

STATE EMPLOYMENT  
RELATIONS BOARD

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STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

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IN THE MATTER OF: \*

FRATERNAL ORDER OF POLICE \*  
OHIO LABOR COUNCIL \*

AND \*

CASE NO. 98-MED-05-0550

OTTAWA COUNTY SHERIFF \*

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REPORT AND AWARD OF THE CONCILIATOR

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## CONCILIATOR'S REPORT AND AWARD

### I. HEARING BACKGROUND

This is a conciliation between the Fraternal Order of Police, Ohio Labor Council, Inc., hereinafter referred to herein as the "Union" and the Ottawa County Sheriff, hereinafter referred to herein as the "Employer".

The Unit is a multi party bargaining unit, consisting of 4 divisions within the Sheriff's office. The units are: a) 20 Corrections Officers; b) 5 Communications Officers (dispatchers); c) 13 Road Patrol Personnel (9 Road Deputies, 1 Civil Deputy, 3 Detectives; d) 7 Sergeants. The parties agreed to a multi-unit bargaining unit for purposes of negotiating a new agreement.

Ottawa County is located in northwestern Ohio. It consists of 1,253 square miles with 673 miles of roads, including 302 miles of state and county highways. It includes, but the unit in question performs few services for, the Lake Erie Islands. The permanent population of the entire county is 40,000. During the Summer boating and vacation season, the population swells to 200,000 and on holidays to 300,000. Nevertheless, the county is essentially rural in character. The City of Port Clinton (pop. 7,000) is the only municipality in the entire county. There are 14 police departments within the county.

In 1998 15,387 service calls were received, many of which were either responded to by local police departments required no response from sheriff personnel.

The primary duties of the Road Patrol Unit, which is the only unit of concern herein, consist primarily, of traffic law enforcement and to a lesser degree misdemeanor and felony crime investigations. Felony crimes are chiefly crimes against property (burglary) and domestic violence, though during the summer season, drug, assault and theft crimes increase.

The current contract between the parties expired on September 5, 1998. The parties have continued to operate under the expired contract.

The parties, because of a rival union's representation petition, did not begin to bargain until after the expiration of the present contract. The parties were unable to reach agreement and a Fact Finding hearing was held on November 19, 1998 before Donald R. Burkholder.

Twelve of the Fourteen open issues were actually resolved on the basis of a mediated agreement between the parties. No evidence was presented to the Fact Finder on those issues. The recommendations of the Fact Finder, with the exception of the wage and wage equalization recommendations, were agreed to between the parties during Fact Finding. The parties did not sign off on the issues on which agreement allegedly was reached.

The only two matters on which the Fact Finder may have heard evidence were the wage increase and pay equalization (between the communications and corrections officers) issues. There was some dispute whether any evidence was presented to the fact finder. In any event, the Fact Finder's recommendation on the wage increase issue which is the only issue under review herein, does not state that the recommendation was based upon an agreement of the parties.

The parties acknowledged that the recommendations were submitted as a multi unit bargaining unit with each of the four units reserving the right to accept or reject. The Patrol unit rejected the recommendations and the tentative agreements. The other three units either accepted or were deemed to have accepted the recommendations. The Board of County Commissioners were deemed to have accepted the recommendations.

Subsequent bargaining sessions between the Employer and the Union did not result in an agreement and this matter was presented for conciliation on the basis of 6 open issues, 4 from the Union and 2 from the Employer.

The unresolved issues are as follows:

1. Additional Personal Days (Art. 43.4);
2. Computation of Overtime (Art. 20.3(b));
3. Wage Increase (Art. 24);
4. Duration of the Agreement (Art. 44);
5. Deletion of Sick Pay from Overtime Computation (Art. 20.7);
6. Reduction of Sick Days (Art. 28.1)

## II. APPEARANCES

On Behalf Of The Union:

Jackie Wegman, FOP Staff Representative  
Kay Cremeans, FOP General Counsel  
Doug St. Clair, Road (Patrol) Div. Representative  
James Karr, Road (Patrol) Div. Representative

On Behalf Of The Employer:

James Sciarini, Attorney for Employer  
Craig V. Emahiser, Ottawa County Sheriff  
Bob Bratton, Ottawa County Sheriff's Office  
Ruth Dyles, Ottawa County Human Resources Director  
Jere Witt, County Administrator

## 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 OAC 4117.14(G)(7)(a) through (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 County to finance and administer the issues proposed and the effect of the adjustments on the normal standard of public service. The Conciliator must chose between the final settlement offers of the parties.

The criteria used during conciliation are included among the same criteria used in fact finding. [R.C. 4117.14[C][4][e]]. Most conciliators employ a standard requiring a finding of clear error on the part of the fact finder before a recommendation will be overturned. Though not statutory, it appears to be the standard used by conciliators since first advanced by Professor Drotning.

This hearing, however, presents a case in which the Conciliator must, at on 4 of the 6 issues, make a de novo determination because the Fact Finder's recommendations were based not upon the evidence, but upon the alleged agreement of the parties. A finding of error on the part of the fact finder is therefore, not required. The Fact Finder, however, had greater discretion that does this Conciliator

who must chose between the final offers of the parties. The clear error standard will be employed only on the wage increase and duration issues.

During the hearing and contained in the Employer's final offer on the wage issue was the offer to pay retroactive wages to October 1, 1998. While both parties generally agreed that the conciliator was not empowered to make a retroactive wage increase beyond January 1st, the Employer stated that such increases would be paid if the Conciliator adopted the economic recommendations of the Fact Finder.

The conciliation process is a statutory creation which prohibits "increases in rates of compensation and other matters with cost implications ..... " prior to the start of the fiscal year next commencing after the date of the final offer settlement award.[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 (C.P., Franklin Co. 1985)], the Conciliator concludes that he is without jurisdiction to order a retroactive award involving compensation or cost implications before January 1, 1999. The parties cannot waive this lack of authority, in advance of the award. The parties may amend or modify the conciliator's award, after the fact, by mutual agreement. [R.C. 4117.14[G][11] The Employer can pay retroactive wage increases to October 1, 1998, if it so elects.

#### IV. ISSUES FOR CONCILIATION

ISSUE NO. 1: INCREASE IN THE NUMBER OF PERSONAL DAYS  
FACT FINDERS ISSUE NO. 17  
ART. 34  
SECTION 34.4

FINAL POSITION OF THE UNION: the Union is seeking to increase the number of personal days from 1 per year to 3.

FINAL POSITION OF THE EMPLOYER: The Employer desires to retain the current language of Article 34.4.

**FACT FINDER'S RECOMMENDATIONS:** The Fact Finder recommended the number of personal days to remain at one when the Union withdrew its demand.

**DISCUSSION:** The Union withdrew this request during fact finding but sought to renew the issue during conciliation. The Union submitted that the Road Patrol unit is in need of additional personal days to compensate for the "mental fatigue" inherent in the job (even for a civil deputy who serves subpoenas and summonses?). No medical evidence of either stress or fatigue was proven. The comparables introduced by both parties failed to disclose a clear pattern in neighboring counties where the number of personal days range between none and three.

The Conciliator is not persuaded by either of the Union's arguments. Comparables failed to establish a clear trend. The other three units agreed to retain 1 day personal leave.

Personal leave was originally intended to enable an employee to attend to important personal business, such as a real estate closing and is not the a substitute for sick leave.

#### **AWARD**

The Conciliator adopts the final position of the Employer. Personal leave shall remain at one day per year.

The new contract shall retain the present language of Section 34.4.

#### **ISSUE NO. 2: COMPUTATION OF OVERTIME HOURS**

##### **FACT FINDERS ISSUE NO. 3 ARTICLE 20 SECTION 20.3**

**FINAL POSITION OF THE UNION:** The Union seeks a modification of Article 20.3 (b) to compute overtime pay on the basis of 80 hours in a 14 day period.

**FINAL POSITION OF THE EMPLOYER:** The Employer seeks to retain the current procedure on overtime computation (160 hours/ in a 28 day period.

FACT FINDER'S RECOMMENDATION: The Fact Finder recommended that overtime be computed on the basis of 80 hours worked in a 14 day period.

DISCUSSION: The Fact Finder's recommendation was based upon the tentative agreement of the parties. No evidence was heard.

Nevertheless, the evidence, particularly the comparable practices of neighboring sheriff offices, supports the computation of overtime pay on the 80/14 basis.

It is noted that the expired contract required overtime pay computation for the communications unit to be based upon a 40 hour workweek. Under the tentative agreement accepted by both the corrections and sergeants units, overtime is to be computed for those units is to be computed on a 80 hour/14 day period. The Conciliator can discern no real difference between the communications unit and the road patrol unit, nor between that unit and the corrections and sergeants units.

Financial ability is not deemed a factor herein since cost figures were not submitted. Though the Employer contended that it assented to the 80/14 formula as part of an economic package, the evidence suggests that the current practice is maintained for purposes of scheduling flexibility by management. The 14 day period grants sufficient flexibility to management in scheduling hours.

#### **AWARD**

The Conciliator adopts the final position of the Union. Overtime compensation at time and a half the regular base rate shall be computed upon the basis of 80 hours worked in a 14 day period.

#### **ISSUE NO. 3: WAGE INCREASE**

#### **FACT FINDERS ISSUE NO. 8 ARTICLE 24 SECTION 24.1**

FINAL POSITION OF THE UNION: The Union is seeking a wage increase of 4%, 5%, and 5% in the three years of the new contract.

FINAL POSITION OF THE EMPLOYER: The Employer is willing to give an increase of 3%, 4% and 4%.

FACT FINDER'S RECOMMENDATION: The Fact Finder recommended increases of 3%, 4% and 4%.

DISCUSSION: The Fact Finder's recommendation does not state that it was based upon the tentative agreement of the parties. The parties, however, contended that no evidence was submitted to the Fact Finder. Nevertheless, since the fact finder's recommendation appears to have been the result of his deliberation of relevant factors, clear error in the recommendation must be proven in order to overturn it.

The recommendation (Section (b)), also, contains language which appears applicable only to communications officers and does not concern this conciliation.

The Union produced evidence of county-wide increases among selected employees of between 0% and 13%. The Union also argued that the approximate cost to the county if its position were adopted would be approximately \$3,554.00 (slightly more if weighted between the lower paid road deputies and the higher paid civil deputy and detectives).

The County Administrator testified that the county is in a relatively strong financial condition courtesy primarily of the Davis-Besse nuclear plant, but that he expects the county to experience a reduction in revenues due to deregulation and current litigation involving the electrical industry. Thus, financial ability is not a factor in the determination of this issue.

Comparable wage scales disclosed that Ottawa County is in the middle of the 7 county comparison submitted by the Union.

The Employer submitted that, except in a number of individual instances in which the annual pay was adjusted to become either more competitive or equitable, non-union county employees earning less than \$14.43 per hour received a 4% increase. Road patrol personnel earn less than \$14.43. The civil deputy and the detectives earn in excess of \$14.43. Based upon the county's own formula, and this Conciliator cannot discern any difference between non-union employees and the unionized deputies, it appears that the road patrol personnel, but not the civil deputy or detectives, should have received an increase of 4%.

Aside from that policy, however, this Conciliator finds that the recommendation for a 3%, 4%, 4% wage increase is reasonable. It was accepted by the other 3 units of this



multi party bargaining unit. Though the road personnel of this unit may have been entitled to a larger increase (4%) using the county's own formula, the option of granting such an increase to the road patrol personnel only is not available to this Conciliator who must choose between the final offers of the parties, neither of which include a bifurcated increase between the members of this unit.

#### **AWARD**

The Conciliator, as did the Fact Finder, awards wage increases of 3%, 4% and 4%, retroactive to January 1, 1999 be granted herein.

#### **ISSUE NO. 4: DURATION OF AGREEMENT**

##### **FACT FINDER'S ISSUE NO. 20**

##### **ARTICLE 44**

##### **SECTION 44.1**

**FINAL POSITION OF THE UNION:** The union is proposing a 3 year contract commencing January 1, 1999 and ending December 31, 2001. (The written final position requested at January 1st 1999 to January 1st 2002, but was corrected without opposition from the Employer and all discussions regarded the more conventionally worded inclusive dates).

**FINAL POSITION OF THE EMPLOYER:** The employer also proposed a modified 3 year contract, but one which would commence October 1, 1998 and terminate September 30, 2001.

**FACT FINDER'S RECOMMENDATION:** A 3 year contract commencing October 1, 1998 and ending September 30, 2001.

**DISCUSSION:** The Fact Finder's recommendation of a 3 year contract commencing October 1st does not appear to have been premised upon the tentative agreement of the parties. The rejection of the tentative agreement by this unit prevents the payment of a retroactive wage increase to October 1st.

It is also noted that the prior contract expired on September 5th and not on September 30th.

Lastly, the agreement between the parties, because of the awards resulting from this conciliation, will differ from the agreement already adopted by the other units in this multi party bargaining unit which received retroactive

wage increases and agreed to a reduction in the number of sick days in return for an increase in base rates.

#### AWARD

The Conciliator adopts the final position of the Union and orders that the new agreement between these parties shall commence January 1, 1999 and terminate on December 31, 2001.

#### ISSUE NO. 5 DELETION OF SICK PAY

#### FACT FINDERS ISSUE NO. 3 (COUNTY) ARTICLE 20 SECTION 20.7

FINAL POSITION OF THE UNION: Retain the current language of 20.7 and count sick leave as time worked.

FINAL POSITION OF THE EMPLOYER: Delete "paid sick leave" from consideration as active pay status and not count it as time worked.

FACT FINDER'S RECOMMENDATION: The Fact Finder recommended adoption of the Employer's position with the agreement of the Union.

DISCUSSION: The recommendation of the Fact Finder was a part of the tentative settlement between the parties. No evidence was taken in support of the recommendation which was a modification of a prior bargained issue.

The desirability of such a change is rather obvious from the Employer's standpoint. However, mere desirability to reduce a benefit previously bargained and incorporated into at least one prior agreement is not sufficient grounds upon which to order a change.

Cost savings were not established. Financial ability was not an issue. The County could afford to continue to count sick leave as active pay status upon which to base overtime compensation.

Though alleged as the reason behind the change, the Employer did not establish that the sick leave process was abused by members of this unit much less than establishing that this abuse lead to the payment of overtime compensation.

The Conciliator can see no reason to differentiate between sick leave pay and vacation, compensatory time, military and court leave pay.

#### AWARD

The Conciliator finds in favor of the Union and orders that sick leave pay continue to be considered as active pay status and counted as time worked. The present language of Section 20.7 shall remain in the new agreement.

#### ISSUE NO. 6 REDUCTION IN SICK LEAVE

#### FACT FINDER'S ISSUE NO. 6 (a) COUNTY ARTICLE 28 SECTION 28.1

FINAL POSITION OF THE UNION: The Union seeks to retain the current language of Section 28.1.

FINAL POSITION OF THE EMPLOYER: The Employer seeks a reduction the number of sick leave days from 15 to 10 per year. In turn, the employee's base rate would be increased (Detective \$.23; Deputy \$.20) in the first year of the contract only.

FACT FINDER'S RECOMMENDATION: The Fact Finder recommended, as a part of the tentative agreement of the parties, a reduction in the number of sick days from 15 to 10 per year in return for an increase in the base rate of between \$.20 and \$.23 per hour per employee. No evidence was presented during the hearing.

DISCUSSION: The other three units of this multi party bargaining unit accepted the reduction in benefits in exchange for a increase in base rate wages. The road patrol unit was displeased and rejected the agreement.

Sick leave minimums are established by statute. (R.C. 124.38). An employee is entitled to 4.6 hours with pay for each 80 hours of service (1 1/4 days per month or 15 days per year). The now expired contract between the parties adopted the state minimums.

Sick leave is a benefit almost unique to public employment. Apparently, the General Assembly thought it to be so important that it has been codified. It is, however, a matter that can be bargained pursuant to R.C. 4117.10.

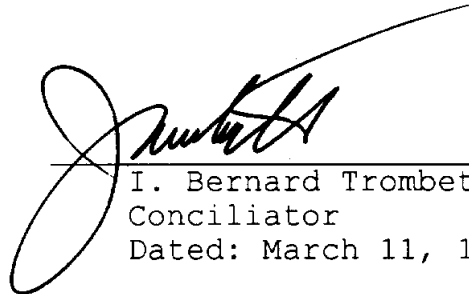
A reduction in the number of paid days would be of obvious benefit to the Employer. The employees loss would not be offset by the increase in wages (the corresponding increase would cover only 75% of the dollar value of the lost benefit).

The Conciliator is cognizant that the representatives of the unit herein agreed to the reduction in benefits and that the other three parties to this multi unit bargaining unit accepted the reduction in the stead of an adjustment in base rate pay. This Conciliator, however, is of the opinion that a reduction in state mandated benefits must be accomplished by the mutual agreement of the parties and not the result of a conciliator's award. Further, since the Fact Finder's recommendation was based upon the tentative agreement of the parties and not upon the evidence, a showing of clear error is not necessary. The Conciliator can base an award upon the evidence, de novo.

#### AWARD

The Conciliator adopts the final position of the Union. Sick leave accumulation (Section 28.1) shall remain at 15 days per year.

Respectfully Submitted

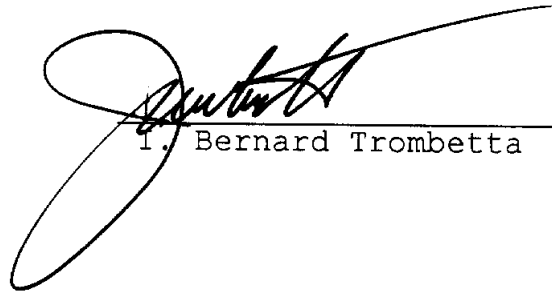


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I. Bernard Trombetta  
Conciliator  
Dated: March 11, 1999

V. PROOF OF SERVICE

The undersigned hereby certifies that this award was served upon James M. Sciarini, Attorney for Employer, 608 Madison Avenue, Suite 1000, Toledo, OH 43215 and Jackie Wegman, Union Representative, 545 Dussel Drive, Maumee, OH 43537 and Thomas Worley, Administrator, Bureau Of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213 on this 12th day of March, 1999 by ordinary U.S. Mail.



I. Bernard Trombetta