

STATE EMPLOYMENT
RELATIONS BOARD

2007 JUL 25 A 11:51

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STATE OF OHIO

In the Matter of Fact-Finding Between)	<u>FINDINGS AND</u>
)	<u>RECOMMENDATIONS</u>
IAFF LOCAL 218)	
)	CASE NO. 06-MED-09-1090
and)	
)	
CITY OF MIDDLEBURG HEIGHTS)	CHARLES Z. ADAMSON, FACT- FINDER

For IAFF, Local 218
James P. Astorino
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For City of Middleburg Heights
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The undersigned was appointed Fact-Finder in this dispute by the State Employment Relations Board (SERB) on December 8, 2006 pursuant to Section 4117.14(C)(3) of the Ohio Revised Code in respect to a unit of full-time employees of the Fire Department occupying the positions of firefighter, lieutenant and captain, excluding the Fire Chief, Assistant Fire Chief and all part-time, seasonal, temporary and probationary employees employed by the Employer. The collective bargaining agreement between the parties was effective January 1, 2005 and expired December 31, 2006.

HEARING

A hearing was held June 26, 2007 as to issues where the parties had reached an impasse.

The issues at impasse are as follows:

- | | |
|----------------------|---------------------------|
| 1. Uniform allowance | 4. Holidays and Vacations |
| 2. Longevity | 5. Wages |
| 3. Work Week | 6. Manning |

CRITERIA

In compliance with Ohio Revised Code, Section 4117.14(C)(4)(3) and Ohio Administrative Code Rule 4117-9-05(J) and 4117-9-05(K), the Fact-Finder considered the following criteria in making the findings and recommendations contained in this report:

- I. Past collectively bargained agreements between the parties;
- II. Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

- III. The interest and welfare of the public, the ability of the public Employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- IV. The lawful authority of the public employer;
- V. Any stipulations of the parties;
- VI. 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 agreed upon dispute settlement procedures in the public service or in the private employment

ISSUES AND RECOMMENDATIONS

UNIFORM ALLOWANCE

The Union's Position

The firefighters' uniform allowance is set forth in Article XXI, **UNIFORM ALLOWANCE**. Article 21.01 provides that all newly hired probationary employees receive an \$850.00 uniform allowance within thirty days of appointment. Article 21.02 provides that all employees shall receive an annual uniform allowance after their first anniversary date in the amount of \$850.00.

The Union asserts that the uniform allowance has not been increased for the unit involved herein for the last ten years and that it is long overdue for an increase. It points out that firefighters in the surrounding communities of Berea, Brook Park, Fairview Park, North Royalton, Parma, Parma Heights and Strongsville all receive higher uniform allowances. The record reflects firefighter uniform allowances for the year 2006 in Berea of \$1,250.00; North Royalton pays

\$1,000.00. In 2005 Fairview Park firefighters received \$1,350.00 for uniform allowance while Parma Heights firefighters received \$1,025.00. In 2007 Brook Park firefighters received a \$900.00 uniform allowance. In 2007 Parma firefighters received a \$1,150.00 uniform allowance while Strongsville firefighters received a \$950.00 uniform allowance.

The record also indicates that there has been a substantial increase over the years in the cost of various uniform items required by firefighters. For example, the cost of a T-shirt with a pocket has increased from \$12.00 in 2002 to the current price of \$20.00; a heavy cotton sweatshirt cost \$23.00 in 2002 and currently costs \$31.00.

The Employer's Position

The Employer makes three basic arguments in opposition to the Union's proposed increase in the uniform allowance and in support of its position to retain the current \$850.00 annual uniform allowance. First, it asserts that the current contract provision provides sufficient funds to compensate the firefighters for normal wear and tear on the uniforms. It notes that the rationale for the the uniform allowance is to compensate firefighters for expenses incurred for any uniform repairs and replacements. It maintains that during contract negotiations the Union presented no evidence that the cost of uniform repair and replacement had increased over the past year. It claims that the Union's only purpose in seeking an increase in the uniform allowance is to increase the annual wage of the firefighters.

Second, the Employer asserts that the current uniform allowance is comparable to the uniform allowances in municipalities in the Region (Berea, Brook Park, Fairview Park, North Royalton, Parma, Parma Heights and Strongsville are the municipalities in the Region which the parties have used for comparison purposes throughout this proceeding). Its states that while

Middleburg Heights uniform allowance is \$209.38 lower than average, it is within \$100.00 of Strongsville and Brook Park's uniform allowance. It argues, however, that when the current uniform allowance is rolled into the Employer's compensation package, the Middleburg Firefighters Compensation Package is above average in the region. According to the Employer, accepting the Union's proposal would give the Middleburg Heights firefighters one of the highest uniform allowances in the Region. The Union's proposal would make the Middleburg Heights firefighter uniform allowance 13.2% higher than the local average. This would result in the already above average compensation package becoming inflated substantially beyond the Regional average.

Third, the Employer argues that the Union's increase is merely an attempt to make the uniform allowance an outright component of wages. It notes that while the Union proposes to increase the uniform allowance by \$350.00, it provided no evidence that the firefighters spent an additional \$350.00 per year more in uniform expenses. The Employer argues that fact-finders have frowned upon the use of subsidiary contractual components to increase a public employee's wages. It refers to an award by Conciliator Minni where an increase in longevity for Lorain firefighters was rejected because of absence of evidence to support the reasoning for the Union's proposed increase. By the same token, according to the Employer, the absence of Union evidence in support of its uniform proposal warrants its rejection.

Findings and Recommendations

The record reflects that the firefighters in the instant matter receive the lowest annual uniform allowance of all of the firefighters in the Region referred to above. They have not received an increase in reimbursement for uniform expenses for the past ten years. The

Employer's argument that the Union's attempt to achieve an increase in this area is merely an attempt to make the uniform allowance an outright component of wages will not sustain scrutiny. This argument may have more validity in respect to a proposed increase in longevity, but a uniform allowance should not necessarily be considered as part of a firefighters' wage package for the reason that it compensates for the wear and tear and replacement of uniforms. As a result, considering the increase in the cost of uniforms over the past ten years and the uniform allowances of other firefighting units in the Region, it is hereby recommended that the uniform allowance provisions in Article 21.01 and 21.02 be increased from \$850.00 to \$1,000.00.

LONGEVITY

The Union's Position

In the current contract the provision as to longevity reads as follows:

Article 22 All employees shall receive longevity payments commencing on the completion of five (5) years of full-time continuous employment with the City of Middleburg Heights in the amount of three hundred seventy-five dollars (\$375.00), which shall be increased by seventy-five dollars (\$75.00) for each succeeding year of employment.

The Union proposes that longevity should be increased to \$100.00 for each succeeding year of employment after the completion of five years of full-time continuous employment with the Employer. The Union notes that there has been no increase in the firefighters' longevity provision since 1999. It maintains that the longevity increase requested is well within the range of reasonable increases and will keep the firefighters involved herein in a comparable position with other firefighters in the Region.

The Employer's Position

The Employer opposes any changes in the longevity provisions. It provides several reasons in support of this position. First, it points out that the firefighters' longevity compensation is the same as the longevity provision in all contracts it has with other collective bargaining units. A change in the longevity provision would result in sweeping changes in the other collective bargaining contracts. Granting a firefighter an increase in this respect would result in other city employees asking for a similar increase. The result would be the destruction of parity that is required to efficiently manage the Employer's workforce.

Second, the Employer argues that the current longevity clause is competitive within the Region. The Middleburg Heights longevity provision is positioned in the middle; three cities stand above the Employer and three standing below the Employer in this respect. Further, the Employer's longevity clause is within the average of adjacent cities. The Employer notes that a five year firefighter in the Region receives an average longevity payment of \$360.71 while a five year Middleburg Heights firefighter is paid \$375.00, resulting in the Employer's firefighter exceeding the Regional average by 4%. Further, a ten year firefighter in the Region receives an average longevity payment of \$777.85 while a ten year Middleburg Heights firefighter receives a longevity payment of \$750.00; this is slightly below Regional average by 3.6%.

Third, the Employer asserts that the Union is seeking to increase longevity pay as an outright component of a wage increase. Referring again to Conciliator Minni in The City of Lorain and the Firefighters, (Case No. 05-MED-05-0657) the Employer notes that Minni was opposed to longevity pay being sought as an outright component of wages because longevity increases are meant to retain long tenured employees. Minni rejected the increase in longevity

because there was no record that “fully trained and skilled firefighters” were leaving Lorain for other departments. The Employer maintains that the Union proposal would change the five year firefighter longevity compensation to 38.6% above the regional average and the ten year firefighter longevity compensation to 28.6% above the regional average. This is characterized as a “camouflaged attempt to increase the basic wage”.

Fifth, the Employer reiterates that the Middleburg Heights firefighter already receives an above average compensation package with the firefighters involved herein being currently compensated better than a majority of their peers. It states that the Middleburg Heights Firefighter Compensation Package was \$63,027.92 in 2006 as compared to the compensation package offered by the Region in 2006 of \$61,555.61. The Employer calculates that this a 2.4% benefit above what firefighters other surrounding communities enjoyed. Consequently, the Middleburg Heights Compensation Package offsets any potential deficiencies in the area of longevity.

Findings and Recommendations

As indicated above, the undersigned believes that, while the uniform allowance can be considered as a separate, discrete matter, longevity must always be considered as part of the total compensation package because it directly affects an employee’s compensation. An examination of the record reveals that Middleburg Heights firefighters longevity compensation is in the mid-range of the six municipalities that comprise the Region of cities used for comparison purposes. Also, the record reflects that currently firefighters in the unit involved herein receive a compensation package that is above the average compensation package for firefighters in the Region. Further, if the Union’s proposal were adopted, Middleburg Heights firefighters longevity

compensation would be substantially above the regional average.

It is appropriate for longevity pay to be considered as an outright component of wages since the basic reason for longevity is to retain long-tenured employees. City of Lorain and the Firefighters, supra. Uniformity in wages and fringe benefits is a reasonable goal which most public employers seek to achieve. Avoiding changes in longevity clauses and other key contract provisions, prevents a situation arising where other city employees would also request similar increases. In the instant matter the Employer is warranted in maintaining its position so that it can continue to maintain uniformity in longevity clauses in collective bargaining contracts of other bargaining units.

According, in view of the above and the record as a whole, it is concluded that the Union's proposal to change the longevity clause is not warranted in the instant matter. As a result, the undersigned recommends that the longevity clause remain the same as said clause in the current contract.

WORKWEEK

The Employer's Position

Article 17.06 of the current contract states as follows:

“For the purpose of this Article, all holiday, vacation leave and sick time is considered duty time”.

The Employer proposes to delete “sick time” from the applicable contract.

Referring to contracts in the Region, the Employer indicates that these contracts do not count “sick time” as duty time. As a result, “sick time” should not be used to determine whether or not an employee qualifies for overtime because contracts in the Region only compute duty time

from hours actually worked. It indicates that if a contract in the Region allows for hours not actually and physically worked to be included in duty time, the contract would contain language specifically setting this forth. It points out as an example that both the cities of Brook Park and North Royalton specifically include longevity in computation of overtime. This results in the absence of “sick time” from the calculation of duty time and from the calculation of overtime.

The Employer argues that none of its other collective bargaining agreements include sick time in the calculation of duty time. It points, in particular, that the Middleburg Heights Service Contract contains the same provision as the firefighters’ Article 17.06, absent the words “sick time”.

Further, the Employee asserts that the inclusion of sick time in the calculation of overtime, inhibits its fiscal responsibilities. Since duty time is always used to calculate overtime, the addition of sick time as part of duty time results in more overtime. It notes that, in recent years, overtime wages and sick pay has increased. While the Employer cannot control the use or abuse of sick time, it maintains that under the current contract provision, a firefighter can control the amount of sick time taken so as to manipulate the system and maximize overtime. The deletion of the “sick time” language would avoid any potential abuse of sick time and overtime.

The Union’s Position

The Union opposes any change to the language in Article 17.06. It points out that the sick time provision has been in the contract for at least the last eight to ten years. It argues that a change in the provision would inhibit firefighters from taking overtime and or volunteering for overtime. Further, the Union notes that the firefighters are allowed 144 hours of sick time a year, but the records reflects that none of the members of the bargaining unit have ever taken that much

the new contract. It states that this sentence was added to the contract as an emergency measure when all shifts were manned by eight firefighters. However, according to the Union, for the last four years the Fire Department has operated with seven firefighters per shift rather than eight firefighters per shift. It asserts that if the last sentence is strictly interpreted by the Employer it would interfere with the firefighters taking time off for holidays and vacations.

The Employer's Position

The Employer opposes the deletion of the last sentence from the paragraph because it claims the second sentence assists in clarifying the paragraph and if the sentence was deleted, the meaning of the whole paragraph would be clouded and ambiguous. In addition, the Employer maintains that the ambiguity created by the sentence deletion would allow for an increase in overtime and inhibit the Employer's ability to control requested time off. The Employer points that the record reflects a trend of increasing overtime costs which the Employer has to continued oppose.

Fire Chief Bernard Benedict testified on behalf of the Employer in support of maintaining the current language in Article 13.06. He stated that in the last three to five years no firefighter has ever been prevented from taking either vacation or holidays because of the language.

Findings and Recommendations

It is significant that the record reflects that in the past three to five years no firefighter has been prevented from taking requested holidays or vacations because of the language in dispute. The language also serves the purpose for clarifying the meaning of the whole paragraph.

Accordingly, in view of the above and the record as a whole, the Union's proposal in respect to the deletion of the language in question is not recommended because the Union has

failed to substantiate its position in this regard.

WAGES

The Employer proposes a two year contract effective from the date of execution with a 3% wage increase the first year and a 3% wage increase in the second year. It opposes any retroactivity in the proposed contract. The Union proposes a two year contract with 3.5% increases for each year of the contract. According to the Union, the increases would become effective retroactively to January 1, 2007.

The Employer's Position

The Employer asserts that since 2004 its firefighters have enjoyed one of the highest base rates of any firefighters in the Region. The base wage, according to the Employer, is the firefighter's salary set forth in the contract and does not include longevity, premium pay and uniform allowance. It points out that in 2005 the average base wage for firefighters in the Region was \$55,501.75 while the Employer's firefighters in 2005 received a base wage of \$57,083.52. This results in the Middleburg Heights firefighters receiving 2.85% above the Regional average base wage.

The Employer further asserts that in 2006 the gap in the base wage between the Employer's firefighters and the firefighters in the Region increased to 3.94%. While the regional firefighter earned a base wage of \$56,838.30, the Middleburg Heights firefighter earned a base wage of \$59,080.32. This resulted in the Employer's firefighters earning a base wage of \$2,242.02 more than the regional firefighters.

The Employer argues that under its proposal the Middleburg Heights firefighters would continue to enjoy a base wage exceeding the regional average by almost 2%. The 2007

projections reflect that the Employer's firefighters will receive wages of \$60,852.73 while firefighters in the Region will average \$59,741.94.

The Employer notes that, in order to ensure economic parity, it has maintained a history of "pattern bargaining". It offered the same economic package to service employees and the police as it has offered to the firefighters. All of the agreements contain similar or identical longevity, vacation and holiday provisions as well as, in general, most other generic benefits. The Employer refers to labor relations authorities as well as fact-finding reports to support its position of utilizing pattern bargaining in dealing with difficulties arising when a single employer is required to bargain collectively with multiple unions. The goal to be achieved in bargaining with multiple units is the maintenance of similar contractual and economic relationships between the Employer and the various bargaining units. According to the Employer, pattern bargaining evens the playing field for units with less bargaining power so that major benefits, such as health insurance, sick leave, disability benefits and general wage increases become standardized.

The Employer states that Middleburg Heights has set a pattern covering wage increases where a 3% increase is presented to all bargaining units for each year. It maintains that, if any union seeks to deviate from this pattern, it must present a compelling reason for the deviation. It claims that the Union in the instant matter has not presented a compelling reason for deviating from the pattern.

Next the Employer asserts that its total economic compensation package offered to the firefighters exceeds the Regional firefighters' average compensation package. The total firefighter compensation package includes premium pay, longevity, uniform allowance and wages. Its states that in 2006 the Employer's firefighters' total compensation was \$63,027.92 as compared to the

Regions' compensation package which averaged \$61,555.61. The Employer asserts that the 3% raise offered by the Employer will continue the benefits enjoyed by its firefighters who will maintain an advantage of \$1,158.29, or 1.8% over the firefighters in the Region.

The Employer further maintains that its proposal is comparable to other cities' proposals in the Region. The State Employment Relations Board (SERB) report for 2006 reflected that the average wage settlement for the Cleveland area was 2.99%. SERB also reported that statewide firefighters accepted proposals of a 3% annual wage increase. It notes that the Brook Park wage increase for 2006/2007 was 3%, identical to the Employer's proposal. The Employer also points out that its 3% proposal exceeds proposal recently accepted by other employee unions in northeast Ohio as well as the 2.62% wage increase accepted by teacher unions statewide in 2006.

The Employer notes that the firefighters increases in the cities of Parma and Strongsville were somewhat higher than the Employer's 3% proposal. However, it argues that its overall compensation package and base wage for years has exceeded these two municipalities and will continue to do so with its proposed increase of 3% in wages.

The Employer concludes its arguments as to wages by stating that the firefighters' wage exceeds the average wage of all occupations within the Region according to the United States Department of Labor statistics. It also notes that the Employer's proposal almost doubles the Consumer Price Index increase for 2006. It refers to statistics which indicate that the 3% proposal almost doubles the rise of the Cleveland-Akron Consumer Price Index; the Bureau of Labor Statistics reported that the Consumer Price Index increased by 1.7% in this area in 2006.

The Union's Position

The Union proposes wage increases of 3.5% retroactive for each year of the contract to January 1, 2007. It argues that the wage increases that it has requested are not out of line with the increases being agreed to in the Cuyahoga County region. It maintains that these increases take into account the Employer's financial situation and would not cause any hardship. It also points out that in recent years Middleburg Heights voters supported an income tax increase from 1 3/4% to 2% which brought in a substantial amount of additional revenue.

Further, the Union provided a chart entitled "Recent Increases". It reflects firefighter increases for the years 2006, 2007, 2008 and 2009 for thirteen selected municipalities in the greater Cleveland area. The cities include eleven municipalities within Cuyahoga County and two municipalities outside of Cuyahoga County. It is a random selection reflecting an average increase in excess of 3% for the years 2006 through 2009, but provides no figures for a substantial number of other municipalities within this geographic area.

Findings and Recommendations

When making a recommendation as to wages certain facts should be afforded great weight and significance. First, it is important to note that in the SERB report for 2006 that the average wage settlement for the Cleveland area was 2.99%. Second, it must not be overlooked that the Employer's proposal of 3% is consistent with the proposals that the Employer is offering the other bargaining units within Middleburg Heights. When these two factors are considered along with the record as a whole, a recommendation for a 3% increase in wages for each year of the contract is warranted.

The effective date of the wage increases should be January 1, 2007 and January 1, 2008.

The Employer has taken the position that the effective date of the wage increases should be as of the date the contract's execution. However, it has provided no compelling reasons in support of this position. A recommendation making the respective wage increases effective from the date of the execution of the contract does not appear to be a rational approach for the resolution of the wage issue in this matter. Following that course of action would result in penalizing the employees involved herein and would not contribute to stability of labor relations between the parties.

Accordingly, in view of the above and the record as a whole, the undersigned recommends that the employees involved herein receive the following wage increases in the new collective bargaining agreement:

Effective January 1, 2007 - 3%

Effective January 2, 2008 - 3%

MANNING

The Union's Position

The Union proposes the following to be inserted as new Article 10.05:

The Employer agrees that the department will be staffed to require at least six (6) certified Fire Suppression Firefighters (excluding Chief and Assistant chief) to be on duty at all times.

The Union asserts that it is not asking the Employer to allow the Union to determine adequacy of the workforce by agreeing to this contract provision since the contract clearly indicates that this is a management right. The Union argues that it is asking for the establishment of a safety standard that will provide a safe work environment and enable firefighters to provide

emergency services to the community in a safe manner. It maintains that, although the issue of the adequacy of the workforce is not an negotiable item, safety is an negotiable item and should be addressed during these contract negotiations.

The Union states that the number of on-duty personnel working on a shift at a particular time has a great impact on the safety of the firefighters and the safety protection of the community. In support of its argument it provided a manual produced by the International Association of Firefighters and the International Fire Chiefs' Association which addresses consideration of staffing levels and the impact on safety. It also introduced another manual produced by the International Association of Firefighters dealing with issues relevant to fire based EMS which indicates that staffing levels have a direct impact on safety of EMS personnel as well as the residents and communities utilizing the emergency 9-1-1 system.

The Union asserts that, when service calls are increasing and firefighters are assuming greater responsibilities, firefighters are asked to perform more with less. It notes that when the voters of Middleburg Heights passed an income tax increase in 1997, one of the reasons for the income tax increase was to improve the safety forces.

The Union indicates that it is aware that increased staffing costs the Employer money. However, it maintains that short staffing continues to kill and seriously injure firefighters and can also result in many additional civilian deaths and injuries.

The Union believes that its proposal will allow the Employer to operate the Fire Department in a safe manner. It notes that its proposal is well below the national accepted standards, but it believes that the elimination of a fluctuating workforce will allow training to provide a firefighting operation which operates in a consistent and uniform manner rather than

operating with four firefighters on a shift on some days, five firefighters on other days and six firefighters on a good day. The Union proposes that the Fire Department should be required to operate with six firefighters assigned to fire suppression every day. The Union indicates that the Employer would continue to be able to determine how to provide for six firefighters per day as part of its management rights. However, it would not longer be able to operate with a fluctuating number of firefighters on each shift.

The Union provided additional exhibits in support of its arguments. A document entitled Area Fire Department Staffing reflects minimum requirements in nine communities. Berea has a minimum manning requirement of five based upon a verbal agreement. Brook Park has a minimum manning requirement of nine based on contract. Brunswick has a minimum requirement of three per station as part of its standard operating guidelines. Independence has a minimum manning requirement of five based on a verbal agreement. North Royalton has minimum of six on a shift based on contract. Parma has minimum by truck based on a contract. Parma Heights has minimum manning of six based on rules and regulations. Strongsville has minimum manning of thirteen based on standard operating guidelines and Brooklyn has minimum manning of seven based on contract.

The Union also presented a number of contract provisions and memorandums of understanding between various municipalities and firefighters' unions in the various surrounding communities. These provisions range from agreements by a municipality and the union as to the number of firefighters to be assigned to each shift to agreements between the municipality and the union to establish a committee of employer and union representatives for developing plans as to how to raise daily minimum staffing levels.

Also, the Union relies on a research paper produced by the Baldwin Wallace College, Business Administration Division - Exploration of Fire Service Regionalization: Berea, Brook Park, Middleburg Heights, Parma and Parma Heights. In support of its argument for shared resources and regionalization of fire department and EMS services, the paper proposes the following: a combined fire dispatch center, a combined training delivery and facility, a combined maintenance facility, and a shared radio system.

The Employer's Position

The Employer opposes the Union's proposal in respect to staffing for a number of reasons. The first, the Employer states, that the Union can offer no contract in the Region with the same policy to support its rationale. Rather, it claims, that the Union can only point to four irrelevant clauses in three city contracts. The Brook Park contract states that Brook Park needs to maintain a five to one ratio of firefighters to lieutenants if, and only if, there is a reduction in force. The Parma contract provides that Parma will maintain a staffing of sixty firefighter paramedics out of approximately a hundred total firefighters. Both of these clauses deal solely with department staffing. The Employer maintains that this is an entirely different issue than the Union proposal concerns mandatory scheduling and maintaining of six firefighters per shift, excluding the Assistant Chief and the Fire Chief.

The Parma contract states that Parma will make "a reasonable good faith effort" to schedule three firefighters to a piece of front line equipment. Reasonable good faith, according to the Employer, does not mandate that the department must schedule three firefighters. Further, the provision only applies to those pieces of equipment which the safety director designates as front line equipment. This allows Parma to maintain the necessary control over the manning of stations

within the city by designating as front line the equipment the safety director deems necessary to protect the citizens of the city.

The Employer points out that the North Royalton contract agrees to schedule six certified firefighters assigned by the chief, except in extreme emergencies. According to the Employer, this provision differs from the Union's proposal because scheduling does not require six certified firefighters to be on duty at a given time. It maintains that there is a clear distinction between scheduling and requiring firefighters to be on duty on a particular shift at all times. According to the Employer's argument, North Royalton can schedule six firefighters, but if one firefighter calls off sick, North Royalton is not required to call in another firefighter on overtime. As a result, North Royalton is able to maintain the necessary control over the manning of stations and not subject the city to unnecessary overtime. Further, the Employer points out that the North Royalton clause allows the city to deviate from staffing requirements in time of emergency.

The Employer's second argument in opposition to the Union's proposal is based on the Ohio Revised Code. O.R.C. 4117.08(C)(5) provides a public employer has the right and responsibility to "...determine the adequacy of the workforce". According to the Employer an important element essential in providing an adequate workforce is determining the resources allocated per shift. O.R.C. 4117.08 also reserves the right and obligation to the Employer for the "layoff, transfer, schedule, promote, or retain employees". The Employer argues that in order to discharge this obligation it must have the discretion to determine the number of firefighters manning each shift. Further, the Employer's right and obligation to control and determine the adequacy of its workforce, including the number of firefighters on each shift, is consistent with O.R.C. 737.09 which gives the fire chief the sole responsibility for stationing of firefighters.

Third, the Employer points out that under the management rights provision set forth in Article V, the Employer is empowered to control the manning of fire stations. Under Section 5.01, it retains the right to control the adequacy of the workforce set forth in Ohio Revised Code 4117.08(C)(5). It notes that the statute reserves these provisions for the public employer, absent limiting or restrictive language. The Employer points out that the current contract does not contain any limiting or restricting language as to any of the provisions in O.R.C. 4117.08(C). Further, the Employer asserts that Section 5.01 enhances the rights bestowed on the Employer by only indicating, and not limiting or taking away "...types of matters or rights which belong and are inherent to the Employer." The Employer argues that Mandatory Minimum Manning would severely inhibit its ability to carry out rights or matters which belong to or are inherent to it as provided in Section 5.01 of the current collective bargaining agreement.

In addition Section 5.02 specifically states "all functions, rights, powers, responsibilities and authority of the Employer, in regard to operation of its work and business and the direction of its workforce, unless specifically stated otherwise shall remain exclusively of the City". According to the Employer the contract contains no language that deletes or eliminates the Employer's language or the Employer's right to decide as to the manning of stations. Rather, it is imperative for the Employer to determine the manning of stations to properly discharge both its statutory duties and to maintain physical control.

Fourth, the Employer argues that minimum manning is a permissive subject of bargaining and is not a mandatory bargaining subject. It points out that O.R.C. 4117.01 et seq. creates three classifications of bargaining subjects. Mandatory bargaining subjects involve negotiations between an employer and an union as to wages, hours, terms and conditions of employment and

“...the continuation, modification, or deletion of existing provisions of a collective bargaining agreement”. It notes that the General Assembly set forth a list of subjects described as permissive subjects of bargaining also referred to in Cincinnati v. Ohio Council 8, AFSCME 61, Ohio St. 3d. 658, at 664-665 (1991) which distinguishes between mandatory and permissive subjects of bargaining. It is impermissible for an union to insist to the point of impasse on inclusion of a permissive bargaining subject in a collective bargaining agreement.

The Employer indicates that O.R.C. 4117.08(C) indicates permissive bargaining subjects and states that there is nothing in this statute that impairs a city’s right and responsibility to determine the methods, means or personnel by which operations are conducted, determine the adequacy of the workforce and effectively manage the workforce.

The Employer argues that in Article V of the current contract the parties agreed to a provision that specifically enumerates that the Employer agrees to the rights and responsibilities set forth in 4117.08(C). Section 5.02 of the contract is also referred to because of the reservations of powers, responsibilities and authority to the Employer. The Employer maintains that the current contract contains no provision restricting the Employer’s right to decide the personnel by which government operations are conducted to determine the adequacy of the workforce or effectively manage their workforce. Consequently, there is no contract restriction on the Employer right to decide appropriate manning levels. The Employer also cites SERB decisions in support of its position.

In Toledo Police Patrolmen’s Association, Local 10, IUPA - AFL-CIO v. Toledo, 127 Oh. App. 3d 450 (1998) the court indicated that “...as a general rule, the issue of manpower or staffing is management decision subject to only permissive bargaining”. It points out that the

Toledo contract differs from the Middleburg Heights contract since it did not contain a management rights provision reserving to Toledo the right to determine the adequacy of the workforce and overall personnel by which government operations are conducted. It further argues that since this provision is contained in the current contract, the Employer is not required to bargain minimum manning with the Union and that this issue is not properly before the undersigned.

Fifth, the Employer asserts that it adequately staffs its firefighter shifts. Its states that during negotiations the Union could not point to a single empirical study to support its position that this was safety issue. It argues that current data indicates sufficient manning of each station. According to analysis conducted in 2007 there are generally six firefighters per shift. In the ninety shifts of the first quarter eighty five shifts consisted of six men or higher. There have been only five shifts with less than six total men in 2007 and four of these shifts had the Chief and/or the Assistant Chief available to assist in the event of an emergency.

Further, the Employer states it is significant that if there ever was an emergency where safety became an issue the Employer has a mutual aid policy with surrounding cities to deal with emergencies. It is a formal agreement among local fire departments to lend assistance across city boundaries when necessitated by an emergency that exceeds the local resources, or if a disaster occurs. As a result, the Employer argues that minimum manning is not crucial because it can enlist the services of other surrounding cities in the case of an emergency. It reiterates, however, it usually has six firefighters per shift.

It asserts that management has always had the exclusive right and responsibility to determine the number of fire stations to be manned on a daily basis, the apparatus that can be

utilized to provide acceptable fire protection and the number of firefighters required to staff and operate fire stations. If a city had unlimited financial resources it could maximize the number of fire stations, the number of pieces of apparatus and the daily manning of both the stations and the apparatus. However, no city is in a position with unlimited financial resources. As a result, management must decide on the allocation of available resources where they will be most beneficial to the citizens of the city.

The Employer argues that the city cannot be hamstrung by contractual language that could prevent it from making a decision to open one or more fire stations for budget or other factors. Further, management must have the right to control manning to effectively budget and control overtime within its financial means.

The Employer refers to City of Lorain and the Firefighters supra where Conciliator Minni denied a request for minimum staffing for the reason that a city is required to keep its inherent discretionary power to manage any city service in order to be prepared for future economic conditions. The Employer argues that the same factors present in Lorain are also present in Middleburg Heights. It compares the city's economic crisis in Lorain to Middleburg Heights rapidly declining economic base. In Lorain, Conciliator Minni also referred to the lack of evidence that the city would reduce manning to an unsafe level. The Employer maintains that in the instant matter the Union has offered no evidence to show any unsafe manning by the Employer. Rather, the city has presented evidence demonstrating a pattern of sufficiently and safely manned stations. As a result, minimum manning must be denied in order for the city responsibly and effectively control its budget.

Seven, for its final argument, the Employer asserts that minimum manning is a "Trojan

Horse” for overtime. It claims that granting this new provision will allow the firefighters to force the Employer to pay overtime on shifts failing to satisfy the minimum manning requirement. The Union’s proposal requires six firefighters on duty at all times irrespective of a firefighter calling off sick or using a day off. The Employer maintains that if the Union prevails in this regard minimum manning will become an engine for overtime that the firefighters, and not the Employer, control. It characterizes this provision as an attempt by the Union to increase the available overtime for firefighters resulting in an increase in the Employer’s already above average wages and total compensation package for firefighters.

Findings and Recommendations

A review of the record evidence, the applicable statutes and the case law as well as the applicable contract provisions support the conclusion that the Union’s proposal cannot be granted in the instant matter. First, it is undisputed that the Ohio Revised Code provides the Employer with the right and obligation to control and determine the adequacy of its workforce. Further, the applicable contract contains clear provisions in both Section 5.01 and Section 5.02 where the Employer retains the right to control the adequacy of the workforce and has broad rights and powers in regard to the operation and direction of the workforce. As such, these contractual provisions provide the Employer with a clear and unfettered right to determine the staffing of all work shifts.

Furthermore, minimum manning is a permissive and not a mandatory subject of bargaining. As indicated above, the applicable statutes and the case law support the conclusion that minimum manning is within the exclusive purview of the Employer. It may agree to enter into negotiations in this regard, but it is not required to do so. In addition, the record also reflects

that during the current year, with few exceptions, six firefighters have been staffing the Employer's shifts.

Accordingly, in view of the above and the record as a whole, the Union's proposal as to staffing is not recommended by the undersigned.

Cleveland, Ohio
Cuyahoga County
July 23, 2007


Charles Z. Adamson, Fact-Finder