

CONCILIATION REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
April 25, 2016

CASE No: 2015-MED-09-0859

Ohio Patrolmen's Benevolent Association (Police Officers), Union
and
City of Englewood, Employer

CONCILIATOR: Howard Tolley

HEARING

Monday, April 4, 2016, 9:30 – 11:15 am at the administrative offices for the City of Englewood, 333 W. National Rd, Englewood, Ohio 45322.

APPEARANCES

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION

Mark J. Volcheck, Esq. OPBA Attorney
Richard A. Ring, OPBA Employee Representative
David Collins, OPBA Employee Representative

CITY OF ENGLEWOOD

Dwight A. Washington, Attorney
Barbara McCormick, Personnel Director
Mark Brownfield, Chief of Police

Introduction

This Conciliation arises under Ohio Revised Code Section 41117.14 between the Ohio Patrolmen's Benevolent Association "OPBA or the Union" and the City of Englewood, Ohio "the City."

The Conciliation process is final offer issue-by-issue arbitration. The parties both accepted two of the four Fact Finder Recommendations, and have made separate final offers on two remaining issues – wages and shift differential. On November 19 the parties signed an extension agreement to waive limitation of the Conciliator's powers as provided in 4117.14(G)(11) so that compensation increases can take effect January 1, 2016.

The Fact Finding report notes: "The City of Englewood is a planned community in the northern portion of Montgomery County in southwest Ohio. It is located along the 1-70 corridor approximately 5 miles from Dayton International Airport. It has a diverse population of approximately 13,600. The OPBA is a labor Union serving over seven thousand members employed in law enforcement in the state of Ohio. The collective bargaining unit here consists of 16 full-time patrol officers. The prior collective bargaining agreement was for the term January 1, 2013 through December 31, 2015. The parties have agreed by tentative agreement that the duration of this successor agreement shall be January 1, 2016 through December 31, 2018. "

Criteria for Conciliation

The Ohio Public Employees Bargaining Statute in Rule 4117-9-05 directs fact finders and conciliators to consider six factors including three deemed critical in this case:

- Past collectively bargained agreements, if any.
- Comparison of 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;
- Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues . . .

I. Wages Article XIV and Addendum I

Union Position:

As reported by the Fact Finder: "The OPBA proposes a general wage increase to the current wage scale of 2.5% effective January 1, 2016, 2.5%, effective January 1, 2017, and 2.5% effective January 1, 2018. It asserts that this proposal is realistic, supported, and balanced. The OPBA submits that the relevant external comparables support its position and that 2.5% represents the 'going rate' for city police officers in Montgomery County. This percentage increase is also supported by the bargaining history of the parties. The Union notes that the City has not raised an inability to pay argument. It asserts that the City has the ability to finance and administer the proposal of the OPBA, and that the proposed increase will not harm the normal standard of public service within the City." (*Ohio Patrolman's Benevolent Association and City of Englewood, SERB 2015-MED-09-0859 Betty Widgeon, February 19, 2016, p. 3*)

As its final offer, the union argues that the Conciliator should defer to the Fact Finder's recommendation of a 2.5% wage increase.

City Position:

As reported by the Fact Finder: "The City proposes a wage increase of 2% effective each year of the contract. It asserts that comparable data and bargaining history of the parties demonstrates that employees are the fourth highest from the top pay among similarly situated police departments." (p.3)

The city rejected the Fact Finder's recommendation and made a final offer of a 2% wage increase, noting that all other employees received the same 2% increase, and this union had received generous wage increases in several prior contracts.

Analysis:

Fact Finder Widgeon indicated that 16 jurisdictions were compared but did not provide a list. The union offered a list of 14 comparable jurisdictions, all from Montgomery County, including three the city did not list. The city's list of 16 comparable jurisdictions include four neighboring cities from other counties to the North and East. Those four municipalities outside Montgomery County are closer to Englewood than one on the union's list, Springboro, which straddles Montgomery and Warren counties to the south.

In 2015 Englewood and Moraine offered the same top pay, above both the median and the average, but below 5 other jurisdictions of the 19 listed by the parties. The union's proposal for a 2.5% increase would lift Englewood above Moraine that will provide a 2% raise for 2016. The Conciliator also considered a list of 14 drawn from the 19 comparables offered by the parties, using population differences to exclude considerably larger and smaller jurisdictions -- Brookville, Dayton, Huber Heights, Kettering, and Moraine. Using those 14 comparables, whether Englewood paid increases of 2% or 2.5%, its rank order at #6 for top wages would not change.

The parties did not provide enough data for the Conciliator to compare the wage increase for all 19 jurisdictions. For the top wage increase in 2015, 11 of the 16 cities listed by the City offered a 2% increase, the median for that group. For the wage increase in 2016, the union provided data for 12 cities, and the median was 2.5%.

Five Englewood OPBA 3 year contracts negotiated since 2001 provided for annual wage increases averaging 3.1%. 3.5 % in 2007 was the median. Those increases raised Englewood OPBA wages from the bottom to the top half of comparable jurisdictions.

Fact Finder Widgeon concluded: "Given the history surrounding wages and comparing Englewood with the comparable jurisdictions, the Fact Finder is persuaded that a 2.5% wage raise during each of the 3 years of the new contract is fair." (p. 7)

As noted by the union, Conciliator Dennis Byrne wrote: "If the moving party cannot adequately prove that the fact finder made a mistake, then there is no reason for a conciliator to make a different recommendation." (*City of Lakewood and Local 382, IAFF, SERB 00-MED-09-0952, May 1, 2002.*) Conciliator Margaret Nancy Johnson noted that deference "promote(s) closure and precludes undue delay in the bargaining process" that would result from frequent reversals of Fact Finders' recommendations. (*Shaker Heights*

and FOP SERB 98-MED-02-0130, Feb. 24, 1998, p. 5.

Conclusion: Based on the Conciliator's analysis of comparable jurisdictions and the parties' prior contracts, the Fact Finder's recommendation should be respected.

II. Shift Differential Proposed New section for Addendum 1 to Art XIV

The OPBA Position

Fact Finder Widgeon reported: "The Union proposes a new Section to the Article. Its proposal is for a shift differential of \$0.50 per hour to be paid to employees for all time worked between the hours of 3 pm to 7 am. Additionally, the OPBA proposes that for all time worked between the hours of 11 pm on Friday to 11 pm on Sunday, employees be paid an additional \$0.50 per hour. These amounts would not be compounded, such that an employee's shift differential pay for any hour would not exceed \$0.50.

The Union states that this proposal is a means to compensate officers for the hardship associated with those work times. It notes that all such shifts diminish an officer's family time. Officers on such shifts are working or sleeping when they could be attending to family duties and/or typical family recreation. Additionally, data from numerous studies have shown, and the community has come to generally acknowledge, findings that continuous work during those hours more readily leads to sleep deprivation and other serious health conditions. The Union asserts that the proposed wage is comparable to other jurisdictions that offer such benefit." (pp. 4-5)

As its final offer, the union proposes the Fact Finder's recommendation of a \$.50 shift differential for all hours worked between 3 pm and 7 am to take effect July 1, 2016.

The City's Position

From the Fact Finding Report: "The City underscores that employees are currently entitled to bid their shifts based upon seniority. It argues that the additional pay is not justified by comparables or industry practices. The City views this proposal as just another proposal by the Union for more compensation without a demonstration of a genuine need." (p. 5)

As its final offer, the city proposes no change to current contract language.

Analysis

SERB Conciliation and Report Guidelines require each party submit a report five days prior to the hearing "defining all unresolved issue, stating the party's final offer and summarizing the position of the party with regard to the unresolved issue." The employer submitted a position statement that did not provide the required summary of its argument and then presented new evidence and argument for the first time at the April 4 hearing that the Fact Finder's report would constitute the Pyramiding of premium pay in violation of Article 27 Section 3.

That city's failure to submit a complete position statement left the union representative feeling blindsided without an advance opportunity to prepare a response to challenging the new argument

Even if the new argument and evidence had been properly presented, the Conciliator concludes that implementation of the Fact Finder's shift differential recommendation would not impose an unreasonable administrative burden nor constitute be premium pay, but a plus rating provided for in Article XXIII.

The conciliator concludes however that the Fact Finder's analysis of the shift differential argument and evidence was not logical and misinterpreted the data, constituting serious error.

The OPBA's pre-hearing statement (p. 5-6) argues for a presumption to affirm the fact finder's recommendations "unless data relied upon was flawed or otherwise misinterpreted" and cites several Conciliators as authority. Conciliator Byrne notes that an overriding reason to change the fact finder's recommendation is "a mistake in fact or logic." (*City of Lakewood and Local 382, IAFF, SERB 00-MED-0952, p. 4 May 1, 2002.*) Conciliator Harry Graham noted that a showing of error would justify altering the Fact Finder's Recommendation. (*OPBA and the City of Warren, SERB 2006-MED10-1267, Feb. 12, 2008, pp. 4-5*).

The conciliator finds the following two Fact Finder statements inconsistent:

Management voiced no overall objection to the Union's position and its studies on sleep deprivation and other negative impacts that have been associated with long-term evening and night shift employment as opposed to day shift work." (p. 8)

The overarching concerns the Fact Finder heard the City voice in opposition to the Union's proposal were that, (1) the accounting changes that would be required to manage shift differential wages would be burdensome and (2) even if the data presented by the Union is correct, \$0.50 per hour shift pay increase would do nothing to alleviate the concerns raised. (p. 8-9)

At the conciliation hearing the employer's representative strongly reemphasized the second argument, leading the Conciliator to conclude the Fact Finder made a serious error when stating: "as both sides acknowledge, the general rationale behind shift differential pay is generally accepted." The Fact Finding report offered no explanation of that rationale, but proceeds with a conclusion that the Conciliator finds is contrary to the evidence presented. "Given the improvements with technology applications, the Fact Finder is persuaded that the overall benefits of adopting a shift differential pay scale would far outweigh attendant burdens." That conclusion only addresses the City's first objection. The Conciliator agrees with the Fact Finder only that the recommendation would not impose unmanageable administrative burdens.

The Fact Finder however misinterprets the principal study introduced as a Union exhibit: "Sleep Disorders, Safety and Health in Safety in Police Officers" *Journal of the American Medical Association* Vol. 306 #23 December 21, 2011. The JAMA study did not conclude, as the Fact Finder reported, that night shifts are the main cause of police officer's sleep deficits. According to the published report, Obstructive Sleep Apnea that affects all shift workers is the primary cause of sleep deficit, and that condition is heavily correlated with the 73% overweight/obesity rate of the 5,000 officers studied. The JAMA article does not recommend shift differentials to address the problem. If sleep deprivation caused by

night shift has led to accidents by drowsy Englewood police officers, then applying the JAMA article research would favor physical conditioning, weight loss and CPAP machines.

The Fact Finder also failed to take into consideration shift pay differentials in comparable jurisdictions; the union provided data on 15 cities in Montgomery County. Excluding the one jurisdiction that paid the same bonus to all officers, half of the 14 provided shift differentials of varying amounts. Among the six jurisdictions closest in size to Englewood (between 6,000 and 20,000) four do not provide any shift differential.

Conclusion: The Fact Finder's misinterpretation of the medical research, mischaracterization of the employer's position, and disregard for comparables leads the Conciliator to reject her shift differential recommendation.

AWARD

1. On the issue of wages the final offer of the OPBA is awarded – three general wage increases of 2.5% effective January 1, 2016, January 1, 2017 and January 1, 2018.
2. On the issue of shift differential the Conciliator awards the final offer of the city, no change to current contract language.
3. The Conciliator expressly incorporates by reference all of the Agreements, tentative and otherwise, previously entered into between the parties.

Respectfully submitted and issued at Cincinnati, Ohio this 27th day of April, 2016.

Howard Tolley

Howard Tolley, Conciliator

April 27, 2016

Date

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Fact Finding Report has been served via electronic mail to Mark J. Volcheck, Esq. OPBA Attorney markvolcheck@sbcglobal.net, Dwight A. Washington, Attorney dwashington@jhallc.com., Mark Brownfield, Brownfield@englewood.oh.us, BarbMcCormick, McCormick@englewood.oh.us and to the State Employment Relations Board, Columbus, Ohio med@serb.state.oh.us this 27th day of April, 2016.

Howard J. Tolley

Howard Tolley, Conciliator

April 27, 2016

Date