

FACT FINDING REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
December 19, 2003

2003 DEC 24 A 10: 33

In the Matter of:)
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The Bath Township Trustees)
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and) 03-MED-02-0137
)
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International Association of)
Firefighters Local 4130)
)

APPEARANCES

For Local 4130:

Andy Drwal, International Association of Firefighters
Scott Forshey, Local 4130 Bargaining Committee
John Rodriquez, Local 4130 Bargaining Committee
Susannah Muskovitz, Attorney for Local 4130

For the Township:

Jim Paulette, Bath Township Fire Chief
William Snow, Bath Township Administrator
Robert Konstand, Attorney for the Township

Fact Finder: Dennis M. Byrne

Background

The Fact Finding involves the full time members of the Bath Township Fire Department represented by the International Association of Firefighters (IAFF) and the Bath Township Trustees. This is the first contract between the parties; and in an attempt to reach an agreement the parties met numerous times during the preceding year. The Fact Finder did not conduct a formal mediation session prior to the start of the Fact Finding; however, during the hearing the parties often went off the record to discuss their positions on various issues, and they were able to come to agreement on a number of open articles. Moreover, they were also able to make progress on closing the gap between their respective positions on a number of other issues. However, they were unable to come to a final agreement; and nine (9) issues remain on the table. The issues are 1) Purpose and Intent, 2) Management Rights, 3) Fair Share Fee, 4) No Strike, No Lockout, 5) Wage paid to the Staff Lieutenant, 6) Duration, 7) Shift Supervisor Pay, 8) Alcohol and Drug Testing, and 9) Union Insignia.

The Ohio Public Employee Bargaining Statute sets forth the criteria the Fact Finder is to consider in making recommendations in Rule 4117-9-05. The criteria are:

- (1) Past collectively bargained agreements, if any.
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.
- (3) The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards of public service.

- (4) The lawful authority of the public employer.
- (5) Any stipulations of the parties.
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agree-upon dispute settlement procedures in the public service or private employment.

The report is attached, and the Fact Finder hopes the discussion of the issues is sufficiently clear to be understandable. If either or both of the parties desire a further discussion, however, the Fact Finder would be glad to meet with the parties and discuss any questions that remain.

Introduction:

The most salient disagreement between the parties is the duration of the proposed contract. This is the first agreement between the parties, and the Township Trustees want the contract to run for one and one-half years in order to evaluate the contractual relationship between the parties after a relatively brief period. The Firefighters want a longer duration. This disagreement over the length of the contract was a major reason that they were not able to reach an agreement.

The Trustees' position is based on the fact that they have never negotiated with their employees and never signed a contract with a State Employment Relations Board (SERB) certified unit and they are unsure how the process will unfold. They believe that the agreement may appear to be reasonable when it is executed, but that problems with the language may emerge over time. The Trustees believe that a short duration will allow the

parties to fix problematic sections of the agreement during negotiations for a successor contract before potential problems are allowed to fester.

The Union argues that the contract duration should be three years. The Union disputes the contention that the Township has never negotiated a contract with any of its employees and, therefore, the Union believes that the Township does have experience with unions and contracts. Furthermore, the Union believes that the parties should have time to "live with the contract" in order to see how their relationship will change.

The parties agree that the contract will be retroactive with respect to wage increases to January 1, 2003. The Township's position is that the agreement should run for eighteen months and that gives a termination date of June 30, 2004. The Union argues that acceptance of the Township's proposed termination date means that the parties will start negotiations on a new agreement in two to three months. The Union believes that is unreasonable by any standard.

ORC 4117 requires a Fact Finder to consider the evidence from other jurisdictions, i.e., comparables, when making recommendations. Usually each party presents a list of comparable jurisdictions that it believes the Fact Finder should consider. In this instance the parties presented the same contracts as comparables. Both sides agreed that they used the Copley Township contract with the IAFF and the Bath Safety Forces contract as their reference documents.

Issue: Article 1: Purpose and Intent

Union Position: The Union demands that the sentence, “However, current practices concerning wages, hours, and other terms and conditions of employment, which were in effect at the time of execution of this agreement, and which were not addressed at the bargaining table, shall remain in full force and effect.”

Township Position: The Township rejects the Union’s demand.

Discussion: The parties agree the agreement will contain a zipper clause and the language submitted by both parties on this issue is identical. The Union argues that if the contract has a zipper clause, then it should also have “current practices” language. That is, the Union argues that the quid pro quo for the zipper language is the recognition that current practices remain in effect for the duration of the agreement. The Union is concerned that some practice that benefits its membership may be canceled by the Township and wants language placed in the agreement to protect its membership from this eventuality.

During the hearing both parties agreed that they were unaware of any current practice that was not discussed during the negotiations leading up to the Fact Finding. However, the Union believes that something may have been overlooked and that its suggested current practices language would protect the membership.

The Township contends that the Union had ample opportunity to discuss any issue that affected its membership during negotiations and believes that the proposed contract is the full and complete agreement between the parties. The

Township is afraid that the language proposed by the Union may lead to misunderstandings and perhaps arbitrations. Therefore, the Township does not believe that the Union's proposed language should be included in the contract.

There is no reason to believe that the parties did not exhaustively discuss their relationship during the year they met to negotiate the contract. Both sides stated that they met numerous times and fully examined the issues dividing them. Moreover, neither side could give any example of a working condition that might be changed to the detriment of the Union membership. Rather, the Union wants its suggested language included in the contract as a type of insurance policy in case there is some factor that might be changed. Parenthetically it should be noted that the focus of this type of language concerns the use of department vehicles; however, the parties have language into their agreement dealing with this issue.

The Fact Finder does not believe that there is any reason to include the Union's suggested language into the contract. A whole agreement or zipper clause is usually added to a contract in order to indicate that the parties fully and fairly negotiated their contract. There is some slight probability that the parties may have overlooked something of importance; and if a situation arises where the Union believes that the Township is changing some rule or regulation that has risen to the level of importance that it is considered a condition of employment, the Union has a number of courses of action open to it. The Union can 1) request a labor-management meeting to talk about the issue, 2) file a grievance, or 3) raise the issue in future negotiations. However, given the

Union's inability to give any specifics on this issue and in the face of Management's objection to the proposed language, the Fact Finder cannot recommend inclusion of the Union's suggested current practices language into the agreement.

Finding of Fact: The Union did not prove that there was a need for its suggested language on "Current Practices."

Suggested Language:

Article 1: This Agreement shall constitute the sole and complete understanding for all terms and conditions of employment between the parties and shall supersede all previous Agreements, oral and written.

Issue: Article 3: Management Rights

Union Position: The Union agrees that the Management Rights language contained in ORC 4117 should be added to the Agreement.

Township Position: The Township has proposed Management Rights language that differs from the language in ORC 4117 for inclusion into the contract.

Discussion: The Township's suggested language is a combination of the language found in the Copley Township contract between the Copley Township Trustees and the IAFF and the language found in the Bath Township agreement with the Bath Safety Forces. It should be noted that most of the Township's proposed language deals with the same items covered by the Management's Rights language found in ORC 4117 but uses different words. Therefore, the

parties have some basic agreement on the outline of the Management's Rights clause.

The Union contends that the idea that a Management's Rights clause should be included in a labor agreement dates back to the passage of the National Labor Relations Act. The Union further argues that the language of the clause has been the subject of numerous legal proceedings in both the private and public sectors. Consequently, the Union argues that Management's Rights are well established and not the subject of any real debate. The Union believes that ORC 4117 lists the factors that are now accepted as Management's Rights in a public sector setting. The Union believes that the language proposed by the Township is unwieldy and unnecessary.

The Fact Finder has examined the language in all of the documents submitted by the parties and agrees with the Union's position. Most of the Township's enumerated items are covered by the language of 4117. There are some differences notably in the last two sections (Sections J and K) proposed by the Township. Section J is concerned with promotions, and the parties have included promotion language in their agreement. Section K is concerned with department facilities, processes, and the relationships with other municipalities. However, the law on these issues is clear. The Township can make decisions with regard to facilities, etc., but it must bargain with the Union over the impact such changes have on the bargaining unit. Consequently, the Fact Finder does not find that the language proposed by the Township actually offers it more

protection of its Management's Rights than the protections afforded under labor law in general and ORC 4117 in particular.

Finding of Fact: The language of ORC 4117 concerning Management's Rights is standard in most contracts throughout Ohio. This language protects the inherent Management Rights that are necessary for the Township to meet its obligations to the citizens of Bath.

Suggested Language: The Fact Finder recommends the language submitted by the Union in its pre hearing statement. This language is identical to the language in ORC 4117.08 (C1) through ORC4117.08 (C9).

Issue: Article 4: Fair Share Fee

Union Position: The Union demands that language requiring a fair share fee be added to the contract.

Township Position: The Township rejects the Union's demand and does not want a fair share provision added to the contract.

Discussion: Fair share fees are one of the more contentious issues facing parties involved in negotiating contracts. Unions always demand that fair share fee language be included in contracts and Management almost always objects to the inclusion of the language in the agreement. The reasons for Management's objection are often not clear. For example, in this instance the Township simply stated that the Union did not demand a fair share fee in its original list of proposals. That is, the Union amended its demands to include fair share fee language after negotiations were underway. Furthermore, the Township

stipulates that all full time firefighters belong to the Union. Therefore, the Township does not think that there is a need for fair share language in the contract.

The Union points out that there are only seven full time members of the department, and with such a small number of full-time employees the financial burden on each member is considerable. The Union believes that given the legal requirement that it represent all employees that it is only reasonable that all members pay a fair share for the services the Union provides. The Union agrees that at the present time all members of department belong to the IAFF, but argues that the department will hire sometime in the future and that new hires may elect not to join the Union. The Union believes that this is a matter of equity and that all beneficiaries of collective bargaining and the grievance procedure should pay for the benefits. That is, the Union believes that there should be no "free riders."

While the Township did not give a detailed explanation of its position, the standard Management position is that it will not force individuals who elect not to join a Union to support the Union. This position has been the subject of numerous legal proceedings, and the language regarding fair share fees has been worked and reworked numerous times. The result is that a fair share fee is seen as a fee for service and is legal in Ohio and throughout the nation. The main problem with fair share fees is a rebate procedure. In other words the fee can only be a fee for service, and no portion of the monies collected can be used for any purpose except to pay for collective bargaining related activities.

The Fact Finder believes that fair share fees are unobjectionable. That is, the Union has a right to expect to be paid for the services that it renders to all members of the department. In some senses the Duty of Fair Representation requires the payment of a fee for service, i.e., a fair share fee.

It is true that currently there is no need for a fair share fee because all members of the department who are eligible for inclusion in the bargaining unit are members. However, this line of reasoning is a two edged sword because if there is no pressing need for the language, it also has zero cost to the Township. It must also be stated again that both parties indicated that they used the Copley firefighter's contract as a template for their positions, and the language that the Union is proposing for inclusion into the contract is contained verbatim in the Copley contract.

Given the entire record, taking into account the size of the bargaining unit, and because the demand has no cost to the Township, the Fact Finder believes that the Union's demand is reasonable

Finding of Fact: The Union's position that a very small unit cannot afford to carry "free riders" is reasonable. In addition, the Union's demand has no cost to the employer.

Suggested Language:

Section 8: Fair Share Fee. On or after sixty (60) days following the date of employment or the date of this Agreement, whichever is later, all employees in the unit who are not members of the IAFF shall pay to the IAFF a Fair Share Fee not to exceed dues paid by members of the bargaining unit in accordance with

the provisions of ORC 4117.09 (C). A rebate procedure in accordance with applicable State and Federal law shall provide for a rebate to fair share contributors of expenditures for matters not related to the work of employee organizations in the realm of collective bargaining. The Township shall transmit the aggregate Fair Share Fees to the IAFF at the same time and in the same manner as regular dues. Such employees need not sign an authorization card for such deduction to be made.

Section 9: Hold Township Harmless. The IAFF shall indemnify and hold the Township harmless from any claims, suits, or actions resulting from its collection of the Fair Share Fees.

Article V: No Strike/No Lockout

Union Position: The Union proposes language that requires the IAFF to instruct all employees engaged in an unlawful strike that they must cease and desist from any illegal activity and return to work. In addition, the Union demands that the contract contain language that will preclude the Township from locking out its members.

Township Position: The Township has proposed similar language to the Union's for inclusion into the agreement. However, the Township has added language spelling out the penalties that will be levied against the Union if it fails to adhere to the provisions of Article V.

Discussion: **Note:** Prior to the discussion of this issue, it must be noted that the parties are discussing an unauthorized strike or job action, that is, a strike or job action during the term of a valid contract.

The discussions about No Strike/No Lockout provisions often become contentious for little reason. Unauthorized strikes and/or lockouts rarely occur. Moreover, ORC 4117:13 (01) through ORC 4117:13 (07) deal with this topic in great detail. The State of Ohio and SERB are unsympathetic to employees who engage in concerted activity to withhold their services during the term of an existing contract. The law provides that the employer shall be able to punish strikers in Section ORC 4117:13. The sanctions against unauthorized strikers are severe and include termination. Therefore, the ORC gives the Township ample protection against unlawful strikes.

Nonetheless, the parties agreed that they used the Copley Township Contract with the IAFF as a template for their agreement. That is, it is the comparable for the present negotiation. The language that the Township wants included in the agreement is taken verbatim from the Copley contract. The Fact Finder believes that the Union would not sanction an unauthorized strike under any foreseeable circumstance; but if the Union does take such an action, then it should pay the penalty. Therefore, the Township's insistence on a penalty against the Union for sanctioning an unauthorized strike is reasonable.

The second part of the demand concerns lockouts. The Union contends that the Township's language is unnecessary because ORC 4117 prohibits the employer from locking out employees. It is clear that ORC 4117.11(A)(7)

prohibits a lockout by an employer as a tool to bring pressure on the employees to agree to the employer's terms regarding any labor relations dispute. If an employee reports to work and is performing his/her assigned duties, Ohio law protects these workers from any employer job action. In general, employers can not lock out their employees under most circumstances in Ohio. Moreover, it is hard to understand why the Township would wish to lock out firefighters who are on duty and answering calls. Consequently, the Fact Finder does not believe that the last sentence of Article 5 – Section 3 as proposed by the Township should be included in the contract.

Finding of Fact: Both lockouts and job actions during the course of a valid contract are proscribed in Ohio.

Suggested Language:

Section 2: If a violation of this Section occurs, the IAFF will promptly instruct all bargaining unit employees to immediately cease and desist any activities in violation of this Article and take appropriate action against anyone who continues to engage in such violation. If the IAFF discharges its obligations, it shall not be liable for the unauthorized and uncondoned acts of individual bargaining unit members. If the IAFF fails to discharge its obligations, the dues check off provisions normally required under this Article shall be suspended for one month for each day of any strike in violation of this Article. If there is any dispute over the suspension of the checkoff, it will be the burden of the IAFF to demonstrate a good faith effort to discharge its obligations hereunder. Nothing herein shall be construed as limitation upon or election of remedies by the Township.

Section 3: The Township agrees that neither it, its officers, its agents, or representatives, individually or collectively, will authorize, instigate, cause, aid or condone any lockout of the members of the IAFF.

Issue: Article 9: Wages

Union Position: Note: The dispute is not over the wage rate. The parties have agreed on a 3% per year wage increase. The Union demand is that the position of Staff Lieutenant remain in the unit and, correspondingly, receive the agreed upon 3% increases, overtime, etc.

Township Position: The Township wants to move the Staff Lieutenant position out of the bargaining unit. That is, the Township wants the Staff Lieutenant position to be an exempt position according to the Fair Labor Standards Act.

Discussion: The Union objects to the inclusion of this issue in the Fact Finding claiming that the Fact Finder is precluded from making unit determination findings. The Union argues that this is a right reserved by SERB. Therefore, the Union believes that if the Township wants to move the Staff Lieutenant position out of the unit, it must work through SERB procedures. The Fact Finder agrees with the Union and does not believe that he has the ability under the law to recommend that the Staff Lieutenant position be removed from the bargaining unit.

In some ways the determination outlined in the preceding paragraph ends the discussion of this issue. However, the Township's reasoning deserves some attention. The Township argues that the position was intended to be a

management position. The Township introduced evidence (Township Exhibit 2) that explains its position. In record shows that on January 1, 1997 the position was given an \$8,289.00 raise to compensate the individual who holds the position for loss of overtime payments and increased supervisory responsibilities. In other words, the Township claims that the position is a management level position and should never have been included in the bargaining unit.

The question then becomes why the Township did not object to a bargaining unit that included the Staff Lieutenant position during the SERB unit certification process. The Township's representatives agreed that they knew that the Staff Lieutenant position was included in the bargaining unit during the certification process, but stated that they intended to confront the situation during negotiations. Therefore, regardless of any other fact, the Staff Lieutenant position is included in the bargaining unit, and the Township cannot claim that there was a mistake in the certification.

Consequently, the Township's desire to remove the position from the bargaining unit is based on two factors. First, the Staff Lieutenant makes earns more than anyone else in the Township because of January 1997 pay increase and the fact the position is non-exempt with regard to overtime payments under the FLSA. The Township believes that this is inequitable. Second, the Township stated that there was an evaluation of the department and in a proposed reorganization, the Staff Lieutenant's position was supposed to be classified as a management level position.

The Union on the other hand argues that the Township knew that the position was in the proposed unit and did nothing. Furthermore, the Union believes that someone must be the highest paid individual, and in this instance it just happens to be the Staff Lieutenant.

The Fact Finder believes that there is nothing to do in the current circumstances. The incumbent in the position is a member of the union and has the salary and benefits associated with the position. However, contracts should not create ongoing problems. The parties will have to deal with the problem some time in the future.

Finding of Fact: The position of Staff Lieutenant is included in the unit according to the unit certification procedure conducted by SERB. Any changes to the unit must go through SERB.

Suggested Language: None

Issue: Article 31 – Shift Supervisor

Union Position: The Union demands that any firefighter who is designated as a Shift Supervisor shall be compensated at the rate of pay of a full-time lieutenant.

Township Position: The Township rejects the Union's demand.

Discussion: The Union's demand is for Officer in Charge (OIC) pay. The Union argues that a person who has the responsibility of a supervisor should be paid for taking on the added responsibility. The Township, on the other hand, argues that on most shifts that there are only one or two full-time firefighters on duty. That is, there is very little supervisory responsibility. Furthermore, the Township

also stated that the full-time firefighters were expected to exercise independent judgment when answering calls on their shifts. The Township stated that this system had worked well in the past and there was no reason to change the current practices in any way.

This Fact Finder has recommended OIC pay numerous times in the past. A basic principle of equity is that a person should be compensated for the work actually performed. However, in this situation the record indicates that there is very little supervision involved by the firefighter who is designated as the shift supervisor. The full-time firefighters have worked either singly or with one other department member for years. Given this fact, the Fact Finder does not believe that the duties of the Shift Supervisor in the department are so different from the duties performed by other full-time firefighters that the Shift Supervisor requires an increase in compensation. If the OIC duties increase in the future, then future negotiations can be used to revisit the issue.

Finding of Fact: The duties of the Shift Supervisor are not sufficiently different than the duties of other full-time firefighters that the Shift Supervisor position should be paid a premium.

Suggested Language: None

Article: 34 – Alcohol and Drug Testing.

Union Position: The Union demands that a person who admits that he/she has a drug or alcohol problem be allowed to enter treatment with no (minimal) impact

on job security or promotional opportunities. The Union wants this “benefit” to be available more than one time.

Township Position: The Township has agreed to allow a person who admits that he/she has a drug or alcohol problem to enter a treatment program with no (minimal) impact of job security or promotional opportunities, but wants the “benefit” to be a one time offer. In addition, the Township wants to have the ability to change the drug testing language if the Bureau of Worker’s Compensation wants changes in the program. The Township argues that this will save money and not adversely affect the Union membership.

Discussion: Note: Both parties agree that any firefighter, who deals drugs, is involved with an accident while drunk, etc. should be arrested and tried for their actions.

The Union representative made a strong argument that substance abuse, especially alcohol abuse, is a never ending problem. Therefore, the Union believes that there is always the possibility that an addict or alcoholic may back slide and return to self-destructive behavior. The Union believes that if a person recognizes their problem and asks for help, the Township should help. The Union argues that this will ultimately save money by keeping fully trained firefighters in the department. The Union also believes that the policy it is recommending will give an incentive for individuals with substance problems to come forward and get help. The Union believes this will work to the benefit of the Township’s citizens because the substance abuser will get help and not be

on the street either high or drunk. Finally, the Union argues that helping people who ask for help is the right thing to do.

The Township believes that the individual who asks for help should get it one time. The Township believes that firefighters must take responsibility for their actions. The Township argues that it cannot allow a person who continually has drug or alcohol problems to remain on the job. The Township believes that serial treatment may endanger the health and welfare of the citizens of Bath.

The Fact Finder agrees with the Township. Public safety workers must be alert and able to do their jobs at all times. The implications of a firefighter who attempts to work a fire while impaired by either drugs or alcohol are frightening. For example, an Emergency Medical Technician arriving at the scene of an accident impaired may lead to life or death decisions being made by a person who is incapable of making these decisions. The citizens of Bath have the right to expect that their public safety forces are alert and fully functioning at all times.

The Township's position is very reasonable. Many jurisdictions have zero tolerance policies. The Township is allowing a person who has a problem to receive the help he/she needs. However, a person who continually abuses drugs and alcohol cannot be surprised if his/her employment is terminated. In many ways the serial drug abuser is responsible for his/her termination.

Finding of Fact: The Township's one time forgiveness policy for a drug or alcohol abuser is reasonable. Many jurisdictions have a zero tolerance policy and the Township's policy gives a person who needs help the opportunity to ask for it.

The Township also had a demand related to Article 34. The Township demands the right to change the language of Article 34 if the Bureau of Worker's Compensation makes a testing protocol available that would lead to lower insurance rates. The Union believes that any changes in the language of Article 34 should be negotiated. The Union argued that with no knowledge of what the new testing protocol is, there is no way to evaluate the Township's proposal. The Union pointed out that there are privacy and medical considerations that must be discussed before wholesale changes can be made to a drug testing policy.

During the discussion of this issue the parties discussed the problems associated with random drug testing. The Union claimed that random testing language had to be negotiated and that it could not accept the language proposed by the Township unless there were more specifics to the proposal. The Township stated that it believed that there would be significant insurance savings offered to the Township if it incorporated specific language into the contract when the Bureau of Worker's Compensation developed a policy on drug testing. Both sides agreed that in the event that such a policy was developed, random drug testing language would probably find its way into the contract. The Township also stated the contract with the Bath Safety Forces (including the Dispatchers) had the proposed language in their agreement.

A compromise position is that firefighters will accept the change in the drug testing article if other full-time Township employees also are subject to the same policy. This is a major change in the provisions of Article 34. The current

language specifies the circumstances under which the Township can refer an employee for testing. It is also true that the proposed language of Article refers to random testing rather than testing based on reasonable suspicion, which is a significant modification of the existing language. However, based on the Township's presentation, the Fact Finder believes that this is a reasonable compromise.

It also must be noted that the language proposal put forth by the Township relates to changes made during the term of the proposed contract. Either or both parties have the right to raise changes in the drug testing language in future negotiations.

Finding of Fact: The Township's position that it will save on its insurance if it agrees to language developed by the Bureau of Worker's Compensation is reasonable. The firefighters will not be disadvantaged vis-à-vis other Township employees if they accept the Township's proposed changes in the Drug Testing language when other full-time Township employees accept the same changes.

Suggested Language:

Section 3: The words "first and only" shall be placed in the second sentence of the article. The sentence shall read. "Employees who voluntarily admit problems with drugs or alcohol prior to violating this policy will not have their job security or promotional opportunities jeopardized by a first and only request for treatment."

Section 15: The Township reserves the right to alter or revise the above drug policy at its option at such time as a suitable random drug testing policy is

available from the Ohio Bureau of Worker's Compensation, provided that said suitable random drug testing policy is in place and implemented for all other full time employees of the Township.

Issue: Article 35 – Union Insignia

Union Position: The Union proposed no language on this Article and rejects the Township's demand.

Township Position: The Township proposed language that would prohibit the Union from placing union (IAFF) insignia on Township property.

Discussion: The Township stated that it desired the proposed language be placed in the contract in order to insure that the Union would not place IAFF insignia on the fire stations, trucks, etc. The Township's demand is similar to a ban on advertising logos on Township property. The Township stated that it was unaware of any attempt by the Union membership to place IAFF insignia on Township property but wanted to make sure that it did not occur.

The Union claimed that it had no intention of placing IAFF insignia on any Township property. The Union membership claimed that it had no idea of where the idea that it might use Township property to "advertise" for the IAFF originated. The membership stated that they did not want to place any insignia on Township property and saw no reason for the Township's concerns.

The discussion on the issue proved that the only IAFF insignia on any piece of equipment was a small IAFF logo on the firefighters' helmets. The chief stated that this was acceptable. The Fact Finder does not believe that there is

any reason for the Township's proposed language in the contract. The discussion on this issue proved that the Union members did not want to place IAFF insignia on Township property. Therefore, the proposed article is attempting to solve a problem that does not exist.

The Township may worry that if the contract does not contain the prohibition on Union insignia that at some time in the future the Union membership may attempt to place Union insignia on Township property. However, the time to cure this problem is when the problem actually exists. Contracts, as a general rule, should not contain provisions attempting to correct future problems that may or may not eventuate. Superfluous articles have a way of causing problems for no reason. Also, if the Union should attempt to place Union insignia on Township property, the Township would discipline the offending members, the Union would most likely grieve the discipline, and an arbitrator would look at the bargaining history of this item which clearly shows that the Union has stated that it has no intention of placing Union insignia on Township property. Consequently, the Fact Finder believes that the Township's interests are protected without including the proposed language in the contract.

Finding of Fact: There is no need for Article 35

Suggested Language: None

Issue: Article 30 – Duration

Union Position: The Union demand is for a contract that runs from January 1, 2003 to January 31, 2006.

Township Position: The Township wants the contract to run from January 1, 2003 through June 30, 2004.

Discussion: The Township's position is that an initial contract should have a short duration so that the parties can determine if the contractual relationship is working. That is, the Township believes that there may be problems with the contract and a short initial duration allows the parties to identify and fix these problems.

The Union disagrees with this analysis. The Union believes that the first contract should run at least three years. The Union argues that this time frame allows the parties to learn to live with the contract. The Union also points out the practical consideration that the parties have negotiated for a year and are just finishing their initial agreement. The Union argues that the Township's demand would bring the parties back to the table in the spring of 2004.

The difference between the parties' positions on this issue is based on the way that they view the agreement between the Township and the Bath Safety Forces. From 1980 until the present the Trustees and the Safety Forces including the firefighters have "negotiated" an agreement. The Union argues that this agreement (Joint Exhibit 3) is a contract. The Union points out that it sets out the understanding of the parties with respect to "wages, hours, terms and other conditions of employment." Moreover, there is an execution page signed by the President of the Safety Forces and the Chairman of the Board of Trustees. The Union believes that this document is a contract regardless of whether the safety forces are affiliated with a national union or not. The Union

believes that the Bath Safety Forces are an independent union and, consequently, the IAFF contends that the Township and the Safety Forces have a well defined bargaining relationship.

The Township disagrees with this characterization of their relationship with the safety forces and argues the agreement is not a contract. Rather, the Township contends that the "agreement" is just portions of the Township Policy Manual and some other language placed in a document that allows the safety forces to find the rules and regulations that apply to them in a convenient place. The Township stated that viewing the agreement with the safety forces as a binding contract was giving the agreement more weight than it deserves.

The Fact Finder has read the agreement in question and finds that it is a contract in the accepted meaning of that word. There are numerous reasons for this determination, but the language of the Duration Article can be used to prove the point. This article actually contains a number of sections that are often separate articles, but the relevant language states:

"This Agreement constitutes a sole and complete understanding between the parties superseding all previous Agreements, oral or written."

The next section of the clause states that

"In the event any one or more provisions of the Agreement is or are deemed invalid or unenforceable by any final decision of a court or government agency, that portion shall be deemed severable from the rest of the Agreement and all such other parts of this agreement shall remain in full force and effect."

This language says that the written document executed by the parties on January 1, 2003 is the sole agreement between them. Furthermore, if any of the

clauses are found to be in violation of applicable law, then the offending clause is severed from the rest of the agreement, which remains in effect. This is a contract. It represents the sole agreement between the parties. The agreement was reduced to writing and executed by representatives of both sides.

Furthermore, it contains a Grievance Procedure that allows either party access to a Neutral and/or the Courts. That is, it may be the subject of a legal proceeding. This means that the Township does have experience dealing with Unions and contracts, although that experience does not extend to SERB certified units.

The Fact Finder cannot recommend a termination date of June 30, 2004. The parties will not finish adopting their initial agreement until December 31, 2003 at the earliest. If either the Union or the Township do not accept the Fact Finding Report and continue the process through the Conciliation procedure, the time frame is lengthened. If a Conciliator is appointed sometime at the end of December 2003, although a more realistic appointment date is the middle of January 2004 given the changes in SERB rules, then the hearing may not take place until February 2004, and the Conciliator's report may not be issued until March 2004. Under that scenario the parties may be beginning to negotiate a successor agreement less than a month after the initial agreement goes into effect. This is not reasonable.

Therefore, the Fact Finder is taking the Township's eighteen month time period to mean eighteen months from the date of execution of the initial contract; and for argument's sake, the Fact Finder will assume that the contract will be

ratified on December 31, 2003. The Fact Finder is not assuming that the parties will accept the report, but an expiration date of June 30, 2005 is more realistic than June 30, 2004.

The difference in the parties' positions then is an eighteen month period from June 30, 2005 until December 31, 2006. The question then becomes what is a reasonable time for the first contract? Three year contracts are the standard in both the private and public sector throughout the United States for both initial and successor agreements. The experience of numerous employers and unions is that a three year term is reasonable. It is not so long that the employer cannot make realistic estimates of revenues, etc., and it is not so short that the parties are constantly negotiating with all of the attendant cost and disruption that continuous negotiations can cause.

Therefore, the realities of the situation are that a relatively longer duration is preferable from both practical and theoretical viewpoints. The overwhelming weight of the evidence is that three years is a workable duration. In this instance the Fact Finder is recommending that the contract run for two years from December 31, 2003. That is the recommendation is for an expiration date of December 31, 2005. It should be noted that this corresponds to a three year duration from January 1, 2003, which is close to a) the time the Union was certified and b) the retroactivity date for the wage agreement.

In addition, given the agreement on wages, an argument can be advanced that the statutory time line limiting an agreement to three or less years would be violated by an agreement that lasted beyond December 31, 2005. The

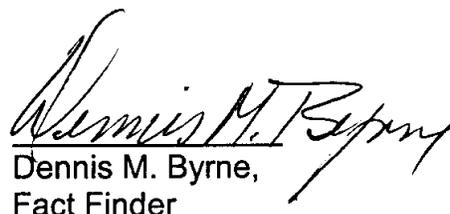
statutory time frame usually starts when an agreement is executed, which in this instance would imply an expiration date of December 31, 2006. However, retroactivity provisions usually extend back to the expiration date of the contract. Therefore, given the entire record and the positions of the parties, the Fact Finder believes an expiration date of December 31, 2005 is reasonable. It should as be noted that if the parties are satisfied with their contract, nothing precludes a joint agreement to extend the duration until December 31, 2006 at which time the wage provisions for the other bargaining unit will expire.

Finding of Fact: The Township's proposed contract expiration date of June 30, 2004 is unrealistic.

Suggested Language: The Contract shall expire at midnight on December 31, 2005.

All other tentative agreements between the parties shall be incorporated by reference into the final agreement.

Signed and dated this 19th day of December 2003 at Munroe Falls, Ohio.


Dennis M. Byrne,
Fact Finder

ADDENDUM

Union Position: The Union demands that employees who are regularly scheduled to work a forty hours per week shift be paid time and one-half for training time that takes place out side of the regularly scheduled work week.

Township Position: The Township rejects the Union's demand.

Discussion: The Township has a practice of required employees who work a forty hour work week to attend three hour training sessions outside of their scheduled work week. The employees are paid the straight time rate for attendance at this training. The Union believes that this is a violation of the Fair Labor Standards Act (FLSA) and demands that the training time be paid at the overtime rate, i.e., time and one-half.

The question is what is the law with regard to this situation? The FLSA sets forth the conditions under which the employer is required to pay for training. Essentially time at training sessions is not counted as hours worked only if four distinct criteria are met:

1. Attendance is outside the employee's regular work hours;
2. Attendance at the sessions is voluntary;
3. The training is not related to the employee's job; and
4. The employee does not perform any productive work during the training.

The situation presented here does not meet these criteria and the employees must be paid for the training.

The second question is whether the employees should be paid at a time and one-half rate. This question turns on the work schedule. The FLSA has the 7(K) exemption for public safety workers who work non-standard schedules. The

7(K) exemption sets for the criteria under which employees can work more than forty hours per week and still be paid straight time. Members of fire departments, for example, who work a twenty-four hour on and forth-eight hour off duty schedule with a work period of twenty-one or twenty-eight days are covered by the exemption.

However, in the situation presented here, the employees in question are scheduled for forty hour shifts in a seven day work period. It must be noted that the work period can be different from the pay period. That is, an employee can have a forty hour schedule and be paid once every two weeks or once a month, etc. However, the pay period has no impact on the work period and the FLSA requirements for overtime are not impacted by the pay period.

In this situation, the employees in question are scheduled for forty hours per week and required to attend training outside their regularly scheduled shift by the employer. This training must be paid at time and one-half. The Township's position that the members of the fire department are covered by the 7(K) exemption and can work up to fifty-three hours per week before overtime must be paid is only true for employees who work a non-standard work schedule. If any employee is regularly scheduled for forty hours that employee is covered under the usual overtime provisions of the FLSA regardless of whether the employee works for the fire or police department.

Finding of Fact: The FLSA requires all employees who are regularly scheduled for forth hours per week must be paid time and one-half for all hours worked over

forty hours per week. That is the FLSA 7(K) exemption only applies to public safety forces that work non-standard schedules.

Suggested Language: The Fact Finder is not suggesting specific contract language; rather, the recommendation is that the employees be paid according to the FLSA.

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