

STATE EMPLOYMENT RELATIONS BOARD

CASE NO. 15-MED-11-1220

IN THE MATTER OF: *
 *
CITY OF TROTWOOD *

 EMPLOYER *

 AND *

IAFF, LOCAL UNION 4024 *

 UNION *

AWARD OF THE CONCILIATOR

CONCILIATOR: I. BERNARD TROMBETTA

HEARING DATE: DECEMBER 15, 2016

PLACE OF HEARING: TROTWOOD ADMINISTRATION BUILDING

HEARING

This is a conciliation hearing between the International Association of Firefighters, Local Union 4024, representing the Firefighters/ EMT, the Firefighters/ Paramedic and the Lieutenant, hereinafter sometimes referred to herein as the "Union" and the City of Trotwood, hereinafter sometimes referred to herein as the "City".

The hearing was held in the Trotwood Administration Building in Trotwood, Ohio on the 15th day of December, 2016.

BOTH PARTIES ORALLY WAIVED THEIR RIGHT TO HAVE THESE PROCEEDINGS TRANSCRIBED ELECTRONICALLY OR BY A COURT REPORTER.

APPEARANCES

On Behalf Of The Union

Steven Lazarus, Esq.- Attorney
Ross Gillingham, Esq.- Attorney
James Neal- Member
Tony Johnson- Member

On Behalf of the City

Kelly Babcock- City Consultant
Stephanie Kellum- Asst. City Manager
Steve Miliken- Chief
Chris Peeples- Finance Manager

EXHIBITS

Both parties introduced exhibits in support of their respective positions. The same exhibits were used during fact finding. A few exhibits containing updated material, not available at the fact finding, were used during conciliation. Neither party offered an objection to any exhibit attached to the final position statements of the other.

The employee manual, referred to by the fact finder, posed a problem of sorts. The Union attached a copy of "page 13" which addresses the layoff procedure (Exhibit 2, Tab "G" of Union Position Statement).

However, during oral argument, the City claimed that unionized employees were not covered by, and, in fact, were excluded from coverage under the manual. The Union's exhibit did not address that issue and the City did not attach a copy of the exclusionary language. Post hearing the Conciliator requested that a copy of that portion of the manual be submitted for review and both parties responded. The Union, paraphrasing the applicable section of the manual (Page 7) sent an email and the City emailing a copy of the manual's article (Article 1). The Conciliator deems both documents to be accepted into evidence.

BACKGROUND

This matter is before the Conciliator because the recommendations of Fact Finder Louis V. Imundo were not accepted by the City.

Trotwood, located in western Montgomery County, became a city in 1971. It is governed by home rule under a council/ city manager form of government. In 1996 it merged with Madison Township, tripling its population and is now the fourth most populous city in the county with 27,431 residents, but is still experiencing above average unemployment, little industry and underutilized commercial space.

Trotwood is a city of residences. Though the surrounding area is home to many major employers, many of the newer employers are simply taking the places of plants that closed or moved during the past 30 years or so. Wright-Patterson AFB and supporting high tech companies provide thousands of job opportunities. The area is home to the University of Dayton, Wright State University and many smaller public and private colleges. The 2008 recession was a crippling blow. GM closed a plant and NCR left for Atlanta. Departed industries are being replaced but those industries employ fewer persons. Different job skills are now required to fill the new jobs, but they do appear to be creating a job pool for residents. None of the new companies are, however, located within Trotwood.

The area has ample commercial space, but there are no shopping centers in the city proper. The Salem Avenue shopping district was the commercial hub of northwest Montgomery County for years, but became dated and was demolished some 12 years ago. It now awaits redevelopment. Trotwood is connected to the center of Dayton through the "Trotwood Connector" which provides access to the City and adjacent areas. In short, the City has a lot of potential development possibilities.

The economic crisis of 2008 created financial problems. Residential markets were affected with mortgage foreclosures, but real estate taxes went unpaid and income taxes fell due to a loss of jobs. The City made the necessary adjustments in its spending and programs and slashed wages by 10%, but by 2013 a slow turn-around began. The City began acquiring and renovating homes in need of rehabilitation in areas of the City in most need of assistance. By 2016 some 30 homes have been acquired and either rehabbed or are slated for rehab. The city's internal financial control structure provided safeguards for assets and also provides reasonable assurance of proper financial transactions. It operates in compliance with Ohio law. It maintains an encumbrance accounting system as a method of maintaining budgetary control and purchase orders which result in overruns of appropriations are not processed until additional appropriations are made either by ordinance or transfer from another appropriation. (See letter of July 25, 2016 from city manager to council). The dark days of the recession appear to be behind Trotwood which while not enjoying boom times, is in much better condition financially.

This unit consists of the 18 full time firefighters/EMTs; firefighters/paramedics and a lieutenant. The union has been recognized as the sole bargaining agent since 2000. The present contract is a successor agreement to at least two prior agreements.

At present, the full time members of the department are augmented by approximately 40 part-time firefighters. The number of part time members fluctuates and the City, at one time, employed more than 50 part-timers. Prior to converting to a full-time/ part-time department, the fire department was an all part-time department.

Part-timers are assigned regular shifts and the Chief expressed fear that if he is faced with laying off part-timers before full time firefighters or was unable to regularly assign shifts to them that he would lose them to other departments willing or able to offer regular shift assignments.

The assistant finance director, Chris Peeples expressed fear that a totally full time department would cost more than the City could afford if all part time firefighters are laid off before any full timers. There is no indication that layoffs are under consideration at this time.

The present contract expired on December 31, 2015 and despite numerous bargaining sessions the parties were unable to resolve 4 core issues, though the differences between them appears minimal.

The matter was submitted to fact finding on: Article 22- Compensation (really a two part issue involving wage increases as well as elimination of the two tier wage system for presently employed firefighters); Article 30- Duration of Agreement (which became an issue due to the city's wage offer of a reopener for 2018; Article 36- Layoffs (a provision that all part time firefighters be laid off before any full time firefighters could be laid off) and Memorandum of Understanding containing the issue of concession days.

The Union adopted the Fact Finder's recommendations as its final position. The City modified its wage offer, but otherwise maintained its original offer on the three remaining issues as its final position.

CRITERIA

The criteria used in conciliation are found in Ohio Revised Code 4117.14(G) (7) (a) through (f) and Ohio Administrative Code 4117.14(G) (7) (a) through (f) and include past collectively bargained agreements between the parties, comparison of issues between the affected employees with those issues related to other public and private employees doing comparable work; the interest and welfare of the public; the ability of the of the public employer to finance and administer the issues proposed and the effect of the adjustments on the normal standard of public service.

A Fact Finder is able to consider the positions of the respective parties, weight the evidence and make recommendations which do not, necessarily, have to be the position advanced by either party.

A Conciliator does not have that authority and, instead, must choose between the final offers of the parties and in this case, the findings of the fact finder since the Union adopted those findings as its final position on each of the four outstanding issues. A Conciliator has no discretion other than to make a choice between final positions.

A Conciliator may reject the Fact Finder's recommendation when the recommendation is adopted by one of the parties as its final position and choose the final position of the other party but the criteria the Conciliator is to use are not found in either the Ohio Revised Code or the Ohio Administrative Code. Over the past 30 plus years the test used in conciliation has pretty much remained a constant requiring the party seeking the change to meet a standard of "clear error" in order to set aside the fact finder's recommendations. This standard is attributed to Professor Drotning in one of the early cases

involving the Ohio collective bargaining procedure.

Most conciliators agree that conciliation is not a de novo proceeding and "clear error" must be established by the party seeking to overturn the recommendation of the fact finder and may be proven by showing that the fact finder erred in his findings of fact, or failed to consider material evidence (evidence sufficient to influence the outcome of a recommendation) on an issue, or material evidence that may not have been available at the time of the fact finding hearing, but which was available and used at the conciliation hearing.

I find the "clear error" standard to be too exacting for collective bargaining purposes. Nevertheless, the party seeking an award different from the recommendations of the Fact Finder (when adopted by a party in its final position statement) must prove error, either omission or commission. It is not enough to simply disagree with or have a difference of opinion with the fact finder and establishing error is more difficult when the fact finder's recommendations are supported by well-reasoned positions. The party challenging the Fact Finder bears the burden of establishing factual or legal error.

While many may consider this to be an exacting burden, it is, nevertheless, the standard used in these proceedings. The burden lies with the City since it is the party seeking the changes.

ISSUES

The first issue consists of two-parts, arising under the same article of the collective bargaining agreement. Though considered by the parties and Fact Finder under the same issue, they address different matters- a general wage increase and the elimination of the two-tier wage system for lieutenants. They were separately addressed, though not separately numbered:

Issue No. 1 Article 22- (a) Compensation/ Wage Increases and
(b) Elimination of the 2-tier system for
lieutenants

Issue No. 2 Article 30- Duration of Agreement

Issue No. 3 Article 36- Layoffs

Issue No. 4 Memorandum of Understanding- Concession Days

ISSUE NO. 1

Article 22
Part (a) Compensation

FACT FINDER'S RECOMMENDATION: Effective January 1, 2017 a wage increase of 3% across the board; effective July 1, 2017 a wage increase of 1% across the board and effective January 1, 2018 a wage increase of 1%.

UNION'S FINAL POSITION: Adopted the Fact Finder's recommendations as its final position.

CITY'S FINAL POSITION: 2% wage increase effective January 1, 2017, 1% wage increase effective July 1, 2017 and a wage reopener for 2018.

DISCUSSION: No wage increases were proposed for 2016. The City proposed a 1% wage increase effective January 1, 2017, 1% effective July 1, 2017 and a reopener for 2018. The Union proposed a 3% increase as of January 1, 2017, a 1% increase effective July 1, 2017 and a 1% increase effective January 1, 2018. For purposes of conciliation, the City increased its wage offer from 1% to 2% effective January 1st, coupled with a 1% increase effective on July 1st with a reopener for 2018.

While the revised offer narrows the differences between the parties, it did not fully address the wage inequities addressed by the Fact Finder.

The Fact Finder underscored that the Union had provided him with considerable information to show that this unit's firefighters are significantly underpaid in comparison to wages paid to firefighters in comparable area cities. During conciliation, the City did not point out any error in the Fact Finder's conclusion nor did it introduce any evidence to demonstrate that the Fact Finder committed any error in his conclusions.

The size of the unit, only 18, underscores that the costs of the wage increase as recommended will not create an unsurmountable burden on the City. The Fact Finder specifically found that the data provided shows that the City's financial condition has considerably improved over the past few years and that the outlook is promising. The Conciliator concludes that the Fact Finder believed that the City could absorb the wage increase suggested by the Union to be feasible. The Fact Finder then considered and rejected the City's argument that

the recommended increases would create too great a financial burden since it was expected that other unions will seek "me too" percentage increases in their next contracts. "Me Too" fears are raised as a matter of course and are not a reason to deny or limit a wage increase.

The Fact Finder did not accept the City's reasoning for limiting this unit's wage increases and added that internal parity is not a sufficient reason to limit this unit's wage increase. The Fact Finder noted that the Department has a significant surplus in the operating fund from which this unit is paid and that the wage increases as recommended are not likely to greatly affect this surplus which stands in excess of \$500,000 (the unencumbered balance for non-capital fire and EMS expenses). The wages of this unit are paid from that fund. The fact finder concluded that the fund is expected to show a surplus for the third consecutive year.

The Fact Finder noted that over the years the job demands of this department have grown while the City has failed to add to the full time staff which means an increased workload for the same pay.

The City did not claim that the members of this unit are not deserving of the raises sought, but that additional time was needed to permit the City to regain a secure financial condition and to feel more confident about the local economy. In rejecting this argument, the Fact Finder noted that the voters passed a 4.5 mill levy for payment of the expenses of this department and was convinced that the City could afford the modest increases sought by the Union and the Conciliator notes that this is a relatively small unit and that the increases will not crimp the City's overall financial condition. The Conciliator is aware that cities always feel more comfortable when its surpluses continue to increase year after year, but there comes a time when competitive wages must be paid. This unit has not regained the sacrifices it made when helping the City out of the recession bind. The fact finder concluded and the conciliator agrees that the wages sought will not significantly affect its surplus.

The City did not point out any particular error committed by the Fact Finder in his wage recommendation, nor did it point to a single piece of evidence either not considered or erroneously considered in making those recommendations. The City failed to meet its burden of establishing error. The City's rejection of the Fact Finder's recommendations is a difference of opinion and not based on error of fact or law.

AWARD: The Conciliator adopts the final position of the Union as it relates to wage increases- a 3% wage increase across the board effective January 1, 2017, a 1% wage increase across the board effective July 1, 2017 and a 1% wage increase across the board effective January 1, 2018.

ARTICLE 22

Part (2)- Elimination of the Lieutenant's Two-Tier Pay System

Fact Finder Recommendation: Eliminate the two tiered wage scale as it pertains to lieutenants (by removing the pay scale differentiation beginning with the words: For Those Lieutenants (24/48) newly hired on or after January 1, 2013- on page 19 of the current contract.

Union's Final Position: Adoption of the Fact Finder's recommendation.

City's Final Position: Retain current contract language

Discussion: The Fact Finder was critical of the City's two tier wage structure, and noted that the purpose of the two tier system was simply to lower wage costs for employers facing financial difficulties. But the City is no longer facing those financial difficulties. Retaining the two tier system is simply a matter of continuing to operate a low budget fire department.

The effects of the two tier wage system have not been fully felt since there appears to have been few new firefighters hired since January 1, 2013 and no new hires are contemplated. The Union did not request elimination of the entire two-tier system and left intact the system as it pertains to firefighters/paramedics hired after the aforesaid date. The gist of the Union's request appears aimed at protecting the current unit. The two-tier system has had little effect to date, but as the current staff ages and retires or moves on to other better paying jobs and new personnel are hired, the effect of the two tier system will come into play and firefighters doing the same work, and exposed to the same dangers will begin to voice their objections to this system which provides no avenue for the newer hires to reach the same wage level paid to older colleagues.

The City was unwilling to concede on this issue and desired to retain

the current two-tier language for lieutenants and firefighters. New lieutenants are not contemplated at this time, but if a lieutenant position is added and promoted from within, the replacement firefighter will be hired under the two-tier system and paid at the lower rate.

The Fact finder's recommendation is in line with the Union's proposal, and puts an end to the two tier wage system as far as the lieutenant position is concerned.

The City defended its position of retaining the two-tier system by citing its successful efforts in implementing the two-tier system city-wide. The economic reasons for retaining the two-tier system are no longer present and its continued retention is the City's desire to lower wage costs. The wage structures of neighboring departments will have an impact on the wages paid here.

The Conciliator was not presented with any financial information proving that the City is facing the same financial conditions which prompted the draconian reductions of the past. The City could not point to any financial data that the fact finder failed or erroneously considered in making his recommendations and thus failed to meet its burden of proof. The Conciliator has no alternative but to adopt the Union's position which incorporated the fact finder's recommendations.

Award: The Conciliator adopts the Union's final position on this issue

ISSUE NO. 2

ARTICLE 30

DURATION OF AGREEMENT

FACT FINDER'S RECOMMENDATION: The fact finder recommended a full three-year agreement without any wage reopeners, beginning January 1, 2016 and expiring December 31, 2018.

UNION POSITION: The Union adopted the fact finder's recommendation as its final position.

CITY POSITION: The City maintained its original offer of a wage reopener for 2018 and did not directly express an expiration date of shorter than the usual 3-years.

DISCUSSION: This is a rather moot issue. The Fact Finder recommended a 1% wage increase for 2018 and against a wage reopener for 2018 which is the last year of the contract. The reopener clause is a part of the compensation package and has nothing to do with the length of the contract.

The fact finder's recommendation is clear- a three year contract expiring December 31, 2018 without any wage reopeners. The Conciliator does not see the necessity of a wage reopener in the last year of the contract and if accepted would place the parties in the same position one year from now, bargaining over a raise for the last year of the agreement.

The fact finder correctly drew the parties attention to the costs of multiple bargaining sessions in which unit members are paid to attend, attorneys and consultants fees, and fact finding and possibly conciliation costs which simply outweigh the costs of the minimal wage increase as recommended.

The Conciliator doubts that a wage reopener clause for 2018, the last year of an otherwise three year agreement, shortens the agreement from three to two years, but since this matter was raised as an issue, it is addressed accordingly.

AWARD: The Conciliator adopts the Union's final position on this issue as his award and recognizes this matter as a full 3-year agreement commencing January 1, 2016 and terminating on December 31, 2018.

ISSUE NO. 3

ARTICLE 36.2

LAYOFFS

FACT FINDER'S RECOMMENDATION: The Fact Finder recommended that the Union's proposed language be adopted and memorialized in the new agreement.

UNION POSITION: The Union proposed that Article 36.2 be amended as follows: "In the event of a layoff situation, bargaining unit employees will be laid off in accordance with their seniority (last hired, first laid off). Layoffs shall be made in accordance with Article 2, Section Q of the City of Trotwood Personnel Manual dated

August 2012".

The Union argued that a full-time staff serves the City far better than a staff of part-time firefighters, has more training and work better as a unit than a department consisting primarily of part-time employees.

CITY POSITION: The City proposed that the current contract language be adopted in the new agreement and submitted that the fact finder failed to consider the history of the parties as it related to layoffs.

DISCUSSION: The City's brief traced the history of the department from the merger with Madison Township Fire Department in 1996 when it had 6 fulltime firefighters and 80 plus paid-on-call staff to a merger with Trotwood Rescue in 1999 when a total of 9 more fulltime firefighters/paramedics were hired for a total of 15 fulltime firefighters forming the core of the new Trotwood Fire/Rescue supplemented by former paid-on-call members of the Trotwood department, former part-time members of Trotwood Rescue. Over the next 3 years the paid-on-call staff declined and those that remained transitioned to part-time status. In 2005 3 full-time firefighters/ paramedics were added to the staff for a total complement of 18 which is where the unit stands at this time,

The City relies on part-time staff for a substantial portion (about 43% by the City's estimate) of its daily staffing and maintained that without part-time personnel it could not operate. The City desired to maintain its long-standing practice of a full-time/ part-time department.

The current layoff language was negotiated between the parties during bargaining in the previous contract, though the procedure for layoffs began appearing in the collective bargaining agreement beginning in 2007. The current contract contains a formula requiring the layoff of no less than 20% of the dual certified part-time staff with the first full time layoff and thereafter 5% of the remaining part-time employees with each successive full-time employee laid off. Thus, if the department had 40 part-timers, 8 would have to be laid off if 1 full-time member were laid off and if another full-time firefighter were to be laid off, then 1.6 part-timers would have to be laid off. No one explained how .6 of a part-time employee could be laid off, but the City was adamant about retaining the language.

There do not appear to have been any layoffs during the effective

dates of the recently expired contract so there is no way of testing the efficacy of the formula. In the opinion of the Conciliator, the present layoff procedure suits the City's objective of maintaining its full-time/ part-time character, but is cumbersome, untested and possibly unworkable. Inclusion of untested language in the now expired agreement for the first time does not establish a history of bargaining between the parties and there is no compelling reason to continue it into the new agreement.

While the fact finder appears to have some definite views on the use of part-time firefighters, those views do not, necessarily, render his findings to be biased against the City. The Conciliator opines that the part-timers used by Trotwood are full-timers in another department using their off-hours to staff other area fire departments as fill-ins or on a semi-regular basis as in this City. The part-time firefighters are certified and trained, the difference being that they are trained in other departments and not necessarily with members of the Trotwood fire department which is one of the issues expounded by the fact finder.

Laying off part-time employees before laying off any full-time employees is a legitimate goal of collective bargaining. The City's continued reliance on part-time firefighters is strictly a cost saving measure. The practice does not make the Trotwood department better and while the part timers are all certified, their continued use at the rates they are used by the City, do not result in a more cohesive department nor a better firefighting force. The Union is not trying to force the City to hire more full-time firefighters, but seeks only to protect the fulltime employees who have a greater stake in the City and its residents than part timers who are likely members of a neighboring department or who may serve part time in more than one municipality.

Moreover, the City has not proven that its financial condition requires part-time staffers at the expense of full-time firefighters. It is a carry-over philosophy from its days as a part-time department- and one designed to save money not create a better department.

During oral argument, the City suggested that the Fact Finder committed error by recommending adoption of the layoff procedure contained in the Trotwood Personnel Manual which specifically excludes unionized workers. The Union's Position Statement contained the layoff procedure in the manual, but the language referred to by the City was not in the exhibit.

If, in fact, exclusionary language is in the manual, then the fact finder may have exceeded his authority by incorporating a procedure from which unionized employees are excluded. Article 1 of the manual clearly states that the manual covers all union and non-union employees, but if it, the manual, is inconsistent with a collective bargaining agreement, then the collective bargaining agreement shall govern.

The collective bargaining agreement does not contain the layoff procedure and as remarked above is a cumbersome method dealing in percentages. It is silent on the actual procedure. Incorporating a layoff procedure into the collective bargaining agreement between the parties is reasonable and provides a guideline where there is none.

AWARD: The Conciliator adopts the language offered by the Union in its Final Position Statement on this issue.

ISSUE NO. 4

MEMORANDUM OF UNDERSTANDING

FACT FINDER: The fact finder recommended the following:

"Members of Local 4024 will be awarded four (4) days off with pay in 2017 and five (5) days in 2018.

Concession days will be scheduled in accordance with the provisions of Article 16, Section 16.5 of the Agreement.

Any member hired after January 1, 2012 shall receive a prorated amount of concession days, if any, based on the amount of concession days that they took."

UNION POSITION: Adopted the fact finder's recommendation as its final position on this issue.

CITY POSITION: Proposed its original 4 days off be incorporated into the new agreement.

DISCUSSION: This unit absorbed financial cutbacks as part of the cost savings implemented by the City following the 2008 recession.

Members of other units received concession days in repayment, partial or full, for give backs and cutbacks made at that time. The members of this unit did not receive those concession days.

Prior to the hearing, the parties agreed on the language of the Memorandum of Understanding, but could not agree on the number of concession days. The Union proposed 7 days and the City countered with 4 and neither party could explain the rationale behind the number of days proposed by either.

The fact finder awarded 9 days, 4 to be used in 2017 and 5 to be used prior to October 31, 2018. Unfortunately, the fact finder did not explain the rationale behind his recommendation of increasing the number of concession days beyond those demanded by the Union, but a fact finder is not relegated to choosing between the positions of the respective parties and can fashion different recommendations as the facts are interpreted. Simply exceeding the demand of both parties is not grounds for rejecting the fact finder's recommendations and the City did not prove that the fact finder committed any particular error, its objection is clearly a difference of opinion.

This problem may have arose out of the 10% salary reduction which were agreed to by both the police and fire department members in 2012. The discrepancies occurred when the police were given the option of working 26 fewer days, creating overtime situations within that department. Fire department employees also accepted a 10% reduction, but were required to work all normally schedule hours with no overtime pay.

The Union's final position statement contains an explanation behind the fact finder's recommendation. Twenty-six 8-hour days for the police is equal to 8.66 24-hour days for the fire department. It seems quite mathematical and one on which an agreement should have been reached, but City's offer was less than half of the losses sustained by the fire department personnel. The fact finder rounded up the 8.66 days to 9- the next whole number, ergo days and accordingly awarded them 9 concession days, 4 in 2017 and 5 in 2018 to be used prior to October 31st. The shift schedule of the firemen is couched in whole days, 48 hours on (2-24 hour days and 96 hours (3-24 hour days) off which may have caused the fact finder to round up the number of concession days from 8.66 to 9.

AWARD: The Conciliator adopts the final position of the Union and awards 9 concession days, 4 to be used in 2017 and 5 to be used in 2018 prior to October 31st.

Respectfully submitted,

/s/ I. Bernard Trombetta

I. Bernard Trombetta, Conciliator
6590 Creekside Trail
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December 30, 2016

SERVICE

A copy of the foregoing Award was served upon Stephen S. Lazarus, Attorney for the Union and Kelly E. Babcock, Consultant for the of Trotwood and on the Bureau of Mediation, State Employment Relations Board on this 30th day of December, 2016 electronically.

/s/ I. Bernard Trombetta