

**IN THE MATTER OF CONCILIATION**

**BETWEEN**

**THE OHIO PATROLMEN'S BENEVOLENT ASSOCIATION**

**AND**

**THE CITY OF BARBERTON, OHIO**

**SERB CASES # 2013-MED-10-1335 (PATROL)**

**Robert G. Stein, Conciliator**

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## **INTRODUCTION**

The parties to this matter of conciliation are the Ohio Patrolmen's Benevolent Association (hereinafter "OPBA," "Union, or bargaining unit"), who represent approximately thirty (30) full-time Police Patrol Officers, and the City of Barberton, Ohio (hereinafter "Employer" "City," or "Department"). The parties, prior to the commencement of the hearing modified their positions following the conciliator's initial attempt at mediation. The current agreement ran from January 1, 2011 through December 31, 2013. The fact finder, Margaret Nancy Johnson, submitted her report to the parties and it was subsequently rejected, leading to the instant conciliation. Two (2) issues were eventually brought to conciliation.

### **Open Issues:**

This Conciliation arises as a result of a dispute between the OPBA and the City of Barberton, (Employer) regarding the following open issues:

Issue 1. Article 1. Recognition, Section 1.3 (3)

Issue 2. Article 17 Wages / B.E.A.T.\* (City's wage offer contingent on B.E.A.T. OPBA's wage proposal uncoupled from B.E.A.T.)

\* B.E.A.T. is a physical fitness test.

### **General/State/Local Economic Overview/Discussion**

Infrastructure issues continue to be a challenge for cities and states across the country and in Ohio for the foreseeable future. Accelerated by the severe recession that began in 2008 and its aftermath, business continues to learn how to be more efficient and do more with less or with part-time employees rather than full-time employees. In the experience of this neutral, public sector entities in Ohio, having to have endured the impact of the recession and multiple rounds of severe reductions in state assistance in recent years, are following the lead of the private sector and are very leery to again be put in a position to have to cut back services, make drastic

cuts in staffing, reduce benefits, and freeze or reduce wages just to balance their budgets. In Ohio the majority of manufacturing jobs are related to transportation, which continues to experience sustained recovery. Yet, caution still exists and there is still cause for concern in the number of people unemployed and underemployed. Many of the jobs being created in Ohio, as in other parts of the country are not the same well-paid jobs, with good benefits that in the past created and sustained a vibrant middle class. Currently there are several million people who have been unemployed for 6 months or more. Complicating the future in another manner is the fact that for millions of workers income has not changed markedly for several years. ("Incomes are Flat, Reflecting a Slowdown in Job Growth, but Consumer Spending Rises," Associated Press, 2-2-14) What long-term effect this will eventually have on markets and the willingness and ability of citizens to be able to financially support their communities is a question only time will answer.

The August unemployment rate in Ohio was 5.7% and in Summit County it was 5.0%, both being lower than the August national unemployment rate of 6.1%. What holds for the remainder of 2014 is not certain on a national or statewide perspective given considerable instability in many parts of the world. Yet, signs of a sustained recovery continue to persist, including the most recent Bureau of Labor Statistics (B.L.S.) jobs report that cited 248,000 new jobs added to the economy in September and a national unemployment rate that fell to 5.9%, the lowest in six years.

The local economy in northeast Ohio finds there are some fortunate municipalities who have endured the past years of recession successfully and continue to be prosperous. Other municipalities have been less fortunate and have found it more difficult to adjust to substantially less revenue from the state of Ohio, the elimination of the estate tax, lower property values, etc. Many in the latter category were already suffering a decline in population and an eroding economic infrastructure prior to the beginning of the recession in 2008. The City of Barberton, like so many others in Ohio, has been a passenger on a rollercoaster ride marked by the plunge of severe job losses and foreclosures, followed by a long, slow, and bumpy ride that has been in motion since the declared end of the recession in 2009. That ride was initially

steepened by incremental elimination or loss of tangible personal property tax, and then made more jarring through severe “turns” of state legislation that drastically reduced local government funding and eliminated estate taxes, forcing many local governments to hang on while they figured out where to go from here while coping with less revenue related to decreases in real property value. Again, not all municipalities experienced the same ride. Those who were better off economically were able to cushion their revenue losses with large funding balances and/or growth that were fostered by demographic and economic growth advantages through a combination of effort and fortune that came with being located in a prosperous geographic location in Ohio. The City of Barberton, while not fortunate enough to have an abundance of geographic and or economic advantages, is nevertheless a resilient city that continues to make adjustments to its economic circumstances while providing the best services it can to the citizens of Barberton.

## **CRITERIA**

### **OHIO REVISED CODE**

In the finding of fact, the determinations contained in this report are based upon the criteria set forth in Section 4117-9-05(K) of the Ohio Administrative Code. For the purposes of review, the criteria are as follows:

1. Past collective bargaining agreements, if any between the parties;
2. Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private sector employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
3. The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effects of the adjustments

on the normal standard of public service;

4. The lawful authority of the employer;
5. Any stipulations of the parties;
6. Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in the private employment.

For the purpose of efficiency the respective positions of the parties are summarized in an abbreviated form. (See the Pre-hearing Statements of the parties for exact language and take note of the below stated modifications made by the parties prior to commencement of the conciliation hearing). The determinations made herein are based upon a careful review of the evidence and testimony presented by the parties, the fact finder's report, and the application of the statutory criteria, the following determinations are made:

## **Union's and City's Final Position on Open Issues:**

### **Issue 1. Article 1, Recognition, Section 1.3 (3)**

**The City proposes current language (emphasis added for purposes of this deliberation):**

*Utilize reserve police officers for such functions as prisoner transport, traffic direction and control, crowd control, parades, parking enforcement, report writing, supplementing a beat car, surveillance, foot patrol, and other similar functions. Reserve officers will not work a traditional beat alone unless emergency circumstances exist. No reserve officer will be used for the sole purpose of displacing full-time officers. [Emphasis added]*

The City argues that this language, which was agreed to in the last contract, should remain as a practical matter in providing the best possible police services to the citizens of Barberton. It contends that the Union's effort to eliminate the words underlined above is an attempt to have

the City hire more full-time officers. The City avers it does not have the funds “to do that and the amounts paid to the reserve officers for the time worked is a very small portion of the City’s police department budget.” (See p. 3, City’s Pre-hearing Position Statement) The City also argues it needs the flexibility provided by presence of additional reserve officers. These reserve officers perform work that full-time officers “desire not to perform,” and “not one union member has been displaced by any reserve officer,” argues the City. The City also emphasized that full-time bargaining unit members have not lost any work as a result of having reserve officers work.

**The Union proposes current language with the single exception of the deletion of the phrase “supplementing a beat car.”** This proposed change was not what the Union proposed in fact finding and it was not what was awarded by the fact finder. As opposed to what it had proposed and was awarded in fact finding, the Union, following an attempt at mediation, modified its position in this matter and agreed to maintain the language that refers to “control” following the words “traffic direction” and to maintaining the words “crowd control.” Its position zeroes in on what it believes is to be specific language that the City has misinterpreted and misapplied since it was placed in the Agreement three years ago. The Union emphasizes the fact finder’s conclusion that “greater precision in specifying the duties to be assigned to reserve officers is warranted.” Moreover, the OPBA highlights the bargaining history of Article 1.3, which it avers supports its position that the Chief of Police has been utilizing reserve officers in a manner that undermines the intent of Article 1.3 to have the bargaining unit be the exclusive provider of routine patrol services in the City.

## **Discussion**

In her deliberation Fact finder Johnson states, “Except for opinion testimony, nothing in the evidence submitted demonstrates to this fact-finder that the interests and welfare of the public have been better served by the law enforcement capabilities of reserve officers.” (See p. 4, Fact-finder’s report) While the testimony in the conciliation hearing was largely based upon opinion rather than any other form of evidence, as it apparently was in the fact-finding hearing, the conciliator found that the testimony of the City’s witnesses, and in particular the testimony of Lt. Chris White and Chief Vincent Morber to be persuasive regarding two out of the three parts

of the language that were originally in contention in fact-finding, but were not present in conciliation. Lt. White's and Chief Morber's description of the use of reserve officers in "traffic direction and control" and in "crowd control" did not appear to be inconsistent with the introductory statement of Section 1.3 of Article 1 that states, "The City recognizes that the bargaining unit shall be the exclusive provider of routine patrol services in the City of Barberton." Lt. White testified as to the important supportive roll of reserve officers during the Labor Day holiday in terms of traffic direction and control and in having reserve officers serve along with bargaining unit officers in the City act as an additional "...visible deterrent to crime" in crowd control activity. Chief Morber specifically identified several activities, such as the Mum Fest, the Cherry Blossom Festival and Independence Day Fireworks, where reserve officers provided tangible assistance in crowd control and traffic management. The reason these sections of the agreement that were formerly sought to be removed by the Union are mentioned is because in terms of clarity of meaning they stand in contrast to the wording that remains in contention and is before the conciliator. The operational meaning of "traffic direction and control" and "crowd control" as it applies to the duties assigned to reserve officers is far more discernable than is the meaning of the term "supplementing a beat car" This is where the Union contends the intent of this provision has been misapplied by the Department and has been a source of considerable friction between the parties during the last three (3) years. With specific regard to that language the conciliator concurs with the fact-finder when she states,

*"...undisputed contractual language upon which the parties have bargained requires that "routine police patrol service" is exclusively unit work....any language which creates an ambiguity or a variance is properly addressed and corrected through bargaining."*

The testimony of witness Rob Mingle and the evidence provided by the Union, and in particular the Union's presentation of the history of negotiations over Article 1, supports its contention that the phrase "supplementing a beat car" is at best unclear as to its intent and agreed upon application. In the opinion of the conciliator, maintaining wording in an agreement that is equivocal as to its applicability to an important function that is policing is more harmful than helpful to the parties' collective bargaining relationship.



Fact-finding and Conciliation are an extension of the bargaining process and it is incumbent upon neutrals to provide parties to a collective bargaining agreement with responsible and efficacious recommendations to resolve disputes. With granting the Union's position, the parties are advised to take a step back and in absence of a generalized phrase that has proven to be very divisive to attempt to agree upon additional discernable duties that truly supplement the work of full-time officers. During the hearing such activity as ferrying cars for needed maintenance, transporting prisoners, and picking up meals was testified to by witnesses for the City, and these may represent a good starting point for future understandings.

### **Determination**

**The position of the Union (as modified prior to the conciliation hearing) is awarded. The phrase, "supplementing a beat car" shall be removed from Article 1, Section 1.3 (3).**

**Article 1, Section 1.3 (3) shall read as follows:**

**Utilize reserve police officers for such functions as prisoner transport, traffic direction and control, crowd control, parades, parking enforcement, report writing, surveillance, foot patrol, and other similar functions. Reserve officers will not work a traditional beat alone unless emergency circumstances exist. No reserve officer will be used for the sole purpose of displacing full-time officers.**

### **Issue 2. Article 17 Wages**

The Union proposes what was recommended by the fact-finder; a 2% increase each year of the Agreement.

#### **Section 17.1 Hourly Rates**

**Bargaining unit members shall receive wages as provided in the following schedule. Wage rates shall be increased by 2% on January 1, 2014; 2% on January 1, 2015, and 2% on January 1, 2016.**

It argues that although it still believes that its position in fact-finding of 2.5% each year is justified, it is willing to accept the same wage increases that were negotiated with the Firefighters bargaining unit. Additionally, the OPBA does not oppose the implementation of the B.E.A.T. program (as modified by the parties prior to the start of the conciliation hearing to include "make up" testing for someone who may not be physically able to take the test at a certain time) however its wage proposal is not coupled to the implementation of the B.E.A.T.

The City proposes wage increases as follows:

**A raise of 2% as of January 1, 2014, a 1.5% wage increase on January 1, 2015, and a 2% wage increase on January 1, 2016, coupled with the implementation of the B.E.A.T. program.**

The City argues that the fact-finder misstated its position in fact-finding as proposing a 2% increase each year of the Agreement. While this may be a fact, this assertion was not substantiated with additional evidence. The City contends that although the Firefighter bargaining unit received 2% increases each year of their recently settled agreement, the implementation of the B.E.A.T. program in conjunction with its 1.5% offer in the second year of the Agreement would be exceeded monetarily if bargaining unit employees took advantage of the incentives offered in the B.E.A.T. program. The City also avers that its above stated position is consistent with average wage settlements of 1.66% in 2013 (SERB data). In addition, the City asserts that participation in the BEAT program would be beneficial to the health of each bargaining unit member, but it would provide the citizens of Barberton with a more effective police force.

### **Discussion:**

Internal comparable data is significant in assessing the value of one party's position over another. The Firefighter settlement of 2% each year of the Agreement is a persuasive fact, as is the recommendation of the fact-finder. It is common for safety forces to track each other in terms of wage increases and overall compensation. Moreover, it is noted that the Firefighter's bargaining unit was not offered the B.E.A.T. program as a condition for negotiating the level of

their pay raises. While it is certainly reasonable and logical for a police department to require police officers to meet job related physical fitness standards in order to carry out their duties, the concern this conciliator has for directly tying monetary incentives to a reduced wage increase are twofold. First, the B.E.A.T. incentive does not equate to a wage increase in terms of its ongoing value for matters such as pension, overtime, and future wage increases. Secondly, and possibly of greater significance is the possibility of the program's vulnerability to legal challenges. The conciliator is aware that employer instituted physical fitness and agility testing has been the subject of legal challenges based upon Title VII, the ADEA, and the ADA. Recently in July of 2014 in New Jersey and in Pennsylvania the NYPBA and the U.S. Justice Department respectively filed suits claiming physical fitness standards violate employee's rights under Title VII. That is not to say that the B.E.A.T. program, which was not in contention as to content and mechanics, would be challenged, yet if it were the bargaining unit would have made a bad bargain by exchanging a reduced salary increase that was consistent with that received by the other safety unit (Firefighters) for a wage incentive that maybe disrupted or suspended by the legal action of a single person. It is also recognized the a 2% increase currently represents an increasingly common settlement, particularly among bargaining units that have received subpar or no salary increases during the last several years in Ohio.

## **Determination**

**The position of the Union is awarded.**

### **Section 17.1 Hourly Rates**

**Bargaining unit members shall receive wages as provided in the following schedule. Wage rates shall be increased by 2% on January 1, 2014; 2% on January 1, 2015, and 2% on January 1, 2016.**

**B.E.A.T. The City may implement the B.E.A.T. program at its discretion and as agreed to by the Union, but for the length of the Agreement it is not tied to the wage increases provided above.**

**TENTATIVE AGREEMENT**

Any tentative agreements reached by the parties as well as any current language that is not changed or not addressed above shall be considered to be recommended in the successor Collective Bargaining Agreement.

The conciliator respectfully submits the above determinations to the parties this \_\_\_\_ day of October 2014 in Portage County, Ohio.

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Robert G. Stein, Conciliator