

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

CONCILIATION AWARD

March 11, 2016

In the Matter of:

City of Delaware )

and )

Delaware Fire Fighters Association, )  
IAFF Local 606 )

Case No. 2015-MED-01-0004

APPEARANCES

For the City:

Darren Shulman, City Attorney  
Jonathan J. Downs, Labor Counsel  
John L. Donahue, Fire Chief

For the Union:

Kevin Rader, Consultant  
Jim Oberle, President  
Joseph Murphy, Member  
Jarrod Lilly, Member  
Daniel Lobdell, Member

Conciliator:

Nels E. Nelson

## BACKGROUND

The instant case involves the City of Delaware and the Delaware Fire Fighters Association, IAFF Local 606. The city is a charter city and is the county seat for Delaware County. It has a population of approximately 35,000 and a 2012-2013 median household income of \$56,963 compared to \$48,308 in Ohio. The union represents full-time fire department employees who hold the rank of Fire Fighter, Lieutenant, and Captain, excluding the Fire Chief and the Management Captain. The bargaining unit includes approximately 54 members.

The parties are negotiating the successor agreement to the one which expired on March 31, 2015. They met with a State Employment Relations Board mediator on three occasions but no agreement was reached. At that point, impasse was declared and Sandra Mandel Furman was appointed as the Fact Finder. She engaged in extensive mediation and conducted two full days of hearing. On November 19, 2015, the Fact Finder issued her report and recommendations for 12 unresolved issues. One or both of the parties rejected her recommendations and the dispute proceeded to conciliation.

The Conciliator was notified of his selection on December 22, 2015. He conducted a hearing on February 8-9, 2016, and attempted to mediate the 14 unresolved issues. Six of the issues were resolved but no overall settlement was possible. The parties agreed that they wanted the opportunity to submit revised final offers.

On February 22, 2016, the Conciliator received the revised final offers from the parties. One or both of the parties provided revised offers for four of the eight unresolved issues. In addition, the parties indicated that they wished to attempt to resolve two of the issues. However, on March 4, 2016, the union informed the Conciliator that the parties were unable to reach an agreement on either issue.

The Conciliator's selection between the parties' final offers is based upon the criteria set forth in Section 4117.14(G)(7) of the Ohio Revised Code. They are:

- (a) Past collectively bargained agreements, if any, between the parties;
- (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (c) The interest and welfare of the public, and 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;
- (d) The lawful authority of the public employer;
- (e) The stipulations of the parties;
- (f) 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, fact-finding, or other impasse resolution procedures in the public service or in private employment.

## ISSUES

The parties submitted eight issues to the Conciliator. For each issue the Conciliator summarizes the arguments and evidence presented by the parties and offers his analysis of the issue. He then provides a brief rationale explaining his final-offer selection and sets forth the contract language submitted by the prevailing party.

### 1) Article 14 - Continuation of Existing Benefits and Changes of

Agreement - The current contract requires the continuation of past practices that "have existed for a reasonably long time, have occurred repeatedly, have been clear and consistent, and have been known to the city and the Local." It also requires the city and the union to "strive on a

continual basis to reduce all past practices to writing.” The city seeks to eliminate Article 14 and the union proposes to retain it.

City Position - The city presents several arguments in support of its position. It reports that the union cited Article 14 and no other article in 20 of the 55 grievances it filed during the term of the current agreement. The city complains that processing these grievances took substantial time and resulted in significant costs.

The city charges that “the continued abuse of the past practice clause prevents the city from making changes to adapt to changing conditions and control costs.” (City Pre-Hearing Statement, page 34)

The city asserts that among Concord, Genoa, Lancaster, Liberty Township, Marysville, Newark, Norwich, Upper Arlington, Violet Township, Westerville, and Whitehall, only Lancaster has a past practice clause. (City Exhibit 16)

The city charges that the clause should be dropped because the union failed to meet its obligation to compile a list of past practices.

Union Position - The union argues that Columbus, Franklin Township, and Pleasant Township have provisions in their contracts similar to Article 14; that while Marysville does not have a past practice provision in its contract, in a 2013 fact-finding report, Fact Finder Mitchell Goldberg stated that Marysville is no longer comparable to Delaware; and that the city shares the responsibility for the parties’ failure to develop a list of past practices.

Analysis - The Conciliator selects the union’s final offer. First, while some nearby jurisdictions do not have provisions such as Article 14 in their contracts, other jurisdictions do. Second, although the union may have cited Article 14 in many of the grievances it filed during the term of the agreement, this does not justify the removal of the provision from the contract.

Third, as the union pointed out, the responsibility for developing a list of past practices was shared by the city and the union. Fourth, as the Fact Finder noted, even absent the language of Article 14, the union will still be able to argue a past practice in appropriate cases pursuant to long-standing arbitrable principles. Finally, the first paragraph of Article 14, which serves to protect past practices has been included in the parties' collective bargaining agreement since 1985. The city was unable to show that it should now be removed from the contract.

Award - The Conciliator awards the current contract language.

2) Article 16 - Wages, Section 1 - Pay Ranges and Rates - The current contract provides for top salaries of \$67,489.81 for Firefighters; \$70,864.30 for Firefighter/Paramedics; \$78,588.51 for Lieutenants; and \$87,154.65 for Captains.<sup>1</sup> The union demands 2.25% wage increases effective April 1 of 2015, 2016, and 2017. The city offers 2% wage increases effective on the same dates.

Union Position - The union argues that its wage offer should be selected. It points out that non-bargaining unit employees received 3% wage increases in 2015. The union notes that between 2015 and 2017 Columbus Fire Fighters are scheduled to receive wage increases of 3.5%, 3.5%, and 3%. It adds that in 2016, Firefighter/Paramedics in Liberty Township earned \$79,288 and \$81,053 in Westerville.

City Position - The city argues that its proposal is supported by external comparisons. It points out that the State Employment Relations Board's Annual Wage Settlement Report shows that for 2012-2014 Firefighters in the Columbus region received wage increases of 1.11%, 1.64%, and 1.88% and 1.21%, 1.66%, and 1.86% in Ohio. The city notes that between 2014 and

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<sup>1</sup> These salaries include the 4% premium for employees on a 40-hour schedule and the 5% premium for paramedics.

2016 Marysville wages rose by 1%, 1.4%, and 2%. It adds that in 2014 Marysville Firefighter/Paramedics earned \$66,712 compared to \$70,864 in Delaware.

The city contends that internal comparisons also support its position. It states that its proposed 6% wage increase over three years matches the increases given to the FOP and the AFSCME Technicians. The city claims that the “to the extent other employee groups got higher wage increases, those groups not only had wage freezes, but also provided contractual ‘give backs’ to the city in exchange for additional wage increases.” (City Pre-Hearing Statement, page 5)

The city maintains that while the difference in the wage offers may seem small, the impact over the life of the agreement is substantial. It observes that the two FOP bargaining units would likely have to be granted the same wage increase as the Firefighters so that the cost of the union’s proposal would be more than \$1.6 million. (Ibid.)

Analysis - The Conciliator selects the city’s final offer. First, the city’s wage offer produces a significant increase in compensation over the term of the agreement. Depending on the work schedule, it results in the top rate reaching \$75,201.71 or \$76,621.27 for a Firefighter/Paramedic; \$83,398.89 or \$86,734.62 for a Lieutenant, and \$92,489.16 or \$96,188.84 for a Captain.

Second, the city’s proposal is generally consistent with wage increases in the area and around Ohio. While the wage increases in Columbus were substantially larger, they no doubt reflect particular circumstances. In any event, it is not customary to compare the wages of a city of 35,000 with one of 789,000.

Third, the Conciliator agrees with the Fact Finder that internal comparisons support the city’s wage offer. She pointed out that while the FOP unit got 3% wage increases in 2015, they

got 1% percent increases in 2014. In addition, the Fact Finder noted that the AFSCME Technicians received a 2% wage increase in 2015.

Award - The Conciliator awards the following contract language.

For the dates specified below, the new pay rates are effective for the pay period starting on the date included in the table. Pay rates reflect a 2% increase in year one, a 2% increase in year two and a 2% increase in year three.

The differential between ranks shall be as follows:

1. The Firefighter/Paramedic pay shall be 5% above Firefighter pay;
2. 1<sup>st</sup> step Lieutenant pay shall be 2.5% above top step Firefighter/Paramedic;
3. 2nd step Lieutenant pay shall be 6.7% above top step Firefighter/Paramedic;
4. Top step Lieutenant shall be 10.9% above top step Firefighter/Paramedic;
5. 1st step Captain pay shall be 2.5% above top step Lieutenant;
6. 2nd step Captain pay shall be 6.7 % above top step Lieutenant;
7. Top step Captain shall be 10.9% above top step Lieutenant;

<b>Firefighter</b>					
<b>Pay Steps</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
<b>April 8, 2015</b>					
Hourly (40)	\$26.4138	\$28.1514	\$30.1222	\$31.7199	\$33.0959
Hourly (50)	\$21.1310	\$22.5211	\$24.0978	\$25.3759	\$26.4768
<b>Annual</b>	<b>\$54,940.69</b>	<b>\$58,554.83</b>	<b>\$62,654.30</b>	<b>\$65,977.25</b>	<b>\$68,839.56</b>
(40) +4% Shift Premium	\$27.4704	\$29.2774	\$31.3271	\$32.9887	\$34.4198
<b>Annual (40) +4% Shift Premium</b>	<b>\$57,138.37</b>	<b>\$60,897.08</b>	<b>\$65,160.41</b>	<b>\$68,616.40</b>	<b>\$71,593.14</b>
<b>April 6, 2016</b>					
Hourly (40)	\$26.9421	\$28.7144	\$30.7247	\$32.3543	\$33.7579
Hourly (50)	\$21.5537	\$22.9715	\$24.5798	\$25.8834	\$27.0063
<b>Annual</b>	<b>\$56,039.50</b>	<b>\$59,725.93</b>	<b>\$63,907.38</b>	<b>\$67,296.80</b>	<b>\$70,216.35</b>
(40) + 4% Shift Premium	\$28.0198	\$29.8630	\$31.9537	\$33.6484	\$35.1082
<b>Annual (40) + 4% Shift Premium</b>	<b>\$58,281.14</b>	<b>\$62,115.02</b>	<b>\$66,463.62</b>	<b>\$69,988.72</b>	<b>\$73,025.00</b>
<b>April 5, 2017</b>					
Hourly (40)	\$27.4809	\$29.2887	\$31.3392	\$33.0013	\$34.4330
Hourly (50)	\$21.9847	\$23.4309	\$25.0714	\$26.4011	\$27.5464
<b>Annual</b>	<b>\$57,160.29</b>	<b>\$60,920.45</b>	<b>\$65,185.53</b>	<b>\$68,642.73</b>	<b>\$71,620.67</b>
(40)+ 4% Shift Premium	\$28.5802	\$30.4603	\$32.5927	\$34.3214	\$35.8103
<b>Annual (40) + 4% Shift Premium</b>	<b>\$59,446.76</b>	<b>\$63,357.32</b>	<b>\$67,792.89</b>	<b>\$71,388.50</b>	<b>\$74,485.50</b>

<b>Firefighter Paramedic</b>					
<b>Pay Steps</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
<b>April 8, 2015</b>					

Hourly (40)	\$27.7345	\$29.5590	\$31.6283	\$33.3059	\$34.7507
Hourly (42)	\$26.4238	\$28.1514	\$30.1223	\$31.7198	\$33.0959
Hourly (50)	\$22.1876	\$23.6471	\$25.3027	\$26.6447	\$27.8006
<b>Annual</b>	<b>\$57,687.72</b>	<b>\$61,482.58</b>	<b>\$65,787.01</b>	<b>\$69,276.11</b>	<b>\$72,281.53</b>
<b>April 6, 2016</b>					
Hourly (40)	\$28.2892	\$30.1501	\$32.2609	\$33.9720	\$35.4458
Hourly (42)	\$26.9421	\$28.7144	\$30.7247	\$32.3542	\$33.7579
Hourly (50)	\$22.6313	\$24.1201	\$25.8088	\$27.1776	\$28.3566
<b>Annual</b>	<b>\$58,841.48</b>	<b>\$62,712.23</b>	<b>\$67,102.75</b>	<b>\$70,661.64</b>	<b>\$73,727.16</b>
Hourly (42) + \$0.65 Shift Premium	\$27.5921	\$29.3644	\$31.3747	\$33.0042	\$34.4079
<b>Annual (42) + \$0.65 Shift Premium</b>	<b>\$60,261.14</b>	<b>\$64,131.84</b>	<b>\$68,522.34</b>	<b>\$72,081.17</b>	<b>\$75,146.85</b>
<b>April 5, 2017</b>					
Hourly (40)	\$28.8550	\$30.7531	\$32.9061	\$34.6514	\$36.1547
Hourly (42)	\$27.4809	\$29.2887	\$31.3392	\$33.0013	\$34.4330
Hourly (50)	\$23.0840	\$24.6025	\$26.3249	\$27.7211	\$28.9237
<b>Annual</b>	<b>\$60,018.31</b>	<b>\$63,966.47</b>	<b>\$68,444.81</b>	<b>\$72,074.87</b>	<b>\$75,201.71</b>
Hourly (42) + \$0.65 Shift Premium	\$28.1309	\$29.9387	\$31.9892	\$33.6513	\$35.083
<b>Annual (42) + \$0.65 Shift Premium</b>	<b>\$61,437.88</b>	<b>\$65,386.12</b>	<b>\$69,864.41</b>	<b>\$73,494.43</b>	<b>\$76,621.27</b>

<b>Lieutenant</b>			
<b>Pay Steps</b>	<b>1</b>	<b>2</b>	<b>3</b>
<b>April 8, 2015</b>			
Hourly (40)	\$35.6195	\$37.0790	\$38.5386
Hourly (50)	\$28.4956	\$29.6632	\$30.8309
<b>Annual</b>	<b>\$74,088.66</b>	<b>\$77,124.40</b>	<b>\$80,160.41</b>
Hourly (40) + 4% Shift Premium	\$37.0444	\$38.5622	\$40.0802
<b>Annual (40) +4% Shift Premium</b>	<b>\$77,052.27</b>	<b>\$80,209.42</b>	<b>\$83,366.79</b>
<b>April 6, 2016</b>			
Hourly (40)	\$36.3319	\$37.8206	\$39.3093
Hourly (50)	\$29.0656	\$30.2565	\$31.4475
<b>Annual</b>	<b>\$75,570.43</b>	<b>\$78,666.89</b>	<b>\$81,763.62</b>
Hourly (40) + 4% Shift Premium	\$37.7852	\$39.3334	\$40.8817
<b>Annual (40) +4% Shift Premium</b>	<b>\$78,593.19</b>	<b>\$81,813.57</b>	<b>\$85,033.94</b>
<b>April 5, 2017</b>			
Hourly (40)	\$37.0586	\$38.5770	\$40.0955
Hourly (50)	\$29.6469	\$30.8616	\$32.0765
<b>Annual</b>	<b>\$77,081.84</b>	<b>\$80,240.23</b>	<b>\$83,398.89</b>

Hourly (40) +4% Shift Premium	\$38.5409	\$40.1201	\$41.6993
<b>Annual (40) +4% Shift Premium</b>	<b>\$80,165.06</b>	<b>\$83,449.84</b>	<b>\$86,734.62</b>

<b>Captain</b>			
<b>Pay Steps</b>	<b>1</b>	<b>2</b>	<b>3</b>
<b>April 8, 2015</b>			
Hourly (40)	\$39.5021	\$41.1207	\$42.7393
Hourly (50)	\$31.6016	\$32.8965	\$34.1914
<b>Annual</b>	<b>\$82,164.26</b>	<b>\$85,530.98</b>	<b>\$88,897.69</b>
Hourly (40) + 4% Shift Premium	\$41.0821	\$42.7655	\$44.4488
<b>Annual (40) +4% Shift Premium</b>	<b>\$85,450.83</b>	<b>\$88,952.32</b>	<b>\$92,453.60</b>
<b>April 6, 2016</b>			
Hourly (40)	\$40.2921	\$41.9431	\$43.5941
Hourly (50)	\$32.2337	\$33.5545	\$34.8752
<b>Annual</b>	<b>\$83,807.55</b>	<b>\$87,241.60</b>	<b>\$90,675.65</b>
Hourly (40) + 4% Shift Premium	\$41.9038	\$43.6208	\$45.3379
<b>Annual (40) +4% Shift Premium</b>	<b>\$87,159.85</b>	<b>\$90,731.32</b>	<b>\$94,302.78</b>
<b>April 5, 2017</b>			
Hourly (40)	\$41.0979	\$42.7820	\$44.4660
Hourly (50)	\$32.8783	\$34.2255	\$35.5728
<b>Annual</b>	<b>\$85,483.70</b>	<b>\$88,986.43</b>	<b>\$92,489.16</b>
Hourly (40) + 4% Shift Premium	\$42.7419	\$44.4932	\$46.2446
<b>Annual (40) +4% Shift Premium</b>	<b>\$88,903.05</b>	<b>\$92,545.94</b>	<b>\$96,188.84</b>

3) Article 16 - Wages, Section 16.3 - Forty-Hour Employees - The current contract provision is titled “40-Hour Employees.” It provides that 40-hour employees are to receive an additional 4% of their base salary, which is to be included in the wage tables shown in Section 16.1. The provision also states that employees temporarily assigned to a 40-hour schedule are not entitled to the 4% differential.

The union’s initial final offer called for a number of changes. It proposed the creation of 4.2% differential for employees on a 42-hour schedule. The union also sought to restrict

temporary assignments to another shift to no more than two weeks except for light duty, new employee orientation, and “other exigent management needs.”

The city’s initial final offer also proposed a number of changes. It sought to change the title of the section to “Shift Premiums;” to change the term “base salary” to “regular hourly rate;” to add “training” to the exceptions; to provide a \$.65 per hour premium for employees on a 42-hour schedule; to make the premium effective April 6, 2016; to limit the premium to hours actually worked and approved time off; and to exclude the premium from hours cashed out annually or upon resignation, retirement, or dismissal.

At the conciliation hearing, the parties agreed to change the title of the section to “Shift Premiums;” to change “base salary” to regular hourly rate;” and to limit temporary assignments to 14 days except for “light duty, orientation of new employees, and initial training to secure paramedic certification.”

After the conciliation hearing, both parties submitted revised final offers. The union proposed a \$.65 per hour premium. The city’s revised final offer dropped its demand to apply the premium only to hours actually worked or approved time off.

The revised offers and the agreements reached at the conciliation hearing leave the Conciliator with two questions. The first question is whether the premium should apply when employees cash out accrued time. The second question is the effective date of the agreed-upon \$.65 per hour premium for employees on a 42-hour schedule.

Union Position - The union argues that the \$.65 per hour shift premium should be effective April 1, 2015. It states that the agreed-upon ground rules, which were executed on April 6, 2015, provide that “the contract may be effective, retroactive if need be, to April 1, 2015, the restriction on a conciliator imposed by R.C. 4117.14 to make an award effective this fiscal year

being expressly waived.” The union complains that the city now claims that the agreed-upon shift premium should not be retroactive.

City Position - The city argues that the shift premium should be effective on April 6, 2016. It stated at the conciliation hearing that “a condition of its offer [for a shift premium] is no retroactivity.”

Analysis - The Conciliator selects the union’s final offer. First, he finds no basis to exclude the shift premium from an employee’s cash out of hours annually or at separation from the city. Nothing in the Fact Fighter’s report or the record suggests that this restriction was proposed prior to conciliation. In addition, employees represented by the FOP and the other unions do not have their shift premiums excluded from their annual cash-outs or their cash-outs when they leave city employment.

Second, the Conciliator believes that the shift premium should be retroactive to April 1, 2015. The agreed-upon ground rules allow the Conciliator to make economic provisions retroactive and, in fact, may suggest that he should do so. Furthermore, the Fact Finder’s report does not indicate that the city was opposed to making the premium retroactive and nothing in the record at conciliation suggests that prior to reaching conciliation, the city was opposed to making a shift premium retroactive.

Award - The Conciliator awards the following contract language.

Section 3. Shift Differential.

Forty-hour employees that are not receiving the medic differential will receive an additional four percent (4%) of their base salary as established above. This additional amount is included in the wage rates above. Employees temporarily assigned to a 40-hour work week are not eligible for the 4% differential.

Forty-two hour employees will receive an additional shift differential of sixty-five (\$0.65) cents per hour as established in the wage rates above.

No member may be involuntarily assigned to another shift for a temporary assignment in excess of two (2) weeks absent the following circumstances: light duty, orientation of new employees, and initial paramedic certification training.

4) Article 18 - Wages, Section 18.3 - Overtime Policy - The current contract states that it is the city's policy is to avoid overtime except when absolutely necessary and that it will not compensate Firefighters for overtime without the advance authorization by the appropriate supervisor, except in an emergency where authorization may be granted after-the-fact.

The union adopted the Fact Finder's recommendation as its final offer. She recommended that overtime be administered in accordance with SOP 1.1.41, dated August 1, 2008, and amended April 27, 2014. This policy governs the approval of overtime, limits the number of consecutive hours of work, requires the use of an Overtime Worksheet for filing openings in the daily schedule, provides for the maintenance of an Overtime Worksheet, establishes a Mandatory Overtime List, and includes procedures for limited and general recalls. The union's offer adds that it will engage in "good faith bargaining" on "an occasional, limited basis" when it is necessary to waive the provisions of the overtime policy for the "smooth [and] effective provision of services to the public." The city's final offer consists of the current contract language.

Union Position - The union argues that its final offer ought to be selected. It points out that the Fact Finder said that "it is more usual, useful and predictable for both parties to have overtime language referenced specifically in the CBA." (Fact Finder's Report, page 10) The union notes that she added that "the union stated a legitimate concern that absent cba language addressing such a term involving wages and hours that it would be at a constant disadvantage in

terms of notice of its obligations and rights [and that] ... it is [not] at all clear that any recourse exists for improper/alleged improper application of a SOP.” (Ibid.)

The union contends that overtime is an appropriate subject for bargaining. It reports that overtime affects wages and hours. The union observes that the Fact Finder stated that “decades of case law enforce [the obligation to bargain].” (Fact Finder’s Report, page 11)

The union maintains that its proposal benefits both parties. It reports that the Fact Finder stated that “the CBA is a mutually acceptable reference document outlining the means/methods of overtime assignment that is binding [and] provides guidance and stability.” (Fact Finder’s Report, page 11) The union observes that the Fact Finder held that “management’s concerns are implicitly addressed as it wrote the SOP.” (Ibid)

City Position - The city opposes the union’s demand to incorporate SOP 1.1.41 in the collective bargaining agreement. It complains that the Fact Finder’s recommendation to do so “stripped [it] of a long-held management right, rendering the entire concept of a SOP useless.” (City Pre-Hearing Statement, page 16) The city claims that “locking down an SOP ... interferes with the right to ‘make a reasonable rules to regulate the workforce and to establish and amend personnel policies and procedures relating to any matter which is not set forth in this agreement.’ ” (Ibid.)

The city rejects the union’s claim, which was accepted by the Fact Finder, that the union would have no way to challenge decisions related to overtime unless the SOP was incorporated in the collective bargaining agreement. It states that “it is absolutely clear that work rules and directives are grievable, and the Union has consistently exercised this right.” (Ibid.) The city observes that Article 12 provides that “any charge by a member that a work rule, or Department

Directive, is in violation of this agreement or has not been applied or interpreted uniformly to all members, shall be a proper subject for a grievance.”

The city challenges the Fact Finder’s suggestion that many of the union’s grievances relate to overtime. It asserts that 49 of 55 grievances filed under the current contract had nothing to do with overtime. The city adds that the fact that some of the grievances relate to overtime, contradicts the union’s claim that decisions regarding overtime cannot be challenged without a reference to the SOP in the contract.

The city contends that 8 out of 11 comparable departments have no contract provisions governing overtime. It reports that Concord, Genoa, Liberty Township, Marysville, Norwich, Upper Arlington, Westerville, and Whitehall have no overtime provisions while Lancaster, Newark, and Violet Township have such provisions in their contracts. (City Exhibit 30)

Analysis - The Conciliator selects the city’s final offer. First, while the union is correct that an employer must bargain regarding overtime, that obligation does not mean that an employer has to agree to any particular proposal. In the instant case, the employer has met its obligation to bargain but has insisted on retaining the current contract provisions relating to overtime.

Second, the Conciliator rejects the union’s claim that without a reference to SOP 1.1.41 in the contract, it is unable to challenge any decision relating to overtime. Article 12, which deals with work rules and division directives, states that “any charge by a member that a work rule, or Department Directive, is in violation of this Agreement or has not been applied or interpreted uniformly to all members, shall be a proper subject for grievance.” Furthermore, the record indicates that on many occasions the union has grieved the city’s actions relating to overtime.

Third, the union's offer gives the city very limited flexibility in assigning overtime in response to circumstances that are not unlikely to arise during the term of the agreement. The offer states that "on an occasional, limited basis" the city may request a waiver of the provisions of the SOP and that it "agrees to engage in good-faith efforts in such limited circumstances to agree to such waivers."

Finally, the union's offer is not supported by external or internal comparisons. Only 3 of the city's 11 comparable jurisdictions include overtime in their contracts and none of the contract provisions submitted by the union deal with the distribution of overtime or the other issues dealt with in SOP 1.1.41. In addition, the union did not offer any provisions dealing with overtime from the city's contracts with other unions, including the FOP.

Award - The Conciliator awards the current contract language.

5) Article 34 - Contracting Out - The current contract provision includes two sections. Section 1 states that contracting out falls under Article 4, Section C, which states that management's rights include "the right to... subcontract for services except that [it] agrees that it will not subcontract under any circumstances that will result in the layoff of members or the continued layoff of members." Section 2 states that Article 34 "does not restrict the employer from entering into a contract to provide fire protection and EMS service through members of the Bargaining Unit to an entity located outside the jurisdictional boundaries of the employer."

The city and the union submitted the initial and revised final offers. Both parties' initial offers included the current language of Article 34. In addition, the union proposes the following MOU:

The parties agree that if and when the employer has finalized an implementation plan and date for integration of part-time firefighters within the fire department the employer shall provide a ninety day notice to the union. No more than seventy-five

(75) days or less than sixty (60) days prior to the start of the part-time program, the union by filing a Notice to Negotiate for a reopener with the State Employment Relations Board, will meet with the employer to negotiate any articles of this Agreement which may be affected by the hiring of part-time fire fighters or any of the effects of the part-time program on wages, hours, terms and conditions of employment of bargaining unit members.

By meeting with the employer does not constitute acceptance of the part-time program by IAFF Local 606.

The parties submitted revised final offers. Both of their offers included the current contract language for Article 34 but they proposed different MOUs. The union's MOU states:

The City agrees that if a part-time program is implemented that the staffing of part-time employee shall not exceed four (4) per 24-hour period.

This MOU shall remain in effect for all subsequent contracts unless agreed upon by both parties.

This MOU shall not be considered an acceptance of the part-time program by Local 606.

The city's MOU states:

Part-time personnel will not be called in to cover full-time members' unscheduled absences.

This MOU will not be considered a past practice against either party and will not be construed as IAFF acceptance of the part-time program.

Contracting special duty: Special duty paid by an external party will be offered first to full-time personnel.

This MOU will expire on March 31, 2018 unless renewed by both parties.

Union Position - The union's submissions included the following:

- Pages 12-14 of the Fact Finders report, which discusses Article 34, including the MOU which was part of the union's initial final offer. (Union Exhibits, Tab 8, pages 3-5)
- A draft of the "Part-Time Firefighter Program" dated February 2, 2015. Page 5 of the report states that "part-time personnel will be used to fill the existing positions on the apparatus due to full-time leaves [and] the part-

time program is not designed to replace or eliminate full-time positions.” (Union Exhibits, Tab 8, pages 6-26)

- An e-mail dated May 5, 2015 to Kevin Rader, the union’s consultant, regarding an informational meeting where the chief answered questions regarding how the part-time program would work. The chief suggests that at the next bargaining session, the city and union should “pick off some of the easier issues and get some articles locked up.” (Union Exhibits, Tab 8, page 27)
- An excerpt from the Civil Service Rules regarding layoff and job abolishment. (Union Exhibits, Tab 8, page 29)
- An Unfair Labor Practice Charge filed by the union on September 8, 2015, charging that the city failed to bargain over a number of issues, including the use of part-time firefighters. (Union Exhibits, Tab 8, pages 30-33)
- A number of MOUs regarding calling in personnel for overtime. (Union Exhibits, Tab 8, pages 34-37)
- The 2016 operating budget submitted by the City Manager to the Mayor and City Council. Page 43 of the document shows full-time staffing of 61 full-time firefighters in 2015 and 2016 part-time staffing increasing from 17.18 in 2015 to 19.23 in 2016. (Union Exhibits, Tab 8, pages 38-43)
- Internet job postings for part-time firefighters in Delaware. (Union Exhibits, Tab 8, pages 44-45)
- The City Manager’s Proposed Capital Improvement Plan for 2016-2020. Page 66 of the plan refers to \$4 million for the construction of Station 304 and states that “the department will begin implementation of the long discussed Part-Time program [which] ... allows for the backfilling of full-time positions, allowing an increase of on duty staffing.” (Union Exhibits, Tab 8, pages 46-52)
- A portion of a report titled “City of Piqua Fire Department Part-Time Staffing, Evaluation & Elected Officials’ Concerns.” Pages 23-24 of the report includes a summary of the comments of John Donohue, the Delaware Fire Chief, indicating that with part-time staffing in Delaware from 1998 to 2000 “there were issues with discipline, criminal activity, high turnover, and knowledge deficits of the equipment and community, and difficulty in meeting needed training [and that] the quality and commitment of the full-time staff was superior in comparison to ... part-time staff.” (Union Exhibits, Tab 8, pages 53-55)

City Position - The city argues that the union's initial final offer would have prevented it from using part-time firefighters. It points out that part-time firefighters would be permanent city employees "so the [union's] proposed language is inappropriate in an article governing when [the city] can contract with an external entity." (City Pre-Statement, page 18) The city notes that it has offered to include the part-time firefighters in the union but the union responded that IAFF policy prevents it from doing so.

The city contends that the union's position eliminates its right to use part-time employees to supplement its workforce. It states that since 1998 permanent part-time firefighters have been included in City Council's Permanent Part-Time Pay Plan. The city indicates that it has employed part-time firefighters in the past. It observes that two current union members were part-time firefighters in the city before they were hired as full-time firefighters.

The city maintains that the Fact Finder's recommendation supports its position. It reports that she stated that she "does not recommend the creation of language setting up a bar to the hiring of any persons performing the duties of the current unit." (Fact Finder's Report, page 14) The city observes that the Fact Finder indicated that the city has a "fundamental management right to determine the number and classifications needed in the department." (Ibid.)

The city argues that part-time personnel will become critical when it opens a fourth fire station. It claims that without using part-time firefighters to cover vacations and Kelly Days, it will be unable to staff the station.

The city contends that it has made no attempt to reduce the number of full-time personnel. It points out that part-time firefighters are being used to add capacity; that the full-time headcount has not been reduced; and that full-time staffing levels have consistently been above the contractual minimum manning levels. The city notes that "full-time staffing has grown

as the city has grown and continues to be the focal point of [its] Fire/EMS operations.” (City Pre-Hearing Statement, page 19)

The city maintains that the part-time firefighters are used in other fire departments. It points out that the Fact Finder stated that they are employed by American Township (Lima), Marysville, Mount Vernon, West Licking Township, Westerville, and Zanesville,. The city notes that Grandview Heights (City Exhibit 33) and Mentor (City Exhibit 34) also employ part-time firefighters.

Analysis - Integrating part-time firefighters into a full-time fire department involves many issues. The questions include the pay and benefits, training, and proper use of part-time firefighters. Some of the issues are addressed in the city’s final draft of the city’s “Part-Time Firefighter Program,” dated February 2, 2015. (Union Exhibits, Tab 8, pages 6-26) Many of the topics are concerns for both the city and the union.

The parties have had little success in dealing with the issues related to the use of part-time firefighters. As the Fact Finder indicated in her report, the union’s position at fact-finding would have prevented the city from using part-time firefighters. She stated, however, that she would not recommend any language barring the use of part-time employees. (Fact Finder’s Report, pages 12-13 and 14)

The Fact Finder made two recommendations. First, she recommended the retention of Section 1, which states that contracting out falls under Article 4, Section C, which states that management’s rights include “the right to... subcontract for services except that [it] agrees that it will not subcontract under any circumstances that will result in the layoff of members or the continued layoff of members,” and Section 2, which indicates that Article 34 “does not restrict the employer from entering into a contract to provide fire protection and EMS service through

members of the Bargaining Unit to an entity located outside the jurisdictional boundaries of the employer.”

Second, the Fact Finder recommended a MOU, which she suggested the parties had already agreed to, be “adopted as part of the CBA.” (Fact Finder’s Report, page 14, footnote 10)

The MOU states:

Part-time personnel will not be called in to cover full-time members’ unscheduled absences.

This MOU will not be considered a past practice against either party and will not be construed as IAAF acceptance of the part-time program.

Contracted special duty: Special duty paid by an external party will be offered first to full-time personnel.

This MOU will expire on March 31, 2018 unless renewed by both parties.

The Fact Finder’s recommendation for Article 34, however, was rejected along with the rest of her report.

After of the rejection of the fact-finding report and prior to conciliation, the parties made little or no progress in resolving their dispute over the use of part-time firefighters. The union’s initial final offer included a MOU requiring the city to bargain over the impact of the part-time program on wages, hours, and terms and conditions of employment. The city continued to simply propose the retention of Article 34.

When the issues regarding the use of part-time firefighters were not resolved at the conciliation hearing, the parties agreed to submit revised final offers.<sup>2</sup> The union’s revised final offer proposed a MOU limiting the use of part-time firefighters to 4 per 24-hour period and requiring the MOU to remain in effect until the parties agree otherwise. The city’s proposed

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<sup>2</sup> Section 4117-9-06-(E)(4) of the Ohio Administrative Code states that “if ... mediation efforts result in a change in a final offer, a party or parties may, by mutual agreement, submit a revised final offer to the conciliator.”

MOU stated that part-time personnel would not be called to cover full-time members' absences and stated that the MOU would expire on March 31, 2018.<sup>3</sup>

While neither party's final offer adequately addresses the issues related to the implementation of the part-time firefighter program in the city, the Conciliator must select the city's final offer.<sup>4</sup> First, the city's final offer appears to raise no significant problems. It states that part-time personnel will not be used to cover full-time members' unscheduled absences and provides that full-time firefighters are entitled to the first opportunity to fill special duty events paid for by an external party. There is no indication that either of these points is inappropriate or unacceptable to the union.

Second, the city's MOU, which states that the MOU "will not be considered a past practice against either party" and does not indicate that the union's acceptance of the part-time program, is also not a problem. In fact, the union's proposal includes a statement indicating that its MOU "shall not be considered an acceptance of the part-time program by Local 606."

Third, the city's demand that the MOU expire at the termination of the collective bargaining agreement is not unreasonable. As suggested above, there are many aspects of the part-time firefighter program that will need to be addressed by the parties as the program is implemented and during negotiations for a successor agreement. To freeze a single aspect of the program makes little sense.

The union's proposed MOU is problematic. As noted above, it limits the use of part-time firefighters to 4 per 24-hour time period. While this limit may or may not be appropriate, the Conciliator does not have enough information to determine if that is the case and, as indicated

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<sup>3</sup> The city's MOU also stated that the MOU will not "be considered a past practice against either party and will not be construed as IAAF acceptance of the part-time program" and that special duty work paid for by an external party would be offered first to full-time personnel.

<sup>4</sup> The city and the union agreed that Article 34, Sections 1 and 2, should be retained making the competing MOUs the sole issue.

above, it represents only one aspect of the use of part-time firefighters. Furthermore, many factors influence manpower needs and the use of part-time firefighters are likely to change as the fourth station opens and part-time firefighters are integrated into the department. An inflexible limit on the number of part-time firefighters, coupled with the parties' difficulty resolving questions regarding use of part-time firefighters, could be a problem.

The Conciliator recognizes that the conciliation process may have provided little assistance in resolving the parties' disagreements relating to the part-time firefighter program. As the factfinder recognized:

The Union's concerns are obvious: there could be reduced staffing levels in its unit; the part-time employees might have the ability to restrict/limit overtime opportunities; experience in training and safety issues may exist and the mere presence of a part-time staff erodes union security. These concerns are legitimate but must be balanced against management's staffing and public safety concerns, desired service response times and cost control. (Fact Finder's Report, page 13)

The Conciliator urges the parties to continue their discussions to accommodate their competing interests.

Award - The Fact Finder awards the following contract language.

Article 34  
Contracting Out

Section 1. Contracting Out. The City agrees that contracting out shall fall under the provisions of Article 4, Section C of this Agreement.

Section 2. Services Outside City Boundaries. This Article does not restrict the employer from entering into a contract to provide fire protection and EMS service through members of the Bargaining Unit to an entity located outside the jurisdictional boundaries of the employer.

Memorandum of Understanding

Part time personnel will not be called in to cover full-time members' unscheduled absences.

This MOU will not be considered a past practice against either party and will not be construed as IAFF acceptance of the part time program.

Contracted special duty: Special duty paid by an external party will be offered first to full time personnel.

This MOU will expire on March 31, 2018 unless renewed by both parties.

6) Article 39 - Earned Time, Section 5 - Time Off - The current contract allows three bargaining unit members to be off at the same time. It provides that the time off can be in the form of a Kelly Day, pre-scheduled vacation, earned time off, and/or non-pre-scheduled vacation, granted in that order, and permits the chief to approve additional requests. The provision states that no more than two members may use leave in the form of a Kelly Day at the same time unless approved by the chief.

The city and the union submitted initial and revised final offers. The union's initial offer, which was its position at factfinding, was recommended by the Fact Finder. It included separate demands for employees on 40-hour, 42-hour, and 50-hour schedules. At the conciliation hearing, the parties agreed that for 42-hour schedules where up to six were assigned to the shift, one member could take leave and that when more than six were assigned to the shift, two members could take leave. For the 40-hour schedule, up to one-half of the members in a division staffed with more than one member, could take leave with the stipulation that if there were three in the division, two could take leave. The parties also agreed that leave had to be requested in advance but that leave would be approved unless the member requesting the leave was needed to fill an operational position that would otherwise have to be filled using overtime.

Both parties had proposals for employees working a 50-hour schedule. The union's offer allowed two members to be on pre-scheduled vacation, earned time off, and/or non-pre-

scheduled vacation, in that order. The proposal also included a provision allowing the chief to approve additional requests and a restriction that no more than two persons could use Kelly Days at the same time without the permission of the chief. It also indicated that “the intent is that up to four (4) persons may be off on leave: two (2) persons using any eligible non-Kelly Day leave and two persons for Kelly Day leave ... [and] when the 50-hour shift has more than eighteen (18) of assigned members, a third member may request earned leave ... and it shall be granted [and that] there will at that time also be three (3) persons allowed off on a Kelly Day.”

The city’s initial offer was different from the union’s offer in a number of ways. It allowed three members to be off with the stipulation that if there were more than 18 members on a shift, an additional member could be off. The city’s offer also provided that it would allow an additional member to be off provided the leave was requested 30 days in advance and provided the city was able to schedule an additional part-time firefighter. Its proposal deleted the language allowing the chief to approve additional requests for leave and stated that a request for the additional leave could not be cancelled without the approval of the chief.

Both parties submitted revised final offers for members on a 50-hour schedule. The union’s revised offer permits 4 members to be off and provides that when more than 18 members are scheduled, an additional member may be off. It specifies that the requests may be in the form of a Kelly Day, pre-scheduled vacation, earned time off, and/or non-pre-scheduled vacation, in that order. The union’s final offer also specifies that the chief may approve additional leave and states that only two members can be off on a Kelly Day. It also provides that if crew strength is 1 to 9, 1 member is permitted off for each FLSA period; if crew strength is 10 to 18, 2 members can be off on a Kelly Day; and if crew strength is 19 to 27, 3 members can be off.

The city's revised final offer changed two aspects of its initial offer. It dropped the requirement that additional leave, pending the availability of a part-time firefighter, would be granted only when it was requested 30 days in advance and reinserted the sentence permitting the chief to grant additional leave.

Union Position - The union argues that due to staffing issues, members cannot use the leave they are entitled to use. It points out that the 15 members of crew 1 have a total of 9614.60 hours of leave to use, including holidays, vacation, personal leave, and Kelly Days, but a limit of 3 members off means that only 8736.00 hours are available, which results in a shortage of 878.60 hours. (Union Exhibits, Tab 9, page 5) The union notes that the shortage is 730.40 hours for crew 2 and 748.00 hours for crew 3. (Ibid, pages 6-7) It observes that in addition to these shortages, all of the crews have 2340.00 hours of sick leave each year.

The union contends that three examples, with different assumptions about crew strength and average seniority, show that four members must be permitted to be off to allow members to use their leave. It points out that in the first example, where crew strength is assumed to be 15 and average seniority is assumed to be 12.72 years, 3.45 members would have to be permitted off. (Ibid., page 9) The union notes that in example 2, where it assumes a crew size of 17 and an average seniority of 14.99 years, 3.91 members would have to be allowed to be off. (Ibid.) It adds that in example 3, where Kelly days are not included, and crew size is assumed to be 16 and service is assumed to be 9.44 years, 1.54 members would have to be permitted off for holiday, vacation, and personal leave. (Ibid., page 10)

City Position - The city argues that the Fact Finder's recommendation was based on misleading evidence presented by the union and should be disregarded by the Conciliator. It acknowledges that at the fact-finding hearing, union members testified that more leave was

necessary because members were unable to schedule time off and had to forfeit leave. The city claims, however, that “no specifics were provided and no exhibits were introduced to substantiate this claim.” (City Pre-Hearing Statement, page 21) The city adds that because the union had not made any claim regarding the forfeiture of time during negotiations or in mediation, it was unable to respond at the fact-finding hearing, except through the testimony of its witnesses who testified that they did not believe that Fire Department employees have had to forfeit time.

The city contends that allowing an additional member to be off is “problematic.” It states that allowing four members off means a “potential” need to call someone in on overtime every day. The city indicates that given the \$1,656-\$1,990 cost of an overtime shift, the cost to the city would be \$1,855,638 over the life of the contract.<sup>5</sup> (City Exhibit 28)

The city maintains that the members’ conduct contributes to their difficulty in getting time off at the times they wish. It points out that members sometimes schedule time off, which blocks other members from scheduling that day off, and then decide on the day in question that they are not going to take the day off. The city notes, however, that when it proposed requiring a member to cancel scheduled vacation three days in advance so another member could take the day, the union opposed the change.

The city argues that when it agreed to change the provision governing trades of time, it made it easier for members to get time off at their desired times. It reports that in this round of negotiations, it increased the number of firefighters eligible to trade time. The city observes that this will allow members to schedule longer vacations.

The city contends that it has a generous vacation payout benefit that “acts as a safety valve for employees who accumulate leave and do not use it.” (City Pre-Hearing Statement, page

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<sup>5</sup> The city assumes wage increases of 2% per year over the life of the contract.

23) It points out that under Article 25, Section 6, a member can trade up to 3 weeks of vacation for pay.

The city maintains that the chief has ameliorated any problems regarding scheduling leave. It points out that under the contract, he has the authority to grant additional members time off. The city notes that he has done so on 16 occasions from 2014 through June 30, 2015. (City Exhibit 25A)

The city argues that the current contract allows “ample” opportunities to schedule time off. It states that from 2014 through June 30, 2015, there were 76 days when less than three members took leave. (Ibid.) The city indicates that this means that “the issue is not whether there are enough days to take off, but whether sought after days are available.” (City Pre-Hearing Statement, page 23)

The city contends that members have been able to schedule “lengthy” vacations. It reports that from 2015 through the date of the fact-finding hearing, there were 120 occasions when members were able to be off work for eight days or more using Kelly Days, vacation, and trades of time. (City Exhibit 26) The city claims that this number “increases greatly” if sick days are included.

The city maintains that its offer “significantly” increases the number who can be off compared to the current practice and its position at fact-finding. It points out that it has adopted the Fact Finder’s recommendation regarding employees on 40-hour and 42-hour schedules so that they are removed from the overall limit on the number of firefighters who can be off. The city adds that it recognizes that when staffing exceeds 18, additional slots will be necessary so it allows more to be off when that level is reached.

The city maintains that the use of part-time firefighters may solve the problem of staffing gaps. It states that with this in mind, it proposed allowing an additional member to be off if a part-time firefighter can be scheduled to fill the position. The city indicates that this increases the number of employees eligible to take time off without increasing overtime costs.

The city argues that its proposal responds to the union's interests. It points out that its offer increases the number of members who can be off by up to six by allowing up to 6 employees on the 42-hour schedule to be off, up to 4 on the 40-hour schedule, and 1 on the 50-hour schedule. The city notes that its offer means that the union achieves its goal of separating members on the 40-hour and 42-hour schedules from those on the 50-hour schedule.

Analysis - The scheduling of time off for firefighters is always complex. In the instant case, it is made more complicated by the existence of three different work schedules and uncertainties regarding the future use of part-time firefighters. For these reasons, a negotiated agreement is likely to be superior to one awarded or recommended by a neutral.

The parties apparently recognized this fact. After the conciliation hearing, they requested the opportunity to negotiate a settlement of the dispute regarding taking time off. Unfortunately, on March 4, 2016, the union notified the Conciliator that the parties had failed to reach an agreement on either Article 34 or 39.

Given the failure of the parties to resolve the issue, the Conciliator selects the city's final offer for Article 34. First, he rejects the union's argument that members have been unable to use the time off to which they are entitled. The Conciliator believes that it is not a matter of firefighters not being able to get time off but a matter of them not being able to get the time off when they wish -- a problem shared by employees in many lines of work.

This conclusion is supported by the data submitted by the city. It shows that from 2014 through June 30, 2015, there were 76 days when less than three members, the number permitted off, took time off. (City Exhibit 25A) Furthermore, the city's data shows that on 60 occasions, more than three members were allowed to be off. (Ibid.) In any event, the union provided no testimony or evidence to show that any firefighter had been forced to forfeit leave.

Second, the city's final offer increases the number of firefighters who can be off. As demanded by the union, the city agreed to remove the members on 40-hour and 42-hour schedules from the overall limit on the number who can be off. The city's final offer also allows more members to be off as crew size increases.

Third, the city pointed out that members who wish time off at a particular time can trade time with another firefighter. It noted that in negotiations it had agreed to expand the number of firefighters who are able to trade time.

Finally, the use of part-time firefighters should reduce the problem of scheduling time off. The city's final offer provides that if it can schedule a part-time firefighter, an additional member will be allowed off. The city's revised final offer removed the restriction in its initial offer that the member's request for leave had to be submitted 30 days in advance in order to take advantage of this provision.

Award - The Conciliator awards the following contract language.

Section 5. Time Off.

50 hour shift: Three (3) bargaining unit members on the 50-hour shift may request leave and it shall be granted. When more than 18 members are scheduled on a 50-hour shift, an additional member may request leave and it shall be granted. These requests may be in the form of a Kelly Day (Article 18), pre-scheduled vacation (Article 25), and/or earned time (Article 39) and/or non-pre-scheduled vacation, listed in the order of priority. An additional member will be granted requested leave provided the city is able to schedule an additional part-time firefighter to cover the shift. This additional leave request may not be cancelled without approval by the fire

chief. Additional requests may be approved by the fire chief or his designee. These members do not need to show up or be available to work at the beginning of their scheduled shift. No more than two (2) members may use leave in the form of a Kelly Day at the same time, unless approval is granted by the Fire Chief or his designee.

42 hour shift: When up to six members are staffed on the 42-hour shift, one (1) member may request leave and it shall be granted. When more than six members are staffed on a 42-hour shift, two (2) members may request leave and it shall be granted.

40 hour shift: Up to half of the members assigned to a division staffed with more than one (1) member assigned to a 40-hour shift may request leave and it shall be granted as long as the request is submitted prior to the day off requested (rounding down such that if the unit is staffed by three members, two can take off). Requests submitted on the 40-hour shift on the day off requested shall be granted unless the member is needed to backfill an operational position that would otherwise need to be filled by use of overtime.

For all of the above time off requests, additional leave requests may be approved by the Fire Chief or his designee.

7) New Article - Promotion - The current contract has no provision dealing with promotions. The union proposes language establishing minimum qualifications for Lieutenant and Captain, including years of service in the department, certifications, and education. The city's proposal calls for the use of the rules, regulations, and procedures of the Civil Service Commission and states that there will be no changes in them "until the next labor contract occurring after the change." (City Exhibits 27 and 28)

Union Position - The union argues that its final offer should be accepted. It states that the city has changed the requirements for promotion to Lieutenant and Captain by mandating paramedic certification and by increasing the passing score on the civil service exam from 70% to 75%. The union indicates that promotion to Police Sergeant requires two years of service rather than the five years required for promotion to Fire Lieutenant and does not require an Associate's degree and that promotion to Police Captain allows 10 years of experience to be substituted for an Associate's degree.

The union charges that the city improperly opened up the position of Lieutenant to external candidates. It points out that the City Charter states that except for the Chief of Fire and the Chief of Police positions, promotions are to be made from those in the lower ranks. The union claims that the Civil Service Commission's rule that allows the consideration of external candidates conflicts with the City Charter. It adds that the Fire Department has qualified individuals to fill Lieutenants' and Captains' positions.

The union maintains that the city failed to meet its obligation to bargain regarding the requirements for promotion. It points out that it filed an Unfair Labor Practice charge with SERB alleging the city violated Sections 4117.11(A)(1) and (A)(7) of the Ohio Revised Code by failing to bargain with the local union and by failing to preserve the status quo during negotiations. (Union Exhibits, Tab 10, pages 38-41) The union notes that the city also opened the promotion process to external candidates, imposed requirements for promotion beyond the requirements in the City Charter, and failed to bargain the requirement that a member must maintain certification as a Fire Safety Inspector and indicated that it intended to hire part-time firefighters. (Ibid.)

The union argues that other supervisory positions in the city do not require an Associate's degree. It states that those positions include Facility Maintenance Supervisor, Investigator/Diversion Manager (Part-time), Office Supervisor-Finance-Utility Billing, and Office Supervisor-Finance-Income Tax, and Public Service Group Director. (Union Exhibits, Tab 10, pages 53-77)

The union contends that the contracts for 20 comparable jurisdictions support its demand. It reports that in Ashland, Bellefontaine, Columbus, Newark, Mansfield, Marion, Marion Township, Marysville, Norwich Township, Newark, Orange Township, Pleasant Township, Whitehall, and Zanesville promotion is addressed in the collective bargaining agreement. The

union acknowledges that promotion is not included in the contracts in Grandview Heights, Lancaster, Liberty Township, Mount Vernon, Westerville, and Worthington. (Union Exhibits, Tab 10, Pages 72-92)

City Position - The city argues that its final offer ought to be selected. It states that increasing professionalism in the Fire Department is in the best interest of public safety and that its ability to do so must not be arbitrarily limited. The city indicates that “the Fact Finder incorrectly concludes that the inclusion of minimum qualifications in the contract ‘in no way eliminates the use and role of the CSC.’ ” (City Pre-Hearing Statement, page 25) It claims that “the establishment of minimum qualifications for a position is a fundamental responsibility of management.” (Ibid.)

The city contends that the issue of promotion was not properly before the Fact Finder. It points out that the agreed-upon ground rules prohibit submitting new issues. The city notes that while the Fact Finder took note of its objection to the union’s proposal, she did not discuss the merits of its objection.

The city maintains that the Fact Finder relied on misleading information provided by the union. It reports that she stated that the passing score was raised from 70% to 75% and that the qualifications were changed by adding a requirement for an Associate’s degree and Paramedic certification.

The city characterizes the Fact Finder’s recommendations as “overreaching.” It states that she incorporated the entire Civil Service Commission process in the contract. The city observes that the Fact Finder’s recommendation went far beyond the union’s stated concerns and was “unnecessary.”

The city argues that internal comparisons support its position. It emphasizes that “no contract in the city, including the FOP contract, has or has ever had a promotional article.” (City Pre-hearing Statement, page 26)

The city contends that external comparisons also support its proposal. It points out that among Concord, Genoa, Lancaster, Liberty Township, Marysville, Newark, Norwich, Upper Arlington, Violet Township, Westerville, and Whitehall only Concord, Newark, Norwich, and Violet Township, have promotional criteria in their collective bargaining agreements. (City Exhibit 44)

The city challenges the Fact Finder’s statement regarding the union’s external comparisons. It observes that she indicated that 70% of the jurisdictions cited by the union have promotion language in their contracts. The city claims that “had the IAFF provided the actual contracts, the fact-finder would have seen that the examples the Union claimed supported their position did not.” (City Pre-hearing Statement, page 27)

The city maintains that most of the cities offered by the union that have promotional articles are not comparable to Delaware. It points out that they are either townships or are not charter cities. The city notes that only five are charter cities and three of them, Columbus, Marysville, and Whitehall do not support the union’s position. (City’s Pre-Hearing Statement, page 29)

The city charges that the union’s proposal would eliminate long-standing qualifications for promotion. It claims that the criteria at issue have been in place since the Lieutenant’s position was created. (City Exhibit 38) The city asserts that “the omission of these requirements ... was either an oversight on the part of the fact-finder or a decision that is not explained in the report or supported by any evidence.” (City Pre-Hearing Statement, page 30)

The city argues that the union's proposal "conflicts with [the city's] civil service rules and impinges on long-held management rights reserved by it in the contract." (City Pre-Hearing Statement, page 31) It states that the promotion process is governed by the Civil Service Commission established by the City Charter. The city rejects the union's claim that the Civil Service Commission is "strictly an arm of the city." It adds that any concern regarding the civil service process should be brought to the Civil Service Commission.

The city complains that the union's proposal has one particularly egregious provision. It points out that the union's proposal calls for lowering the minimum standards if less than two people are able to pass the promotional exam. It claims that "there is simply no possible benefit to the citizens to reducing standards for the sole purpose of making it easier for current members to be placed in the position." (Ibid.)

The city contends that the union's proposed article is "a clear infringement of the rights reserved to [it] by the Management Rights article." It observes that the management rights clause states that it has the "right to ... promote ... employees [and] ... to determine appropriate job classifications." The city claims that it "has consistently and fairly exercised its authority and established minimum requirements for positions, including promotional positions." (City Pre-Hearing Statement, page 32) The city adds that "no other Union has challenged the criteria or qualifications for positions [or] ... proposed language for their contracts regarding qualifications for positions or the promotional process." (Ibid.)

The city maintains that its language mirrors the language in the Marysville contract. It points out that Marysville was held to be the city the most similar to Delaware by Arbitrator Donald Staudter in City of Delaware and International Association of Firefighters, Local No.

606I; August 7, 2005. (City Exhibit 47) The city notes that its proposal is “more generous” than the contract in Marysville because it delays the effective date of any new requirements.

Analysis - The Conciliator selects the city’s final offer. First, he believes that a neutral should be careful about placing detailed job requirements in a collective bargaining agreement. In the instant case, the union claims that its demand is justified by the fact that the city recently changed the requirements for promotion to Lieutenant and Captain. The city, however, disputes the union’s claim. It further indicates that the union has the opportunity to influence job requirements through the civil service process. In any case, the city has partially addressed the union’s concern about possible changes in promotion requirements by freezing them until after negotiations are completed for the contract to be effective April 1, 2018.

Second, the Conciliator recognizes that while the union has an obvious interest in promotions, the city also has concerns about promotions because of their impact on the quality of public service. With this in mind, the city has negotiated a management rights clause, which gives it the right to “effectively manage the workforce . . . , [and to] determine the appropriate job classifications and personnel by which government operations are conducted.”

Third, external comparisons do not support the union’s demand. The union stated that “promotion was addressed” in the collective bargaining agreements in Ashland, Bellefontaine, Columbus, Mansfield, Marion, Marion Township, Marysville, Newark, Norwich Township, Orange Township, Pleasant Township, Violet Township, Whitehall, and Zanesville. The contracts in Marion and Newark are not unlike the union’s demand in the instant case. However, the contract in Columbus leaves promotion requirements to civil service rules and focuses on appeals and grievances; in Marysville the title of the article submitted by the union includes promotion but the provision deals with vacancies and transfers; in Pleasant Township there are

no details regarding promotional requirements; and in Whitehall the contract only states that the term of a civil service list is two years. The union did not submit the contract language for Ashland, Bellefontaine, Mansfield, Marion Township, Norwich Township, Orange Township, or Zanesville. In addition to this, some of the jurisdictions offered by the union are not comparable because they are located some distance from Delaware or are significantly larger or smaller.

The city's comparable jurisdictions support its position. It stated that among Concord, Genoa, Lancaster, Liberty Township, Marysville, Newark, Norwich, Upper Arlington, Violet Township, Westerville, and Whitehall, only Concord, Newark, Norwich, and Violet Township include promotional criteria in their contracts.

Finally, the record is clear with respect to internal comparisons. None of the city's contracts with its other unions include a promotion provision. It is particularly significant that the city's contract with the FOP does not deal with promotions but instead the FOP and the city have agreed to leave promotions to the Civil Service Commission and civil service rules and regulations.

Award - The Conciliator awards the following contract language.

The City shall use the rules, regulations, and processes of the civil service commission for promotions. However, the parties agree that any additional promotional requirements adopted by the commission shall not take effect until the next labor contract occurring after the change.

8) New Article - Vacancies and Transfers - The current contract has no provision dealing with vacancies and transfers.

The union submitted initial and revised final offers. Its initial final offer called for the city to post a seniority list; defined a vacancy as an opening resulting from a promotion, retirement, or transfer or the creation of a new position; called for the posting of a vacancy for 15 days;

allowed members to request reassignment; required vacancies created by the process to be posted for seven days; prohibited the city from accepting bids before a vacancy was posted; prevented the selection of the successful bidder until conclusion of the bidding period; required vacancies to be filled based on seniority provided minimum qualifications were met; barred successful bidders from bidding on a posted position or requesting a reassignment for one year; and stated that vacancies not filled through the bidding process would be filled by the least senior employee.

The union's revised offer made a number of changes. It reduced the posting period to 10 days; required the city to post only the first position created after the initial vacancy was filled; dropped the language allowing members to request reassignment; indicated that vacancies were to be filled based on seniority unless the skill, ability, and work performance of a less senior bidder was greater; required the Fire Chief to explain in writing why a less senior bidder was deemed to have greater skill, ability, and work performance; prohibited Captains and probationary employees from bidding on vacancies; and required vacancies not filled by the bidding process to be filled by the least senior non-probationary employee assigned to a 50-hour schedule.

The city initially offered a limited proposal related to vacancies and transfers. It proposed adding to Article 3 a definition of "seniority" as "the length of the accumulated service with the fire department" and adding to Article 15 a new Section 9 requiring the chief to post a seniority list, and a new Section 10 requiring the posting of a vacancy for 15 days.

Following the conciliation hearing, the city submitted a revised final offer. It dropped its proposals relating to Articles 3 and 15 and offered a proposal for a new article for vacancies and transfers requiring the chief to maintain a seniority list; stating that the city determines whether a

vacancy exists; requiring vacancies to be posted for 15 days; limiting bidding to “qualified” employees; stating that the vacancies will be filled by “the most qualified based on experience, skill, ability, and work performance;” indicating that “if two or more qualified candidates are relatively equal, the most senior employee shall receive the position;” and specifying that any vacancies created by a bid will be filled at the discretion of the Fire Chief.

Union Position - The union argues that its final offer should be selected. It points out that at factfinding, the city offered no proposal for vacancies and transfers but argued that filling vacancies and transferring employees was a management right. The union notes that the Fact Finder rejected the city’s claim and recommended the language it proposed.

The union contends that a grievance filed by Firefighter Mark Huston supports its position. It points out that on May 19, 2015, he requested a transfer from Fire Prevention, a 40-hour schedule, to suppression, a 50-hour schedule but the chief refused his request and ordered him to maintain his Fire Safety Inspector’s certification. The union charged that the city’s actions violated Article 1, Sections 4 and 6 of the contract.

The union maintains that when the city denied the grievance, the grievant was forced to stay in Fire Prevention. It reports, however, that on October 7, 2015, he was transferred to fire suppression but at the same time, the city warned him that in February it intended to transfer him to the 42-hour schedule.

The union argues that the FOP’s contract with the city supports its position. It points out that Article 29 of the FOP’s agreement states that “members shall select their shift assignment by seniority.” (Union Exhibits, Tab 12, pages 16-17) It acknowledges that the Police Chief can veto a member’s selection but notes that the Chief’s decision cannot be “arbitrary, capricious, or without just cause.” (Ibid. page 17)

The union contends that the city offered it a similar arrangement in SOP 1.1.1. It states that under the SOP, the Chief is to notify Firefighters of vacancies and to incorporate their preferences when assigning staff. The union indicates, however, that pursuant to the SOP, “the Fire Chief will select the person best suited for the position organizationally [but] he may not be one of the personnel who expressed interest.” (Union Exhibits, Tab 12, page 16)

The union maintains that comparisons to other jurisdictions support its demand. It points out that in Jefferson Township employees are assigned to vacant positions based on “rank, seniority, skill, ability, and work performance;” in Columbus assignment to vacant positions is “made on the basis of rank seniority unless the skill, ability, and work performance of the less senior bidder is greater;” in Madison Township seniority prevails for vacancies and transfers “unless the experience, training and skill of the less senior bidder are greater;” in Westerville vacancies are “filled through a seniority bid system;” and in Whitehall vacancies are filled “on the basis of rank seniority.” (Union Exhibits, Tab 12, pages 18-30) The union acknowledges that Upper Arlington’s contract does not refer to seniority in connection with vacancies and transfers.

City Position - The city argued in its pre-hearing statement that the Fact Finder’s recommendation to add a seniority-based bidding system was against the weight of the evidence she cited in her report. It complains that her recommended language “creates a new system without a demonstrated need for the structure.” (City Pre-Hearing Statement, page 35) The city adds that her recommendations “do not take into consideration relevant factors beyond seniority, an arbitrary factor not consistent with the balancing of the skills and experience necessary for optimal performance and service to the public.” (Ibid.)

The city contends that it is important to balance the skill, experience, and knowledge at its three stations and on its three schedules. It claims that the Fact Fighter’s recommended

language “would eliminate [its] ability to maintain the optimal personnel and operational balance.” (City Pre-Hearing Statement, page 36)

The city maintains that the union has not shown a need for change. It states that the union referenced only one grievance in support of its “seniority-only system” for selection to shifts. The city indicates that the union “failed to demonstrate how employees have been harmed by the SOP that has been in place for many years.” (Ibid.) It claims that “the Union’s proposal is another attempt to create impediments to the utilization of the 42-hour shift awarded by Arbitrator Goldberg.” (Ibid.)

The city argues that the Fact Finder’s recommendation is based on a faulty assumption. It states that she wrote that under the SOP, an adversely affected employee has no recourse. The city indicates that under Article 14 “it is absolutely clear that work rules and directives are grievable, and the Union has consistently exercised this right.” (Ibid.)

The city contends that the union’s proposal infringes on its management rights as set forth in Article 4. It points out that under this provision, it has the right to “effectively manage the workforce.” The city notes that part of this right “is giving the Chief the ability to select the best employee for the position.” (City Pre-Hearing Statement, page 38) It claims that its management rights were upheld by Arbitrator Donald Staudter in City of Delaware and IAAF, Local No. 606; August 17, 2005.

The city maintains that its external comparisons support its position. It states that its survey of Concord, Genoa, Lancaster, Liberty Township, Marysville, Newark, Norwich, Upper Arlington, Violet Township, Westerville, and Whitehall, found that only 3 of 11 departments had a shift bid system. (City Exhibit 54)

The city argues that the Marysville and Grandview Heights contracts support its position. It points out that the Marysville contract states that “shift assignments shall be made by the Fire Chief.” (City Exhibit 56) The city notes that the Grandview Heights agreement indicates that hours of work are “subject to change as the City reasonably determines in its discretion to be appropriate to meet operational conditions.” (City Exhibit 59)

The city questions the comparable data offered by the union. It claims that Columbus is not an appropriate comparison for Delaware. The city adds that in any event, the Columbus agreement bases assignment to a vacant position on seniority “unless the skill, ability, and work performance of a less senior bidder is greater.” (Union Exhibits, Tab 12, page 19)

The city contends that the union’s proposal is not similar to the FOP contract. It observes that in the FOP contract the Police Chief retains the authority to override seniority; the system is limited to the selection of the shift; and the selection process is limited to once per year. The city complains that Section 4 of the union’s proposal allows the union to force the chief “to post a position for bid to request reassignment even when there is no vacancy at all.” (City Pre-Hearing Statement, page 37)

The city maintains that the Fact Fighter’s recommended language is “overly ambiguous.” It states that Section 1 requires the chief to post a seniority list but her recommendation fails to define seniority and that Section 2 fails to define a vacancy “rather ... it simply dictates what to do ‘in order to fill vacancies during the promotion, retirement, transfer, or a member otherwise leaving employment [so that] it is ... unclear if the language is intended to apply to shifts, stations, promotions, or specialty assignments.” (City Pre-Hearing Statement, page 39)

The city contends that Section 5 of the union’s final offer is “unworkable.” It reports:

Footnote 25 of the report recognizes that the proposed language is vague. The fact-finder acknowledged that she was “unclear what ‘qualifications’ might be listed.”

Fact-Finder's Report p. 26. The fact-finder also stated that the “content is too nebulous at this point.” Fact-Finder's Report p. 26 . If the Fact-Finder did not know what the language she recommended meant, how can the parties? In recommending the parties “work together to define what will be on the list and what is relevant for listed qualifications” and recommending delaying the implementation until 2017, the fact-finder recognized that the language as written will be impossible to implement. Fact-Finder's Report p. 26. Unfortunately, there is no language in place to decide what would happen if the parties cannot agree. (Ibid.)

The city maintains that its final offer addresses some of the union’s concerns. It states that its proposal requires the Chief to notify personnel of vacancies so they can express their interest in a vacancy. The city indicates that “the Chief will then incorporate preferences to the extent possible in assigning staff.” (Ibid.) It claims that when it opened a new station in 2013, the chief granted the first or second choice of assignment for 22 of the 29 firefighters who submitted a preference. (City Pre-Hearing Statement, page 40)

Analysis - The Conciliator selects the union’s final offer. First, the union’s proposal is not inconsistent with contracts in comparable jurisdictions. The Conciliator recognizes that some jurisdictions have detailed provisions dealing with vacancies and transfers while others have limited or no contract clause relating to the topic and instead leave it to city policies. In Delaware, however, the union has made contractual language governing vacancies and transfers a significant priority, perhaps reflecting the existence of a 12-hour shift along with the more common 8-hour and 24-hour shifts.

Second, while the Conciliator might not support every aspect of the union’s final offer, there is generally nothing remarkable about it. It requires the chief to prepare and post a seniority list; defines vacancies as openings due to promotion, retirement, transfer, or the creation of a new job; calls for the posting of a vacancy for 10 days; states that a vacancy will be filled by the senior bidder unless a less senior bidder has greater skill, ability, and work performance; requires the chief, upon request, to provide a written explanation regarding the selection of a less senior

bidder; requires the posting of the first position created by filling the vacancy for seven days; prohibits an employee who was awarded a job from bidding on another job within one year; and indicates that vacancies not filled through the bidding process will be filled by the least senior non-probationary employee assigned to a 50-hour schedule.

Third, the union's final offer is consistent with the public interest and welfare. As noted above, it provides an orderly process for filling vacancies. While its initial final offer required vacancies to be filled by the senior bidder, provided he met the minimum qualifications, its revised offer responds to the city's interest by placing the most qualified bidder in a position.

Fourth, a factor routinely considered by Conciliators is the consistency of each side's offer. The city's revised final offers sets out two standards for filling a vacancy. Its offer states:

A position will be filled by the most qualified bidder based on experience, skill, ability, and work performance. If two or more candidates are relatively equal, the most senior employee shall receive the position.

The first sentence awards the vacancy to the most qualified bidder. However, under the second sentence, a less qualified employee with more seniority is entitled to the position provided his qualifications are "relatively equal" to those of the most qualified bidder.

Fifth, the city's bar on grievances over the selection of a successful bidder is not the usual arrangement. Even where a collective bargaining agreement includes no provision for filling vacancies, allowing the employer to rely on its management rights, it is well-established that an employer's exercise of its management rights cannot be arbitrary, capricious, discriminatory, or unreasonable. Under the city's final offer, however, the chief's decision cannot be challenged. Interestingly, the city recognized the importance of an employee's ability to challenge the city's decision regarding the filling of a vacancy when it took the Fact Finder to task for failing to

recognize that under the SOP governing vacancies and transfers, an employee could file a grievance. (City Pre-Hearing Statement, page 37)

Award - The Conciliator awards the following contract language.

Section 1. Seniority

The Fire Chief along with the Union shall establish and post a seniority list along with qualifications of members by January 1st each year. This list will be used to determine the selection of members for vacancies.

Section 2. Vacancies defined

In order to fill vacancies due to promotion, retirement, transfer or a member otherwise leaving employment, an announcement of the vacancy shall be posted for bid.

New positions added to current staffing levels shall be considered as vacancies and subject to bid.

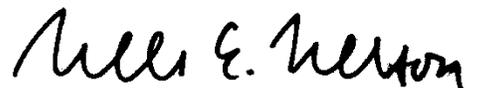
Section 3. Posting

Once the Fire Chief becomes aware of a vacancy in the Department he shall post the vacancy for ten (10) days at all stations. Once the original vacancy has been filled, the process shall be repeated once. No bids are allowed until the position has been posted. No vacancies shall be filled until the relevant posting period has ended.

Section 4. Vacancies shall be filled based upon seniority unless the skill, ability and work performance of a less senior bidder is greater. Upon request of the Union, the Fire Chief shall substantiate, in writing, why he considers the skill, ability and work performance of a less senior bidder greater. Captains and probationary employees are not eligible to bid on vacancies.

Members taking a vacancy through the posting/bidding process may not re-bid nor seek re-assignment for a one-year period from the date of being placed in the vacancy. This does not prevent a member who has taken a bid from seeking and accepting a promotion.

Vacancies not filled through the bidding process shall be filled by the least senior non-probationary employee assigned to the fifty (50) hour assignment.



Nels Nelson  
Conciliator

March 11, 2016  
Russell Township  
Geauga County, Ohio