

STATE EMPLOYMENT
RELATIONS BOARD

Nov 16 9 28 AM '98

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

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IN THE MATTER OF: *

CITY OF LYNDHURST *

AND *

CASE NO. 98-MED-02-0136

OHIO PATROLMEN'S *
BENEVOLENT ASSOCIATION *

* * * * *

REPORT AND AWARD OF THE CONCILIATOR

I. BERNARD TROMBETTA
ATTORNEY AT LAW
30505 BAINBRIDGE ROAD
SOLON, OHIO 44139
[440] 349-2110

CONCILIATOR'S REPORT AND AWARD

I. HEARING BACKGROUND

This conciliation is between the City of Lyndhurst (hereinafter referred to herein as the "City" and the Ohio Patrolmen's Benevolent Association, hereinafter referred to herein as the "Union").

The unit consists of approximately 20 patrolmen. Previously, the patrolmen had been represented by the Fraternal Order of Police, Ohio Labor Council. The contract negotiated by the former representative expired on December 31, 1997, but the parties have continued to operate under the expired contract.

The City and the Union, during the months of April and May, met three times and resolved all but eight issues which went to fact finding on July 23rd, 1998 before Dana Castle. Ms. Castle issued a Fact Finding report on August 31, 1998 on the unresolved issues. Her recommendations were accepted by the Union, but rejected by the City.

The unresolved issues are as follows:

1. Firearm Proficiency Allowance;
2. Holiday Credits;
3. Call-In Time (court time and call-in pay- treated as separate issues)
4. Officer-In-Charge Pay;
5. Sick Leave Cash-Out;
6. Uniform Allowance;
7. Vacation Accrual

Prior to the conciliation hearing, the parties settled Issue Nos. 4 through 7 (Officer-In-Charge; Uniform Allowance; and Sick Leave Cash-Out) and signed off on the same. (The Conciliator is in possession of those sign-offs). The 8th issue, Vacation Accrual, was not addressed by either party in either the respective pre-hearing brief or during the hearing and must be considered as having been resolved.

A conciliation hearing on the unresolved 4 issues (1. Firearms Proficiency Allowance; 2. Court Time; 3. Call In Pay; 4. Holiday Pay/Credits) was conducted on November 3, 1998 in Lyndhurst, Ohio at the city hall.

II. APPEARANCES

On Behalf Of The Union:

S. Randall Weltman	Attorney for the Union
Michael Govanello	Member, Union Negotiating Committee
Milo J. Tilocco	
Christopher Cianciolo	
Nick Codrea, Jr.	Ohio PBA Staff Member

On Behalf Of The City:

Suellen Oswald	Attorney For City
Sherwood Eldredge, Jr.	Chief Of Police

III. CRITERIA

The criteria to be used by the Conciliator in determining this matter are found in R.C. 4117.14[G][7][a] to [f] and include the following: past collectively bargained agreements between the parties, comparison of issues between the affected employees with those issues related to other public and private employees doing comparable work, the interest and welfare of the public, the ability of the City to finance and administer the issues proposed and the effect of the adjustments on the normal standard of public service.

The criteria which are to be used during conciliation are included among the criteria used in fact finding. [R.C. 4117.14[C][4][e]]. Both representatives recognized the need for the conciliator to find error on the part of the fact finder before overturning the award [the City, argued that the conciliator need only find error and the Union that the conciliator must find grievous or prejudicial error before overturning the recommendation]. Though the requirement of clear error is not statutory it appears to be the norm used by conciliators since first advanced by the Professor Drotning. This Conciliator does not believe that he must first determine that the fact finder committed clear, grievous or prejudicial error before overturning such an award. Nevertheless, it is clear that the prevailing practice is that error in some form must be found before overturning a fact finder's award.

Another substantive issue which arose during the hearing was whether the Conciliator had authority to issue a

retroactive award. While both parties generally agreed that the conciliator was not so empowered, the representative of the City, in writing, offered to waive any objections regarding retroactivity as to the issue involving the Firearms Proficiency Allowance.

The conciliation process is a creature of statute and the statute specifically states that "increases in rates of compensation and other matters with cost implications . . . may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award. . . The parties may, at any time, amend or modify a conciliator's award or order by mutual agreement." [R.C. 4117.14 [G][11]].

In conformity with the plain and unambiguous meaning of the above statute and the various judicial interpretations thereof [See; SERB v. City of Barberton, 1990 SERB 4-46 (C.P. Summit Co., 1990); SERB v. City of Columbus, 1984-86 SERB 429 (CP, Franklin Co. 1985)], the Conciliator concludes that he is without jurisdiction to issue any type of retroactive award involving compensation or with cost implications and that the parties cannot waive, in advance of the conciliator's award, the prohibition against a retroactive award involving compensation or cost to the public body. The Conciliator does, however, conclude that the parties may amend or modify the conciliator's award, after the fact, by mutual agreement. [R.C. 4117.14[G][11]].

IV. ISSUES FOR CONCILIATION

1. FIREARM PROFICIENCY ALLOWANCE

The Fact Finder awarded an increase in the Firearm Proficiency Allowance at the rate of 2% of base annual salary in the stead of an annual payment of \$250.

The Union's final offer was:

a] Payment of \$882.54 on January 1, 1999 or the first payday thereafter for each employee who satisfactorily completed the Firearm Re-qualification Program in 1998; and

b] Effective January 1, 1999 that each patrolman who satisfactorily completes the re-qualification program shall receive, annually, a sum of money equal to 2% of the top patrolman's annual rate of pay. Such sum shall be paid to the employee in a lump sum separate check as soon

thereafter as may be practical. Such sum shall be added to each employee's annual pay for the purpose of computing longevity compensation.

The City offered to maintain the current practice of \$250 per year as its final offer.

The current contract [Art VII, Sec. 6] requires payment of \$250 to those passing the firearm requalification test. Both parties, during presentation of their respective cases, introduced various compensation practices of neighboring municipalities. There is no clear or overwhelming trend among the neighboring suburbs.

The Union drew a parallel between payment to firefighters who are also certified paramedics who receive an additional 5% of annual base pay and patrolmen who receive a flat rate of \$250 per year for firearm requalification and argued that there should be parity between the safety forces. The City countered that paramedic training is an 11 month program which costs the City more than \$2,000 in training costs whereas the requalification test is a single range test.

The Conciliator, as did Fact Finder Castle, concludes that while parity may be desirable between safety forces, differences do exist, and this Conciliator adds, will likely continue to exist. Firearm proficiency is a job requirement and not one that would necessarily entitle a marksman to any greater compensation. In addition to untold possibilities of civil liability, it would be discomfoting to the general public if it became known that unqualified, but armed patrolmen were on the job.

The policy of "add-ons" to base compensation rates is endemic to public employment, particularly safety forces. As the Fact Finder noted, it would be preferable to incorporate annual firearm re-qualification into the job requirement and fold the allowance into the base wage. That issue is not before this Conciliator and regardless of the reasons such payments were originally adopted, they have become an accepted part of the total compensation package. It is noted that the patrolmen's longevity compensation and the compensation for paramedics are both tied to percentages of base compensation. As base rates rise, so does compensation for longevity enjoyed by policemen and paramedic training received by firefighters.

A continuation in the policy of flat rating an important segment of the total compensation package received

by one branch of the safety forces only serves to increase the disparity of pay between safety forces.

The Union's proposal for a double payment in 1999 is a thinly veiled attempt to avoid the prohibition against retroactive compensation awards. Nevertheless, the Conciliator finds that he has the authority to accept such a proposal. It appears that an increase in the firearm proficiency allowance when considered as a part of the compensation package is within the compensation parameters of neighboring municipalities. The Conciliator did have difficulty with understanding the intent of the Union's final proposal in regard to basing the additional compensation on "the top patrolman's annual rate of pay". It appears that the percentage should be computed upon the annual rate of pay in effect at the time of the re-qualification, but the choice is between the final proposals of the parties.

AWARD

The Conciliator, as did the Fact Finder, finds in favor of the Union. It is the Conciliator's award that:

Effective on the first payday following January 1, 1999, each employee who satisfactorily completed the Firearm Re-qualification Program in 1998 shall receive \$882.54, and

Each employee who satisfactorily completes the annual Firearm Re-Qualification Program as required by the State of Ohio thereafter 1999 shall receive, as additional compensation as soon as practicable following re-qualification, a sum of money equal to 2% of the "top patrolman's annual rate of pay".

Payment received for Firearm Proficiency Allowance shall be added to the employee's annual base pay when computing longevity compensation.

2. COURT TIME

The current, but expired agreement between the parties, calls for the payment of a minimum of 2 hours pay for actual time spent when required to appear in municipal court.

The Union's final position was to increase the minimum time to 3 hours. If more than 3 hours were spent, the patrolman would be paid for the actual time.

The City's final offer was to maintain the minimum at 2 hours.

The Fact Finder increased the minimum to 3 hours.

The City argued that the compensation packages of neighboring communities did not establish a 3 hour minimum and that Lyndhurst patrolmen are not inconvenienced as are many other patrolmen from surrounding municipalities since the court and police headquarters are housed in the same building. Moreover, the City argued that the average time spent in Court was only 20 minutes. The Union, on the other hand, submitted that the City's offer failed to recognize the inconvenience of having to come into court on off days or after or before shift times.

Though there is no clear cut standard, increasing the minimum to 3 hours will not create a financial burden upon the City and will compensate the patrolmen for the inconvenience, travel time and expenses which they are required to incur when appearing in municipal court during other than normal shift or contiguous to a normal shift time.

The expired contract recognizes a minimum of 3 hours for appearances in common pleas and juvenile courts and the grand jury. The Conciliator can see no real purpose in continuing a two tier system dependent upon the location of the court.

AWARD

The Conciliator, as did the Fact Finder, finds in favor of the Union.

Effective January 1, 1999, patrolmen shall be paid for a minimum of 3 hours for appearances in the Lyndhurst Municipal Court which are outside of and not contiguous to scheduled work time.

3. CALL-IN PAY

The Fact Finder recommended minimum call in pay be increased from 2 to 3 hours at overtime rates.

The union adopted the Fact Finder's recommendation as its final offer.

The City desired to maintain the current policy of the greater of a 2 hour minimum or actual time spent.

Again, both parties submitted comparables in support of their respective positions. The present contract requires payment for a minimum of 2 hours, but fails to mention whether the payment is at straight or overtime rates. (Article VII, Section 5). The firefighters receive 3 hours minimum at overtime rates when required to return to work after normal shift time. The Conciliator can see little difference between the firefighters and patrolman in this instance. Both would be called in if the regular shift personnel were unable to deal with a particular situation, accident, fire or natural disaster.

A "double back" whether by a firefighter or police officer is an inconvenience and an additional expense for which each are entitled to be justly compensated.

AWARD

I agree with and adopt the recommendation of the Fact Finder.

Effective January 1, 1999, any employee required to report for work during times that are outside of scheduled work time and which is not contiguous to scheduled time, will be paid the greater of a minimum of 3 hours pay or for the actual time spent, both to be computed at the overtime rate of the respective patrolman.

4. HOLIDAY CREDITS

The current contract provides for 11 annual holiday credits. A patrolman working a holiday is paid straight time.

The Fact Finder adopted the union proposal of time and a half pay for work on 6 Holidays (Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve Day, and Christmas Day) plus the 11 credits.

The Union submitted the adoption of the Fact Finder's recommendation as its final position.

The City offered no change from the present 11 Holiday Credits as its final position.

Once again, there does not appear to be any prevailing standard in the general area. Holiday compensation runs the gamut from Euclid's 17 Holidays (triple time for 8 and double and a half for 9) to Lyndhurst's straight comp time for 11 holidays. The majority of the municipalities considered in this matter have adopted a policy more liberal than that of the City.

Worthy of note, however, is that the City's firefighters receive 132 hours of credit versus the patrolmen's 88 hours. While not espousing total parity between safety forces, this appears to be an area in which both the patrolmen and the firefighters should be treated, if not the same, at least similarly. The Union proposal is quite reasonable and within the various comparable holiday package benefits provided patrolmen in neighboring municipalities.

AWARD

The Conciliator agrees with the Fact Finder and awards that:

On the first pay day following January 1, 1999, each employee who during 1988 worked on Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve Day, or Christmas Day shall receive compensation at the rate of 1 1/2 times his regular hourly rate of pay in addition to the 11 holiday credits.

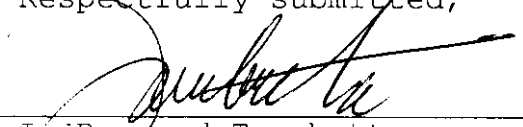
Effective January 1, 1999, and thereafter any employee working on Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve Day, or Christmas Day, shall be compensated at the rate of 1 1/2 times his regular hourly rate of pay in addition to the 11 holiday credits.

V. CONCLUSION

Though both sides supported their respective positions with comparable benefits being paid to members of the police departments of surrounding communities, there does not appear to be an overwhelming or prevailing policy regarding the open issues. The Fact Finder's report contains a lengthy comparison of both external and internal compensation packages. The Fact Finder's recommendations are supported by

the weight of the evidence. Also, the Fact Finder does not appear to have committed any error in reaching those recommendations. The Conciliator does not believe it proper to substitute his recommendations for those of the Fact Finder in the absence of error, material or otherwise.

Respectfully submitted,



I. Bernard Trombetta
Conciliator

Dated: November 12, 1998

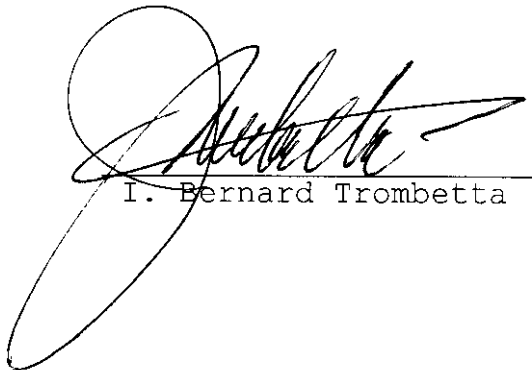
VI. PROOF OF SERVICE

The undersigned hereby certifies that this award was served upon the following parties by ordinary U.S. mail this 12th day of November, 1998:

Suellen Oswald, Esq., 1301 East Ninth Street, 20th Floor, Cleveland, Ohio 44114, representative of the City, and

S. Randall Weltman, Esq., 1228 Euclid Avenue, 9th Floor, Cleveland, Ohio 44115-1981, representative of the Union, and

G. Thomas Worley, Administrator, Bureau Of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213.



I. Bernard Trombetta