014
Employee Organization,	)	Date of Award: May 30, 2014
and	)	
DEERFIELD TOWNSHIP, WARREN COUNTY, OHIO,	)	**CONCILIATION AWARD**
Public Employer.	)	

Before Mitchell B. Goldberg, SERB Appointed Conciliator

Appearances:

For the Association:

Andrew Register,	President, Local 4284
Andrew Burwinkel,	Vice President, Local 4284
Matt Young,	Trustee
Christian Elliott,	Treasurer
Jon Harvey,	OAPFF Vice President

For the Township:

Thomas Swope,	Law Director
Bill Becker,	Administration
Lois McKnight,	Assistant Administrator
Matt Clark,	Director of Administrative Services
Douglas Wehmeyer,	Battalion Chief
Chris Elsele,	Chief

I. Introduction and Background.

This is a conciliation proceeding conducted under Chapter 4117 of the Ohio Revised Code, the Ohio Public Sector Labor Relations law. The State Employment Relations Board ("SERB") appointed the undersigned as the Conciliator of this public employment labor dispute in accordance with Section

4117.14 (D)(1) on April 4, 2014. The Employer is an Ohio township in Warren County, north of Cincinnati, with a population of approximately 36,000. It employs 98 persons in the Fire Department. There are 31 members in the bargaining unit represented by the Association. The unit consists of firefighter/EMT/Paramedics, Lieutenants, Captains, Fire Inspectors, and a Mechanic. It employs about 58 part-time firefighters, many of which are employed with other fire departments on a full-time basis. Part-timers are employed throughout the ranks. The Department is not subject to a civil service system.

The parties participated in collective bargaining to reach a successor collective bargaining agreement ("CBA") to replace the CBA that expired by its terms on December 31, 2013. They have resolved 24 out of a total of 26 issues or proposals through negotiations, mediation and fact finding, leaving only 2 issues that are presented in this conciliation proceeding. These same 2 issues were submitted to fact finding before Fact Finder William C. Heekin, who issued his Fact Finding Report on March 14, 2014.

II. Unresolved Issues.

(1) Promotional Eligibility List

Both the Fact Finder and this Conciliator were confronted with a threshold legal issue involving the Association's proposal to include a new article within the CBA for the exclusive inclusion of full-time firefighters/paramedics on a Promotional Eligibility List to fill vacancies in the lieutenants and captains ranks. The expired CBA contained no negotiated promotional eligibility process for filling these vacancies. Instead, the CBA contained a management rights clause that reserved to the Employer the right to promote employees of its choosing into these ranks. The Employer historically has filled vacancies from both its full-time and part-time workforces. Its relies upon its reserved management right to promote in Article 3 and its statutory right under Section 4117.08 (C) that makes bargaining over promotions a permissive subject of bargaining, and not a mandatory bargaining subject. It has

never agreed to bargain over this subject at the table, and it has never subjected itself to any agreement to abide by civil service laws that contain promotional processes. Instead, it has historically acted unilaterally with regard to this subject, and it has no desire to act otherwise. It believes that Ohio legal authorities protect its right to act unilaterally with regards to its promotion decisions – it has never agreed to act otherwise, or permitted itself to negotiate over this subject so as convert the subject from a permissive subject into a mandatory subject. It asserted its status quo position before the Fact Finder and now before the Conciliator.

The Union believes that Ohio law requires the Employer to negotiate over the promotion issue and its proposal because promotions are an integral part and element of wages, hours and terms and conditions of employment, the underlying principle for the establishment of the collective bargaining process in Ohio's public sector labor relations laws. It adjusted its proposal to reduce the eligibility requirement of full-time firefighters from 5 years as proposed in fact finding to 3 years, thereby increasing the number of eligible employees in the Department's selection pool. It believes the Employer must bargain over this issue, and that its proposal, which was substantially recommended by the Fact Finder, is fairer and more reasonable than the Employer's status quo position that permits it to fill promotional vacancies from both part-time and full-time ranks at its complete discretion. The Employer's position is at odds internally with its police unit, and the other nearby comparable fire department CBAs.

The Legal Issue

Arbitrator Heekin decided to make a conditional recommendation as a Fact Finder for the purpose of serving what he believed was his "central function of issuing recommendations in order to assist [the parties]in the resolution of a labor dispute." He went on to state"

> Indeed the undersigned has never before while acting as a fact finder been asked to make a legal determination. Therefore, and while greatly emphasizing that other avenues are specifically provided for under the ORC Chapter 4117 as to resolving questions of law under

> the State Employment Relations Act, no legal determination finding will be made in this matter.

I do not take issue with Fact Finder Heekin's reasoning in deciding to make recommendations as a Fact Finder. His hope was to bring the parties together by accepting what he believed was a reasonable compromise on the mechanics of the promotional process, the acceptance of which would remove the legal issue and avoid what could be a long and arduous litigation road through SERB and the courts. I believe my situation as a conciliator involves different concerns once the Fact Finding Report is rejected. My mission is to make a final and binding decision on the disputed issues; either to accept the Union's amended proposal as written, or to permit the Department to retain its arguable right to make unilateral promotion decisions based upon its legal right not to bargain over what it believes is a permissive subject, one that it has chosen never to bargain over. Accordingly, I believe I must review, analyze and navigate through the submitted legal authorities to decide which of the submitted proposals should be subject to a final and binding conciliation award.

The History of Mandatory and Permissive Bargaining Subjects

The history of what subjects the parties must bargain over during their negotiations, and the subjects that they may instead merely choose to bargain over, finds its origin in the private sector, in the federal collective bargaining law.[1] Section 8(d) of the Labor Act requires the parties to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." Some provisions may lawfully be incorporated in a labor contract, but are nonetheless outside the area of wages, hours and other terms and conditions of employment. These so-called "permissive" subjects may be proposed by either party at the table, but the proponent may not insist on its position to the point of impasse or as a condition of reaching an agreement. The other party may decline to discuss the issue altogether without violating the law. Mandatory subjects

1 The principles have been developed by the NLRB and the courts in three stages, the Wagner Act or National Labor Relations Act of 1935, the Taft-Hartley Act or Labor-Management Relations Act of 1947, and the Landrum-Griffin Act or Labor-Management Reporting and Disclosure Act of 1959.

characteristically deal with the working relationship of the employees to the employer; permissive subjects fall for the most part into two groups. The first group are those that deal with the relationship of the employer to third persons, and are normally regarded as within the prerogative of management. The second group are those that deal with the relationship between the union and the employees in the bargaining unit, and are normally regarded as within the internal control of the union. The union commits an unfair labor practice when it insists to impasse that the employer agree to a subject that does not touch the employer-employee relationship or regulate a "condition of employment." The Employer violates the law when it insists to impasse upon a subject that touches upon the union-employee relationship. The "permissive" idea, however, means that the parties in any negotiation could by voluntary agreement expand their bargaining subjects beyond those that are considered mandatory. These subjects may be incorporated in an agreement if both parties wish.[2]

Ohio Law – The Statute

There are a number of practical differences between the private sector labor law and the law for public sector collective bargaining that were considered by the Legislature when it drafted and passed Chapter 4117. First, there was already in existence state civil service laws that provided remedies for public employees that covered many of the same areas that would be addressed and covered in collective bargaining agreements. Public employers could adopt civil service laws for its employees, those represented and those non-represented. Bargaining could take place over which, if any, civil service provisions should be included in the CBA. The CBA could substitute a grievance/arbitration procedure for civil service laws and remedies. Secondly, public sector bargaining could involve both rank and file employees and supervisors. The notion that private sector manufacturing companies would have union represented supervisors and managers would be an anathema in the realm of private

2 Basic Text on Labor Law Unionization and Collective Bargaining, Robert A. Gorman, West Publishing Co., pp. 523-29 (1976).

sector bargaining. This anathema would include the notion that the decision to hire and

promote supervisors from the rank and file would restrict management in any manner. Most managers and supervisors are at-will employees who serve at the pleasure of higher-up managers.

The legislature decided to address the subjects of mandatory and permissive bargaining by focusing on the public sector workplace and its differentiating characteristics instead of relying upon the general principle of looking merely at the relationship between the employer and third person non-bargaining unit employees . Section 4117.08 (A) states that bargaining is to cover all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a CBA, *except as otherwise specified in this section.* Section (B) specifically addresses civil service promotional matters such as examinations, rating, eligible lists, and appointments as subjects that are not appropriate subjects for collective bargaining. The statute appears to rule out bargaining over these issues.

Section (C) clarifies the matter further. It lists what all labor law specialists consider to be reserved management rights both in the public and private sector, rights that may permissively be bargained away or restricted if the parties decide to do so. Included in this broad range of reserved management rights is the right of the public employer to promote its employees as set forth in Section (C) (5). This right should be reconciled with management's right to adopt a civil service system that otherwise restricts its right to decide who to promote and delegates that function to a third-party system that ultimately makes the final decision. Without such a civil service system in place, Section (C)(5) is operative as being an exclusive management right, not subject to collective bargaining unless the public employer chooses to include that subject in collective bargaining. I conclude that a rational reading of this statute means that a public employer such as the Township, who has not enacted or delegated away its promotional decisions to a third-party civil service system, and who has reserved its unilateral right to make promotional decisions, would not be forced to bargain over this issue the same as if it was a

mandatory subject of bargaining. This promotional subject could, however, somehow by law, rule or

regulation be converted from its permissive nature into a mandatory subject. The next step is to decide whether this has occurred in the cases that have been submitted for review.

The Supreme Court, in *DeVennish v. City of Columbus*, 57 Ohio St.3d 163 (1991), was confronted with the issue of whether Section (B) and its civil service language prevents the parties from bargaining over promotional matters and eligibility lists. It reconciled Section (B) with the City's CBA that contained a promotion system by finding that (B) restricts the parties from bargaining over original appointments when employees are not represented by a union, as opposed to promotional matters that arise later. It found that all post-hire promotional matters are "appropriate" subjects for bargaining because these issues pertain to and directly "affect and pertain to wages, hours or terms and other conditions of employment." I find that the Court did nothing more in this case than remove post-hire promotional issues from the restricted civil service language in (B). All post-hire promotional issues are appropriate subjects for bargaining, and not otherwise restricted under (B). One must then apply Section (C) (5) to find whether promotional matters are both appropriate and permissive subjects under the management rights umbrella. Public employers may choose to bargain over those issues, but they are not forced to do so because the promotional issues are identified as being permissive rather than mandatory subjects. The three types of bargaining were clearly delineated; (1) prohibited bargaining subjects (pre-hire civil service matters); (2) appropriate subjects, those that pertain to and directly affect wages, hours and conditions that may be permissively or voluntarily bargained under (C)(5) such as post-hire promotional eligibility lists, and (3) those that pertain to and directly affect wages, hours and conditions and *must* be bargained, either because they directly affect wages, hours and conditions from the outset, or they later became constructively mandatory because the public employer agreed to include those formerly permissive issues in bargaining and they thereafter effectively became mandatory subjects.

The facts in this record are clear. There is no civil service issue in play, and the Township has

never agreed to bargain over its unilaterally established CBA management right to decide upon promotion issues. One must look further for authorities that mandate bargaining over promotional issues.

The Supreme Court decided another case involving the subject of permissive bargaining in 1991. *City of Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St. 3d 658 held that a CBA negotiated under Chapter 4117 prevailed over a conflicting provision of the City home rule charter. It discussed the federal labor law background for distinguishing between illegal subjects, mandatory subjects and permissive subjects. It held that 4117 prevails over conflicting charter law or other law except as specifically provided in the 4117 exceptions. Once a City decides to enter into a CBA, that agreement trumps any conflicting charter provision. The case does not add much to our discussion over the critical issue of whether promotional issues are now legally mandatory subjects regardless of whether the public employer never agreed to relinquish its unilateral right to make those decisions in accordance with Section 4117.08 (C)(5). I agree with the Court's language that regardless of whether a subject is considered mandatory or permissive, once a party voluntarily chooses to bargain over a permissive subject, that subject becomes mandatory for all practical purposes. The evidence here, however, is that the Township at all times has refused to bargain over promotional issues.

This was not true in the *Salem Fire Fighters, Local 283, IAFF* SERB decision (2009-02 – ULP Hearing). The facts are closer to the the instant facts in the sense that no reasonable person would argue that a minimum manning proposal is unrelated to terms and conditions of employment. It relied upon its previous *Youngstown* 1995 decision that established standards for determining whether a subject was mandatory or permissive. I stated above that an agreement to bargain over a permissive subject converts it to a mandatory subject "for all practical purposes," but *Youngstown* refined this analysis by stating that the permissive subject is not transformed into a mandatory subject after it is

included into a CBA. Instead, it is enforced like a mandatory subject, but its continuation depends

upon the contract terms. Again, *Salem* is unlike our case. The City agreed to minimum manning and then sought to modify or delete it in a later CBA. This Township, as stated above, has never agreed to bargain over the permissive subject of promotions.

The Hancock County Court of Appeals decision in *City of Findlay v. Findlay Civil Service Commission*, 91-LW-4513 (3rd (1991) relies upon *DeVennish*. The CBA incorporated the civil service rules into the CBA, as amended by specific contract language. The rules, therefore, and the subjects therein became in play and subject to negotiations. This Township has not incorporated the civil service system into a CBA.

Ryther v. City of Gahanna, 2005-Ohio-2670 (10th Dist. Ct. App.) involved a similar conflict between applicable civil service rules and conflicting CBA language. The subject of promotions was in play as a permissive subject as was the application of civil service rules. The Franklin County appellate court held that the issue was controlled by the CBA and was subject to the grievance procedure. Here, management has reserved the subject of promotions and has not relinquished its right either through a civil service process or by CBA provisions.

City of Akron v. SERB, 1998 SERB 4-49 (CP, Summit, 8-12-98) is another court case finding that Civil Service Rules on promotions are primary determinants of salary and working conditions. Changes to those rules requires collective bargaining. The key to this decision is the Court's statement that:

> The City did not have a duty to bargain the *adoption* by the Commission of the proposed rules primarily addressing promotions . . .. Once the rule revisions were adopted and became effective, they immediately applied to all non-bargaining unit employees and to bargaining unit employees whose exclusive representative did not request bargaining.

This case supports the Township's position that having a CBA that provides it with unilateral

discretion on promotional issues, without adopting a civil service system, means that it does not have a

duty to bargain over promotional issues.

In re City of Cincinnati, SERB 2005-006 (9-8-2005) is a ULP case charging the City with an unfair labor practice in refusing to bargain over the procedure for promoting assistant chiefs. At first blush, there appears to be language in the decision supporting the Association's contention that notwithstanding the (C)(5) language characterizing promotional issues as being permissive subjects, one must apply the *Youngstown* standards and analysis to determine if the subject should be considered mandatory or permissive. Promotion issues impact upon wages, hours and employment conditions. Therefore, according to the Association, the subject should be treated as a mandatory subject and a refusal to bargain over promotional issues would constitute a ULP. However, upon closer reading, I find that this case is merely another *Akron* type case. The Agency found that the parties had a "longstanding [practice] use of the procedure set forth in the state civil service law." It found that after applying the *Youngstown* three-prong analysis "that, on balance, the promotional process for Assistant Police Chiefs is a mandatory subject of bargaining." But, this finding is based upon the fact that promotional issues were put in play by the parties when they had a longstanding agreement to abide by the civil service process. Their CBA did not address the precise issue, but because they used civil service procedures, the issues affected wages, hours and working conditions and thus the issues were relegated to the mandatory subjects of bargaining. It is now certain from reading all of this law that if public employers and organizations choose to have promotional issues determined by civil service systems or by collective bargaining agreements, they must bargain over any changes that are proposed. The case, however, should not be interpreted to apply to public employers like this Township, who has never relegated promotional decisions to civil service system or to collective bargaining, and who has continued to reserve these decisions as part of its management rights, thereby never converting the issue from a permissive subject into a mandatory subject.

There are well worn statutory and contract interpretation principles that apply here. All of the

words used in the statute should be interpreted to have meaning, and the words that might be interpreted to be contradictory or ambiguous should be reconciled to resolve the contradiction or ambiguity if the language can be read to do so. 4117.08 contains three distinct concepts regarding collective bargaining subjects. The first is contained in (A). This is the mandatory requirement that "all" matters pertaining to wages, hours, or terms and other conditions of employment and changes or additions to existing CBAs "are" subject to collective bargaining, "except as otherwise specified." The second concept addresses the "appropriate" or "not-appropriate" matters. Section (B) defines one of those issues as being civil service examinations, rating, eligible lists and appointments. This has been defined by case law as only applying to original appointments or pre-hire matters, and not to the same items that are regulated after the hires. Specifically, CBAs or civil service issues regarding these post-hire matters are now mandatory subjects and are deemed appropriate for bargaining. The third category involves permissive subjects listed in (C) that are reserved management rights that may be bargained on a voluntary basis. They are also appropriate subjects if the parties wish them to be by voluntarily agreeing to negotiate over these identified working conditions. They are appropriate permissive subjects as opposed to non-appropriate prohibited subjects.

Decision and Award: Based upon the above analysis, I find that the Township's proposal should control and that the Association's proposal should not be accepted. So long as the Township has no civil service system in place, and continuously insists upon its right not to bargain over promotional decisions, and otherwise reserves its right not to do so under the existing or expired CBA, it may continue to refuse to bargain over this issue. The language in the expired CBA shall remain unchanged.

(2) Article 40 – Working Out of Classification

The CBA currently provides for higher pay when any employee works for 2 hours or more in the position of a higher paid classification. The pay for this work is the pay rate of the higher

classification for the number of hours worked in that classification. The Association proposes new

language to cover pay for an acting lieutenant or captain when there is a vacancy on the shift. Only one acting officer is permitted per shift. The Association is concerned about the selection process to fill the vacancy. If there is a current lieutenant promotional list, the highest ranked career firefighter, or a full-time firefighter would receive the pay grade for the shift. If no promotional list exists, the Battalion Chief would make the selection, but the firefighter filling the spot would be a full-time firefighter from the bargaining unit.

There was little discussion or time devoted to this issue at the hearing. The Fact Finder did not recommend acceptance of the Association's proposal. I agree generally with the Association's proposal. It appears reasonable. However, if I choose the precise Association proposal I must accept it completely, including language that I believe is not appropriate considering that I did not accept the Association's promotion proposal. I am concerned that including language in the CBA that states "if there is a current Lieutenant promotional list" may create a later dispute between the parties as to whether the existence of a promotional list is now a subject of bargaining. The Township's clear intent is to reserve its right to maintain its organizational structure, direct employees, transfer, assign and promote its employees. Article 40 as it now stands relinquishes management's right with respect to its specific terms; that working out of classification for two or more hours brings the higher pay. But, it contains no language modifying management's right to select the person for the job. I am rejecting the Association's proposal because this issue should be bargained between the parties on the basis of the Township agreeing to relinquish its managerial rights on this subject. The obligation to bargain should not be triggered by conciliator awarded language that arguably opens the door on the promotional selection subject without the Township's clear intention to do so.

Decision and Award: The Association's proposed change and addition to Article 40 language is not accepted. The CBA shall remain unchanged.

Date of Award: May 30, 2014

/s/ Mitchell B. Goldberg, Conciliator

CERTIFICATE OF SERVICE

The above Award was served upon the following parties by electronic mail on the 30th day of May, 2014:

Jon D. Harvey, jharvey3@woh.rr.com

Thomas A. Swope, Tswope@fbtlaw.com

SERB: MED@serb.state.oh.us

/s/ Mitchell B. Goldberg