

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

FACT-FINDING PROCEEDINGS

DANIEL N. KOSANOVICH
FACT-FINDER

2003 JUL -9 A 10:30
STATE EMPLOYMENT
RELATIONS BOARD

IN THE MATTER OF

INTERNATIONAL ASSOCIATION OF :
FIRE FIGHTERS, LOCAL 698, :
Employee Organization : Case No. 02-MED-11-1206
and :
CITY OF XENIA, :
Public Employer :

REPORT AND RECOMMENDATIONS OF FACT-FINDER
ISSUED: July 8, 2003

Appearances:

James W. Skogstrom
10 West Columbia Street
P.O. Box 1885
Springfield, OH 45501
(For the Union)

William R. Groves
Martin, Browne, Hull & Harper, P.L.L.
P.O. Box 1488
Springfield, OH 45501
(For the Employer)

REPORT AND RECOMMENDATIONS

I. Background and Procedural History

The City of Xenia is a municipality in the county seat of Greene County with a population of approximately 25,000. The City of Xenia and IAFF, Local 698 have a collective bargaining relationship that dates back 19 years. The bargaining unit was certified by SERB on November 21, 1984. The unit description contained in the collective bargaining agreement reads as follows:

The bargaining unit will consist of all full-time City of Xenia, Ohio, uniformed Fire Division personnel in the rank of Firefighter and Fire Lieutenant (or other ranks/titles used to designate line supervisors assigned to the operations platoons) and excluding the positions of Fire Chief and the individual who is normally Acting Fire Chief in the absence of the Fire Chief. The term "member," "bargaining unit member," or "employee," wherever it appears in this Agreement, means member of the bargaining unit as described in this Section.

In the summer of 1999, the City of Xenia renamed the position of Administrative Captain to that of Assistant Chief. The City then created 3 new shift Captain Positions, whose responsibilities include supervision of platoon operations. The City did not replace the 3 firefighter positions vacated by the reorganization.

In the fall of 1999, the parties began negotiations for a new collective bargaining agreement. According to the Union, at that time the City agreed to with SERB a request to amend the bargaining unit description to specifically include Captains. The request was never filed. Furthermore, according to the Union the City made a representation that

there was no need to amend the recognition clause of the contract in 1999. As a result, it was not modified.

In the fall of 2002, the City and the IAFF entered into contract negotiations. From the outset of the negotiations, the City has refused to discuss the inclusion of the Captains into the bargaining unit and maintaining that such an amendment must be obtained through SERB. Parenthetically, the City disagrees with the Union's position that the Captains should be included in the bargaining unit because they are supervisors, although during the last round of negotiations, the parties agreed upon a wage rate for the rank of Captain which appears in the contract.

This problem created an almost insurmountable obstacle to successfully completing collective bargaining negotiations in 2002. Coupled with the extreme, and diametrically opposed, positions taken by the parties on virtually half of the substantive articles of the contract, negotiations failed to produce a contract. The parties are now looking for third party intervention to provide a contract.

Despite "going through" the collective bargaining process, including mediation, the parties were only able to agree upon the modification of 2 articles of the contract and to leave undisturbed 13 other articles of the contract.

The IAFF and the City reached impasse on 16 articles of the contract. Those articles include: Article 2, Recognition; Article 4 Management Rights and Responsibilities; Article 5 Wage Rates; Article 7 Plus-Rating; Article 9 Sick Leave; Article 10 Group Insurance Benefits; Article 11 Vacations; Article 12 Holidays; Article 13 Injury Leave; Article 14 Court Time; Article 15 Hours of Employment; Article 16

Overtime Pay; Article 20 Tuition Reimbursement; Article 25 Fitness for Duty Testing; Article 27 Training; and Article 31 Health and Safety (New Article).

Under the circumstances, in this report changes to the contract were recommended only where the most compelling arguments and evidence were presented to do so. Otherwise, the status quo is recommended. Wholesale change of substantive provisions of the contract does not provide the parties with a realistic framework for resolution of the issues at hand, nor does it provide a basis upon which this report can be adopted.

SERB appointed the fact-finder on January 16, 2003 pursuant to ORC Section 4117.14 (C)(3). The parties extended the fact-finder's report date. The parties rejected the fact-finder's offer to mediate the dispute. As a result, a hearing was conducted on June 3, 2003. The fact-finder's Report and Recommendations are due no later than close of business on July 8, 2003.

II. Criteria

In compliance with Ohio Revised Code Section 4117.14 (G)(7) and the Ohio Administrative Code 4117-9-05(J), the fact-finder considered the following criteria in making the recommendations contained in this Report.

1. Past collectively bargained agreements between the parties;
2. Comparison of unresolved issues relative to the employees in the bargaining units 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 affect of the adjustments on normal standard of public service.
4. The lawful authority of the public employer;
5. Stipulations of the parties; and
6. Such factors not confined to those listed above, which are normally or traditionally taken into consideration.

III. Findings and Recommendations

Article 2—Recognition

IAFF's Position

At the fact-finding hearing the Fire Fighters advocated changing the Recognition clause in two respects. First, the IAFF sought to specifically include the classification of Captain in the bargaining unit description. According to the Union, in the summer of 1999, the City of Xenia created 3 new shift Captain positions. These positions were filled by the promotion of Lieutenants from the bargaining unit. These Captains were assigned to shifts and have supervisory responsibility over a platoon.

Further, the IAFF submits that the in the fall of 1999 the City agreed to include the Captains in the unit. In addition, the City indicated that it would not be necessary to alter the language of Article 2, Section 2. However, in the 2002 negotiations, the City refused to discuss any article that addressed the Captains. Therefore, the Union has filed the appropriate petition with SERB to alter the certification.

The IAFF also sought to add a provision to Article 2. The IAFF proposed to add Section 4, which would obligate the Director of Finance to deduct from each bargaining unit member's pay (provides the member authorizes a deduction) an amount designated by said member for the purpose of establishing a PAC fund. The Director of Finance is also compelled under the IAFF's proposal to forward the monies withheld to the Association.

City's Position

The City has resisted the IAFF's attempt to alter the Recognition clause to include Captains for several reasons. First, the City contends that the Captains and Chief were specifically excluded in the original certification in 1984. Furthermore, the City asserts that the topic is not appropriate for collective bargaining. The Captains are supervisors and may constitute a separate bargaining unit as the Police Department Captains do, but are not properly included in the existing IAFF bargaining. In addition, the City sought to amend the Recognition clause to specifically exclude the position of Captain from the bargaining unit.

With respect to the IAFF's proposal to add a new Section 4, the City argues that it places an unnecessary burden on the City administration. Furthermore, the IAFF can establish and fund its own PAC fund.

Recommendation

The simple resolution to the parties' disagreement over the alteration of Article 2, Section 2 of the Recognition clause is to maintain the status quo and allow SERB to address the issue. Therefore, the fact-finder recommends that Article 2, Section 2

remains the same. SERB provides the appropriate forum to entertain alteration of the certification and recognition clause.

The Association failed to advance a compelling reason to recommend the adoption of its proposal to add a new Section to Article 2 (Section 4) which would provide for the Director of Finance to deduct money from bargaining unit member's pay (when authorized) for the purpose of establishing a PAC fund. While it may facilitate the Association's effort to establish a PAC fund and arguably some of those funds could be expended to advance various political issues that both the City and the Association support, it requires the City to accept an additional administrative burden. Additionally, the lack of the provision does not affect the Association's ability to establish a PAC fund.

Therefore, the undersigned recommends against the addition of Section 4 to the Recognition clause.

Article 4—Management Rights and Responsibilities

IAFF's Position

The Association proposed several changes to this Article. Article 4, Section 2 of the current collective bargaining agreement deals with "Privatization". The current language reads, in part:

No subcontracting of work presently performed by Union members and which could result in the displacement of employees from their classification will be undertaken by the City.

The Association sought to add language to this provision to restrict the use of volunteers and part-time personnel with the same restrictions applicable to subcontractors. Further, the Association expressed its desire to delete the second paragraph of Article 4, Section 2,

which provides for the creation of a joint labor-management committee to research privatization among other objectives.

The IAFF also sought to add successor language to this provision by creating a new Section 4. Each of these proposals addresses an element of employment security. In order to make its point, the Association directed the fact-finder's attention to the Position Description for the Fire Chief and a form letter sent to perspective Fire Chief candidates. The Position Description indicates that the Chief is responsible for staff and *volunteers*. The Fire Division has never used volunteer personnel. Furthermore, the form letter sent to perspective Fire Chief candidates states that during the course of a preliminary interview the candidates were to bring a writing sample with them which discusses "...pro's and con's of a mixed full-time, part-time volunteer Fire/EMS Department for a City the size of Xenia."

According to the IAFF the inference to be drawn is that the City intends to use a "mixed" work force, at the very least, or, perhaps, combine with the Township to provide Fire and EMS services to the detriment of the members of the bargaining unit. The protections provided by the proposed changes are warranted.

City's Position

The City's position is rather straight forward. According to the City, the number and type of employees employed to provide the City's EMS and Fire services is a fundamental management right. Therefore, the contract language should remain undisturbed. The City contends that to adopt the IAFF's proposal will only serve to gut the management's right. In fact, at the fact-finding hearing the City indicated that it does not want to give up the right to study or implement changes.

With respect to the addition of Section 4 (the successor language), the City asserts that the provision, if included would be unenforceable under ORC 4113.30. To further support these argument the City referred the fact-finder's attention to the case of Finocchi vs. Greater Cleveland Regional Transit Authority, 85 Ohio App. 3d 572 (8th App. Dist., 1993).¹

Recommendation

Maintaining the integrity of a bargaining unit is fundamental to the effective operation of the collective bargaining process. While certain rights are inherent in management and those rights provide the cornerstone for the exercise of management prerogatives, the more the exercise of the rights have a detrimental impact on the bargaining unit member's employment security (and ultimately the integrity of the bargaining unit) the more balance must be struck.

Placing restrictions upon an employer's right to use contractors, part-time employees and volunteers is a fairly common method in collective bargaining for striking that balance. Such restrictions do not serve to "gut" management's rights. Restrictions on management's right to utilize contractors, part-time employees and volunteers may be shaped to deal with the labor organization's true need, without being overly intrusive into management's prerogatives.

The Association's proposal does not prohibit the use of contractors, part-time employees or volunteers. Only when the utilization of such employees "could result in the displacement of employees from their classification" will the restriction come into play.

¹ The Association responded that ORC 4117 is controlling and, if the parties negotiate a successor clause it is binding. The City countered that no caselaw exists which stands for the proposition that ORC 4117

Moreover, the possibility that the City will exercise management rights with respect to staffing that will detrimentally impact the bargaining unit appears to be a very real threat. Thus, it the recommendation that the first paragraph of Article 4—Section 2 be modified to include the use of volunteers and part-time employees. The fact-finder also recommendations the adoption of the Association’s proposed deletion of the second paragraph of Section 2.

The proposal to add successor language to this Article stands on a different footing. The undersigned is fully cognizant of the significance of the inclusion of successor language in a collective bargaining agreement—particularly when there is a likelihood that the City’s EMS and Fire services will be combined with the Township’s. However, there is a legal issue posed which the fact-finder does not feel equipped to resolve based upon on the evidence and information presented at the hearing. The last thing that these parties need is another reason to refuse to engage in bargaining. Therefore, the undersigned recommends that the successor language be excluded from the contract.

Article 5—Wages

IAFF’s Position

The IAFF argued vigorously for a 4% across the board wage increase for the Xenia fire-fighters. Such a wage increase would serve to “close the gap” between public safety workers in both the City and the County.

The fire-fighters are first in the cycle of collective bargaining negotiations in the City. Generally, the other units that follow in the bargaining process are able to secure more than the fire-fighters.

Moreover, the fire-fighters are on the low end of the scale of comparable safety force bargaining units in the City and surrounding area. For instance, the yearly salary for a Beavercreek fire-fighter is \$49,825.00 as compared to the Xenia fire-fighter who makes \$46,314.00, which is next to last in the comparables offered by the Association.

Furthermore, the City is solvent. According to a financial analysis provided by the IAFF's Department of Labor Issues & Collective Bargaining, Xenia's financial situation appears to be positive.

Finally, the IAFF notes that the number of EMS calls has increased significantly over the past 3 years. It is appropriate for the compensation level to be increased of the fire-fighters who are responsible for handling this heavy load

NOTE: The IAFF seeks a lump sum payment equal to the retroactive pay amount calculated back to the date of contract expiration—February 16, 2003.

City's Position

It is the City's position that average hours must be reduced from 56 to 54.5 to take into account the 3 Earned Days Off (EDOs) contracted for in the last round of bargaining, which will result in a 5.4% base salary reduction from current levels for ranges 315 and 324. Then, the City proposes to increase the base wages 1% for each year of the contract. The City contends that this approach is necessary to correct a failure to adjust base salaries in the last negotiations when the EDOs were negotiated and that the 1% is warranted given the City's financial condition.

The City also sought to alter Section 3 of Article 5 to reflect that the first pay would be based on 106 hours. The second pay would be balance and adjusted for hours actually worked in excess of 212 hours in a 28 day cycle.

Finally, the City proposes to add a new provision that called for a less hire rate for those entering the work force absent full qualifications. If an employee is hired without a Level II Certification, that individual would receive \$2,000.00 less than the base salary. If an employee is hired without EMP-T Certification, that individual would receive \$4,000.00 less than the base salary.

The City asserted that its position on these issues should be adopted based on the following. First of all, the comparables offered by the Association are neither relevant, nor germane. For instance, the salary figure used for the Xenia fire-fighter does not reflect overtime pay, which is substantial. According to data compiled by the City 87.8% of the General Fund expenditures for the Fire Division go to personnel costs. This percentage is far too high and must come under control. Moreover, the City had a negative cashflow in key operating funds for 2002 and projects very small positive ending balances in upcoming years.

Recommendation

It is the recommendation of the fact-finder that the fire-fighters receive a 3.0% increase for each year of the contract as a base salary increase. Also, it is recommended that the fire-fighters receive a lump sum equal to the difference in the pay earned from February 16 to the date of this report and what would have been earned had the 3.0% increase gone into effect then. In addition, the fact-finder recommends that the 28 day pay continue to be calculated on a 56 hours basis. Furthermore, Section 3 of Article 5 shall remain as it appears in the current contract. Finally, it is recommended that the new hire rates should be adopted.

The City treated the reduction of the of the 28 day pay rate on a 56 hour basis as a technical adjustment to correct an oversight stemming from the last round of negotiations. Nothing could be farther from the truth. Altering the 56 hours calculation to a 54.5 hours calculation admittedly results in a 5.4 % base salary reduction. It is in effect concessionary bargaining disguised.

The City has the wherewithal to pay the wage increase recommended. According to the Association's financial analysis: "...Xenia's financial situation appears positive with the general fund balance increasing by approximately 424% during a three-year time period under review continuing the yearly trend of an increasing general fund balance. The general fund balance, both reserved and unreserved as a percentage of expenditures for FY01 is above Moody's guidelines. All four funds also have a high percentage of cash and equivalents in their fund balances." The City's synopsis of the cashflow for key operating funds is less persuasive than the detailed report submitted by the Association. With respect to the City's need to gain control of personnel costs, especially in the fire-fighter ranks in the form of overtime, there are other methods available to address the issue including the addition of staff and the use of part-time and volunteer fire-fighters consistent with the recommendation for Article 4.

The City's proposal for new hire rates may serve to alleviate both the overtime and staffing concerns. It is a fiscally responsible thing to do under the circumstances and is warranted.

Article 7—Plus Rating

IAFF's Position

The Association sought to increase the plus rating. The IAFF proposed to have the rating increased from \$1.38 per hour to \$1.50 per hour. Plus rating is used to compensate a bargaining unit member for performing higher classified work. According to the collective bargaining agreement, “[b]argaining unit members required to work and substantially perform the job duties in a higher classification on a temporary basis will be paid at the higher rate any time they are required to work and substantially perform the job duties in the higher classification for more than two hours in a work day....”

The evidence adduced at the hearing indicates that the bargaining units in the Police Department were able to secure a \$1.50 per hour factor in their negotiations. The Police negotiations followed the Fire-Fighters in 2000. It is only fair to raise the fact here.

City's Position

The City asserted that the current collective bargaining agreement language should remain in effect. At the hearing, the City had no substantive response to the Association's proposal.

Recommendation.

Based on the City's willingness to provide the Police Department bargaining units with the \$1.50 per hour plus rating factor and the City's indifference to the Association's position, it is recommended that the IAFF's proposal be adopted.

Article 9—Sick Leave

There are 12 Sections contained within the Sick Leave provision of the contract. Both parties sought a modification of Section 1. The Association sought to alter Section 4 and proposed to add a new Section—Section 13.

The City expressed a desire to alter Sections 6 and 10 of the contract. In addition, the City proposed the deletion of Section 11 of Article 9.

IAFF's Position

With respect to Section 1 of Article 9, the IAFF wants to change the language to reflect the actual workweek. The sick leave accrual has always been 360 hour per year. Due to the projected reduction in the workweek the Association proposed the use of the following formula. $360 \text{ hours} / \text{Annual hours worked} = \text{hourly accrual rate}$.

In Section 4 the IAFF proposed to change the increase the number of occurrences before requiring a doctor's excuse from 3 to 6. This alteration is being proposed to reflect an agreement reached in a joint labor-management committee and contained in a Department memo submitted by the Association.

The new Section (Section 13) is a wellness program that mirrors that of the communications operators. It is designed to reduce the number of sick leave hours.

City's Position

The City sought to modify Section 1 by changing the accumulation rate from 0.12363 per hour for each regularly scheduled work hour up to an accumulation of 2912 hours to 0.07746 per hour for each regularly scheduled work hour up to an accumulation of 2840 hours.

The city also proposed to omit the "old formula" and replace it with a new formula to read "R is the 28—salary divided by 218.46" In addition, the City proposed to

delete the words “Members, because of...for the length of this contract only” in this Section.

A modification of Section 10 is also proposed by the City. The alteration contemplates the following: “where disability caused by illness or injury continues for 12 months, the member will immediately apply for disability retirement. If a member is unable to return to work at the end of 12 months without restriction, employment will be terminated.”

Finally, the City proposed an elimination of Section 11, which deals with the Sick Leave Donation Program.

Recommendation

The fact-finder recommends that the current contract language be maintained and none of the proposed changes offered by the parties be adopted. The City is driven to change the formula for accumulation of sick leave by the adjustment to the base salary proposed to correct the oversight that resulted from the negotiations of EDOs in the last round of collective bargaining. The Association’s proposal anticipates a change in the 56 hour factor used to establish the 28 day pay rate sometime in the future. Neither of these proposals can be adopted because the fact-finder has already refused to recommend an adjustment from 56 hour to 54.5 hour proposed by management in connection with Article 4 above. Likewise, it is unnecessary to change the formula set forth in Section 6 of Article 9.

The memo relied upon by the Association to support its position is purportedly the product of joint labor-management committee discussions and modifies the current agreement. It is unclear from the memo whether the contents thereof reflect negotiations

on the issue. The document does not say, for instance, that the parties reached an agreement on the issue. Therefore, in keeping with the basic theory supporting the recommendations made in this report, the fact-finder recommends against the modification proposed by the Association.

In dealing with Section 10, management's proposed change could have a significant impact on the bargaining unit members. This kind of modification should come as a result of the give and take of negotiations not imposed by a third party.

Similarly, the deletion of the Section, which provides for the sick leave donation program potentially, has a negative impact upon the bargaining unit members. It too should result from the give and take of negotiations and not imposed by a third party.

The Association's offer to add a wellness program to this Article of the contract under normal circumstances may be advisable, however, in this case is unwarranted. There are other ways to assist the City in dealing with the perceived sick leave problem. A compelling case for this proposed addition to the contract has not been presented. Thus, the recommendation in this report is to maintain the status quo.

Article 10—Group Insurance Benefits

IAFF's Position

The Association expressed a desire to modify Section 1 of Article 10 to reflect an increase in life insurance benefits. The increase will be to \$50,000.00 of life insurance and \$50,000.00 of death and dismemberment coverage. This is an effort to keep pace with inflation over the past contract term.

The Association also proposed to decrease the members' contribution for dental insurance. The IAFF sought an 85% contribution for dental insurance from the City rather than the 50% required by the current contract.

City's Position

The City proposed to reduce the City's contribution for monthly health insurance premiums from 85% to 75% and increase the fire-fighters premium obligation from 15% to 25%. The City's data indicates a 6.57% increase in premium rates for 2003 and is expected to increase. Changing the office visit and prescription drug co-pay amounts minimized the increase.

Recommendation

It is the recommendation of the fact-finder that Section 1 of this Article remain undisturbed. While it would be nice to see an increase in life insurance benefits to keep pace with inflation, the Association has not presented a compelling argument to do so in this situation.

With respect to the IAFF's attempt to decrease the member's contribution toward the dental insurance premium, the fact-finder recommends against the proposed decrease. Something more than the Association's desire must compel the change in these circumstances. Nothing more was offered at the hearing.

Finally, it is recommended that the City's proposal to increase the employee's contribution toward the health insurance premium be rejected. Generally, employers seek to place some of the responsibility for premium costs upon the employee in an effort to control the premium costs. The employees in this bargaining unit already have accepted the responsibility to pay a significant portion of the health insurance premium

currently (15%). There was no evidence submitted that by increasing the employee contribution toward those premiums would impact future premium costs. Furthermore, the increase for 2003 was 6.57%, which is substantially less than in other years. There are other ways to gain cost containment related to health care premiums, including having the employees share in paying a percentage of the increases in the increased premiums from one year to another. However, this should result from the give and take of bargaining and not be imposed by a third party in these circumstances.

Article 11—Vacation

IAFF's Position

The Association proposed to modify Article 11, Section 1 to reflect an hourly accrual rate based on the actual workweek and to adjust the formula contained in subsection b to include a multiplier of actual workweek.

Further, the Association proposed a change in the threshold eligibility requirement for the maximum accumulation of hours from 22 years to 20 years. This proposal applies to subsection C of Section 1.

The IAFF proposed additions and deletions of language in the vacation approval provision found in Section 3.

The Section 1 modifications are not designed to increase the vacation entitlement. Rather, the changes are offered to reflect the actual change in the workweek. "Due to the changing work week, the hourly accrual will need to be changed so the member receives the total number of vacation days in a year." Also, the change proposed from 22 years to 20 years to maximize accumulation "makes sense because the member actually starts to accrue 12 vacation days per year at 20 years of service."

The Section 3 alterations proposed by the Association are designed to guarantee first and second round vacation selections. Additionally, the changes proposed have the effect of subjecting vacation disputes to the grievance-arbitration procedure. All other provisions are subject to the internal dispute resolution procedure.

City's Position

The City proposed to change Section 1, Subsection 1b, Section 2a, Section 3c, Section 3e, and Section 7. In addition, the City proposed to delete Sections 2d, 3d, and 3g. The changes are necessary, in large part, because of the proposed adjustment caused by the EDOs.

Recommendation

Vacation entitlements and scheduling are very complicated matters and are intimately intertwined with wage calculation and other provisions. Fact-finding is not the forum to propose wholesale change to such a provision without extremely compelling reasons. Moreover, fact-finding should be used as a forum to seek modification of the vacation entitlement and/or scheduling provision only after the true rigors of collective bargaining has had their play and the issues in dispute narrowed significantly. In this situation, the parties are seeking changes to over half the substantive provisions of the contract without the benefit of narrowing the scope of the dispute by effective collective bargaining. Therefore, it is the recommendation of the fact-finder to maintain the status quo and retain the current contract language.

Article 12—Holidays

IAFF's Position

The Association sought to modify the Holiday provision of the contract in several different ways. First of all, the Association proposed to add an additional holiday to the contract. Next, the IAFF proposed to change the pay percentage set forth in Section 1, Subsection C from 5% to 7.5%. Finally, the Association proposed the elimination of Section 2.

The additional holiday proposed is September 11th (better known as Patriot's Day). The City gave that day off last year in recognition of the service provided by Fire-Fighters during the terrible tragedy simply labeled 9-11. The IAFF has a desire to memorialize that holiday.

The proposed change from 5.0% to 7.5% is based upon the concept of fair compensation bargaining unit members not scheduled to work a holiday, but are called to work. The premium received by the fire-fighter called to work is the same as the premium received by a bargaining unit member who is not called in to work. However, the employee called in to work receives pay for all hours worked in addition to his/her premium pay.

With respect to the proposed deletion of Article 12, Section 2, the Association notes that this provision has never been used. The lack of utility of the language dictates its elimination.

City's Position

It is the City's position that current collective bargaining language shall remain in effect. According to the City, granting September 11, 2002 off was in recognition of the one-year anniversary of the tragedy and the dedication of the safety forces that followed.

With respect to the change in the premium paid for employees called into work the City asserts that in a 24 hour work day scheme the adjustment is unnecessary. Finally, a form of Section 2 remains in other contracts within the City and the Association failed to establish a compelling reason for its elimination.

Recommendation

While the Association's proposal is laudable and, perhaps, recognition of a September 11 holiday is in order, given this bargaining setting, the Association has failed to establish a compelling reason for the additional holiday. An additional holiday should not be granted.

Likewise, the premium adjustment is unnecessary. The focus of this fact-finding is to provide the parties with a rational framework upon which they can successfully ratify an agreement. The less disturbed in the basic contract, without exceptionally compelling reasons to do so, the better.

Section 2 may not have been utilized in the past. However, the mere fact that the City proposes its deletion indicates that it has some value. Therefore, subscribing to the basic tenet of the fact-finding approach to this situation, the undersigned cannot recommend its elimination.

The recommendation is to maintain the status quo.

Article 13—Injury Leave

IAFF's Position

The Association proposed to add language to Article 13, Section 1 which would require the submission of additional documentation by the injured worker before injury leave begins. The IAFF also sought to include additional language to Section 2 that

reflects the City's acknowledgement that Worker's Compensation is an employee benefit and the process to obtain that benefit must be initiated by the worker. Finally, the Association expressed a desire to provide a subsection of Section 2 that obligates the City to "cover any and all expenses related to a work related injury."

The proposed change in the language of Section 1 is designed to clear up any confusion related to the use of Injury Leave. More specifically, it serves to assure the injured worker does not have to exhaust accrued sick leave until they have exhausted the 42-day limit provided in the current contract.

The proposed changes are a straightforward attempt by the Association to prevent the City from, in effect, forcing the injured worker onto workers' compensation. To allow the City's current practice to continue reduces the time frame the worker has to file a claim from 24 months, down to approximately 30 days. The proposed changes also serve to protect the worker's ability to exercise the rights guaranteed by the workers' compensation laws.

City's Position

It is the City's position that Article 13, Sections 1 and 2 should be modified. The first modification is to reduce the paid injury leave entitlement from 42 days (1008 hours) to 30 days (720 hours). The second proposed change seeks to require the injured worker to seek a determination from the Chief as to the method of compensation. In this scenario the City shall be the sole determinant of the type of available leave the employee shall receive. These changes will reduce the lag time in making the determination, keep premiums down and reduce time off.

Recommendation

It is the recommendation of the fact-finder that the status quo be maintained and the current language of Article 13 be adopted in the new collective bargaining agreement. There is no anecdotal evidence that there has been a problem securing the 42 days of pay while on sick leave. Therefore, no truly compelling reason has been advanced to warrant the proposed change. With respect to the proposed modification of Section 2, it does not appear to be unlawful for the City to engage in its current practice, nor does the evidence suggest that the practice has actually had a significant and detrimental impact on the bargaining unit.

The City's proposed changes dramatically impact the benefits now provided to the bargaining unit members. While the changes can be construed as cost cutting measures, no information was presented to identify the nature of the impact on the workers. Moreover, at least one of the proposed changes is a clear attempt to cede authority from a negotiated entitlement to an exclusive management prerogative.

Article 14—Court Time

The City originally proposed 2 changes to the language of the contract. At the fact-finding hearing the City withdrew its proposal. Since the Association did not seek a modification, it is recommended that the status quo be maintained.

Article 15—Hours of Employment

IAFF's Position

The Association is attempting to reduce the number of hours in the average workweek and bring the Xenia fire-fighters' workweek in alignment with all other bargaining units in the State of Ohio. The Association took a step toward reducing the

number of hours in the average workweek during the last round of collective bargaining by negotiating 3 EDOs.

Thus, it is the position of the IAFF that Section 7 should be modified to provide for 4 EDOs in 2003; 5 EDOs in 2004; 7 EDO's in 2005; and 8 EDOs in 2006. Adopting this proposal would have the impact of reducing the average hourly workweek significantly. Naturally the introductory language to Article 15 would be similarly altered to be consistent with the addition of EDOs for each contract year. The Association provided comparables to support its position on this point.

In addition, the Association proposed to add language to Section 7E to cover the transfer of employees to another shift and the transfer of their EDOs. This would work in a similar manner as the transfer of first round vacation picks.

City' Position

The City proposed to change Section 1 by adding language which provides that overtime pay will be paid for "all hours actually worked in excess of 212 hours in a 28-day period...." In addition, the City sought to change (Section 3B) the pay back of trades from 60 days to within a 28-day cycle with the approval of the Chief or his designee. The City also expressed a desire to provide a sanction in the collective bargaining agreement for a failure to complete a trade obligation. This would be accomplished through the addition of a new section—Section 3H. Further, the City seeks to delete Section 5 of Article 15. With respect to Section 7F the City proposal is to delete the reference to "unscheduled overtime" and alter the formula for compensation under that section to read "one and one-half times the member's rate." Finally, the City proposed

to change the language of Section 7J from “FLSA pay each 28-day cycle” to “EDOs scheduled by the Chief prorated on a 1/12 per month basis.”.

Recommendation

It is the recommendation of the fact-finder that the status quo be maintained and the current contract language be adopted into the new collective bargaining agreement. The addition of EDOs in the last round of negotiations and their impact on the hours of work, overtime and wage calculation is a significant bone of contention for the parties. To add a provision that provides for additional EDOs without giving some consideration to adjusting the wage calculation would not be proper. While reducing the average workweek for fire fighters is an appropriate objective for collective bargaining, accomplishing the goal through the addition of EDOs cannot be recommended—particularly in light of the recommendation on wages.

The City’s position is characterized by two features cost control (related to overtime pay) and enhancing management’s rights. The case to recommend the changes proposed is not sufficiently compelling in these circumstances. For instance, the analysis offered does not demonstrate significant problems with trades. Moreover, to recommend the proposed changes would be inconsistent with the recommendation made with respect to Article 16.

Article 16—Overtime

City’s Position

The Overtime provision of the contract is comprised of twelve sections. The City proposed to delete Sections 2, 3, 4, 5, 9, and 10 from the contract. In addition, the City

proposed to alter the language in the introductory sentence of the Article and Section 1, 6, 7, and 12.

IAFF's Position

It is the IAFF's position to maintain the current contract language. Therefore, the Association resisted the City's attempt to alter the language.

Recommendation

It is the fact-finder's recommendation that the current contract language be adopted in the new contract. The City's proposal nets sweeping changes in the overtime language and its impact on the bargaining unit. Very little in the way of evidence was produced at the hearing to identify the impact and support the change. Once again, given the circumstances in this case the fact-finder is unwilling to recommend such sweeping changes. Those types of changes should be reflected in an agreement emanating from the give and take of collective bargaining.

Article 20—Tuition Reimbursement

IAFF's Position

The Association sought several changes to the language of Article 20. Those changes involve Section 2 and Section 6. The first modification sought to alter the language of Section 2 so that tuition expended for courses not offered through a college would be subject to reimbursement. (Also, in Section 4 the words "or certificate" would be added to be consistent with the change proposed to Article 2) Additionally, it is proposed that the current reimbursement level of 75% be increased to 100%. Finally, the Association proposed to increase the maximum tuition reimbursement from \$1250.00 per year to \$2000.00 per year. With respect to Section 6, the Association sought to add

this section as a new section to the contract. It is designed to provide an incentive to employees to obtain a degree.

According to the IAFF the City's willingness to make the proposed changes would demonstrate its commitment to have an educated work force. The Association did not offer comparables or other statistical data to support its position.

City's Position

The City encourages employee educational development. However, the City expressed its belief that the employees' should shoulder some of the costs.

Recommendation

In keeping with the notion that only the most fundamental and necessary changes with appear as recommendations in this report, the recommendation is to maintain the current collective bargaining agreement language. The Association has failed to present a compelling case for the change.

Article 25—Fitness For Duty

City's Position

The City proposed to add a randomness element to the chemical testing of employees provided for in Article 25, Section 1 by adding the word "randomly" and the word "or" to the first sentence of that section. That sentence would read: "Chemical tests may be **randomly** administered to any bargaining unit member to determine his or her fitness for duty **or** when such tests are part of an official internal investigation or when there is "reasonable suspicion" that an employee may be unfit for duty. (Boldface type used on the additions proposed)

IAFF's Position

The Association proposed to add additional language to Article 25 which, *inter alia*, deals with: (1) vaccinations for common diseases (such as Hepatitis B and C, Influenza, Tetanus, and Pneumonia) paid for by the City; (2) City provided annual physicals; (3) a City promoted tobacco free program, coupled with City products such as Nicoderm CQ to assist the effort; (4) the employee's right to refuse to participate in drug testing, except to the extent required by the Drug Free Work Place Program (DFWP); (5) maintaining confidentiality of drug testing; (6) the City obligation to review and update the City Bloodborne Pathogen policy annually, and provide at no cost to the employee, follow up testing due to occupational exposure, to blood borne pathogens and airborne diseases; and the random testing of up to 25% of the members of Local 698.²

The Association is not opposed to drug testing because of the savings received from the Bureau of Workers Compensation if one is compliant with the DFWP. Subjecting 25% of the work force to such testing satisfies the BWC and the DFWP. In support of its position on this matter the Association points to other jurisdiction that have testing for diseases such as Hepatitis C.

Recommendation

It is the recommendation of the fact-finder that Article 25, Section 1 be modified to provide the City the right to randomly test up to 25% of the work force in any one calendar year. This change should allow the City to be considered to be DFWP compliant and realize some savings from the BWC. The Association is not challenging

² Random testing as proposed by the Association includes the testing of all levels of management and City Council.

the drug testing per se, but seeks to place reasonable limitations upon such testing, which protect the work force from potential abuses connected with the testing procedure.

It is duly noted that other jurisdictions provide testing for diseases and have programs that encourage healthy living, *e.g.*, tabaco free environments. However, to accomplish this task properly, it takes a great deal of study and preparation. For instance, a decision must be made as to the amount and nature of the resources to be devoted to such an effort. Only through the close scrutiny of the give and take of negotiations can this be done. Unfortunately, the parties' rigid posturing has not provided for this kind of discussion. Therefore, no other changes to Article 25 are recommended.

Article 27—Training

IAFF's Position

With respect to Article 27 the IAFF proposed the deletion of Section 2, dealing with mutual aid. An employer does not have to compensate a worker who responds as part of a mutual aid agreement.

The Association also proposed the replacement of Article 25, Section 3 with new language designed to deal with the fire fighters being reimbursed for meeting their requirement to obtain 80 hours of continuing education over a three year period. According to the IAFF, it does not add any cost to the benefit; rather it provides a better method of management of the benefit.

City's Position

The City also sought a revision of Section 3, of Article 25 by deleting the second, third and fourth sentences of that Section. More specifically, the City proposed to eliminate the reference to General Order # 25.

Recommendation

It is the recommendation of the fact-finder that the status quo be maintained with respect to this provision and the parties adopt the current contract language into their new collective bargaining agreement. There are no compelling reasons offered by the City to adopt its proposed changes, save the unspoken one—gaining the ability to modify General Order # 25 unilaterally. While the Association's goal is laudable, providing the City with a more effective way to manage continuing education requirements is not warranted under the circumstances.

Article 31—Health and Safety (New Article)

IAFF's Position

The IAFF proposed to add a new section to the contract, one entitled Article 31 Health & Safety. There are four sections in the proposed provision. The first section deals with physical fitness. The Association sought to memorialize this benefit which is now available to fire fighters.

Section 2 of the proposed Article according to the Association deals with safety by establishing minimum staffing requirements for the various pieces of equipment operated by the fire fighters. Comparables submitted by the IAFF suggests that Xenia is one of a very few Fire Divisions that have not created minimum staffing levels through the collective bargaining process. Additionally, a recent memo indicates that the minimum acceptable staffing level is considered to be ten, which heightens the IAFF's concerns with respect to this issue.

Section 3 proposed to memorialize the Safety Committee, which was created through the joint labor-management initiative. The Association feels strongly that the language should be included in the contract.

Section 4 is an attempt by the IAFF to contractually bind the City to follow the National Guidelines pertaining to fire-fighter health and safety, as well as the laws of Ohio.

City's Position

The City submitted that the proposed Section is already a practice that does not need to be reflected in the contract. Furthermore, fire fighters can take the opportunity to become physically fit during off duty times.

With respect to the proposed Section 2, the City contends that no safety problem exists. In addition, the City asserts that the creation of staffing minimums is a management prerogative.

The Safety Committee already exists. Therefore, there is no need to add this Section (Section 3) to the contract.

Finally, with respect to Section 4 as proposed, the City contends it is compliant with state and federal guidelines, rules and regulations. Thus, it is unnecessary to add this provision.

Recommendation

The fact-finder rejects the proposed additions of Article 31, Section 1, 3, and 4. In keeping with the concept that the undersigned will only recommend changes based on compelling arguments and evidence under these circumstances, the fact-finder must recommend against their inclusion in a new collective bargaining agreement. Section 1

purports to memorialize an established practice and Section 3 purports to memorialize the existence of an established committee. No real compelling reason was advanced for the addition of these sections. The addition of Section 4 only establishes a contractual right that the City must be compliant with all state and federal laws and regulations with regard to safety and health. The City asserted its compliance. The provision's impact is to give the IAFF access to the grievance-arbitration procedure to vindicate the right to maintain the City's compliance

Staffing levels represent classic elements of the give and take of collective bargaining, which simply cannot be fairly imposed by the intervention of a fact-finder. Moreover, the record is relatively bare with respect to supporting information, save the comparables. Establishing staffing levels in a vacuum can create mischief. Certainly, requiring the City to maintain certain staffing levels per unit operated will impact the personnel costs the City has in the Fire Division—the very costs the City is trying to control. Under the circumstances of this fact-finding, a recommendation cannot be made to establish the staffing section of the proposed Article 31.

Respectfully submitted,



Daniel N. Kosanovich
Fact-Finder
July 8, 2003