

STATE EMPLOYMENT RELATIONS BOARD

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RELATIONS BOARD

STATE OF OHIO

JUN 16 10 02 AM '97

In the Matter of Conciliation	*	
Between	*	
	*	<u>AWARD</u>
AVON LAKE PROFESSIONAL	*	
FIREFIGHTERS,	*	Case No. 96-MED-09-0777
IAFF LOCAL 1361	*	
	*	June 12, 1997
and	*	
	*	Anna DuVal Smith
CITY OF AVON LAKE, OHIO	*	Conciliator

Appearances

For the Avon Lake Professional Firefighters:

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For the City of Avon Lake:

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I. BACKGROUND AND SUBMISSION

The City of Avon Lake is located in the northeast corner of Lake County, bordered by Sheffield Lake, Avon, and Bay Village, the latter in Cuyahoga County. Nearly 64 percent of the city's 11.64 square miles is residential, 16 percent industrial and about 5 percent commercial. It has experienced a 16 percent growth in population since 1990, reaching 17,500 in 1996, and expects an annual growth rate of 3 percent through the year 2000. Median family income is \$51,380 and average home price is \$158,700. Property taxes are low relative to other cities in Lorain County. Major employers are Ford Motor Company and Geon Company. Expanding commercial/industrial areas are Pin Oak Parkway and Town Center.

Avon Lake's Fire Department provides advanced life support emergency medical services in addition to fire prevention and suppression. In addition to Fire Chief, it is staffed by two forty-hour lieutenants, who fill the roles of fire prevention and training officers, three shift lieutenants, 18 firefighters, one secretary/dispatcher and ten part-time firefighters. This is a highly educated and trained department. All full-time members of the department except the chief, secretary and one firefighter are paramedics, and the firefighter is now in training. There are five Advanced Cardiac Life Support Instructors on staff, nine CPR instructors and a Hazardous Materials Response team. In addition, over 40 percent of the department holds a college degree. Total calls by the department have risen each year since 1991, growing 22 percent since 1990, nearly all of which came from rescue and miscellaneous emergency calls.

The Avon Lake Professional Firefighters Association represents all fulltime firefighters and lieutenants of the Avon Lake Fire Department. Its contract with the City expired December 31, 1996, without agreement on a successor. Negotiations failed to produce an agreement, so the parties proceeded to fact-finding under §4117.14(C) O.R.C. A fact-finding report with recommendations on twenty-two issues was issued January 13, 1997. Following rejection by the Firefighters, conciliation was ordered pursuant to §4117.14(D) on January 30, with appointment of the undersigned as Conciliator on February 5 to resolve the dispute by awarding the final offer of one party or the other on the outstanding issues. Pre-hearing position statements were timely filed on or before five days preceding the mutually agreed to hearing date of April 14. The Conciliator met with the parties on that date in the Old Firehouse in Avon Lake. A final attempt to achieve an agreement on some or all outstanding issues was unsuccessful and the Conciliator determined mediation efforts would also prove fruitless. A hearing was therefore convened at 11:45 a.m., adjourned at 6:00 p.m., and continued at 1:30 p.m. on May 9. Present for the Firefighters in addition to Counsel were Jeffrey Moore (President), Christopher Huerner (Secretary), Angelo Tetorakis (Treasurer) and Negotiation Committee members Thomas A. Huerner and Richard Frasolak. Present for the City were Mayor Vincent M. Urbin, Fire Chief Gary Fryfogle, and Finance Director Susan Valesco. The parties agreed to accept the Fact-Finder's recommendations on twelve issues: 9.04 Physical Examinations, 9.new Dangerous Exposures, 12.new Minimum Call-In Pay, 12.new Equalization List, 12.03 Holiday Call-Ins, 15.01 Holidays (but not Personal Days), 21.04(e) Sick Time Buy-Back, 25 Military & Prior Service Pick-Up, 27.01 Injury Leave, and three new articles, Prevailing

Rights, Hazardous Materials Technician, and Fire Prevention Office and Training Office. In addition, they agreed to settle the health insurance issues in accord with the F.O.P. agreement and stipulated the Conciliator has the authority to make economic issues retroactive to January 1, 1997. Nine issues were presented as unresolved: 11.01(a) Hours of Work, 13.01 Lead Man, 14.02 Clothing Allowance, 15.01 Personal Days, 19.01 Longevity, 23.01 Wages and Rank Differential, 12.04 Overtime Compensation, and FLSA 207(K) Exemption. The parties were afforded a complete opportunity to present oral and written evidence and to argue their respective positions. The hearing concluded at 5:30 p.m. on May 9, whereupon the record was closed. In rendering this Award, the Conciliator has given full consideration to all reliable information relevant to the issues and to all criteria specified in §4117.14(G)(7) and Rule 4117-9-06 (H) O.A.C., to wit:

- (1) Past collectively bargained agreements between the parties;
- (2) 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;
- (3) The interest 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) Stipulations of the parties;
- (6) Such other factors, not confined to those listed above, 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.

II. POSITIONS OF THE PARTIES

Article XI. Hours of Work & Article XV. Holidays

Position of the Firefighters

The Firefighters' final offer is to change current contract language and reduce the hours worked each week from 52 hours to 51 hours. This represents a modification of its demand in factfinding for 51 hours in 1997, 50 hours in 1998, and 49 hours in 1999. It argues that in recommending no change, the Fact-Finder erroneously concluded that reducing the work week would result in serious labor costs and that the average work week of comparable communities is 50.9 hours (mean) and 52 (mode), whereas the actual figures from the Union comparables are 50.3 and 50 respectively. With proper scheduling, there need be no adverse impact on overtime. Further, it claims he did not evaluate Avon Lake's need for time off on account of the substantial increase in workload since 1978. Another ground for overturning the Fact-Finder's recommendation is the new fact of the City's intention to hire three more firefighters.

The Firefighters accept the Fact-Finder's recommendation that there be no increase in the number of holidays, but adhere to their desire for an additional personal leave day. In so doing, it argues the Fact-Finder based his recommendation only upon external comparables, ignoring the fact that 113 of 131 employees of the City, including seven members of the Fire Department, receive three personal leave days. It also challenges the Fact-Finder's conclusion that Avon Lake's provision is better than most communities, saying he failed to evaluate the totality of actual hours worked. Awarding the Firefighters' position on personal leave and hours of work will, it claims, bring Avon Lake more in line with

comparable units. Finally, since management controls time off and this provision affects only the firefighter/paramedics, it should result in little additional cost to the City.

Position of the City

The City opposes any reduction in hours of work or increase in personal days, saying the underlying reason the Union is after this is to convert regular time to overtime premium. Mean days worked in 1995 were 91, 88.3 in 1996. Eighty-five percent of the time the department does not have a full complement and needs to hire overtime. Reducing the work week or increasing personal leave will only exacerbate the problem. The chief has some discretion in denying time off, but the reality is he must generally grant requests because most time off cannot be banked and he tries to blend the needs of the City and its employees.

The City also challenges the Union's choice of comparables, saying it picks and chooses to support its position. On the issue of personal days, argues the City, it is inappropriate to compare police and fire "days." The two fire personal days are in reality 48 hours, far greater than the police personal leave of 24 hours.

Article XII. Overtime Compensation & FLSA 207(k) Exemption

The City wants to change the method of calculating the base hourly rate by dividing the employee's bi-weekly rate by 104 hours instead of 80 as is the present arrangement. It further seeks to apply the 207(k) exemption to the FLSA 207(a) requirement to pay time and a half for hours worked in excess of 40 hours per week. It says these changes are necessary to reduce overtime paid by the Department. Changing the hourly rate would reduce the premium rate and cut the cost of overtime. It makes no sense to use the 40

hour/week formula because firefighters are not like 40 hour employees since they are productive for only eight hours of each 24-hour shift, even with paramedic services. Application of the 7(k) exemption would trigger the premium rate only after 212 hours, thus encouraging firefighters to come to work rather than to use paid time off. It submits data on hours worked, overtime hours and overtime compensation to support its claim that the Union has used compensatory time to create artificial manning shortages and generate overtime. It believes the Fact Finder was convinced to recommend the City's proposals on these issues and deny the firefighters' proposals for more paid time off by the fact that in 1995 the average firefighter was on duty only 91 days instead of the 112 on-duty days the 52-hour schedule yields.

The Firefighters object to the City's proposed changes to the overtime provision. The basis of the Fact-Finder's recommendation was his mistaken belief that the Union did not object in factfinding. On the contrary, the Union says it opposed these demands in its pre-hearing statement, during the hearing, and in its post-hearing written summation. In addition, not only did the City provide no data to support its position, but the Fact-Finder failed to take into consideration the comparables provided by the Union (which show no other department is using the 207(k) exemption) and the fact that Avon Lake's response procedure creates overtime with virtually every call.

Article XIII. Lead Man Compensation

The Firefighters' final offer is a modification of that sought in factfinding. It now seeks to have the senior scheduled on-duty firefighter appointed lead man when one is required due to the absence of a lieutenant. It argues that the Fact-Finder erred in holding

this to be a management right and a permissive subject of bargaining. On the contrary, this is a mandatory subject because a lead man provision has already been negotiated into the Contract. The Union also adheres to its claim that such a practice is common, rational (because seniority reflects experience and capability) and efficient (because it would avoid calling someone in for overtime).

The City prefers to retain discretion in this area. Shift officers must work in concert with the office of the chief, anticipating and carrying out his wishes in his absence. Seniority is not necessarily related to the cohesive rapport with the chief which is important in a paramilitary emergency organization.

Article XIV. Uniform Allowance

The Firefighters seek \$750 per year, which is what they sought in factfinding. Acknowledging the Fact-Finder weighed comparables in making his recommendation, they claim he did not fully account for the cost increase imposed by the change in uniform type in the middle of the current contract, and that there have been price increases since factfinding that will put them even further behind at the end of the contract if the Fact-Finder's recommendation stands. The City's argument that uniforms are replaced at City expense is misplaced, says the Union, because Article 14.02 provides for "maintaining and replacing" uniforms.

The City accepts the Fact-Finder's recommendation of \$600/\$650/\$700 (\$650/\$650/\$700 for lieutenants). It says the Union presented no evidence of need beyond its comparables.

Article XIX. Longevity

The Firefighters' final offer is the same as presented in factfinding, \$100 per year of service starting at year six to a maximum of twenty years of service. It acknowledges the Fact-Finder considered comparables on this provision, but erroneously found Avon Lake not to be lagging in total compensation and longevity to be an outdated form of compensation. The Conciliator should award for the Firefighters on this issue because its final offer is fair and comparable.

The City seeks the status quo, which was the Fact-Finder's recommendation. It argues there is no State direction, so there is no \$100/year standard. It points out the present longevity schedule is the same for every employee in the city, union or nonunion. It urges the Conciliator to apply the internal comparison and look to total compensation when comparing externally.

Article XXIII. Wages and Rates of Pay

Wages

In factfinding, the Firefighters sought 5-1/4 percent in each year of a three-year agreement. The City sought, and won, a \$2,000 lump sum on January 1, 1997, \$2,500 on January 1, 1998, and 2-1/2 percent on January 1, 1999. The Firefighters' final offer is now 3-1/2 percent per year, retroactive to January 1, 1997. It contends the Fact-Finder based his recommendation on inaccurate data and claims presented by the City in its post-hearing written summation. Moreover, it claims the Fact-Finder unlawfully admitted and weighed evidence from noncomparable private sector work and that lump sum payments are a matter of political controversy in the city. In support of its own position, the Firefighters present

data to show the Union offer not only does not "outstrip" other comparable departments, but actually causes a slight drop, whereas the City's offer sends the Union to the bottom three.

In arguing for adoption of the Fact-Finder's recommendation, the City takes the position that it is in the public interest to pay competitive wages. It submits data to show the Avon Lake Firefighters' base wage is 25 percent higher than the state-wide average, and the highest compensated of comparable departments in terms of the total package of economic benefits. While it does not argue an inability to pay, it does claim this practice, coupled with the recent decline in tax receipts, puts a strain on its resources and ability to accommodate needs elsewhere, primarily in responding to substantial residential growth. The City submits that its proposal would ease this strain and let other communities catch up. Lump sums are being increasingly used in private industry and should be given consideration under R.C. 4117 as "other factors." In addition, the concept has been accepted by City Council and is being used with department heads and nonunion employees.

Rank Differential

Claiming Avon Lake lieutenants have responsibilities comparable to captains in other cities, the Firefighters reassert their demand that lieutenants be compensated accordingly. They do not seek a change in title or the addition of another rank, only compensation for duties performed. The Conciliator should overturn the Fact-Finder's decision to maintain the 16 percent rank differential because in not considering the unrebutted evidence comparing responsibilities with compensation in other cities, he failed to follow the guidelines of R.C. 4117. The Union submits that the differential for these additional

responsibilities in comparable cities is 20 percent. What it seeks is 18 percent in 1997, 19 percent in 1998, and 20 percent in 1999.

Regarding rank differential, the City submits the Firefighters are attempting to get indirectly what they cannot do directly. The City does not need captains and it does not want captains. The Conciliator should reject this demand as did the Fact-Finder.

III. OPINION OF THE CONCILIATOR

As the parties are aware, this neutral subscribes to the appellate view of conciliation under which a fact-finder's recommendation will not be disturbed unless clear error is found or new evidence leads to a different result. Claim of fact-finder error or new evidence was made by the Union on each issue presented. In most instances, the claim is founded.

Overtime Compensation

Beginning with the City's request to change Article XII - Overtime Compensation, both in the formula for calculating the premium rate and to adopt the 7(k) exemption, the Fact-Finder clearly overlooked the Union's objection which is stated on the last page of its post-hearing factfinding summation statement. This error allows the Conciliator to revisit the issue, with the burden once again on the City to prove that there is compelling reason to alter the status quo. The entire theme of the City's case on this and other issues was to the effect that its overtime costs are excessive. The City may not like its incidence of overtime nor its costs, but it brought no evidence showing they are excessive compared to firefighter units in similar communities or that its existing practices diverge from the norm. On the contrary, the evidence submitted by the Union on the calculation method used by other cities shows the formula is the same or worse (in terms of yielding a higher overtime

rate) in three of the seven cities (Rocky River, North Olmsted and Sheffield Lake), what the City seeks in two (Fairview Park and Westlake), and a blend in two (Bay Village and North Ridgeville). Both of the cities dividing by the scheduled hours also have shorter work weeks (49.8 and 48) than Avon Lake, and one is the highest paid department in the area (Westlake). The City has lived with both the formula and the trigger condition for long enough that no one can remember how they came to be negotiated. Now it wants to change both, but justifies neither on the basis of quid pro quo nor on comparables or financial duress. The Union's final offer of status quo on both issues is fair and reasonable. There shall be no change. The City's overtime usage should nevertheless improve once the three new hires are on board and those who utilized unusual amounts of sick leave are fully recovered.

Hours of Work & Personal Days

Turning now to two related issues, the Union proposes to reduce the hours of work and increase paid time off, both of which increase the potential for overtime. It is true that the Union figures submitted to me on work week do result in different statistics than what the Fact-Finder relied upon. Both the mean and mode are, in round hours after removing Avon Lake, 50. It is also true that Avon Lake has a longer than average work week than most and that reducing it as requested by the Union would move it to the middle of the group it offers as comparable units. However, I think the Union underestimates the ability of the Employer to schedule so as to minimize overtime. The Contract, for example, requires the Employer to "suit the convenience of the employees" as well as to conform "with the proper functioning of the Department" when it comes to scheduling vacation.

Other departments may be better able to manage with shorter work weeks because they have more flexibility in scheduling. In addition, Avon Lake has a high premium rate. These operate to the benefit of the Union. Shortening the work week will not only reduce the number of hours worked to earn base salary (a plus by itself), but also increase overtime wages even if hours actually worked do not change because there will be a transfer of straight-time hours to premium-time hours. In this, the City is correct. In other words, although Avon Lake Firefighters have a longer scheduled work week and actually work more hours than do others, there are tradeoffs, certainly in terms of its high base and premium rates and possibly in terms of scheduling paid leave. Just as the City wants to have its cake and eat it, too (when it comes to hours paid at the premium rate and the premium rate itself), so does the Union (wanting to keep its high premium rate, increase the hours for which it will be paid, and reduce the hours worked for its high base salary). It wants to maintain its wage position relative to North Olmsted and North Ridgeville, but leapfrog over them in hours worked. To put it another way, although the comparables on work week and average hours worked appear to support the Union's proposals on work week and personal days, they cannot be evaluated in isolation from the rest of the contract but instead must be judged in relation to other provisions in the Avon Lake and other cities' Firefighter contracts. When looked at in this light, I find no reason to disturb the Fact-Finder's recommendations despite the different statistics used.

The foregoing applies to personal days as well as to work week, but an additional comment is warranted because the Union also objects to the Fact-Finder seemingly basing his recommendation exclusively on external comparables and disregarding internal parity

entirely. While it may seem unfair to grant three personal days to 8-hour employees but only two personal days to 24-hour employees, the two types of employees are not similarly-situated. But even if they were, the 24-hour employees come out ahead, for they receive twice the paid personal time off that the 8-hour employees do. To be sure, the three 24-hour lieutenants are treated differently from the firefighters, but not differently from the two 8-hour lieutenants. In the final analysis, what matters is total paid time off vis-à-vis firefighters in surrounding communities. In this respect, Avon Lake does not compare badly, for its 500 hours is the mean or better, depending on whether one includes Sheffield Lake which receives premium pay instead of compensatory time.¹

Lead Man Compensation

Although the Fact-Finder explicitly recognized the City's argument that this is a permissive issue, he made no finding whatsoever one way or the other. Instead, he based his recommendation on his opinion that the lead man assignment should not be made on the basis of seniority alone. In so doing, he endorsed the past collectively-bargained agreement on the issue over arguments made by the Union. This, in fact, was the thrust of the City's argument before me, that there are legitimate management reasons outweighing considerations of overtime costs and seniority. I see no reason to disturb the Fact-Finder's recommendation, and so order no change to this article.

¹In this and all instances, Avon Lake has not been used in calculating the statistic so as to get a true picture of how it compares to others. To include it would influence the value of the statistic.

Uniform Allowance

Saying there "does not appear to be any justification for the disparity with other comparable communities or the Avon Lake police department," the Fact-Finder recommended raising the annual uniform allowance to \$700 by the end of the three-year contract. Since his report and recommendations were issued in January, the police fact-finder recommended their uniform allowance be increased to \$750/\$750/\$800. The Firefighter Fact-Finder's recommendation therefore no longer achieves his intent to achieve parity with the police. I accordingly award for the Union on this issue, \$750 per year now better serving to approximate parity with the police and, I note, more in keeping with the average allowance of \$762.50 in six comparison cities (Bay Village, Fairview Park, North Olmsted, North Ridgeville, Rocky River and Westlake, Sheffield Lake being excluded as it provides the uniforms plus an allowance of \$450), \$734.38 if one includes Lorain and Elyria. This award is retroactive to January 1, 1997.

Longevity

The Union claims the Fact-Finder mistakenly found Avon Lake's total compensation not lagging comparable cities. I find no such error. Using cities to which the City has traditionally compared itself and the Union's own figures, Avon Lake ranks fourth of six in total monetary compensation for 1996 and 1.1 percent below the mean of \$45,189. Including Sheffield Lake and North Ridgeville places Avon Lake at fourth of eight and 3.4 percent above the mean. Complete figures for Olmsted Falls, a somewhat smaller city with paramedic service, were not provided, but by the City's Exhibit 3 it appears including them would not help the Union's case. Thus, using figures most favorable to the Union, Avon

Lake is off the mean by only 1.1 percent. In light of this, I cannot fault the Fact-Finder for his findings, or for holding internal parity to outweigh external comparisons, to the extent that he did so. I therefore find no cause to disturb his recommendation on this issue and award the City's final position.

Wages

Since the Fact-Finder issued his report and recommendations, two things have happened. The police fact-finder recommended 3.75%/\$2500/3.5% and the Firefighters moderated their position from 5.25 percent per year to 3.5 percent per year. Notwithstanding the Fact-Finder's holding that the City's approach is sound, the fact remains that it would completely destroy Avon Lake's base salary leadership position within its traditional comparison communities while offering nothing in return. Avon Lake would drop from first to fifth place in 1997 and to sixth the following year.² With the uniform allowance granted above, the situation in terms of total monetary compensation does a good job maintaining Avon Lake's rank order in the first two years (from fourth to third in 1997, fourth again in 1998), but then drops it to sixth place in 1999. Thus, in terms of base salary, longevity, uniform allowance, paramedic bonus and other cash payouts, the City's claim that it is the highest compensated of comparable cities is completely unfounded, whether one uses the City's comparables on Employer Exhibit 2 and 3, or the Union's at Tab 14. Moreover, the City benefits from its relative wage position. The fact that it had 120 applicants for its three firefighter openings during this tight labor market allows it to pick

²The Union's assumption of 3.5 percent increases in contracts yet to be negotiated is reasonable since agreements statewide have been running between 3 and 4 percent.

and choose. It has a highly trained, well educated work force making an increasing number of nonfire runs and capable of performing sophisticated services. No doubt insurance rates in the city reflect, at least in part, the quality of services provided. All this is in the interest and for the welfare of the public. The City is able to pay to maintain these advantages; it just does not want to pay.

On the other hand, the Union's final offer is reasonable and fair. Coming within the settlements statewide, 3.5 percent a year drops Avon Lake to second place in base salary compared to Western Cuyahoga County and paramedic departments in Lorain County. Including the uniform allowance, it maintains its fourth place position in total monetary compensation. It also more closely approximates the recommendation for the police. I therefore award 3.5 percent per year retroactive to January 1, 1997.

As far as rank differential is concerned, the Fact-Finder did not state the basis for his conclusion, only that he did not find the Union's argument persuasive. Since the Union believes in its position, one can see that it would think the Fact-Finder wrong. Although I cannot read his mind and thus do not know his thought process, I achieve similar results. Many, perhaps most, of the job functions of Avon Lake lieutenants are comparable to captains in the cities surveyed by the Union. However, they are not comparable jobs because all but one of these other cities have more elaborate structures. Except for Sheffield Lake, every one has structure of three or four levels below the chief. When there are two levels below chief, the intermediate is lieutenant, not captain. In Sheffield Lake these officers earn a differential of only 10 percent. Avon Lake's lieutenants, who command six instead of three firefighters or who are assigned as Training Officer and Fire Prevention

Officer, earn a differential of 16 percent. This is appropriate for their greater responsibilities compared to Sheffield Lake's. They are not earning a twenty percent differential as captains are in other cities because they are not commanding lieutenants. Thus, I think when the City says it does not want or need captains, it means it does not want or need an additional layer of management between the chief and the firefighters. Yes, Avon Lake's lieutenants have extra responsibilities, but they also earn more, both in terms of differential compared to the other lieutenant-only structure (16 percent v. 10 percent) and absolutely (\$42,527 v. \$39,672). What is more, they also earn more than the shift commander, fire prevention officer, and training officer average salaries no matter what the rank: \$49,365 in Avon Lake compared to \$47,551-\$48,827 for the average of these positions in the other cities (Tab 15). Like the Fact-Finder who preceded me, I do not find the Union's argument persuasive and so I award for the City on the issue of rank differential.

IV. AWARD

Issue

Hours of Work
Personal Days
Overtime Compensation
FLSA 207(k) Exemption
Lead Man Compensation
Uniform Allowance
Longevity
Wages
Rank Differential

Position Awarded

Employer (no change)
Employer (no change)
Union (no change)
Union (no change)
Employer (no change)
Union (\$750/year)
Employer (no change)
Union (3.5%-3.5%-3.5%)
Employer (no change)

Respectfully submitted,



Anna DuVal Smith, Ph.D.
Conciliator

Cuyahoga County, Ohio
June 12, 1997