STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Conciliation Between:	)	
CITY OF BROADVIEW HEIGHTS	)	**Case No. 2017-MED-09-1139 (Full-time Fire Fighters)**
-and-	)	**Jonathan I. Klein, Conciliator**
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 3646	)	

LAST BEST OFFER AWARD

Appearances

For the Union:

Tom Hanculak, Esq. - Attorney for Union
Scott Maynor, President - NOFFA
Cameron Coleman - Secretary, Local 3646
Brian Dunlap, Sec./Treasurer - NOFFA
Alan Leonard - Fire Fighter

For the Employer:

William Blackie, Esq. - Attorney for Employer
Sam Alai - Mayor
David Pfaff - Finance Director
Jeffrey Hajek - Fire Chief
Joe Fleming - Assistant Chief

Date of Issuance: October 8, 2018

I. PROCEDURAL BACKGROUND

This matter came on for hearing on July 13, 2018, before Jonathan I. Klein, appointed as conciliator pursuant to Ohio Revised Code Section 4117.14 (D)(1) and Ohio Administrative Code Section 4117-9-06. The hearing was conducted between the City of Broadview Heights ("Employer" or "City"), and the International Association of Fire Fighters, Local 3646, AFL-CIO ("Union"), at City Hall located at 9543 Broadview Road, Broadview Heights, Ohio 44147. The Union is the sole and exclusive bargaining representative of all full-time members of the Fire Department, excluding the Fire Chief, Officer designated to be Acting Chief and all part-time and seasonal employees. At the time of the hearing, the bargaining unit was comprised of 19 bargaining unit members consisting of three lieutenants and sixteen firefighters. (City's Pre-Hearing Statement, at 2).

The parties engaged in negotiations commencing in late October 2017 for a successor to the collective bargaining agreement expiring on December 31, 2017. The parties were unable to resolve all of the outstanding issues and proceeded to a fact-finding hearing on March 29, 2018. Fact-finder Susan Grody Ruben subsequently issued her Fact-Finder's Report on April 19, 2018. (Employer's C). The Employer rejected the recommendations in the fact-finding report while the Union accepted the report.

After presentation of their respective positions at the conciliation hearing, followed by further negotiations, the parties agreed to resolve all open issues with the sole exception of Article 36 - Holidays. In selecting the last best offer, issue-by-issue, the conciliator reviewed the record of the hearing, including the fact-finder's report, arguments and evidence presented by

both parties, together with their respective position statements. Incorporated by reference into this Award are any provisions of the current collective bargaining agreement not otherwise modified during negotiations, all tentative agreements, and those articles of the agreement which were mutually agreed upon at the conciliation hearing and are attached hereto as Exhibit A.

II. LAST BEST OFFER CRITERIA

In the determination of each issue, the conciliator has also considered the applicable criteria listed in 4117.14(G)(7)(a)-(f), and Ohio Admin. Code Section 4117-9-06(H)(1)-(6). These conciliation criteria are enumerated, as follows:

(1) Past collectively bargained agreements, if any, 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 employees 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 rule, 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.

III. FINDINGS OF FACT AND SELECTION OF LAST BEST OFFER

Issue 1: Article 36 - Holidays

The current agreement language on holidays contains the following:

Section 1.

a) Employees assigned to work one hundred ninety-two (192) hours in a 27-day cycle shall be entitled to one-hundred fifty-six (156) hours of holiday pay per year. For these employees, holiday time off shall be taken in twelve (12) or twenty four (24) hour increments.

b) Employees assigned to work forty (40) hours per week shall be entitled to one-hundred twelve (112) hours of holiday pay per year. For these employees, holiday time off shall be taken in four (4) or eight (8) hour increments.

c) Employees hired after January 1 or whose work schedule is changed after January 1 shall have their holiday hours prorated to the nearest whole hour.

Section 2. If any employee is required to work any of the following holidays, they shall be compensated at one and one half (1½) times their hourly rate:

New Year's Day	Fourth of July
Martin Luther King Day	Labor Day
Easter Day	Thanksgiving Day
Memorial Day	Christmas Eve
President's Day	Christmas Day
	Employee's Birthday

Section 3. For purposes of Holiday Compensation in Section 2 above, the holiday shall be considered as the twenty four (24) hour period commencing on or about 8:00 am of the Holiday specified in Section 2 above.

Section 4. Effective January 1, 2010, if a bargaining unit employee does not utilize more than a total of 72 hours of sick time during the year (as measured from December 1st of the previous year through November 30 of the current year) the Employee may elect to be paid for unused holidays, which payment shall be made on or before the last pay in December and reflect the amount of holiday hours in the Employee's holiday bank as of December 1st. The Employee shall notify the Chief, or designee, of his or her election of said cash out by November 1st. The requirement that an employee not utilize more than a total of 72 hours of sick leave may be waived by the Mayor at his reasonable discretion upon request of the employee.

Fact-finding Report

At fact-finding, the Union proposed to add one tour of holiday time in each of the first two years of the agreement, and 1.5 tours in the final year. It also proposed elimination of Article 36, Section 4 with its preclusion of an employee cashing out any unused holidays if he or she uses more than 72 hours of sick time during a period of one year commencing December 1 of the previous year. The City proposed current contract language.

The fact-finder recommended adding 1 tour as of January 1, 2019 to address parity with the police. She also recommended eliminating Section 4 on the basis that no other City employees are subject to such a rule, concluding it unfairly penalizes the bargaining unit members. At conciliation, the Union's last best offer is the fact-finder's recommendations, and the City maintained its offer of current language.

Discussion

The subject matter of holidays was treated by the parties for purposes of the conciliation hearing as a single issue. Therefore, the conciliator must select between each party's final offer

for Article 36 - Holidays. In reaching his selection, the conciliator finds the evidence consists primarily of two of the statutory criteria: internal bargaining unit comparability and past collectively bargained agreements between the parties. The Union suggests that the City bears the burden of proof at conciliation to overturn the fact-finder's recommendation, and cites decisions arguing that a conciliator is required to defer to the fact-finding report unless the party opposing adoption of the fact-finder's recommendation proves an error or substantial changes since the fact-finding hearing. Not surprisingly, the City reasons that conciliators have broad authority to conduct a *de novo* review of the issues – even referencing authority holding that reliance upon the decision of the fact-finder is foreclosed. The conciliator rejects both positions.

It is the opinion of this conciliator that the fact-finder's report and recommendations may be valuable to understanding the issues presented and reaching a selection of the last best offer. However, this conciliator has long declined to accept the notion promoted by some neutrals that a conciliator must essentially rubber stamp a fact-finder's report absent clear error. Positions on issues may fluctuate significantly between fact-finding and conciliation hearings. The facts supporting the respective offers may, in rare cases, change between the fact-finding and conciliation hearings. In weighing a multitude of issues a fact-finder may treat an issue in such a way as to fit into an overarching framework for his or her report and recommendations. Regardless, a conciliator's primary statutory duty is to examine not only the fact-finder's report,[1]

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1. There is no legislative mandate that conciliators must slavishly follow a fact-finder's recommendation. All that appears to be required is for the conciliator to include in the record and consider the written recommendation of the fact-finder.

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but factual evidence of statutory criteria, which evidence will tip the scale in favor of one or the other last best offers.

The reasoning given to eliminate the current language of Article 36, Section 4 is that none of the other bargaining units in the City have similar language, and it constitutes a "penalty" assessed against the employees covered by the Agreement. The first reason appears true as there was no evidence of other internal bargaining units with similar language.

However, that reason is insufficient standing alone to direct its elimination. For a summary of bargaining history provided in City Exhibit O is evidence that this language has been in the Agreement since the collective bargaining agreement effective January 1, 2009, with the exception of a two-year period when the parties agreed to waive application of this section. Whether this language has had the salutary effect of reducing sick leave sought by the City remains unclear, but there is no question of the contract language's extended presence in the bargaining history between these parties. Second, there is a dearth of facts demonstrating how often and under what circumstances this provision has been used to deprive a bargaining unit member of exercising his right to unused holiday buy back, including waivers by the City's mayor. Future deletion of this provision may present a reasonable position, but the record before the arbitrator does not support doing so for the successor contract.

An equally significant hurdle for selection of the Union's offer is the proposed increase in holiday hours. The Union has advocated that without the recommended increase in the hours of

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1(...continued)
Ohio Rev. Code §4117.14(G)(6). This mandate was satisfied in this case.

holiday pay the members of the bargaining unit will lack parity with the police. Again, the 156 hours of holiday time per year has been in the Agreement for almost ten years. Second, the Union argues an increase of at least the recommended addition of 1 tour, or 24 hours, will bring its members into parity with the police.

The difficulty with the Union's position is the claim that the members of the Fire Department fall 3½ work days/tours short of the police. Any firefighter is well aware of the experiential nature of a fire fighter's job – the 24 hour shift. Its position notes that the police receive 120 hours of holiday time equal to 10 work days/shifts. The Union then emphasizes that it only receives 156 hours of holiday time equal to 6½ days/tours off annually.

The conciliator is of the opinion that in order to accurately compare these two, internal safety bargaining units he is required to examine the actual hours worked and then the hours of holiday time provided both bargaining units by the respective agreements. In the case of the police unit represented by the FOP, the members receive 120 hours of holiday pay for 2,080 hours worked each year. In contrast, the firefighters currently receive 156 hours of holiday time off per work year consisting of 2,595 hours. The ratio of firefighter to police work hours is 1.247 – rounded up to 1.25. Applying that ratio to the 120 hours of holiday time off provided to the police, firefighters should receive 150 hours of holiday time off. Instead, the unit currently receives 156 hours. There is no change in other forms of paid time off that warrant selection of the Union's proposal. There is no evidence that some other contractual provision was negotiated with the understanding that the *quid pro quo* for such language change would require an upward

adjustment in holiday time off. In sum, there is no evidence to warrant the adjustment the Union now seeks.

Last Best Offer

The conciliator selects the Employer's proposal regarding Article 36 - Holidays as the last best offer.

/s/ *Jonathan I. Klein*
Conciliator

Dated: October 8, 2018

CERTIFICATE OF SERVICE

A copy of this Last Best Offer Award, together with Attachment A was served on Thomas M. Hanculak, Attorney for Union, at tmhanculak@aol.com; and upon William Blackie, Attorney for City, at wblackie@fisherphillips.com; and upon Donald Collins, General Counsel & Assistant Executive Director, Bureau of Mediation, State Employment Relations Board, at donald.collins@serb.state.oh.us; and med@serb.state.oh.us; each by electronic mail this 8th day of October 2018.

/s/ *Jonathan I. Klein*
Conciliator