

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the matter of Conciliation between:)	Case No. 2016-MED-07-0712
)	
LORAIN COUNTY DEPUTIES)	Hearing: March 13, 2018
ASSOCIATION (Patrol Officers &)	
Evidence Officers) FOP-OLC,)	Date of Award:
Employee Organization,)	March 23, 2018
and)	
)	
LORAIN COUNTY SHERIFF,)	
Public Employer.)	

CONCILIATION AWARD

Before Mitchell B. Goldberg, State Appointed Conciliator

Appearances: Lucy A. DiNardo, Senior Staff Representative, FOP-OLC, for the Association
Robin L. Bell, Regional Manager/Employer Advocate, Clemans-Nelson, for the Sheriff's Department

I. Introduction and Background.

The State Employment Relations Board ("SERB") appointed the undersigned as the conciliator of this public employment labor dispute on January 9, 2018. The parties agreed to schedule a hearing to resolve the issues that remained outstanding on March 13, 2018 at the Sheriff's offices in Elyria, Ohio. They timely filed their position statements identifying the remaining disputes after participating in negotiations, and later in a fact finding proceeding. SERB submitted for inclusion in the record the written report and recommendations of the Fact Finder.

The issuance of this final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement this award. Under the Act, the conciliator must select one or the other party's final

offer on an issue-by-issue basis. This award considered all of the factors outlined in O.R.C.

Section 4117.14 (G)(6), which are summarized as follows:

- (1) Past collective bargaining agreements between the parties;
- (2) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employers doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) 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;
- (4) The lawful authority of the public employer;
- (5) The stipulations of the parties; and
- (6) 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, conciliation or other impasse resolution procedures in the public service or in private employment.

The bargaining unit consists of 49 employees classified as Deputy Sheriffs, and one employee in the classification of Evidence Officer. The CBA expired on October 31, 2016. The parties met in multiple bargaining sessions throughout 2016, and 2017. There remained unresolved issues that went to fact finding before Fact Finder Dennis M. Byrne. He issued a Report on October 13, 2017. The Report was rejected by the bargaining unit, and was accepted by the County Board of Commissioners. Thereafter, the parties continued their negotiations, and reached a settlement on 13 issues.

The unresolved issues proceeded to a conciliation hearing. A reporter transcribed the proceeding and prepared the official record. The parties offered oral evidence and submitted documentary exhibits. One issue, the issue of language contained in Article 6, Section 6.2, Employee Rights, was negotiated and agreed upon at the hearing, leaving only the following three outstanding unresolved issues for final offer settlement. This Award resolves each of the

outstanding and unresolved issues, and hereby incorporates all unchanged language in the expired CBA, and all tentative agreements reached between the parties before and during the hearing.

II. Unresolved Issues.

ARTICLE 32 - UNIFORMS

The Union proposes an increase in the current uniform allowance for the 2017 contract year of \$100, raising the annual amount from \$1,000 to \$1,100. The proposed increase for the second year of the CBA (2018) is \$200, raising the annual amount to \$1,300. The Union is also proposing additional language to Section 32.4 that requires the Employer to absorb any cost increases that may result if it decides to make changes to the uniform requirements. The Union believes that its proposed increases are necessary due to the ever rising price increases that relate to its uniform costs.

For example, the deputies are required to wear two hats, one for winter and one for summer. They cost over \$200. They are required to pay for any necessary repair or replacement on their lapel microphone, which is an item not covered under the allowance. A Union exhibit is a purchase order with a Department vendor for nearly \$2,400 that includes the cost of various uniform requirements of over \$1,000. The Union presented the allowance provided by other county departments showing that Lorain County is the lowest allowance when compared to Cuyahoga, Summit, Portage, Medina and Ottawa. The average among those other five counties is \$1,250.

The Employer proposes as its final offer, the increase recommended by the Fact Finder of \$100/yr for each year of the CBA. It contends that this amount is consistent with external comparables. It believe that the amount is adequate to address the uniform costs for replacement of items that wear out or that become damaged in the course of duty. The Union's

proposal will cost almost \$4,900 the first year, and an additional \$9,800 in 2018. Moreover, during negotiations, the Employer proposed a voucher system that addresses the uniform cost increases and according to the Employer, would provide more money on a net basis for bargaining unit members. The Union, however, rejected this proposal.

The Employer presented a different list of counties, which it believes is more comparable to Lorain. It includes Ashland, Erie, Huron, Lake, Mahoning, Richland and Stark. The average annual uniform allowance when these counties are added to the Union's list is \$739, showing that Lorain's allowance is more than reasonable.

The Fact Finder, however, found that the data shows that Lorain has a uniform allowance "that is somewhat below the average uniform allowance paid by other comparable jurisdictions." He recommended an increase a \$100 per year increase in each year of the CBA term. The Employer amended its position from that presented to the Fact Finder, and is proposing the Fact Finder's recommendation as its final offer.

I find that the Employer's offer is more reasonable, now that is is proposing a \$100 per year increase, that will result in \$1,100 for each year of the CBA. This is the Fact Finder's recommendation. This is well within the reasonable range based upon the comparables that were provided by the Union. The Employer included in its comparable list 4 counties that pay nothing toward any uniform allowance (Huron, Lake, Richland and Stark). A better comparison is among those that include this form of compensation to relieve its officers of the burden of making these payments. The average of payors among the Employer's list is \$1,161.

I do not find that the Union's language proposal is justified at this time. There was no evidence that the Employer intends to make any uniform changes that would produce any substantial costs for the officers.

Decision: The Employer's Final Offer is awarded.

(2) ARTICLE 36 - FIELD TRAINING OFFICER PAY

The parties have agreed that the field training officer program that was implemented in 1998 will remain in place throughout the new CBA term. The current language provides in a Side Letter Agreement that the training officers receive an additional \$1.00/hour for each hour they actually serve in the capacity of a an FTO.

The Union proposes adding Section 36.3 that states:

Those officers selected to **serve** as field training officers shall receive an additional one dollar (\$1.00) per hour for each hour they actually serve in the capacity of a field training officer. **In addition to the increase in pay, all FTO officers shall receive one and one half hours of compensatory time for every eight (8) hours spent Training.**

The Union contends that an increase in this compensation item is needed due to the tedious work and the amount of responsibility that is imposed upon the FTO to provide training for new hires. The workload has increased due to the number of new hires that have been employed. Its offer is for 1.5 hours of compensation time off for each 8-hour training day. The cost increase for the Employer will be minimal because there are only a small number of FTOs. The Union believes that they are underpaid, based upon their duties and responsibilities.

The Employer's final offer is similar to that proposed to the Fact Finder. It proposes paying the current \$1.00 per hour supplement plus one (1) day of leave for every training officer assignment. It would pay \$1.00 per hour + 2 hours per week for every 40 hours served in the training officer capacity. In other words, one paid leave day would be provided after every FTO assignment, which is generally for 4 weeks or one month. Generally, FTOs work with a new hire for about 4 weeks each. The FTO would receive one paid day off after the completion of this assignment. It believes its proposal is in line with current comparables.

The Employer is opposed to providing compensatory time off that is governed by FLSA as an alternative to overtime pay. The FTO pay is not overtime pay; it is extra pay for extra duties and responsibilities for work performed within their regular work schedule.

The Fact Finder accepted the Employer's distinction between the provision of compensatory time off under FLSA for overtime work, and providing increased compensation relating to increased duties and responsibilities that is not for working overtime over 40 hours per week. He recommended that an FTO receive a personal holiday at the end of each FTO training assignment. The holiday would be scheduled in accordance with Article 29, Section 3 that provides for personal holidays. The Employer's final offer is for paid time off of 8 hours for every 40 hours of FTO work, so that after a one month assignment, the FTO would accumulate one paid leave day (8-hours).

A review of the external comparables does not provide much guidance. Many of the counties do not provide this extra pay for training officers. I agree with the Fact Finder that the parties are not very far apart on their proposals, considering that the Employer is willing to increase the pay in the form of paid time off. I find that the Employer's final offer is more practical in avoiding the use of compensatory time off in FLSA terms, since this payment is not necessarily for overtime work, but instead, for the provision of expert training services within the FTO's regular work schedule.

Decision: The Employer's final offer is awarded.

(3) ARTICLE 26 - HEALTH CARE BENEFITS

Section 26.1 of the expired CBA states that "the Employer" will provide health care benefits under the Lorain County Health Care Plan, except as provided for in Section 26.4, which is the section that addresses the required premium contribution level for employee beneficiaries under the plan. That section contains the requirement that in the case of a

premium increase, the Employer must provide the Union with the supporting documentation (including any actuarial report prepared for the Board of County Commissioners) that an increase is necessary. The language as stated creates an ambiguity between the terms “Employer” and the County health care plan. The Sheriff’s last final offer is based in part upon its desire to make it clear under Ohio statutory law and case law that the Board of County Commissioners (“BOC”) provides the health care plan for all of its employees including the bargaining unit members. The BOC determines plan design and plan benefits.

Under O.R.C. Section 305.171, the BOC may contract for health insurance coverage and benefits. The costs are paid for from the budgets and funds from which the county officers or employees are compensated. These Section 305.171 plans give sole authority to the BOC to contract and provide for health care. The Union does not dispute that Section 26.1 provides for one of these plans, giving the BOC authority to determine plan coverage and benefits for the bargaining unit members. This type of plan is distinguished from a Section 307.86 type plan that provides benefits from a county (or contracting authority) and Union (collective bargaining representative) jointly administered health and welfare trust fund.

Two Ohio Appellate Districts have decided that conciliators exceeded their authority when they awarded union proposals that changed the county-wide plan coverage and benefits in violation of Section 305.171. In *Licking County Sheriff’s Office v. Teamsters Loc. 637*, 2009-Ohio-4765 (5th Dist.), the court found that the Sheriff was without power to contract for health care coverage, when the Sheriff and the Union agreed to participate in the general county plan. That right to contract resides exclusively with the BOC. In *Allen County Sheriff v. FOP-OLC*, 2012-Ohio-3122 (3rd Dist.), the court held that a conciliator exceeded his authority when he required the sheriff to purchase additional health insurance that added coverage for spouses who had other available health insurance coverage. The employees were covered, as

here, under the general health insurance plan for all county employees under Section 305.171. The Sheriff had no authority to negotiate changes in health insurance coverage; that authority was vested solely with the BOC.

The Fact Finder was troubled by the Union proposed position that language be added to 23.3 that would require the Employer to prove that there was a fiscal reason for any mid-term changes to the county plan. He was not sure this provision would comply with the above law if the BOC decided to add a spousal carve-out or surcharge to the plan that would impact the CBA provisions. The Fact Finder made it clear that Chapter 4117 mandates bargaining over health care and medical insurance as part of wages, hours, terms and other conditions of employment,” but the above statute and case law creates an exception for general county-wide plans administered by the BOC. He felt that he did not have legal authority to recommend the Union’s specific proposal that was made in fact finding.

The Employer proposed language specifically made it clear that the BOC is empowered under the county plan to veto any attempted negotiations between the Sheriff and the Union over changes in plan design, benefits and terms. The Fact Finder was opposed to include a third party (BOC) in a CBA between the Sheriff (Employer) and the Union. He recommended that the parties (Sheriff and FOP) execute a Memorandum of Understanding (“MOU”) to the CBA that would serve to explicate the BOC’s role in administering the county health insurance plan.

The Fact Finder considered the possible BOC imposed spousal carve-out issue as a bargaining issue that needed to be addressed. He referred to SERB data that shows that about 50% of the Ohio public sector CBAs have spousal carve-out provisions, and that probably more will come about as one of the possible ways to control rising insurance costs. Spouses who

must remove themselves from the county plan if they have their own employer provided plans is an attempt to reduce claims and usage, that in turn, will help reduce premiums.

Both parties mutually agreed to revise their respective final offers for submission to the conciliator at the hearing. They adopted the Fact Finder's recommendation to enter into an MOU with respect to a spousal surcharge or spousal coverage. The Sheriff's final offer changes the language of Section 26.1 as follows:

The Employer [Sheriff] will provide full-time unit employees with health care benefits under the Lorain County Health Care Plan, one of which will include basic surgical, hospitalization, major medical, dental, vision, and prescription drug coverage (base program) and shall pay the premium cost for said insurance in accordance with Section 4 of this article [premium sharing].

The Union's last final offer is for current language. Both parties agreed to change Section 26.2 to read "Board of County Commissioners" instead of the word "Employer" in the first sentence. This recognizes the Union's agreement that it is the BOC that has the authority to provide for the health care plan and the manner by which coverage is provided.

The Sheriff's final offer contains language changes to Section 26.3 as follows:

Notwithstanding the provisions of Section 1 above, which provides for health care coverage, the Union agrees that the **Board of Commissioners** may offer alternative health care coverage programs during the term of the Agreement. The Board of Commissioners shall determine the terms and conditions and **benefit levels of the base program and any** alternative programs. The costs and/or the terms and conditions **and benefit levels** of said programs shall be at the discretion of the Board of Commissioners and may be subject to change. In the event of changes in the costs and/or terms and conditions of such alternative programs, affected employees may withdraw from said program and shall be entitled to the benefits described in Section 1 above.

The Union's final offer is for current language in Section 26.3. The Sheriff's final offer changes the first paragraph of Section 26.4 to read:

Excluding of any costs which may be associated with non-mandatory individuals (i.e., those individuals for whom the County is not required

to offer coverage) participating in County provided insurance, effective January 1, 2018, the parties will contribute to the cost of the health care coverage as follows:

The Union's final offer is for current language on the first paragraph of Section 26.4. The parties agree to the monthly contribution levels on a 90% Employer - 10% Employee level until the last contract year, when the levels change from 88%-Employer and 12%- Employee. The Sheriff proposes language that states that the employee will be required to contribute through payroll deduction not to exceed 12% "throughout the term of the Agreement." The Union's preferred language merely changes the effective date for an increase from 10% to 12% as being January 1, 2019. The remaining language in 26.4 is unchanged in both final offers.

The critical agreement between the parties relates to the language of the MOU. I can find no material difference between the two last final offers on this point. The last sentence of the Sheriff's offer uses the words "of this article." The Union's offer uses the words "Article 26." Both chosen words express the same intent. The Sheriff's final offer in the second to last sentence contains a typographical misspelling of the word "through."

The Sheriff offers more language changes to the above provisions in Article 26, based upon its belief that it is clarifying the parties intentions with respect to the provision of health care benefits. While I recognize the Sheriff's efforts, the Union's final offer represents less changes to the current language, under which the parties have been operating for at least the last contract term. The Employer's addition in Section 26.3 of the words benefit levels is an unnecessary addition, since it is understood that benefit levels are embodied within the current words of "terms and conditions" of such alternative plans. Likewise the addition of the Employer language in 26.4 referring to the exclusion of any costs associated with non-mandatory individuals seems unnecessary. There is no evidence that the parties have a different understanding on this point, and the insertion of this language might create an issue that

presently does not exist. Because the Union's last final offer contains the least amount of changes to the current language or status quo, neutral fact finders and conciliators generally prefer to leave current language alone when they see no compelling need for a change.

Arbitrator Briggs addressed this principle in more profound terms:

The status quo represents stability, and changes to it are more appropriately made by the parties themselves through the give and take of free collective bargaining than they are by third party neutrals in impasse resolution procedures. After all, the parties return to the bargaining table on a regular basis, giving them repeated opportunity to adjust various elements of the employment package as dictated by changing needs and circumstances. Interest arbitrators are reluctant to make drastic changes to the status quo, on the basis of evidence usually presented in just a few short hours, when the parties themselves can always revisit a troublesome issue during the next round of contract negotiations. The exception, of course, is when a party shows a "compelling need" for change right away.¹

I find that the Union's last final offer adequately addresses the Employer's concerns that the health care plan is provided by the BOC, and that the BOC, under existing statutory and case law, has the right and authority to change the plan terms and conditions that include the types of benefits and levels of its choosing. Employees who dislike any BOC changes may rely upon the the provision of a base plan offered by the county plan that must include basic surgical, hospitalization, major medical, dental, vision and prescription drug coverage. Their remaining issues of percentage contributions for employees, and the terms of an MOU that addresses the BOC's future consideration of imposing a spousal carve-out and surcharge has been agreed upon as set forth in each party's last final offer.

Decision: The Union's final offer is awarded.

Date of Award: March 23, 2018

/s/ Mitchell B. Goldberg
Mitchell B. Goldberg, Conciliator

CERTIFICATE OF SERVICE

¹ *City of Carbondale and Illinois Fraternal Order of Police Labor Council*, S-MA-04-152 p.23 (2006).

The above Conciliation Award was served upon the following persons/agency by electronic mail on this 23rd day of March, 2018:

SERB Email: med@serb.oh.us

Lucy A. DiNardo: ldinardofop@wowway.com

Robin L. Bell: rbell@clemansnelson.com

/s/ Mitchell B. Goldberg
Mitchell B. Goldberg