

STATE EMPLOYMENT RELATIONS BOARD

2003 FEB -7 A 10: 31

01-MED-11-1088

MENTOR-ON-THE-LAKE)	FACT-FINDING REPORT
PROFESSIONAL FIRE FIGHTERS,)	
LOCAL 3049)	STANLEY B. WIENER
)	FACT-FINDER
)	
-and-)	
)	
CITY OF MENTOR-ON-THE-LAKE)	FEBRUARY <u>5</u> , 2003
)	

A Fact-finding hearing was held on December 11, 2002 at the Mentor-On-The-Lake City Hall, 5860 Andrews Road, Mentor-On-The-Lake, Ohio 44060.

Representing the Professional Fire Fighters, Local 3049 ("Union") was JAMES ASTORINO, PRESIDENT, Northern Ohio Fire-Fighters. Also appearing on behalf of the Union were DAVID BIRTLEY, LIEUTENANT PAUL MORRIS, JAMES PECHAFSKO and DONALD L. CUNNINGHAM (FIRE CHIEF, RETIRED).

Representing the City of Mentor-On-The-Lake ("City") was TOM GRABARCZYK, Consultant, Labor Relations Management, Inc. Also appearing on behalf of the City was KIP L. MELENAAR, Administrator/Finance Director and ROBERT MAHONEY, FIRE CHIEF.

I. PAST NEGOTIATIONS – MEDIATION

The last contract was for one (1) year which expired December 31, 2001. This contract was preceded by a Three (3) year contract.

Negotiations for a new three (3) year contract started near the end of 2001, and continued off and on through 2002.

The Union consists of four (4) full-time Fire-fighters. The City also has a separate contract with approximately thirty (30) part-time Fire-fighters. This contract does not expire until August 31, 2004.

Mediation was attempted prior to the hearing on November 21, 2002, and also during the hearing. Several issues were resolved, which for the record are identified below:

- A. Overtime Compensation and Compensatory Time. (Article 34)
- B. Leave of Absence. (Article 27.01)
- C. General Disciplinary Procedures. (Article 13, Section 13.02)
- D. Exchange of Shifts. (Article 5, new Section 5.02)
- E. Sick Leave. (Article 16, Sections 16.12.1 and 16.12.2)

II. ISSUES AT IMPASSE

- A. Hours of Work
- B. Wages
- C. Uniform Maintenance Allowance
- D. Illness and Injury Leave
- E. Grievance Procedure
- F. Fitness for Duty
- G. Drug and Alcohol Testing
- H. Legal Defense Liability

III. POSITIONS, FINDINGS AND RECOMMENDATIONS

For all of the issues discussed below, I have taken into consideration the factors set forth in Ohio Revised Code, Section 4117.14 (G) (7) (a) through (7) (f).

At this time I wish to acknowledge the splendid preparation, patience and assistance of the parties. Each side proceeded in a professional manner.

A. HOURS OF WORK

UNION: The Union for quite some time has proposed a work schedule of twenty-four (24) hours on and forty-eight (48) hours off (24/48). An overwhelming majority of communities in Ohio operate their fire departments on the 24/48 hour schedule.

The City in late 1998 adopted an ordinance requiring it to provide around the clock coverage.

To maintain full-time coverage, the City requires the four (4) full-time firefighters to work a unique schedule; to wit; ten (10) hours per day, Monday through Friday. Part-time firefighters fill in primarily in the evenings and weekends.

The Union requests that the City allow the Employees to work a schedule that almost every firefighter in Ohio works.

Neither the size or the composition of the departments matter.

There is nothing in the contract between the City and the part-time firefighters that should prevent the City from requiring the part-timers to change their hours.

The former Fire Chief, DONALD L. CUNNINGHAM, fully supports the Union proposal.

CITY: The current schedule has worked well for this small city with its limited full-time force.

Utilizing its thirty (30) part-time firefighters the City is able to achieve the required goal of around the clock protection.

The current schedule calls for two (2) full-time firefighters to work from 6:00 a.m. to 4:00 p.m. and two (2) full-time firefighters from 8:00 a.m. to 6:00 p.m., Monday through Friday. Three (3) part-time firefighters fill in the shifts beginning 6:00 a.m. and ending 6:00 p.m., Monday through Friday, as well as covering evening hours and Saturday and Sunday.

Surveys of the part-time Employees have been taken by the City and the Union. From these surveys, it is clear that the City would be unable to maintain the staffing required for the 24/48 schedule.

Only a handful of the present part-time employees would be able or willing at this time to work the daytime shifts. When hired they were advised that the work was primarily for evenings and weekends.

The present Fire Chief, ROBERT MAHONEY, testified in favor of the current schedule.

FINDINGS: Until the adoption of the 1998 ordinance the fire station was not manned 24/7 as part-time firefighters were on standby at home and would respond during the times the station was not manned.

For a very long time the work schedule has been the major issue at impasse. Both sides have spent much time and effort on this issue. The retired Fire Chief and the current Fire Chief are diametrically opposed.

The Union proposed two (2) sets of proposals, each dependant upon the alternate work schedules.

I find that the vast majority of communities in Ohio have 24/48 schedules for their fire departments.

Only a few of the part-time employees would be able or willing to work during week days. They were originally hired primarily for work in the evenings and week-ends.

RECOMMENDATION: I recommend that the present work schedule not be changed and the Union proposal be rejected. In making this recommendation I have given considerable weight to the City's contention that it would be unable to fill the day-time shifts with the current part-time help.

I do suggest, however, that between now and the expiration of this contract (December 31, 2004) as part-time employees leave voluntarily or are discharged, that the City use every effort to obtain replacements willing and able to participate in a 24/48 hour schedule.

B. WAGES

UNION: The Union proposed three (3) annual increases of four percent (4%) commencing January 1, 2002. It furnished a list of comparable jurisdictions which included, Mentor, Willoughby, Eastlake, Wickliffe, Willoughby Hills, Kirtland, Painesville Township and Geneva. Mentor-On-The-Lake was at the bottom third of the list. The Union suggested that even at its proposed increases, the City would be about the middle of the list.

CITY: The City proposed increases of two and one-half percent (2-1/2%) for 2002, and two percent (2%) increases for 2003 and 2004. This proposal is based on its ability to pay and the current economic conditions. The surplus over the past two (2) fiscal years has been seriously depleted, and like most cities it can expect little help from the State of Ohio.

FINDINGS: The wage scale presently is near the bottom for the area. Although the economy is bad, I believe the City can do better than what it has offered.

RECOMMENDATION: I recommend an increase of three and one-half percent (3-1/2%) effective January 1, 2002; an additional increase of three and one-half percent (3-1/2%) effective January 1, 2003; and an additional increase of three percent (3%) effective January 1, 2004.

C. UNIFORM MAINTENANCE ALLOWANCE

UNION: Increase the current allowance of Seven Hundred and 00/100 Dollars (\$700.00) to Eight Hundred Fifty and 00/100 Dollars (\$850.00) for 2002; Nine Hundred and 00/100 Dollars (\$900.00) for 2003 and Nine Hundred Fifty and 00/100 (\$950.00) for 2004.

The allowance has remained at Seven Hundred and 00/100 Dollars (\$700.00) for the years 2000, 2001 and 2002.

CITY: The Union is requesting a twenty-one percent (21%) increase of One Hundred Fifty and 00/100 Dollars (\$150.00) in the first year, and increases of approximately five and one-half percent (5-1/2%) for the second and third years.

The City acknowledges some adjustment can be made based upon a cost of living adjustment.

FINDINGS: The uniform allowance has remained the same for three (3) years. The Seven Hundred and 00/100 Dollar (\$700.00) allowance was already paid for 2002.

RECOMMENDATION: Uniform allowance as follows: For the year 2003, the sum of Seven Hundred Seventy-five and 00/100 Dollars (\$775.00) to be paid within thirty (30) days after the execution of this contract; for the year 2004, the sum of Eight Hundred Twenty-five and 00/100 (\$825.00) payable no later than January 30, 2004.

D. ILLNESS AND INJURY LEAVE

UNION: The Union has submitted the following proposal as a new paragraph to Article 22, Section 22.02:

“Due to the hazard of blood borne pathogens and infectious disease exposure to Fire-fighters and EMS Personnel who respond to emergency medical and hazardous materials incidents and as a result of the State of Ohio Workers Compensation Plan not allowing a Worker’s Compensation claim for exposure only, the City agrees to pay for blood testing and related immediate treatment necessary to determine if an infectious disease has been contracted. If an infectious disease has in fact been contracted due to a work related incident exposure, the claim will then be submitted to the Ohio Bureau of Worker’s Compensation for determination of allowance and subsequent benefits.”

The Ohio Workers Compensation Plan does not allow a claim for exposure only. This places the Fire-fighters and EMS personnel in a “catch 22” situation.

CITY: The Union proposal appears to require the City to immediately begin and pay for treatment of potential HIV exposure.

The City is opposed. It may be required to provide what may be harmful. There is a conflict in the medical profession as to the proper testing.

FINDINGS: I find that the current State position requires contract help for the Employees. The proposed paragraph, however, calls for “immediate treatment.” This language does not appear in the comparable contract provision presented by the Union.

RECOMMENDATION: Add the following paragraph to Section 22.02:

Due to the hazard of blood borne pathogens and infectious disease exposure to Fire-fighters and EMS Personnel who respond to emergency medical and hazardous materials incidents and as a result of the State of Ohio Workers Compensation Plan not allowing a Worker’s Compensation claim for exposure only, the City agrees to pay for diagnostic testing to determine if an infectious disease has been contracted. If an infectious disease has in fact been contracted due to a work related incident exposure, the claim will then be submitted to the Ohio Bureau of Worker’s Compensation for determination of allowance and subsequent benefits.

E. GRIEVANCE PROCEDURE

CITY: The City proposes the following to be added to Article 10, Section 10.01:

“and waives any specific right of appeal to the City of Mentor-On-The-Lake Civil Service Commission, except as set out in Article 42 Residency.

The existence of this Grievance Procedure, hereby established, shall not impair or limit the right of any Employee to pursue any other state or federal remedies available under the law, except that any Employee who pursues any other available remedy other than provided by this procedure, shall automatically have waived and forfeited any remedies by this procedure.”

Section 10.4, Step 4 – Request a list of seven (7) impartial arbitrators instead of five (5).

UNION: The Union does not see any reason to change, but will go along with a panel of seven (7) arbitrators.

FINDINGS: Most comparable contracts contain the language proposed by the City.

RECOMMENDATION: That the City proposal is accepted.

F. FITNESS FOR DUTY

CITY: The City proposes a new Article:

“Fitness For Duty:

Section 1. A physical fitness standard shall be established by the Employer based on requirements of fire and EMS duties. Employees may be required to annually perform a designated agility test.

An Employee found unfit for duty may be removed from employment in a non-disciplinary manner.

Initiation of the process of removal may begin when the Employer reasonably believes that an ongoing condition renders an Employee unfit for duty:

Employees should be able to perform the duties of their positions. A test should be developed.

UNION: The City proposal is too vague. What test? Is it the same as when first hired?

The contract recognizes a Labor-Management Committee (Article 36) to discuss matters of mutual concern.

The committee would be a logical place to negotiate a fitness for duty clause.

FINDING: A fitness provision that is reasonable should be enacted at this time.

RECOMMENDATION: I recommend the following new Article which, in my opinion, meets the objectives of both parties:

“In cases where the Employer feels an Employee is unable to perform the essential elements of his position, an evaluation of the Employee’s condition shall be made by the physician designated and paid for by the Employer. Should the physician concur with the Employer, the Employee may be placed on paid leave (sick leave, vacation, holiday, compensatory time) or extended unpaid leave.

Should there be a conflict between the Employee's doctor and the doctor designated by the Employer over an opinion concerning the Employee's ability to return to work, a third doctor will be chosen by mutual agreement between the Employer and the Union, who shall examine the Employee and decide the matter in question. This jointly-appointed physician shall be paid by the Employer and the Union, with his fee being shared equally by the parties.

If found unfit for duty and unable to return to regular duty within twelve (12) months, the Employee may be removed from service. Any future employment shall be considered in the same manner as any other applicant."

G. DRUG AND ALCOHOL TESTING

CITY: The City proposed a lengthy new Article. It contends that the Employees must be free of drugs and alcohol that could affect their ability to perform in life threatening circumstances.

UNION: The Union also submitted a proposal. But here again it requested that the Labor-Management Committee work this out over the balance of the contract.

FINDINGS: I find that a Drug and Alcohol provision should be placed in the contract at this time. If the Labor-Management Committee can agree on changes over the next two (2) years then the proposed new Article can be amended. But for now, I recommend the following Article, after carefully reviewing the City and Union proposals.

RECOMMENDATION:

NEW ARTICLE

DRUG AND ALCOHOL TESTING

Section 1.

Drug and alcohol screening/testing may be conducted randomly and upon reasonable suspicion. Results of drug or alcohol screening or testing will not be released to a third party except as may be required for administrative proceedings or as required under Ohio Public Records requirements by applicable law. The following procedures shall not preclude the Employer from administrative action upon test results.

Section 2.

All drug screening tests shall be based upon a urine sample and conducted by medical laboratories licensed by the State of Ohio. The procedure utilized by the test lab shall include a chain of custody procedure and mass spectroscopy confirmation of any positive initial screening. All alcohol screening tests shall generally be conducted using an evidential breath testing device.

Section 3.

Drug screening tests shall be given to Employees to detect the illegal use of controlled substances as defined in the Ohio Revised Code. Alcohol tests will be given to determine if an Employee is under the influence while on the job. If the drug screening is positive, the Employee shall be ordered to undergo a confirmatory test using the gas chromatography-mass spectrophotometry method which shall be administered by a medical laboratory licensed by the State of Ohio. The Employee may have a second confirmatory test done from a part of the original sample at a medical laboratory licensed by the State of Ohio of his choosing, at his expense.

If at any point the results of the drug testing procedures conducted by the City specified in this Article are negative (Employee confirmatory tests not applicable) all further testing and administrative actions related to drug/alcohol testing should be discontinued. Negative test results shall not be used against an Employee in any future disciplinary action or in any employment consideration decision.

Section 4.

Upon the findings of positive test results for an illegal controlled substance by the chemical tests, or alcohol impairment, the Employer shall conduct an internal investigation to determine the facts surrounding the positive test. Upon the conclusion of such investigation, the Employer shall have the right to take disciplinary action up to and including discharge pursuant to Article 13. If not terminated, the Employer may also require the Employee to participate in a rehabilitation or detoxification program, as approved by the Employer. An Employee who participates in a rehabilitation or detoxification program shall be required to use sick leave, vacation leave, personal days, holiday time or compensatory time for period of the detoxification program. If no such paid time leave credits are available, such Employee shall be placed on a medical leave of absence without pay for the period of the rehabilitation or detoxification program and may be eligible for FMLA leave. Upon written confirmation of successful completion of such program and a negative test, the Employee shall be returned to his position. Such

Employee may be subject to periodic retesting at the discretion of the Employer upon his return to his position.

Any Employee in the above-mentioned rehabilitation or detoxification program will not lose any seniority or benefits should it be necessary that he be required to take a medical leave of absence without pay for a period not to exceed ninety (90) days.

Section 5

If the Employee refuses to undergo rehabilitation or detoxification, or if he fails to complete a program of rehabilitation, or if he tests positive at any time within two (2) years after his return to work upon completion of the program of rehabilitation, such Employee shall be subject to disciplinary action up to termination pursuant to Article 13. Except as otherwise provided herein, costs of the initial drug screening and alcohol test and confirmatory tests shall be borne by the City. The cost of all other required tests shall be borne by the Employee. For the purpose of this Article, "periodic" shall mean not more than six (6) times within the two (2) year period, except that drug and alcohol tests may be performed at any time upon "reasonable suspicion" of drug or alcohol use.

Section 6

No drug or alcohol testing shall be conducted without the authorization of the Fire Chief or designee. If the Fire Chief or designee orders, the Employee shall submit to a toxicology test in accordance with the procedure set forth above. Refusal to submit to toxicology testing after being ordered to do so may result in disciplinary action up to and including discharge. Records of drug and alcohol testing shall be kept in the official personnel file and shall be kept confidential except as provided by Ohio Public Records Laws, however, test results and records may be used in future disciplinary actions as set forth in this Article.

Section 7

The Employee shall be given a copy of the laboratory reports before any discipline is imposed.

Section 8

Prohibition against controlled substances: The unlawful manufacture, distribution, sale, possession, or use of a controlled substance is strictly prohibited at the workplace. An Employee who violates this section is subject to the discipline up to and including immediate termination from employment and/or referred to an appropriate law enforcement authority.

Section 9

Employees that purposely make false accusations pursuant to this Section shall be subject to discipline including, but not limited to, discharge.

Records of disciplinary action or rehabilitation resulting from positive test results may be used in subsequent disciplinary actions for a period of four (4) years.

H. LEGAL DEFENSE LIABILITY

UNION: The Union proposes the following:

Section 1

The City agrees to provide and maintain professional liability insurance and malpractice insurance of no less than One (1) Million Dollars per each full-time Employee in the bargaining unit at the City's expense during the life of this agreement.

Section 2

As provided by the carrier of such insurance, the legal defense of an Employee shall be provided in any lawsuit alleged to have arisen out of any act or failure to act within the scope of the Employee's regular duties. This provision would be applicable providing such act or failure to act as not malicious or motivated for private gain and did not constitute misfeasance, malfeasance or nonfeasance.

CITY: The City maintains liability insurance for itself and all employees. The contract is not the proper vehicle to negotiate liability insurance.

FINDING: The City has adequate liability insurance.

RECOMMENDATION: That the Union proposal be rejected.

Date: FEB, 5, 2003

Respectfully submitted,



STANLEY B. WIENER,
FACT FINDER

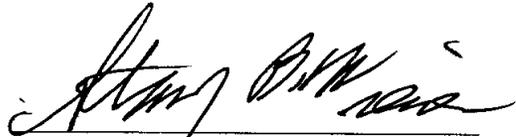
SERVICE

True copies of the foregoing Report were sent this 5th day of February, 2003,
to the following by Federal Express:

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