

**State of Ohio**

**State Employment Relations Board**

<b>In the Matter of Conciliation</b>	:	SERB Case Number: 2017-MED-10-1346
	:	
Between:	:	
	:	
Painesville, Ohio	:	
Employer	:	Date of Hearing: October 25, 2018
	:	Date of Report: November 21, 2018
And:	:	
	:	
IAFF, Local 434	:	
Union	:	Felicia Bernardini, Conciliator
	:	
	:	

**Conciliation Report and Award**

**Appearances:**

**For City of Painesville, Employer**

Jeremy D. Iosue, Esq., Harvey Abens Iosue Co., LPA, Conciliation Spokesperson  
 Andy Unetic, Finance Director  
 Kristin Young, HR Supervisor  
 Mark Mlachak, Fire Chief

**For International Association of Fire Fighters, Local 434, Union**

Susannah Muskovitz, Esq., Muskovitz & Lemmerbrock, LLC, Conciliation Spokesperson  
 Mary Schultz, CPA, CFE, Sargent & Associates  
 Terence Marthe, President, Local #434  
 Justin Cubranich, Vice President  
 Mark Jonovich, Treasurer  
 Amanda Karduck, Member

## 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 June 28, 2018 in compliance with Ohio Revised Code (ORC) Section 4117.14D(1). The case concerns a conciliation proceeding between the City of Painesville, Ohio (hereafter referred to as the “Employer” or the “City”) and the International Association of Fire Fighters, Local #434 (hereafter referred to as the “Union” or “Unit”).

Prior to the hearing, the parties engaged in contract negotiations for a successor agreement to a contract that expired on December 31, 2017. Tentative agreements were reached on a number of issues, however the parties reached impasse on the issue of wages and proceeded to fact finding. Fact Finder James Mancini was appointed to the case. A fact finding hearing was held on May 11, 2018 and a Report and Recommendation was issued on June 12, 2018. The fact finding report was accepted by the Union, but was rejected by the Employer. The matter was referred back to SERB for a conciliation order.

The parties have signed an ORC 4117.14(G)(11) retroactivity waiver. Both parties timely filed the required pre-hearing statements. The conciliator is engaged to resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the parties final settlement offers. At hearing the Employer was represented by Jeremy D. Iosue, Esq. and the Union was represented by Susannah Muskovitz, Esq.

### Issues

The single remaining open issue addressed by the parties is wages, the same issue address by Fact Finder Mancini

### General Background Information

The City of Painesville is located in Lake County in northeast Ohio. Painesville is approximately 30 miles east of Cleveland, OH and is just south of Lake Erie. Painesville is the seat of Lake County government. With a 2013 estimated population of 19,616 it is the fourth largest municipality in Lake County, following the cities of Mentor, Willoughby and Eastlake.<sup>1</sup> The

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<sup>1</sup> [www.painesville.com](http://www.painesville.com)

bargaining unit consists of all full-time employees in the Fire Department in the positions of firefighter/paramedic, lieutenant and captain. There are 25 bargaining unit members. The Fire Department operates out of a single station. In 2016 the Department responded to 4,409 calls making it the single busiest fire station in all of Lake County.

### **Positions, Discussion and Award**

Below the position of each party is briefly summarized, position summaries are followed by a brief discussion, which is followed by the Conciliator's award.

In analyzing the positions of the parties and making recommendations the Conciliator is guided by available, relevant evidence 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.

#### Article XX: Compensation Plan

##### *Employer Position*

The Employer proposes the following wage increases during the term of the contract:

- Effective January 1, 2018 bi-weekly hourly rates increase by 3%
- Effective January 1, 2019 bi-weekly hourly rates increase by 2.5%
- Effective January 1, 2020 bi-weekly hourly rates increase by 2.5%

In addition, the Employer proposes to adopt an annual stipend for all unit members holding a paramedic license of \$700 in 2018, \$1400 in 2019 and \$1400 in 2020.

The Employer's final best offer for the purposes of conciliation is basically the fact finder's recommendation with a slight modification. In the final year of the contract, the Employer proposes to provide a \$1400 stipend to the bargaining unit members rather than the fact finder's recommended \$2100. There are three main points to the Employer's arguments: internal equity, an overestimation of available revenue, and an incomplete picture of area comparable data.

The Employer argues that the third year stipend as recommended by the fact finder throws off internal equity across the Employer's bargaining units. The Employer now has five ratified collective bargaining agreements whereas at the time of the fact finding with IAFF there were only two tentative agreements with other units. The fact finder did not have the full story of the City's collective bargaining pattern to inform his recommendation. These other settled contracts all include the 3%, 2.5%, 2.5% general wage increase along with a few other economic items; however the size of the IAFF stipend, most especially in the third year, tips the scale off balance with respect to the economic packages the City settled on with its other bargaining units. The total non-wage economic increases in the other contracts are as follows: FOP - \$900, AFSCME - \$350, IUOE - \$350, and IBEW - \$300. By comparison the IAFF non-wage economic increase – the paramedic stipend – is considerably beyond the pattern that the Employer has established. At the Employer's offer of \$1400 the stipend is high compared to the other Units' non-wage economic benefits, however to raise it to \$2100 as recommended by the fact finder completely undermines the Employer's interests in maintaining equity across the bargaining units.

Furthermore, the Employer takes note of the fact that the fact finder incorrectly overestimated the unencumbered fund balance by \$600,000, which is a significant amount. In the fact finding report the unencumbered fund balance was cited as \$3.5M going into 2018; however this was the total balance not the unencumbered balance. The actual unencumbered balance for 2018 was \$2.95M. The fact finder also referenced the availability of \$300,000 in the levy fund; however the levy fund revenue cannot be used for wages. These two financial concerns taken together suggest that the fact finder overestimated the amount of money available to the City to fund the recommended wage package by approximately \$900,000. Had the fact finder considered the City's financial resources as they truly are the recommended stipend may have been different.

Finally, the Unit's standing in comparison to comparable fire units in the area may not have been presented to Fact Finder Mancini as fully and clearly as it could have been. A more thorough

review of comparable data could have led the fact finder to a different recommendation. The paramedic stipend was recommended as a way of helping the Painesville Fire Unit makeup ground in comparison to other area fire units; however although the City would not argue that its Unit is the highest paid Department in Lake County, it is certainly not the lowest. Of note in the comparable data is the fact that at \$42,980 the City of Painesville has the lowest median household income of all the jurisdictions included for comparison purposes. This is significant because it is off of this income level that revenues are generated for the City and City employee salaries are funded. In reviewing the comparable data Painesville firefighters receive an hourly rate of \$28.05 which is at the middle of the comparison group. Above them are Willoughby, Mentor, Wickliffe and Willoughby Hills, all larger communities, all wealthier communities. To get a fuller picture of this Unit's economic standing in comparison to peer units, one must consider the number of days worked in a year. Painesville firefighters are scheduled to work 104 days per year – the lowest number of days among all comparators. Factoring out of the equation days off for vacation, personal days, and holidays the Painesville firefighters actually work 89 days – the fewest number of days per year of all comparators, save one (Willoughby Hills – at 88.5 days/year). Painesville firefighters earn \$802.95/day worked. At this daily rate the Unit maintains its place in the middle of the comparison group, surpassed only by Willoughby, Mentor, Wickliffe and Willoughby Hills – again, the larger wealthier communities in Lake County.

The main issue for the Employer is that of the imbalance created by the third year higher stipend recommended by the fact finder. Given that the City's finances are stable, but not as flush as the fact finder depicted them to be; and that the Unit's pay and benefits are reasonably competitive, falling only behind the largest, most affluent communities in the County; there does not appear to be a compelling reason to bear the internal inequity that accompanies acceptance of the fact finder's recommendation in the third year stipend.

#### *Union Position*

The Union is seeking the following wage increases during the term of the contract:

- Effective January 1, 2018 bi-weekly hourly rates increase by 3%
- Effective January 1, 2019 bi-weekly hourly rates increase by 2.5%
- Effective January 1, 2020 bi-weekly hourly rates increase by 2.5%

The Union is also seeking the adoption of an annual stipend for all bargaining unit members holding a paramedic license of \$700 in 2018, \$1400 in 2019 and \$2100 in 2020.

The Union urges acceptance of the fact finder's recommendation. The difference between the third year stipend recommended by Fact Finder Mancini and that proposed by the Employer in their final offer is a scant \$700 per bargaining unit member. By the Employer's own argument, there is no basis for overturning the fact finding recommendation. The Employer's finances are not significantly different than those presented to Fact Finder Mancini. This is also true for the full discussion of external comparables – nothing in the Employer's comparable data for Lake County jurisdictions is different than what was discussed in mediation and in the fact finding hearing.

If anything is different between today's circumstances and those discussed at the time of fact finding, it is the full extent of the economic benefits settled on the City's Police Unit. During fact finding, the Union took at face value the information presented by the Employer as to what economic benefits were being negotiated with the FOP and how those economic provisions were being settled. Since that time the FOP has ratified its agreements with the City and those finalized documents reveal several economic benefits that the IAFF was not aware of during its fact finding proceeding.

As a counterpoint to the Employer's argument that the fact finding report overestimates the unencumbered fund balance available by \$600K, the Union's finance expert witness, Mary Schultz, CPA, CFE points out that the City's revenue collections are somewhat ahead of where they could be expected to be at this point in the year. Although revenues never come in on an even monthly schedule, as of the end of August (two-thirds of the calendar year) income tax collections are at 71% of the full year estimate. The same is true for all revenues coming into the General Fund – they are at 75% of the full year estimate. If the current rate of collection continues the City could collect as much as \$500K more than expected. In addition, the Employer has not included in its General Fund carryover projections the \$625K General Fund Reserve; thus making their projections appear somewhat more dismal than they actually are. Even taking into consideration the fact that the EMS Fund revenues are down somewhat this year, the cost of the Union's proposal is no more than \$23,200 (including rollup costs) and the City is well positioned financially to pay for the third year stipend as recommended by Fact Finder Mancini.

The issue of internal comparables, which the Employer has made its centerpiece for rejection of the fact finding recommendation is essentially a red herring. The reality is that there are several economic benefits in the final ratified FOP contract that were not fully disclosed to the IAFF during the fact finding proceedings, nor have they been fully disclosed for these conciliation proceedings. The FOP received an increase in the health insurance opt-out provision of \$500. This

was a proposal that the IAFF had on the table during negotiations that was rejected by the Employer. The FOP also received an increase in their Sick Leave Incentive benefit, as well as increases in shift differential and in range pay. There has been an increase in the educational reimbursement program and the firearms proficiency program. And there is a new Spanish Proficiency benefit. None of these economic enhancements to the FOP contract were included in the mediation or fact finding discussions. Furthermore, The FOP longevity benefit for sergeants and lieutenants is already significantly more lucrative than their comparators in the IAFF Unit (the lieutenants and captains). There are multiple examples of how there are economic differences between the bargaining units, therefore there is no real basis for the Employer's proposed \$700 revision of the third year stipend.

This Unit's wages use to be toward the top of all comparators in the County, but they have dropped considerably over the years. Meanwhile the call volume for this Unit has gone up considerably. Whereas Painesville use to be one of the most attractive fire units to work for in Lake County it has become one of the least favored employers. On a per station call volume basis, Painesville's 4,409 annual calls in 2016 is far and above the highest call volume for any station across all jurisdictions. A calculation of calls per position also shows that firefighters in Painesville are working harder than their counterparts across the County. This Unit's calls/position is 735, significantly higher than even the next closest comparator which is Madison at 653 calls/position. The firefighters in this Unit are working harder and getting less pay for their effort in comparison to the other fire units in the County. This comparison holds true even when projecting future wages with the accepted 3%, 2.5%, 2.5% provided for in the fact finding recommendation.

All of this data was included in the fact finding proceeding and considered by Fact Finder Mancini in his recommendation. The fact finding recommendation for wage increases is less than what the Union was seeking; the stipend would be more beneficial had it been paid as bi-weekly income; however the Union accepts the recommendation given the totality of the circumstances. The recommended stipend is warranted and should not be reduced.

#### *Discussion and Award*

Among conciliators it is a majority view that fact finding reports are to be given great deference. This widely-held opinion is based on a responsibility to support the entirety of the statutory dispute resolution process which provides for a full evidentiary hearing before an experienced, mutually acceptable neutral selected by the parties to carefully evaluate the data and

respective positions of the parties and render a recommendation taking into account all relevant factors. A practice of conciliators routinely setting aside fact finding reports would render that critical step in the process meaningless by providing an incentive to the parties to consider a fact finder's recommendations as impetus to seek better terms through appeal to a second neutral. Conciliator Dennis Byrne described the conciliator's deference to the fact finder's recommendation this way, "A conciliator is not bound to follow the fact finder's recommendations, but only a foolish or naïve conciliator will change the fact finder's recommendations without an overriding reason." Further on he states, "The conciliator must be deferential to the fact finder unless it can be proved that the fact finder made a serious error in his/her report. This means the bar has been set very high for the party that wishes to have the fact finder's recommendations modified." *International Association of Fire Fighters, Local 382 v. City of Lakewood*, SERB Case No. 00-MED-09-0952. Conciliator Alan Miles Ruben described the presumption in favor of a fact finder's recommendations as, "a rebuttable presumption that the Fact Finder's Recommendations are correct, but the presumption may be rebutted by showing that relevant circumstances have materially changed since the Report was issued, that significant evidence was not available or considered by the Fact Finder, that the data relied upon was flawed or otherwise misinterpreted by the Fact Finder or that some other similar fundamental oversight deprived the Fact Finder's Recommendations of their presumptive validity." *Ohio Patrolmen's Benevolent Association v. City of Amberst*, SERB Case No. 00-MED-10-1127. I agree with this view of the fact finder's recommendations and therefore hold the party seeking to deviate from the fact finder's recommendation to a substantial burden of proof in making its argument.

The Employer has acknowledged that the monetary difference between the fact finder's recommendation (which is the Union's adopted final offer) and its own final offer is roughly \$23,000. Furthermore, while noting that the finances of the City are not quite as the fact finder indicated in his report, the Employer has stipulated that it has the resources to fully fund the fact finder's recommendation. This being the case, Fact Finder Mancini having identified the General Funds' 2017 year-end balance as \$3.57M rather than citing the unencumbered balance of \$2.95M is not a material change in facts and therefore not dispositive on the outcome of the analysis at conciliation.

The Employer's review of external comps for conciliation includes a comparison of how the workweek impacts the Unit's standing in relation to earnings among peer units. This is a take on the comparable argument that was not fully develop for the fact finding proceeding. The newly



developed external comp data was not available at the time of fact finding only in the sense that it was not included in the Employer's presentation, not in the sense that it was only discovered or ascertained subsequent to fact finding. Regardless, the Unit's relative position among Lake County fire units is not significantly different when adding in the workweek data than it was in Fact Finder Mancini's analysis. Fact Finder Mancini found that the Painesville Unit is "approximately 23% behind the highest paid firefighters in the area jurisdictions." The data provided at conciliation pertaining to pay/day worked (not available to Fact Finder Mancini) shows that the Painesville Unit is approximately 17% behind the highest paid firefighters in the area jurisdictions.

The crux of the Employer's argument at conciliation is that the fact finding recommendation creates an imbalance among the Employer's bargaining units, most especially in relation to the Police Unit's economic settlement. The record indicates however that there are, and have been over the years, differences between the IAFF and FOP contracts that advantage one or the other unit until such time as bargaining equalizes and stabilizes the distribution of resources among the units. These inter-unit differences were part of the landscape that Fact Finder Mancini took into consideration in his well-reasoned Report and Recommendation. Fact Finder Mancini thoughtfully framed his recommendation to avoid any unintended consequence in light of the Employer's 'Me Too' contract provisions and settled on a pay adjustment that would be similar to the 'range pay' provision in the Police Unit's contract.

Ultimately, the factual context of this case supports the fact finding recommendations. There is no material error, nor is there a material change in circumstances that renders the fact finding recommendation invalid. Furthermore, the fact finder's exercise of judgement in interpreting the evidence presented in the fact finding proceeding does not disadvantage the Employer in its ability to efficiently and effectively fund and administer public services.

### **Award**

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 wage provision of the fact finder report and recommendation dated June 12, 2018 without modification. In addition, all other tentative agreements (TA's) 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 21<sup>st</sup> day of November 2018.

A handwritten signature in cursive script, appearing to read "Felicia Bernardini".

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Felicia Bernardini,  
Conciliator

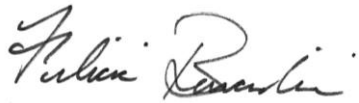
## CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Fact Finder Report was sent by e-mail on November 21, 2018 to:

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Felicia Bernardini