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FACT FINDING REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
April 29, 2007

In the Matter of:)
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The Boardman Township Trustees)
)
)
and)
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)
Boardman Professional Firefighters)
Association, IAFF Local 1176)
)

SERB Case No.
07-MED-01-0046

APPEARANCES

For the Union:

Dennis Haines, Attorney for the Union
Stanley Okusewsky, Attorney for the Union
James Hoover, President Local 1176
John Jarvis, Vice President Local 1176
Brian Barber, Trustee Local 1176

For the Boardman Trustees:

Michael Esposito, Labor Consultant
Jason Loree, Boardman Township Administrator

Fact Finder: Dennis M. Byrne

Background

The Fact Finding involves the members of the Boardman Township Fire Department represented by the International Association of Firefighters (IAFF/Union) and the Boardman Township Trustees (Employer). The parties held numerous negotiating sessions, but were unable to come to an agreement; consequently, they agreed to mediate their differences. A State Employment Relations Board (SERB) mediator met with the parties and helped them reach closure on some issues, but they could not agree on a new contract. Consequently, they scheduled a Fact Finding.

Prior to the Hearing, the Fact Finder attempted to mediate the dispute, and numerous issues were resolved. The agreed upon issues included demands related to (1) Article 2 - Recognition, (2) Article 6 – First Responder Certification, (3) Article 7 – Personnel Files, (4) Article 8 – Grievance Procedure (5) Article 9 – Seniority, (6) Article 10 – Hours of Work, (7) Article 11 – Temporary Assignments, (8) Article 12 – Sick Leave, (9) Article 13 – Leave of Absence, (10) Article 15 – Vacation, (11) Article 16 – Holidays, (12) Article 17 – Clothing Allowance, (13) Article 19 – Medical Insurance, (14) Article 21 – Probationary Period, (15) Article 23 – Rights of the Parties, (16) Article 27 Drug and Alcohol Testing, and (16) Article 30 – Management Rights. It must also be noted that there were often a number of different issues related to the same article, and the parties reached many more than seventeen (17) tentative agreements. In addition, there were numerous grammatical and numbering changes made throughout the contract, and all of these tentative agreements are included in the Fact Finder’s recommendations by reference.

The major remaining differences between the parties' positions were related to the general wage increase, although there are also three other unresolved matters. The open issues include (1) Wages, (2) Promotional Opportunities, (3) Reduction in Force and Recall, and (4) Maintenance of Standards.

The Fact Finding Hearing was held on Wednesday August 1, 2007. The Hearing started at 9:00 A.M. at the Boardman Township Building. The Hearing lasted for *approximately ten hours and ended a few minutes past 7:00 P.M.*

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 agreed-upon dispute settlement procedures in the public service or private employment.*

Introduction:

The negotiations between the parties were long and arduous. In addition to the usual problems surrounding the economic and health care issues, the Employer also proposed numerous changes in the language of many (most) articles in the contract. The Employer believes that much of the current language is either outdated or unclear. The Union argued that there had been no (few) problems with the language over the years;

and, therefore there was no reason to rewrite the contract. Moreover, there is some suspicion on the part of the Union that all of the proposed language changes were an attempt by the Employer to change the contract to its advantage. The Employer vehemently disagreed with this analysis and insisted that all of the proposed changes were intended to strengthen the contract and get rid of potential problems with imprecise wording, and the parties were able to agree on numerous language and editorial changes.

The major differences between the parties' positions were differences of opinion on the wage and medical insurance provisions of the contract. These are the two issues that bedevil most negotiations, and the two sides took the usual positions. That is, the Employer wants the union membership to pay for part of its medical care through increased co-pays and deductibles, and the Union wants to limit its costs. In this particular situation, all other Township employees already pay part of their medical insurance; and, consequently, the firefighters reluctantly agreed to pay part of their medical insurance premiums. The one remaining issue related to medical insurance was whether the firefighters' contribution to the plan would be capped or uncapped.

The parties had prolonged discussions over this issue. The Union demanded a cap on contributions to protect its membership from unanticipated increases in the medical plan's cost. The Township demanded that the contribution be uncapped because (1) a number of other township bargaining units had agreed to uncapped contributions, i.e., internal parity considerations and (2) the township claimed that it could not predict what would happen to the cost of the medical plan in the future.

The parties were able to come to an agreement on the issue because the Township has proposed a novel way to administer the medical plan. Under the Township's

proposal, the parties would set up a medical insurance committee made up of members of each constituency within the township. This committee would determine the medical plan's design, i.e., the committee would be responsible for recommending and implementing changes in the medical plan. In effect, the employees would be empowered to make all of the decisions about the health insurance plan. With the formation of this committee, the Union's concerns about the township making unilateral changes in the health plan were mollified, and the parties were able to finalize an agreement on the union membership's contributions to their health insurance.

The wage issue, which will be discussed below, relates to the size of the general wage increase. The Township contended that it could not afford the Union's demand, and that its offer was reasonable given the state of the Township's finances. The Township also pointed out that other Boardman Township employees had agreed to raises similar in size to the offer made to the firefighters. On the other hand, the Union demanded a substantial raise for its membership. The Union based its demand on the fact that other firefighters in the surrounding area (Mahoning County) have received raises of three and one-half (3 ½%) percent to four (4.0%) percent. Therefore the parties' discussions on this issue focused on the financial position of the Township, equity considerations vis-à-vis other employees of Boardman, and evidence from other comparable fire departments throughout Mahoning County.

With the foregoing as a background to the overall positions of the parties, the specific items that remain unresolved will be discussed in the next portion of the report.

Issue: Article 6 - Maintenance of Standards

Township Position: The Township wants language inserted into the contract that defines a past practice.

Union Position: The Union rejects the Township's proposed language and countered with the status quo.

Discussion: The Township has proposed adding the phrase "*of the bargaining unit, which have existed for a reasonably long time, have occurred repeatedly, have been clear and consistent, and have been known to the Chief, the Employer, and the Local...*" to the existing language of Article 6.01. The Union objects to this phraseology and counters the Township's demand with the current contract language.

The question devolves into the meaning of a past practice. Past practice is the way that the parties give meaning to their agreement(s) when the contract is silent on an issue or in instances where the contract language is unclear and open to more than one interpretation. In general a valid past practice must be:

1) unequivocal, 2) clearly enunciated and acted upon, and 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. However, the mutual acceptance may be tacit, and implied mutual agreement, arising by inference from the circumstances.¹

In this instance the Township's suggested language is patterned after the language in Elkouri and Elkouri.

The Union believes that the contested language limits its ability to contest unilateral changes made to the contract by the Employer. That is, the Union believes that it must have the flexibility to object to any changes in work rules, etc. that it believes

¹ Elkouri and Elkouri *How Arbitration Works* 5th Ed. P. 439

violate the spirit of the agreement; and the Union believes that the Township's proposed language might allow it to make unilateral changes in long standing practices that help define the parties' agreement.

It is settled in labor relations that the Employer has the right to promulgate work rules and change means and methods of operation for valid reasons. It is also clear that a Union has the right to grieve any change in the terms and conditions of employment that it believes alters the labor agreement. The grievance procedure is the forum on which the parties have the right to argue their respective positions in front of a Neutral, and past practice disputes are often arbitrated.

If the parties cannot settle their dispute, then the Arbitrator will determine if a valid past practice exists and whether the Employer's actions changed the essence of the agreement. Therefore, the existence and validity of a "past practice" is entwined with the ability of the Union to grieve any action that it believes fundamentally changes the collective bargaining agreement. In this instance the Fact Finder believes that the parties' agreement contains an arbitration clause that is sufficiently broad that the Union has the ability to grieve actions of the Employer that it believes do not conform to the labor agreement. Therefore, the Union is protected from unilateral management actions that may affect the membership's rights.

However, regardless of that fact, the Fact Finder does not believe that the contested language should be made part of the contract. The mere fact that the Township's suggested language was incorporated into the contract would show the parties had bargained over the concept of past practice and come to some understanding

on the issue. This “understanding” might be used to limit the Union’s ability to cite a past practice argument in some future arbitration or court proceeding.

The usual and customary way that the parties interpret their agreement or give meaning to unclear language is part and parcel of the parties’ relationship. The Employer’s position on this issue is understandable, but absent some concrete examples of situations where the current language has caused problems between the parties, the Fact Finder does not believe that the Employer proved that there was any reason to deviate from the current language.

Finding of Fact: The Employer did not prove that there was any reason to change the current language found in Article 6.01.

Suggested Language: None

Issue: Article 9 – Layoff and Recall

Township Position: The Employer desired to make numerous changes in this article. Many of the proposed changes were unobjectionable to the Union. However, the new Section 3, which specifies the order in which layoffs can be made, i.e., the least seniority within job classification, is not acceptable to the Union.

Union Position: The Union demands the status quo on this issue. That is, employees will be laid off according to Civil Service Regulations and applicable State Law.

Discussion: This was one of the most contentious issues dividing the parties. The Employer believes that the current language in the contract is contradictory because the language allows the Employer to determine if a layoff is necessary, but then ties the Employer’s hands when it comes to implementing the layoff. That is, the Employer is

bound to follow Civil Service Regulations, which specify the way and order in which employees are laid off. The Union argues that Civil Service Regulations cover the issue and that there has never been a situation in Boardman where the contested language has caused problems. Essentially, the Union argues that “if it ain’t broke, don’t fix it.”

The Employer’s suggested language allows the Employer to lay off a ranking officer who is senior to other firefighters and then “bump” into a lower classification. The Union argues that this violates the idea of seniority. The Union claims that the best way to layoff employees is to follow the axiom “last in, first out.” This is the tradition idea of seniority that offers job protection to senior employees. Therefore, the dispute is between “classification seniority” and “unit seniority.” Because the higher ranking officer can bump into a lower rank according to the Employer’s language, the real saving of utilizing the Township’s proposal is that a higher ranking member of the fire department, who is also higher paid, moves into a lower paying job. The Township’s suggested language would also allow the Employer to abolish a position and/or classification in the event of a massive layoff.

Actually, as a practical matter, the difference between the parties is minimal if the projected layoff is small. If only one or two members of the Department are subject to a layoff then the least senior firefighters will be laid off because there is a continuing need for all ranking officers. However, if there were a large-scale layoff, then the Employer’s language would allow a more senior officer who is laid off to bump into a lower position. For example, assume that a captain supervises ten firefighters. If only one or two firefighters are laid off, then there is still a need for all of the current captains. However, if ten firefighters are laid off, then there is a need for one less captain. Therefore, in the

event of either a massive layoff or a layoff designed to save the maximum amount of money, the Employer's language makes perfect sense.

The Union's position is the standard position taken by unions everywhere. Seniority gives some benefits to long term, loyal employees; and one of the benefits is job security. According to the "last in, first out" paradigm, a long-term employee is protected from losing his/her job until all less senior employees have been laid off. In addition, a senior employee maintains his/her position and wages until he/she is laid off.

The Fact Finder does not believe that good industrial relations would be maintained if the Employer could simply pick and choose whom to layoff. If the Employer could lay off a captain before laying off anyone else that might save the employer more money than if the lowest ranking firefighter was laid off. However, this is only a marginal gain to the Employer because under the Township's proposed language, the captain could bump into a lower rank. Therefore for a minimal gain, the Employer would risk antagonizing the senior ranks of the fire department. In the second situation, i.e., a massive layoff, the entire modus operandi of the department would be affected and this would surely lead to either negotiations by the parties over new job assignments, etc., or grievances by the affected employees. In either case, the parties would be forced to discuss the issue among themselves or in front of an Arbitrator.

In most situations the status quo is an acceptable alternative to profound changes in long standing contract language. In this case, the Township has never undergone a layoff, especially a massive layoff. To radically change the language of the contract without any compelling reason does not seem justified. The Fact Finder understands that the Township faces a somewhat problematic financial future; but even in light of that

fact, the Fact Finder cannot recommend a fundamental change in the way that seniority has always been viewed in Boardman. If the need for a large layoff does arise, then the language of the current contract will allow the management of the Fire Department to utilize its manpower in an efficient manner.

Finding of Fact: The Township did not prove that there is a compelling reason to change the way that seniority rights are applied in Boardman.

Suggested Language: Current language

Issue: Article 6 -- Section 2 Preservation of Rank

Township Position: The Township is proposing language that it claims clears up an internal inconsistency in the current Article 6. The Township believes that the current language of Article 6 allows it to lay off employees, but then requires that it fill vacant positions by promotion.

Union Position: The Union rejects the Township's demand and believes that the current language should be maintained.

Discussion: This issue is related to the preceding issue and relates to layoffs. The Employer believes that the current language of Article 6.02 requires that it preserve (promote) a firefighter into the officer ranks even though the same section allows the Township to lay off employees. The current language is:

Article 6.02 Preservation of Rank

During the term of this collective bargaining agreement, the Township agrees to preserve the following rank: three (3) Assistant Chiefs, three (3) Captains, and two (2) Lieutenants in the Fire Prevention Bureau.

No officer who presently holds rank shall be reduced in rank during the term of this agreement for disciplinary reasons. Should a position of Assistant Chief,

Captain or Lieutenant-Fire Prevention Bureau become vacant for any reason, the Township agrees to promote within the department in order to insure the preservation of rank as agreed herein. This provision is not intended to prohibit the Township from otherwise laying off persons in the department, if required.

The language in question states that if any officer position does become vacant “for any reason” the Township must promote someone to the vacant position. Moreover, the last line of the current language states that the language is “not intended to prohibit the Township from laying off persons in the department.”

The Township claims that this inconsistency might cause problems and presented the following language as a way to resolve this internal inconsistency.

Article 6.02 Promotional Opportunities

Section 6.02 Promotional Opportunities During the term of this collective bargaining agreement, the Township agrees to maintain the following promotional opportunities within the bargaining unit: three (3) Assistant Chiefs, three (3) Captains, and two (2) Lieutenants in the Fire Prevention Bureau. Should a position of Assistant Chief, Captain or Lieutenant-Fire Prevention Bureau become vacant, then the Township agree to promote within the department in accordance with the Ohio Revised Code.

Section 6.03 (new) Reduction in Force Unaffected This provision is not intended to prohibit the township from otherwise laying off persons in the department, if required, in a manner that would result in a promotional position becoming vacant. The parties agree that the language in Section 1 only restricts the Employer from abolishing the promotional position identified above.

The question then becomes whether the Employer can lay off a ranking officer and not be forced to promote to the vacant position.

The Fact Finder agrees that the current language of Article 6.02 is deficient. The language states that the Employer can lay off individuals if needed, but it also states that eight (8) positions will be maintained and filled if for any reason any one of the positions becomes vacant. The Union claims that the Township’s proposed language is an attack on the officer corps. The Union also argued that the current language has never caused

any problems and that it should not be changed. However, these arguments do not address the internal consistency problems with the current language.

A fair reading of Article 6.02 shows that the language means that the Township will maintain eight (8) officers in the department under normal circumstances. However, the last sentence was probably appended to Section 6.02 to give the Township the ability to lay off employees, including officers if the need arose: but this sentence seems to be an afterthought that was appended to Section 6.02 to make clear that the Township had the right to lay off employees if necessary.

The Fact Finder believes that the Township's suggested language explicates the intention of the parties when they originally crafted their agreement, and the conclusion is inescapable that the Township has the right to layoff officers in some (undefined) situations. Consequently, the Fact Finder believes that the Township did present a situation where the present contract was unclear and proposed a reasonable remedy.

However, it is also true that the Employer made the same arguments when discussing seniority rights. Therefore, the Fact Finder believes that the language in Article 6.02 and 6.03 (new) should contain safeguards for the Union membership that require the Township to prove that the layoff of an officer is reasonable and that subjects that action to outside review via the grievance procedure.

Finding of Fact: The current language of Article 6.02 contains contradictory statements and could create problems for the Township if it were forced to lay off employees.

Suggested Language:

Section 6.02 Promotional Opportunities - Language Proposed by the Employer:

Section 6.03 (New) Reduction in Force: This provision is not intended to prohibit the Township from laying-off departmental personnel, if required. The Employer maintains the right to layoff employees for lack of work and/or lack of funds. The parties agree that a vacancy created by a layoff for a lack of funds and/or a lack of work will not automatically be filled. The parties further agree that the language in Section 6.02 means that the Employer will not abolish the ranking positions enumerated in the preceding paragraph during the term of this agreement.

Issue: Article 18 – Wages and Salaries

Township Position: The Township offered one and one-quarter (1 ¼%) percent in the first year, one and one-half (1 ½%) in the second year, and one and three-quarters (1 ¾%) in the third year of the proposed contract. The City also proposed a fitness bonus of four hundred (\$400.00) dollars per year over the life of the contract. This amounts to three-quarter (¾%) percent for each year of the proposed contract.

Union Position: The Union demanded four (4.0%) in each year of the contract.

Discussion: The parties' positions reflect their differing views of the evidence gleaned from comparables data. The Union believes that the firefighters are part of a labor market for firefighting services and that many other firefighters in the labor market received raises in the range of three and one-half (3 ½%) to four (4.0%) percent. The Township's representatives countered this argument by stating that the Township's other bargaining units and non-unionized employees had settled for less than the firefighters' demand.

The Township also stated that it was facing severe financial pressure and an uncertain economic future. Furthermore, the Township's representatives stated that the Township was considering various ways of trying to raise revenues and that it could not pay any more than it was offering.

After stating their demands and the reasons for their positions, the parties had a wide-ranging discussion on the issue. The Township's representatives stressed that the Township was facing a looming financial problem (crisis) and that there was much uncertainty surrounding the economic outlook in Boardman. The firefighters agreed with this analysis and modified their demands in an attempt to meet the real financial concerns expressed by the Township. This willingness to try to find a mutually acceptable agreement led to a further exchange of ideas and counter proposals.

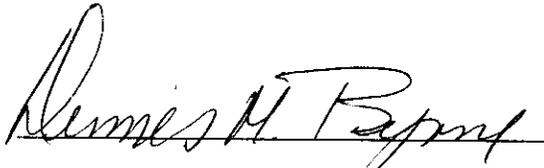
Ultimately, with the help of the Fact Finder, the parties were able to come to a tentative agreement on the wage issue. That is, both parties made adjustments in their original positions in order to find a compromise. The firefighters and the Township agreed on a base wage increase of two and one-half (2 ½%) percent per year. The Township also offered the fitness bonus on top of the base wage increase. Finally, the parties agreed on a signing bonus of five hundred (\$500.00) dollars.

Consequently, the Fact Finder is recommending that the firefighters receive two and one-half (2 ½%) percent pay raises in each year of the proposed agreement. In addition, the Township offered four hundred (\$400.00) dollars in each year of the agreement as a fitness incentive. The Fact Finder believes that the four-hundred (\$400.00) dollar payment should be part of the settlement, but rather than a fitness incentive, the payment should be a payment to any firefighter who qualifies as a "first

responder.” That is, any firefighter who is qualified to respond to emergency calls and offer first aid/medical treatment to persons who have health problems or who are involved in accidents. There is no difference in the cost of the Township’s offer and this recommendation. All payments should be retroactive to April 1, 2007, i.e., the official beginning date of the proposed contract.

Finally, the Fact Finder is recommending that the firefighters receive a five-hundred (\$500.00) dollar-signing bonus when the contract is finalized. This is a one-time payment that will help reduce the gap between Boardman firefighters and other local firefighters.

Signed this 4th day of September 2007, at Munroe Falls, Ohio.

A handwritten signature in cursive script that reads "Dennis M. Byrne". The signature is written in black ink and is positioned above a horizontal line.

Dennis M. Byrne, Fact Finder