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IN THE MATTER OF IMPASSE X
X
BETWEEN X
X
THE CITY OF MIDDLETOWN, OHIO X
AND X
THE FRATERNAL ORDER OF POLICE X
LODGE NO. 36 X

REPORT OF
THE FACT FINDER

SERB FILE NOS.: 2007-MED-02-0095 and 0096

HEARING: June 12, 2007; Middletown, Ohio

FACT FINDER: William C. Heekin

APPEARANCES

For the City

Sara E. Mills, Assistant Law Director

For the FOP

Stephen S. Lazarus, Attorney

ADMINISTRATION

By way of a letter dated April 13, 2007, from the State Employment Relations Board (SERB), the undersigned was informed of his designation to serve as fact finder regarding a successor labor contract, negotiations impasse. On June 12, 2007, and following receipt of pre-hearing submissions, a fact finding hearing went forward where testimony as well as document evidence was presented. During the course of the fact finding hearing, the FOP withdrew its proposed new language as to Article VII (D), "Court Appearance" pay; Article VII, "Continued Education Incentive" (new provision); and Article XI, "Holidays". The record was closed at the conclusion of the hearing and the matter is now ready for the issuance of a fact finding report.

FINDINGS AND RECOMMENDATIONS

This impasse matter involves two Police Department bargaining units – one consisting of 64 police patrol officers and the other made up of 12 police supervisors (sergeants and lieutenants) – who are represented in collective bargaining by the Fraternal Order of Police Lodge No. 36 ("the FOP") and are employed by the City of Middletown, Ohio ("the City" or "Middletown"). Thus, the City and the FOP ("the Parties") will be signatory to the two instant collective bargaining agreements at issue ("the Agreements" or "The Labor Contracts"). The Parties have had a collective bargaining relationship since 1985. Middletown, which has approximately 380 full-time employees, is located in Southwestern Ohio and has a population of approximately 51,605.

At the hearing, the Parties made it very clear that what is central to this impasse is the percentage annual wage increase and health insurance. Accordingly, and despite there having been a number of meetings over the course of the past several months, this served to prevent the

resolution of other issues. Thus, wages and health insurance will be dealt with together in this report.

In recent years, the City's financial picture has not been positive as a result of flat income tax revenues, mainly the result of a marked decline in the local economy. Accordingly, last year it was forced to make reductions in order to balance the budget, while in 2008 the City projects the general fund balance to be approximately \$2.6 million; down from \$5.4 million at the end of the current year, 2007. While noting that the City income tax is the largest general fund revenue source (approximately 46.2%), financing the Police Department this year accounts for approximately 52.3% of the general fund total. Overall, City employee costs make up 77% of the general fund budget.

More particularly as to the local economy, AK Steel, the City's largest employer and largest source of City tax revenue, experienced a very costly labor dispute/lockout which lasted from March of 2006 until March of this year; resulting in an approximate \$600,000 loss in tax revenue. Moreover, earlier this year AK Steel announced it will move its corporate headquarters and approximately 300 jobs to nearby West Chester, Ohio. Accordingly, the City estimates a \$400,000 annual reduction in City revenue when the move is completed later this year. Also, and while noting that in 2003 AK Steel eliminated 200 salaried employees, the City in recent years has lost more than 1,000 jobs due to plant closings. This included Square D and Sorg Paper Board, manufacturing companies which had operated in the Middletown area for decades. More recently, approximately 160 local jobs were lost when Contech relocated to West Chester. Finally, with the Middletown City School District tax levy having failed in May, the District announced the elimination of 100 jobs.

On a brighter note and in looking to the future, the City has hired an Economic Development Director. Also, with Middletown Regional Hospital's new facility nearing completion, the City's East End of town along with the development near I-75 are widely anticipated to be sources of future economic growth. Furthermore, and in mentioning AK Steel again, despite the recent difficulties which at least in part seem to reflect a period of transition and wrenching change brought about by world market conditions – and while emphasizing the fact that the 2006-2007 labor dispute is resolved – it appears that its role as a vital source of economic strength in Middletown will remain.

In response to these economic challenges, the City has made staff reductions through attrition, layoff, and reducing services. In addition, the City has attempted to raise revenues by way of an income tax increase, where in November of 2006 it placed a ¾% tax increase on the ballot with the goal of maintaining current service levels. Despite a strong campaign effort with help from the FOP, the levy was defeated. Nevertheless, City Council is considering going to the voters again this November.

What is also important to consider regarding the years between 2001 and today is that the total number of police officers has been substantially reduced – from approximately 100 to approximately 80 – while crime has substantially increased. Importantly, and as the Police Chief pointed out in his testimony, this is in part due to the reduced Police Department manpower affecting its ability to be proactive (more officers on patrol) in combating crime.

As to health insurance, the City and its employees are facing skyrocketing cost increases, a major problem throughout the country. Here, the City is self-funded and Anthem is the insurance carrier. In 2001, the total cost of health care as to all City employees was \$3,621,009, while in 2006 it was \$4,209,067; a 20% increase in 5 years despite the fact that the City has

substantially fewer employees as compared to 2001. With respect to 2007, the City has budgeted \$11,898 for each employee regarding a family plan and \$5,370 as to a single plan. In 2003, when the prior Labor Contracts went into effect, \$8,550 was the cost per employee regarding a family plan and the cost for a single plan was \$3,864.

In 2005, the City Manager created a task force to address the increasingly high cost of health insurance made up of management personnel, representatives from each of the collective bargaining units (including the FOP), and those employees not represented by a union. Out of this, a standing committee was formed in order to make recommendations to the City Manager and City Council. While the FOP chose to not be a part of the standing committee, it began to function in the summer of 2006 prior to the determination of the 2007 budget. Accordingly, by the end of 2006 the standing committee, with the assistance of a consultant, made its first recommendations; recommendations which were summarized by the City as follows:

- Converted from traditional brand/generic program to a three tiered program with increased co-pays for each tier.
- Increased the Physician Co-pay Office from \$10 to \$15
- Increase the Specialty Care Physician Office Co-pay from \$10 to \$15 in 2007 and \$20 in 2008 (once Anthem is able to administer this change)
- Increase the Emergency Room Co-pay from \$25 to \$75
- Increase the Employee Coinsurance from \$20% to 30% for Out of Network Coverage
- Implemented a four-tiered employee monthly contribution system, rather than having an option of family or single coverage, employees can now choose from 4 options including: Single, Employee plus spouse, Employee + child(ren) and Family.
- Increased the employee monthly contribution amount from 5% of the total cost of health care to 7.5%.

Finally, what follows is the criteria in fact finding as set forth in ORC 4117.14:

* * *

- Past collectively bargained agreements between the parties;
- 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;
- 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 standard of public service,
- The lawful authority of the public employer.
- Any stipulations of the parties.
- 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 private employment.

* * *

Against this backdrop and in recommending that all unchanged contract provisions be adopted, while also recommending that the Labor Contracts be 3 years in duration, the following is recommended as to both the patrol officers bargaining unit and the police supervisors bargaining unit concerning the items at impasse:

1.
WAGES AND INSURANCE

City position: That there be a 3% wage increase in the first year, provided the FOP agrees to certain changes in its health care benefits; a reopener in the second year as to wages and health insurance; and a reopener in the third year as to wages and health insurance. As to health insurance, it proposes the following:

Members shall be entitled to participate in the City's health insurance program recommended by the Health Care Committee and described in the documents on file in the Finance Department.

1. The Union agrees to participate in the City Health Care Committee and to adhere to recommendations of the Health Care Committee regarding all aspects of health insurance, including, but not limited to, the selection of carrier, determination of coverage and determination of co-payments, deductibles and employee contributions. The Committee shall act in accordance with its by-laws, as accepted by the Union. The by-laws of the Committee shall not be revised without the concurrence of the City and the Union. Any overtime accrued by members while attending meetings of the City Health Care Committee shall be paid at the forty (40) hour rate.
2. Unchanged
3. Unchanged
4. Unchanged
5. Unchanged
6. In the event the City investigates alternate forms of health insurance or carriers, the Union will be consulted prior to any change in carriers or forms of coverage. Current levels of insurance benefits will remain the same for the term of this Agreement. In the event the City creates a task force or committee to study alternate forms of health insurance, the Union President will be invited to become a member of such task force or committee.

Appendix A shall be deleted in its entirety.

FOP position: That there be a 5% wage increase in each of the 3 years of the Labor Contracts.

As to health insurance, the FOP again proposes the final offer that it made at the April 5, 2007, negotiations meeting, which it summarizes as follows:

1. The City's proposed health insurance plan maintained for the life of the contract (3 years). However, if the coverage plan were to change in the second or third year of the labor agreement, the City must provide "like or similar" coverage and benefits.
2. All other items concerning health insurance coverage and benefits not contained in this package proposal would remain as current contract language.
3. The FOP significantly increased the monthly premium cap levels due to the "added" cost of the City's health care plan that the FOP was accepting.

These capped amounts are significantly higher than the FOP's initial proposal during these negotiations.

4. The FOP added an "opt-out" option for members who can obtain other medical coverage through a spouse, etc. The "opt-out" would entitle a member, \$4,000 annually if the member declined City medical benefits.
5. The FOP is not required to participate in the "mandatory" committee on health insurance benefits and coverage, as is requested by the City.

* * *

It is recommended that, effective November 1, 2006, there be a 4% increase in wages and the adoption of the FOP's April 5, 2007, final proposal on health insurance (as to the first year); effective November 1, 2007, there be a 4½% increase in wages along with the adoption of the same FOP final proposal on health insurance (as to the second year); and, effective 60 days prior to November 1, 2008, the Labor Contracts be reopened for the purpose of negotiating wages and health insurance. Additionally, the undersigned recommends that the FOP immediately begin to participate in the health insurance standing committee process, where it can withdraw at any time and where its participation will not set a precedent regarding any future proceeding. This would include fact finding and conciliation.

As to the latter recommendation, the undersigned concurs with the City that the present nationwide trend towards dramatically increased health care costs requires an openness to new approaches in addressing the problem. At the same time, the specific idea proposed here by the City – that health insurance essentially be taken out of the Labor Contracts where it has been since 1985 and placed in the realm of a multi-party standing committee operating outside of the traditional one bargaining unit/one employer, collective bargaining process – simply cannot be recommended. In short, this is felt to be too dramatic a departure from normal collective bargaining and the bargaining history of the Parties (*since 1985*) in order to merit

recommendation. This especially follows since there is little “comparable” support, where the FOP is the first City employee bargaining unit to face this proposal in fact finding and no City bargaining unit has accepted the concept contractually. As to the City of Hamilton, the one comparable cited, no details were provided as to the collective bargaining process which led to the creation of its standing committee. With respect to the recommendation regarding wages, this acknowledges the weak financial position of the City presently, as well as financial uncertainty regarding the immediate upcoming years; thus justifying the recommendation that there be a reopener in the third year.

2.
ARTICLE VI
Grievance
Section B.2

City position: Add the following language: “In addition, in disciplinary cases the arbitrator is limited to making a determination on the issue of cause, and as such the arbitrator may not modify the nature or extent of the penalty imposed.”

FOP position: Current language.

It is recommended that the current language be maintained. The undersigned concurs with the FOP that it is well established in arbitral law regarding discipline “for cause” that the appropriateness of the disciplinary penalty imposed is of central importance. Thus, the penalty imposed and the question of “for cause” are interconnected.

3.
ARTICLE VI
Grievance
Section B.4

City position: Add the following language:

“The expenses of the arbitrator shall be shared equally by the parties, ~~except the union shall bear the entire cost of the withdrawal or cancellation in cases in which~~

the union withdraws a grievance from the arbitral forum or cancels an arbitration”.

FOP position: Current language

It is recommended that the current language be maintained. In noting that this sort of provision is normally not a part of a labor contract, grievance procedure – and with virtually no showing as to a history of grievance procedure abuse or a strong “comparable” argument – its inclusion in the Labor Contracts cannot be justified.

4.
ARTICLE VI
Grievance
Section B.7

City position: Current language.

FOP position: Delete Section B.7 from the Labor Contracts:

”It is specifically understood and agreed that in no event shall Employer condonation of any past infractions of any work rule, regulation, duty, responsibility, or policy be found to mitigate, in whole or in part, any discipline imposed by the Employer for any current infraction of any work rule, regulation, duty, responsibility or policy, nor shall an arbitrator so find; nor shall an arbitrator have the power to mitigate any discipline imposed by the Employer based upon a member’s length of service with the Employer.”

It is recommended that Section B.7 remain in the Labor Contracts. While concurring with the FOP’s position on the merits, what tips the balance against recommending its deletion is that it has been in the Parties’ Labor Contracts *from the beginning in 1985*. Accordingly, this is the controlling consideration.

5.
ARTICLE VI
Grievance
Section I

City position: Current language.

FOP position: Modify Article VI, Section I, and add new language to this provision as follows:

- I. Discipline includes reduction in pay or position, removals, and suspensions, with or without pay and written reprimands.

Written reprimands may be kept in the member's personnel file for up to ~~two~~ **one (1) years**. After ~~two~~ **one (1) years** of no further disciplinary action of a **similar nature** has been taken against the member, the written reprimand will be expunged from his file. After expungement a reprimand cannot be used for any purpose.

Discipline resulting in a suspension up to three (3) days may be kept in a member's personnel file for up to two (2) years. After two (2) years if no further disciplinary action of a similar nature has been taken against the member, the suspension and any related material will be expunged from his file. After expungement, the suspension, along with any related material, cannot be used by the employer for any purpose.

Discipline resulting in the suspension of more than three (3) days, but less than six (6) days, may be kept in a member's personnel file for up to three (3) years if no further disciplinary action of a similar nature has been taken against the member, the suspension and any related material will be expunged from his file. After expungement, the suspension, along with any related material, cannot be used by the employer for any purpose.

Discipline resulting in a suspension of six (6) days or more, may be kept in a member's personnel file for up to four (4) years. After four (4) years if no further disciplinary action of a similar nature has been taken against the member, the suspension and any related material will be expunged from his file. After expungement, the suspension, along with any related material, cannot be used by the employer for any purpose.

It is not recommended that this FOP proposed new language be adopted. Basically, with this provision being lengthy as well as involving an important matter, it is felt best left to future bargaining.

6.
ARTICLE VI
Grievance
Section K

City position: Current language.

FOP position: Add a new provision to Article VI, Grievance; Section K:

Letters of counseling may be kept in a member's personnel file for up to six (6) months. After six (6) months if no further disciplinary action of a similar nature has been taken against the member, the letter of counseling will be expunged from his file. After expungement a letter of counseling cannot be used by the employer for any purpose.

It is recommended that the new, FOP proposed Article VI, Section K, language be adopted. This is seen as a modest adjustment to the Parties' employee discipline system which has strong justification on its own merits.

7.
ARTICLE VII (D)
Pay Policy
Sections 1 and 12

City position: Current language.

FOP position: Modify Article VII Section 1 and 12 as follows:

1. ~~Effective November 1, 1989, members shall be paid 1-1/2 times their hourly rate for all "hours worked," as defined by the Fair Labor Standards Act, over 40 hours in a work week. Off duty incident, court time, holidays, injury leave, funeral leave, and call out time count toward the 40 hour breakever point.~~
1. **Effective November 1, 2006, the regular workweek shall be comprised of forty (40) hours, consisting of five (5) days of eight (8) consecutive hours each. The forty (40) hour work week shall be Sunday through Saturday. All sworn employees in the forty (40) hour workweek schedule who are required to work more than eight (8) consecutive hours in any one (1) day, more than five (5) days or more than forty (40) hours in any one (1) workweek, shall be paid overtime compensation in a salary at the rate of one and one-half (1 ½) times the actual hours, or portions thereof, worked. All paid hours shall count as hours worked.**
12. A member working in excess of eight (8) consecutive hours in any one (1) day, more than five (5) days or more than forty (40) hours in any one (1) ~~week~~ workweek, shall be paid overtime compensation in a salary at the rate of one and one-half (1 ½) times the actual overtime hours, or portions thereof worked, ~~as defined by the Fair Labor standard Act, as amended,~~ or shall have the right to request payment of overtime work in compensatory

time off on the basis of one and one half hours off for each hour of overtime worked. Time off to use earned compensatory time will be granted within thirty (30) days of the request made by the member. ~~When compensatory time is used, it shall not count as hours worked during the applicable work period for purposes of determining overtime.~~ If the request compensatory time cannot be scheduled as requested, the member has the option of taking pay in lieu of time off or rescheduling the requested compensatory time. No member shall be permitted to accrue more than four hundred eighty (480) hours of unused compensatory time and any member who has accrued unused compensatory time to the four hundred eighty (480) hour limit shall be paid in cash for additional overtime.

It is not recommended that the FOP's proposed Article VII, Sections 1 and 12, be adopted.

8.
ARTICLE VII
Pay Policy
Section 4

City position: Modify Section 4 as follows:

4. Members shall receive at least ~~three (3)~~ **one (1)** hours pay, for any extra tour of duty that results from being called out to work.

FOP position: Current language.

It is not recommended that this proposal of the City be adopted.

9.
ARTICLE VII
Pay Policy
Section 5

City position: Modify Section 5 as follows:

5. Members will receive hourly pay for actual time worked with a minimum of ~~two (2)~~ **one (1)** hour's pay for any mandatory job assignment scheduled outside the member's normal work hours including but not limited to staff meetings, training, firearms qualifications and BAC proficiency testing. If the assignment begins during the member's regular scheduled shift or begins at the conclusion of the shift, the member shall not be eligible for this premium pay.

FOP position: Current language.

It is not recommended that this proposal of the City be adopted.

10.
ARTICLE VII
Pay Policy
Section 6

City position: Delete Section 6 from the Labor Contract:

- ~~6. Payment under paragraphs (3), (4), (5), and (11) of this Section will be paid at one and one-half times the employee's regular rate of pay.~~

FOP position: Current language.

It is not recommended that this proposal of the City be adopted.

11.
ARTICLE VII
Pay Policy
Section 8

City position: Current language.

FOP position: Modify Section 8 as follows:

7. ~~In December of each year, m~~Members of the Division of Police shall have the option, **once per month**, to request the exchange of up to three (3) holidays ~~annually earned, but not taken, for their equivalent in salary pay at the member's current hourly rate.~~ Officers who **are within three (3) years of becoming** become eligible for the DROP program shall have a one-time option to **declare a period of three (3) consecutive years in each of which years they can** exchange up to an additional ~~nine (9) twelve (12)~~ holidays for their equivalent in salary in December of ~~the first each~~ year such number is **within three (3) years of being** eligible for DROP. All holiday exchanges are subject to the following conditions:
- ~~1. Approval must be given by the Chief of Police and City Manager; and~~
 - ~~2. There are unused funds available in the Division of Police Salary Budget for payment. In the event unused funds are not available to meet all requests for holiday exchange, preference will be given to DROP-eligible members and the distribution of such exchanges shall be at the discretion of the Chief of Police.~~

It is not recommended that this proposal of the FOP be adopted.

12.
ARTICLE VII
Pay Policy
Section 11

City position: Delete Section 11 as follows:

~~11. When a member is involved in an off duty incident requiring the use of his official police powers, and when said police officer is not engaged in employment for any other concern, the police officer shall be paid a minimum of three (3) hours pay for the off duty incident. Proper documentation in the form of a report of the incident must be filed in the Division of Police prior to payment.~~

FOP position: Current language.

It is not recommended that this proposal of the City be adopted.

13.
ARTICLE VII
WAGES
New Section K

City position: Current language.

FOP position: Add a new provision, Section K, "Pension Pickup," which provides as follows:

K. Pension Pickup

That portion of the member's contribution to the Ohio Police and Fire Pension Fund, the Police and Firemen's Disability and Pension Fund of Ohio, or as known by any other name (herein referred to as the "Fund") shall be picked up (assumed and paid) on behalf of the member and, in lieu of payment by the member, by the City of Middletown, as follows:

- A. Effective November 1, 2006, the member's contribution to the Fund shall be (nine) 9% (i.e.; the City pickups the remaining portion of the employee's required contribution, as well as the City's required contribution).**

The provisions of this Section shall apply uniformly to all members and no member shall have the option to elect a wage increase or other benefit in lieu of the payment provided for herein. The City shall, in reporting and making remittances to the Fund, report that each member's contribution has been made as provided by statute.

For purposes of computing the member's earnings, or basis of the member's contribution to the Fund, the amount paid by the City on behalf of the member as a portion of the member's statutory obligation, is intended to be and shall be considered as having been paid by the member in fulfillment of the member's statutory obligation.

It is recommended that due to the present financial circumstances in which the City finds itself, a pension pickup is not recommended.

14.
ARTICLE VII
Uniforms
Section G

City position: Current language.

FOP position: Proposes an adjustment in the uniform allowance.

It is not recommended that there be a change in the uniform allowance.

15.
ARTICLE VII
Shift Differential
Section C

City position: Current language.

FOP position: Seeks an adjustment regarding shift differential.

It is not recommended that the FOP's proposed adjustment to this provision be adopted.

William C. Heekin
June 29, 2007
Cincinnati, Ohio