

I. BACKGROUND

This matter came on for hearing on July 27, 1998, before Jonathan I. Klein, appointed as conciliator by the State Employment Relations Board (SERB) on May 19, 1998, pursuant to Ohio Rev. Code Section 4117.14(D)(1). The hearing was conducted between the City of South Euclid (hereinafter "City" or "Employer"), and the Fraternal Order of Police, Lodge No. 80 (hereinafter "Union" or "FOP"), at the South Euclid City Hall located at 1349 South Green Road, South Euclid, Ohio. At the conclusion of the hearing, the record was closed.

A fact-finder issued his report and recommendations on April 22, 1998, concerning approximately eight disputed issues between the parties. The recommendations were rejected by both the Union and the City, and as of the commencement of the conciliation hearing the parties remained at impasse on six issues pertaining to rank differential, field training officer compensation, vacations, holidays, holiday pay, and firearm proficiency allowance.¹ The bargaining units consist of approximately twenty-five full-time patrolmen, and ten full-time police sergeants and lieutenants.

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1. The parties reached agreement on a number of open issues based on their submissions, a revised statement of open issues (Joint Ex. 1), and verbal stipulations at the conciliation hearing. The issues on which agreement was reached included wages, the differential paid to patrolmen performing work as training officers (FTOs), hospitalization/insurance, and vacations. The Union withdrew its proposal to modify the current contract language on longevity. The conciliator hereby incorporates by reference into this Award all tentative agreements which were duly noted in Joint Exhibit 2 and the revised statement of open issues (Joint Ex. 1), as well as those issues agreed to at hearing.

II. CONCILIATION CRITERIA

In the determination of the facts and the selection, on an issue-by-issue basis, from between each of the party's final settlement offers, the conciliator considered the applicable criteria from those enumerated in Ohio Rev. Code Section 4117.14(G)(7)(a)-(f), and Ohio Admin. Code Section 4117-9-06(H)(1)-(6). This criteria consists of the following:

- (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 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;
- (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, fact-finding, or other impasse resolution procedures in the public service or in private employment.

III. FINDINGS OF FACT AND OPINION

Admissibility of the Nelson Conciliation Award

The conciliator received a copy of an award issued by Conciliator Nels Nelson involving the City and the IAFF, Local 1065 ("Nelson Award"). The Nelson Award was delivered to the conciliator with a cover letter dated November 5, 1998, from the president of

FOP Lodge No. 60 and a member of the lodge's wage and grievance committee. A response objecting to delivery of the conciliation award was filed by counsel for the City, who also requested that the conciliator return the award to its sender. On November 8, 1998, the conciliator requested the parties provide specific reasons for their respective positions that the Nelson Award should or should not be considered by the conciliator in the pending dispute between the City and the FOP. Each advocate timely filed a letter in response to the conciliator's request.

The Union, which is the proponent of the admissibility of the Nelson Award, has the burden to show good cause why such a document should be admitted into the record. Westvaco, 91 Lab. Arb. (BNA) 707 (1988) (Nolan, Arb.). In support of its position for inclusion, the Union argues three main points. First, that the Nelson Award is, as a matter of law, a "public record" pursuant to Ohio Rev. Code § 4117.17, and therefore no reason exists to exclude it from consideration. Second, the Nelson Award is "so inextricably intertwined with the fabric of the police negotiations that it argues by its own terms for inclusion." Finally, the Union suggests that the City facilitated delivery of the award to the conciliator. The Union reasons that contract negotiations do not exist in a vacuum, and the police negotiations influenced the fire negotiations and subsequent conciliation hearing resulting in the Nelson Award.

For its response, the City references Westvaco, *supra*, and emphasizes both the lack of good cause for introduction of the Nelson Award, together with the prejudicial impact admission of the award will have on the City. Counsel for the City takes great pain to

underline the assertion that but for the delay in these proceedings, the Nelson Award would not have existed prior to the issuance of this decision. It urges that a full hearing was conducted in this matter, and the record was closed at that time. Finally, in addition to digressing on the potential for an unfair labor practice which delivery of the Nelson Award to this conciliator may represent, the City contends that any consideration of the Nelson Award will expose this conciliator's award to reversal, clearly invoking the threat of judicial review.

In considering this matter, the conciliator finds the five-part analytic framework contained in Westvaco most instructive.² Clearly, the request to reopen the proceedings to the extent of admitting the Nelson Award for consideration is timely in that it precedes issuance of the award in this matter. Moreover, the fact the Nelson Award was not available at the time of the conciliation hearing on July 27, 1998, is self-evident. However, due to the failure of the Union as the moving party to establish the relevant and pertinent nature of the Nelson Award as it relates to this proceeding, as well as any probative evidence that the Nelson Award is likely to affect the outcome of this conciliation, the Nelson Award must be excluded from consideration by the conciliator. This conclusion is reached for the following reasons.

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2. A truncated version of the applicable standards set forth in Westvaco are, as follows:
 - (i) The request to reopen the hearing must precede the arbitrator's final award.
 - (ii) The proffered evidence must not have been available with due diligence at the time of the hearing.
 - (iii) The proffered evidence must be pertinent.
 - (iv) The proffered evidence must be likely to affect the outcome.
 - (v) Admission of the new evidence must not improperly prejudice the other party.

Merely because the Nelson Award may constitute a public record (and an exception to the hearsay rule) does little to make it relevant to the instant dispute. This is particularly so when review is made of the rationale for admissibility presented by the Union on page two of counsel's letter dated November 12, 1998. First, counsel clearly questions the legal sufficiency of the Nelson Award the very admissibility of which he seeks in this proceeding. More significantly, however, is the Union's assertion that the Nelson Award, rather than providing any insight, authority or relevant guidelines for the issues before this conciliator, was itself materially affected by the police negotiations. Indeed, the Union argues two major benefit subjects addressed in the Nelson Award were made conditional on what emanates from this decision. Not only is there a lack of probative value referenced with respect to the Nelson Award, the opposite is apparently true -- this conciliator's decision is likely to determine matters left unresolved by the Nelson Award. Therefore, the third factor described in Westvaco, i.e., that the proffered evidence is likely to affect the outcome of this dispute, is lacking. Based upon the respective presentations of the parties, the conciliator rules that the Nelson Award must be excluded in this proceeding.³

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3. The City's attempt to persuade by threat of judicial review does not advance its cause. While it is fair to say that no fact-finder or conciliator blithely invites judicial review of an award he or she issues, each party to the process retains the right to seek redress of wrongs, real or imagined, as authorized by the applicable law or controlling agreement. This right coexists with the ultimate goal of fact-finding and conciliation in the public sector in the State of Ohio, which is to resolve disputes over the terms and conditions of employment through application of the statutory criteria with the purpose of promoting orderly and constructive relationships between public employers and their

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Issue No. 1: Rank Differential - Article XI, §11.15

Under the current contract language, the sergeants are compensated at a rate of 10% above the Class A third year patrolman rate, and lieutenants are compensated at 10% over the sergeants rate. The Union reasons that an examination of surrounding comparable jurisdictions indicates an average of 11% between ranks. (Union Ex. C). It proposes an increase in the rank differential of 0.5% in the first and third contract year for a total increase of 1% over the life of the contract. The Union urges its final offer represents a modest increase upward. This rate, which historically has been at 6 to 7%, increased over the last two to three contracts to its current level. In the words of one lieutenant, the bargaining units feel this rate "should be bumped up a little."

For its part, the City feels its position vis-a-vis rank differential places the City right in the middle of the comparable jurisdictions where it should remain. The facts simply do not justify an increase in percentage even of the amount requested by the Union.

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employees.

It may be argued that decisions on evidentiary issues of this nature presented to conciliators should not be overturned absent evidence of an abuse of discretion. Westvaco, supra; Washington - Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971) (no error in excluding evidence, and only if error violates law or conduct contrary to accepted public policy will award be vacated). The judgment whether to reopen a record so that the decision of another arbitrator can be made a part of the record is a procedural matter to be determined solely by the arbitrator. Warehouse Emp., Local 169 v. Acme Markets, Inc., 473 F. Supp. 709, 714 (E.D. Pa. 1979).

The fact-finder rejected the rank differential proposed by the Union noting that there is "no widespread pattern of differentials above that in South Euclid." The conciliator agrees with this assessment. Indeed, the average rank differential for sergeants is 10.6%, excluding the City. Of the ten cited comparables, five jurisdictions have a 10% rank differential for sergeants and lieutenants. The average rank differential for lieutenants is 10.4%, excluding the City and Highland Heights. The conciliator is unconvinced that a change in rank differential is warranted at this time.

Last Best Offer

The conciliator has reviewed the parties respective arguments and the evidence, and determines that the Employer's position on rank differential represents the last best offer.

Issue No. 2: Field Training Officer (FTO) Compensation - Article XI §11.13

The Union proposed modification of the current language relating to payment of a premium for those patrolmen assigned or designated as training officers (FTOs). At present, FTOs are paid fifty dollars for each two consecutive week work period up to a maximum total of \$300 per year per training cycle or training group. The Union's proposal, as modified at the conciliation hearing, requested one hour straight time to be banked as compensatory time for every eight hours of training by the FTOs. After further deliberation, the City agreed to the Union's modified proposal on this issue.

Last Best Offer

Based upon the parties' agreement, Article XI, §11.13 shall provide, as follows:

Patrolmen selected, assigned and designated by the City as a training officer and who perform as such for a two (2) consecutive week period, will be compensated one hour straight time to be banked as compensatory time for every eight hours the patrolmen work as a training officer.

Issue No. 3: Vacations - Article IX, §9.1

As previously indicated, the parties ultimately resolved the issue of vacations at the conciliation hearing. The agreed upon changes to Section 9.1 provide that after seven years of service an employee receives three weeks of vacation; after fourteen years of service the employee is entitled to four weeks of vacation; and after nineteen years of service, the employee receives five weeks of vacation.

Issue Nos. 4 and 5: Holidays - Article VIII, §§8.1 and 8.3

According to the Union, the dispute over holidays concerns two separate issues. First, it proposes to have two additional designated holidays, New Years and July 4, paid at premium pay, or time and one-half, if an employee is scheduled and in fact works either or both holidays. In comparison, the Union noted that of the twelve holidays afforded employees in Highland Heights, ten of the holidays are paid at time and one-half if worked; Garfield Heights provides fourteen holidays and seven of the holidays are paid at time and one-half; in Euclid, the police receive seventeen holidays of which seven holidays worked are paid at double time, and ten at time and one-half; and in the City of Richmond Heights, the comparable bargaining unit receives eleven holidays of which eight are paid at double time.

At fact-finding, the City proposed one additional holiday to be paid at time and one-half.

Finding the data on this issue mixed, the proposal of the City was recommended by the fact-finder.

The second component of the Union's final offer is to add the Martin Luther King holiday in 1998, an offer initially proposed at fact-finding, but dropped in the interest of reaching a settlement. When the cities referenced by the Union are surveyed: Euclid, Garfield Heights, Highland Heights, Lyndhurst, Beachwood, Mayfield Heights, Mayfield Village, Richmond Heights and University Heights, twelve holidays is "in the middle of the pack."

The City urges the conciliator to adopt the fact-finder's recommendation of one additional holiday to be paid at time and one-half. Tab 8 of the City's conciliation brief contains not only the holiday data for the cities cited by the Union, but includes reference to the ten holidays provided in the City of Cleveland Heights. The City urges that eleven holidays appears to be the norm, and there is no need to increase the number of holidays. Only four communities provide any premium for working on a holiday, and Euclid represents an aberration to the norm. This is nothing more than a hidden pay increase, although the City has no objection to the addition of one holiday at premium pay if scheduled and worked by the employee.

Last Best Offer

The conciliator finds that the comparable data supports an increase to Section 8.3 of the collective bargaining agreement of one holiday at premium pay (time and one-half) if scheduled and worked by the employee as proposed by the City, rather than the two additional

holidays at premium pay sought by the Union. As to the addition of one holiday, the conciliator selects the Union's proposal to add the Martin Luther King holiday to §8.1 as amply supported by the comparable data.

Issue No. 6: Firearm Proficiency Allowance - Article XII

The current contract language provides that in accordance with Ohio Rev. Code §109.801, et. seq., all bargaining unit members are required to complete an approved firearms requalification program. Upon presentation of evidence showing satisfactory completion of such a requalification program, each bargaining unit member receives an annual allowance of \$200.

The fact-finder noted the \$1,000 annual proficiency allowance paid by University Heights, but pointed out that the total compensation of that city is less than police officers enjoy in South Euclid, while other comparables provide no proficiency pay at all. Emphasizing the fact the City's payment of firearm proficiency is the lowest in the region among communities which do provide this benefit, the fact-finder recommended the proficiency pay be increased \$100 in each of the first two years of the agreement, and \$150 in the final year.

The Union urges that in 1992 the State of Ohio adopted a law requiring certain standards to be met by those individuals who are sworn officers authorized to carry a weapon. The increase which the Union seeks is fully justified, particularly when issues of parity between police and fire are examined. Simply stated, the fireman's job in the suburbs is

becoming easier, while the policeman's job has become more demanding. The Union's last offer is the fact-finder's recommendation to increase the proficiency allowance resulting in a cost of \$550 per officer over the term of the collective bargaining agreement. It is a deserved benefit, and if one looks at other cities which do not provide this benefit such as Beachwood or Mayfield Heights, they do pay \$1,000 in corporal pay. In terms of the comparable jurisdictions which do pay this benefit, six of the ten jurisdictions besides the City do pay firearms proficiency ranging from \$250 to \$3,640 annually.

While firearms proficiency is part of the police officer's daily job, the City's police department has become a model for training in firearms. The chief of police has upgraded department policies to include firearms training and proficiency standards which are more stringent than the state requirements. The bargaining unit members fire their weapons on a monthly basis, and qualification rounds are every other month, rather than the state's requirement of once each year. If an officer fails to pass the qualification round, the officer is required to requalify and failure to do so can result in being relieved of his or her duty weapon.

In the City's view, the Union's position is the "height of absurdity," as is the fact-finder's opinion on this issue. It is tantamount to paying a writer for his ability to use a pen. Indeed, there are only seven cities in Cuyahoga County which even pay a firearms proficiency allowance, and more than likely those payments are the direct result of political expediency. The City would be more than happy to place this money into the base pay, and take its position with the vast majority of the jurisdictions in Cuyahoga County. There is no logic to

justify the Union's proposal, and if an employee cannot obtain the certificate, the employee cannot be a police officer. Paramedics, on the other hand, undergo constant recertification which requires vast quantities of time. Corporal pay in other jurisdictions is nothing more than a decision to give monies to a discrete group of senior officers who have not been promoted to the senior ranks, rather than the entire work force. It has no bearing on a proficiency allowance. In the case of University Heights, the proficiency pay is high, but the wages are lower than the City. There is no rational basis for such an allowance, which is simply a device to bring monies to the bargaining unit employees in order to counter the paramedic issue.

The Union disputed the assertion that firearms proficiency is merely an expedient way "to beat" the issue of parity. The law is of relatively recent origin, and it is true that not many units in the county have this benefit. It is an ongoing benefit which other jurisdictions refer to as corporal pay — another figment of the imagination — to award police officers for the jobs that they do. The fact-finder did not initiate this benefit within the City, he simply added to it. The Union is willing to accept the fact-finder's recommendation on proficiency.

Last Best Offer

In many ways, this is the most contentious issue before the conciliator. Perhaps this is so because the City's argument lies closest to the truth — firearm proficiency (and the related certification) is a fundamental requirement of the position of police officer -- yet a separate pay category was agreed to by both parties. Firearm requalification bears the same importance to the police officer as the medical license to the physician, the commercial driver's license to the

long distance truck driver, or the license to practice law to the attorney. Firearm proficiency is essential to comply with the requirements of state law, and a predicate to the ability of police officers to carry a weapon and perform their duties.

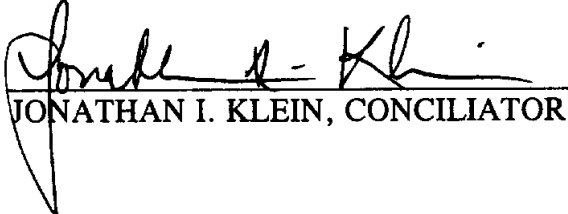
As the fact-finder readily acknowledged, the data on this issue represents a mixed picture. To escalate this payment simply because the City is "the lowest in the region among communities providing this pay" does not take into consideration the fact that while approximately seven cities pay a firearm proficiency allowance, another twenty-seven jurisdictions in the county make no such payment. However, six of the ten comparable jurisdictions do pay a firearm proficiency allowance. (Union Ex. C). Of the six comparables, there is evidence that the amount of the allowance has increased in only two jurisdictions. There is no lengthy history of such payments in past collectively bargained agreements between the parties — as the Union noted, this allowance is a relatively new development.

Resolution of this issue is complicated by the Union's offer based on the fact-finder's recommendation on one hand, and the City's proposal to eliminate the so-called benefit with a one time, one year roll-in of the allowance into base pay — positions which generate a difference in compensation to each bargaining unit member of approximately \$600 over the term of the collective bargaining agreement. As the City so strenuously argues, the proficiency payment appears to be another method agreed to by the parties to increase the total compensation paid members of the bargaining unit for the performance of their duties in lieu of a direct increase in base pay. The conciliator determines the City's offer eliminating the allowance is one which also requires a comparison of compensation to be paid to the

bargaining unit members using the agreed percentage wage increases for the new agreement with the current proficiency allowance, and the agreed wage increases with the roll-in allowance as proposed by the City. Taking the agreed wage increases in each year of 3.5%, together with the pre-increase roll-in of the current \$200 allowance, the difference between the City's proposal and maintaining current contract language on this issue is \$43 less to each bargaining unit member over the entire length of the collective bargaining agreement.

The conciliator has no authority to modify the final offers of the parties on this issue. Based upon the current level of the benefit and other statutory criteria, including the agreed upon comparable jurisdictions, the brief bargaining history on this issue, and the conciliator's finding that the City's reasoning relative to firearm proficiency is inherently sound, the actual cost of the City's proposal represents a minimal reduction in total monies paid to the bargaining unit in lieu of the allowance over the term of the agreement. This offer compares favorably to the Union's final offer on this issue, and is more reasonable.


For each of the foregoing reasons, the conciliator directs that the City's proposal on firearms proficiency be included in the collective bargaining agreement.


JONATHAN I. KLEIN, CONCILIATOR

Dated: November 24, 1998

CERTIFICATE OF SERVICE

An original of the foregoing Final Offer Settlement Award was served upon Robert M. Phillips, Esq., The Phillips Legal Group Co., L.P.A., 55 Public Square - Tenth Floor, Cleveland, Ohio 44113-1904, and upon Marc J. Bloch, Esq., Duvin Cahn & Hutton, Erieview Tower, 10th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114, and upon G. Thomas Worley, Administrator, Bureau of Mediation, Ohio State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, each by express mail, sufficient postage prepaid, this 24rd day of November 1998.



JONATHAN I. KLEIN, CONCILIATOR