

State of Ohio

State Employment Relations Board

In the Matter of Conciliation	:	SERB Case Number: 2015-MED-09-0799
	:	and 2015-MED-09-0806
Between:	:	
	:	
City of Wickliffe, Ohio	:	
	:	
Employer	:	Date of Hearing: November 14, 2016
	:	Date of Report: November 30, 2016
And:	:	
	:	
Fraternal Order of Police Lodge 116	:	
	:	Felicia Bernardini, Conciliator
Union	:	

Conciliation Award

Appearances:

For City of Wickliffe, Employer

Jack Petronelli, Esq., Allain Legal Ltd., Conciliation Spokesperson
 Martin J. Germ, Finance Director, City of Wickliffe
 Randy E. Ice, Chief of Police, City of Wickliffe
 Jim Powers, Fire Department Chief, City of Wickliffe

For FOP Lodge 116, Union

Robert Phillips, Esq., Faulkner, Hoffman & Phillips LLC., Conciliation Spokesperson
 Lt. Joseph Thompson, FOP President
 Sgt. Leonard Nosse, FOP
 Officer Daniel Sabruno, FOP
 Officer Stephen Brenner, FOP
 Mary Schultz, Financial Expert, FOP

Introduction

Case Background

Felicia Bernardini was selected by the parties to serve as conciliator in the above referenced case and duly appointed by the State Employment Relations Board (SERB) on September 8, 2016 in compliance with Ohio Revised Code (ORC) Section 4117.14(D)(1). The case concerns a conciliation proceeding between the City of Wickliffe, Ohio (hereafter referred to as the “Employer” or the “City”) and the Fraternal Order of Police, Lodge 116 (hereafter referred to as the “Union” or “Unit”).

A conciliation hearing was scheduled for November 14, 2016. The hearing was held at the Wickliffe City Hall. Both parties timely filed their pre-hearing statements. This case involves two bargaining units within the City of Wickliffe Police Department, the patrol unit consisting of 19 sworn police officers and the supervisory unit consisting of five sergeants and four lieutenants. The Units have a history of bargaining together and maintaining collective bargaining agreements with the same, corresponding provisions throughout. The parties engaged in three bargaining sessions prior to proceeding to fact finding. Eight open issues were presented to Fact Finder Dennis M. Byrne at a hearing on June 16, 2016. Fact Finder Byrne’s report was issued on July 9, 2016. The fact finding report was accepted by the Wickliffe City Counsel and rejected by a vote of the bargaining unit membership. Prior to conciliation the parties were able to reach agreement on all but three of the fact finding issues.

Issues

The remaining open issues addressed by both parties at the hearing are as follows:

Article 14: Vacation

Article 22: Wages

Article 41: Fitness for Duty

At the conciliation hearing the Union sought to include Article 10: Sick Leave. This is a provision that the parties believed had been settled prior to the June hearing and therefore not include as an open issue at fact finding. Subsequently, the parties found that they did not have a tentative agreement on the sick leave article.

Discussion and Award

The Employer has modified its positions on the remaining open issues and adopted Fact Finder Byrne's recommendations. The Union has modified its positions from fact finding and has final offers on each remaining open issue. In keeping with generally accepted procedural practice in such a situation, the parties agreed that the Union, in seeking alternative positions from the fact finding report, carries the burden of proof in the conciliation process. The following award takes into consideration Fact Finder Byrne's report and recommendation issued July 9, 2016, relevant documentary evidence presented by the parties at hearing, and the criteria set forth in ORC 4117.14(G)(7)(a) to (f):

- (a). Past collective bargaining agreements, if any between the parties;
- (b). Comparison of the unresolved issues 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 interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (d). The lawful authority of the public employer;
- (e). Any stipulations of the parties;
- (f). 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 private employment.

1. Article 10: Sick Leave

Employer Position

At hearing the Employer's final position was to continue current language.

Union Position

The Union seeks to maintain the current accrual level for sick leave set forth in section 10.02, but seeks to update the language of section 10.02 by eliminating expired dates and provisions, and reinstate an expired provision that allows a new bargaining unit member to receive a prospective five-year bank of 600 hours of sick leave.

Discussion and Award

At hearing the parties agreed that due to a misunderstanding the sick leave article was believed to have been TA'ed and therefore not part of the fact finding hearing. Subsequently, the parties realized that they did not have a TA on sick leave. The question arises then, as to whether an issue can be heard at conciliation that was not part of the fact finding process. ORC 4117.14(G)(1) reads as follows:

The parties shall submit to final offer settlement those issues that are subject to collective bargaining as provided by section 4117.08 of the Revised Code and upon which the parties have not reached agreement and other matters mutually agreed to by the public employer and the exclusive representative; except that the conciliator may attempt mediation at any time.

This language can be understood to provide for some flexibility in determining the issues on which the parties have not 'reached agreement.' On an issue where the parties have reached agreement, neither party should be permitted to withdraw from a tentative agreement in order to pursue a more advantageous position through conciliation. However, when the parties are in accord that an error or oversight has left a particular provision unsettled as far into the statutory settlement process as conciliation, it seems permissible to bring such an issue to conciliation for final determination. The *raison d'etre* for all that is encompassed in ORC 4117.14 is dispute settlement and the advancement of labor peace. That being said, it seems appropriate to include an issue when the facts surrounding it are as they are in this particular situation. With this as the backdrop I take up the unresolved issue of sick leave despite the fact that the matter was not included in the fact finding process.

Initially, the Employer offered a single sentence clean-up of section 10.02 maintaining the current accrual rate, but eliminating all expired dates and provisions. In discussion at the hearing, the Employer reconsidered and simply took the position to maintain current contract language. The Union presented a proposal to maintain the current accrual level, eliminate expired dates and extraneous verbiage, and reinstate a five-year accrual bank for new hires. During the course of the hearing, it became evident that there was a lack of clarity and uniformity in understanding how the

five-year bank had been administered in the past and how it would be administered going forward if it were to be reestablished. It is precisely for this type of administrative detail that provisions such as these need to be fully vetted through negotiations. Negotiation is a critical step – lacking in this particular case. Were the Union’s proposal to be awarded by a stroke of the pen, with no bargaining history to rely upon, there would most likely be future disputes concerning the provision’s administration.

Award

The statutory criteria require that the conciliator consider the public good, bargaining history of the parties, and the Employer’s ability to administer contract provisions. In light of these considerations I award the Employer’s position of current contract language in Article 10, Section 10.02.

2. Article 14: Vacation

Union Position

The Union proposes a sixth week of vacation at 25 years of service. This is a modification from the Union’s position at fact finding, where its proposal was to increase the vacation accrual schedule to 240 hours (i.e., six weeks) at 20 years of service. This modification is in direct response to Fact Finder Byrne’s finding that although a number of nearby jurisdictions provide for a sixth week of vacation, the increased benefit is associated with 25 years of service rather than 20 years of service. The Union’s charted data reveals that 75% of police departments in Cuyahoga County get a sixth week of vacation and 72% of police departments in Lake County get a sixth week of vacation. Of these departments with a sixth week of vacation, 66% of those in Cuyahoga County get the sixth week at or before 25 years of service, whereas 87.8% of those in Lake County get the sixth week at or before 25 years of service. Based on this data the Union argues that the 6th week of vacation leave at 25 years of service is the standard benefit in comparable jurisdictions and therefore an appropriate and reasonable benefit for the Wickliffe Police Department.

Employer Position

The Employer opposes the Union’s proposal and seeks to maintain current contract language which provides for 200 hours of vacation (i.e. five weeks) after 15 years of service. Current contract language is the position taken by Fact Finder Byrne and the Union’s data has not

fundamentally changed the fact finding arguments and outcome. The relevant comparison is not with external jurisdictions, which each has its own unique package of economic benefits that comprise its total compensation, but rather with internal units that receive the same package of benefits in their employment with the City of Wickliffe. No action taken regarding the benefits of one City bargaining unit can be considered in isolation; there is a direct ripple effect to other units. From the perspective of the FOP bargaining team, an additional week of vacation may seem like a low cost item, but the City has to consider the potential cost of raising the vacation benefit across all bargaining units. Such costs are substantial, especially with respect to the Fire Department. For these reasons the City rejects the Union's proposal and seeks to uphold the fact finding recommendation of current contract language.

Discussion and Award

As a general matter and absent clear error, Conciliators favor deference to recommendations of fact finders. In the present case, the fact finder determined that, "The Union did not prove that the current vacation schedule found in the parties' contract is substandard when compared to other jurisdictions." This is the finding despite the Fact Finder's acknowledgement that an examination of the data shows that a number of jurisdictions offer a sixth week of vacation. Unlike the conciliator, who is bound by the final offers of the parties, a fact finder can fashion a modification of the parties' proposals if the evidence and statutory criteria support doing so. Fact Finder Byrne could have easily modified the Union's proposal, just as the Union has now voluntarily done, to more closely align the increased vacation benefit with that of other jurisdictions; however he chose not to, because in the end his analysis revealed that the current benefit is not substandard.

I agree with the fact finding recommendation. Barring a history of departures from internal parity, or a clear distinction warranting variation across bargaining units within a jurisdiction, when it comes to vacation leave internal benefit levels are the more persuasive benchmark for comparability.

Award

In accordance with the bargaining history of the parties and in deference to the fact finding report, current contract language is awarded, as proposed in the Employer's final offer.

3. Article 22: Wages

Union Position

The Union seeks the following pay raises:

- 1.5% in 2016
- 1.5% in 2017
- 0.5% in 2018

The Union accepts the fact finding recommendations for the first two years of the contract, but rejects the wage reopener recommended for the third year. It is the Union's position that the Employer can well afford the cost of an additional .5% increase in 2018 for the Unit. The total cost for this third year increase is \$14,000. The Union's proposal would settle the contract fully for the next two years rather than have the parties return to the table for further negotiations. As it is, the parties have been in negotiations for almost 14 months, and the process will start all over again in September of 2017 if the wage reopener is allowed to stand. As soon as the reopener is settled, the parties will be back at the table in 2018 to negotiate a successor contract. Perpetual negotiations are simply not good for the labor management relationship. The updated financial information presented by the Union clearly shows that the proposed increase for 2018 is affordable. Furthermore, the Wickliffe Police Department outperforms neighboring jurisdictions in both quantity and quality of criminal cases submitted to the Lake County Prosecutor. For the reasons of affordability, labor/management stability, and the Unit's outstanding performance a .5% raise in the final year of the contract should be awarded.

Employer Position

The Employer seeks the following pay raises:

- 1.5% in 2016
- 1.5% in 2017
- Wage reopener in 2018

The City's wage proposal is the fact finding recommendation. The proposal does not diminish the value that the City places on the service of the Police Department. Wickliffe police officers are among the highest paid in the area and the City offers a premier health insurance program. The facts are simply that there is insufficient money to cover everything that the

Department would like to fund, whether that be an additional .5% raise for staff, filling vacant positions, or purchasing new patrol cars, computers and communication equipment. The extent of the Department's capital budget for the current year is only \$14,000 (a fraction of the \$150,000 that the Department has typically received), which is barely enough to cover purchases of items required under the contract. There are undeniable uncertainties in the City's future when it comes to revenue, including the potential of losing a major employer and a downward trend in the City's overall finances. Given these financial realities, the City supports the fact finding recommendation which includes a wage reopener in 2018.

Discussion and Award

Both parties offered thorough financial presentations revisiting, to a certain extent, the fundamental evidence and arguments made at fact finding and fully considered by Fact Finder Byrne. The underlying framework for the City's financial situation consists of:

- a consistent decline in revenue due to the lingering effects of the recession and changes in the funding relationship between the State and local governments;
- a trend of shifting income tax revenue away from capital funds into operating funds (68.75% in 2004 to 100% in 2016);
- a heavy dependence on a small group of large local businesses that together represent 60% of the City's income tax revenue;
- persistent uncertainty surrounding the long-term commitment of the largest local businesses to stay in Wickliffe;
- a governing bias in favor of operating strictly on a cash basis rather than using other financial methods to fund capital expenditures; and,
- a declining, but still healthy, annual carryover in the general fund.

The Union does not dispute these underlying realities of the City's financial situation. The Union's argument at conciliation is that the financial circumstances of the City have changed since Fact Finder Byrne's report was issued in July. Chief among these changes are the following:

- ABB (the second largest employer in Wickliffe) is no longer in negotiations with Highland Heights to move its facility. The likelihood that ABB will remain in Wickliffe for the duration of the current contract has gone from uncertain to certain.

- There is also news that Lubrizol (the largest employer in Wickliffe) will begin development of an additional property in Wickliffe; and although no new permanent jobs will be associated with the new Lubrizol facility, the development itself will bring construction jobs and with those jobs – income tax revenue.
- Recently, the Mayor stated that PCC (an employer in Wickliffe) may be adding a new facility in Wickliffe.
- With four additional months of current year budget data available for analysis, it appears that revenue is coming into the City slightly ahead of expectations and expenses are slightly below projections. The Union’s financial expert projects that the year-end general fund balance could be half-a-million dollars higher than the City’s projection.

The extent of the dispute between the parties with respect to the wage settlement is strictly whether to award a .5% wage increase July 1, 2018 or whether to uphold the fact finding recommendation to have a wage reopener in 2018. The wage increases for 2016 and 2017 are settled. To settle the question of what to do in 2018 the Conciliator must determine whether the evidence of changed financial circumstances presented by the Union achieves a quantum of proof that justifies overturning the sound, objective reasoning of the Fact Finder. The totality of Fact Finder Byrne’s recommendation took into consideration the City’s overall current financial condition (i.e., ability to pay), the overall changing financial circumstances of the City which are trending downward, the overall distribution of packaged resources between pay and insurance benefits, the relative salary standing of the Unit *vis-a-vis* comparable jurisdictions, and most particularly with respect to the reopener “...the potential loss of a major employer in the near to intermediate future...”

The four months of additional current year budget data provides immediate comfort, but not long-term relief. Even if the Union’s projection holds and 2016 ends with the rosiest of all possible outcomes, the City is still facing serious future financial challenges in balancing revenue and expenditures, and capital and operational needs. It is unclear whether information concerning the Lubrizol development was included in the fact finding presentation; regardless it has little impact on the overall picture. The PCC information is indefinite and entirely premature to count on as future revenue. Finally, with respect to the most recent turn of events concerning ABB, I do not see the breakdown in negotiations with another jurisdiction as a change in circumstances for the City. ABB is apparently actively seeking to leave Wickliffe and has been resistant to the City’s retention efforts to-date. The future of the ABB/Wickliffe relationship remains unsettled. In the final analysis, the

question is not whether a .5% pay raise is a reasonable and affordable price to pay for labor peace. The question is, have the circumstances changed enough to render the fact finding report in need of modification? The answer to that question is, No.

Award

In keeping with the statutory criteria and in deference to the fact finding report, the wage settlement shall be as proposed in the Employer's final offer, which is as the fact finder recommended: a 1.5% raise in 2016 (in accordance with the existing G11 waiver), a 1.5% raise in 2017, and a wage reopener for 2018.

4. Article 41: Fitness for Duty

Union Position

The Union seeks to maintain current contract language which does not permit the Employer to take disciplinary action in the event that a bargaining unit member fails to pass the fitness test. At conciliation it is the Union's position that the Fact Finder erred in accepting the Employer's proposal allowing for disciplinary action in the event that a patrol officer fails the fitness test. The Fact Finder has erred because the language change only pertains to patrol officers and not to the Sergeants and Lieutenants. Allowing this change to stand will result in a two-tiered system within the Police Department which treats patrol officers differently than the promoted ranks. This is an untenable disparate treatment situation and should be remedied by overturning the fact finding recommendation and allowing the existing contract language to continue.

Employer Position

The Employer supports the fact finding recommendation that substitutes the word "may" for "will not" in reference to subjecting a failed fitness result to disciplinary action.

Discussion and Award

Hearing testimony from both parties is that although the fitness provision has been in the contract for approximately twelve years, the City has not funded the fitness program for about the past 10 years and therefore the provision has not been used. The driving forces behind the proposed change, which was accepted by Fact Finder Byrne, are unclear to me as the conciliator. However, it is clear that there is no evidence in the conciliation record that Fact Finder Byrne erred in any way. In hearing testimony it was confirmed that the original position of the Employer was to make the change in contract language effective only for the patrol unit. The parties agreed that the proposal was clear to the Fact Finder at the time of the fact finding hearing. The fact that the Union does not

like the fact finding recommendation on this issue does not mean that the Fact Finder was in error. I agree that the fact finding recommendation sets up a bifurcated system and that now there are potential consequences for patrol officers that will not apply to Sergeants and Lieutenants. However, this is not a recognized basis on which a fact finding recommendation can be overturned.

Award

In deference to the recommendation of the Fact Finder, the Employer's final offer is awarded. Article 41: Fitness For Duty in the patrol officer contract shall read as recommended by the Fact Finder.

Conclusion

After giving due consideration to the positions and arguments of the parties and to the criteria enumerated in ORC 4117.14(G)(7)(a) to (f) the conciliator awards the provisions as enumerated herein. In addition, all tentative agreements (TAs) previously reached by the parties along with all sections of the current Agreement not negotiated and/or changed, are incorporated by reference into this conciliation award and should be included in the resulting collective bargaining agreement.

Respectfully submitted and issued at Columbus, Ohio this 30th day of November, 2016.



Felicia Bernardini,
Conciliator

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Conciliation Award was sent by e-mail on November 30, 2016 to:

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