

2007 DEC -3 P 1:10

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

November 22, 2007

FRATERNAL ORDER OF POLICE/
OHIO LABOR COUNCIL

CASE # 07-MED-05-0590

and

CITY OF EAST CLEVELAND

FACT FINDING REPORT

APPEARANCES

For the Union

Otto J. Holm, Jr., Staff Representative
Scott Gardner, Union Representative
John Bechtel, Union Representative

For the City

Almeta Johnson, Law Director
Kenneth Adams, Deputy Safety Director
Ralph Spotz, Chief
Frances Paster, Human Resources

ROBERT M. LUSTIG
Fact Finder
615 Leader Building
526 Superior Avenue, E.
Cleveland, Ohio 44114-1964

Introduction

This fact finding involves the full-time patrol officers of the East Cleveland Police Department represented by the Fraternal Order of Police/Ohio Labor Council ("FOP") and the City of East Cleveland (the "City"). The previous Collective Bargaining Agreement ("CBA") between the Ohio Patrolmen's Benevolent Association ("OPBA") and the City expired December 31, 2006. The OPBA was decertified and the FOP recognized as the Union for this bargaining unit by SERB March 22, 2007. (SERB Case No. 06-REP-10-0137)

The undersigned was duly appointed Fact Finder. The fact finding hearing was set, pursuant to demand, for November 7, 2007. The hearing commenced at 10:00 AM and was adjourned at 5:00 PM. A second day of hearing was held on November 9, 2007 commencing at 10:00 AM. The hearing was closed at 4:45 PM.

Both sides presented such evidence as they desired. All testimony and documents were received without objection from the other party. This includes the position statements of both parties. This hearing was unusual in that there was no CBA. The parties were starting, literally, with a blank page. Initially, the parties also started from completely different positions. There was no agreement even as to the time frame that was under discussion.

Both parties recognized the need to get on the same page and worked to do so. The Union offered a full blown contract modeled on the CBA the City has with FOP for the Sergeants and above. The City worked hard on the contract on the day between fact finding sessions and presented detailed responses to each article proposed by the Union. As will become apparent, the parties reached agreement on about 80% of contract.

Attached to this report is a complete CBA. For ease in drafting, the Fact Finder utilized the Union's draft proposal which was provided to him via email. In this Report, where an Article states "Agreed as attached", the language in the CBA is the Union's proposed language with all the changes, edits, corrections and revisions that were discussed and agreed to during the fact finding hearing. Where the parties failed to reach agreement, the language is the Fact Finder's recommendation which is drawn from the proposals of the parties.

Both parties are to be complimented on the efforts made which have brought them close to a final agreement.

For convenience, references to the new CBA for the patrol officers may be referred to as the "Blue Contract". References to the CBA with the police with the rank of Sergeant and above may be referred to as the "Gold Contract".

In considering the recommendations made in this report, the Fact Finder applied the criteria set forth in Ohio Administrative Code ("OAC") Section 4117-9-05 which 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.

Facts

The parties have no agreement for 2007. Wages and terms and conditions of employment for 2007 will remain as they were for 2006 under the OPBA Agreement. The parties agree wages for 2008 will be retroactive to January 1, 2008 under the new CBA with the FOP.

As to economic issues, the City asserts an inability to pay as a basis for any of the economic issues and asserts that its positions are based on sound, conservative financial management of the City's finances. The City's poor financial condition is well known.

Cover Page/Index

A cover page and a Table of Contents are provided for the CBA.

Article 1 **Agreement/ Purpose**

Agreed as attached.

Note: Where the parties agreed to an Article or to sections within the Article, that language is reproduced only in the attached Agreement.

Article 2 **Conflict with Law and Separability**

The parties agreed to the second and third sentences of Section 2.1 and Section 2.2.

The language in dispute is:

The parties intend this Agreement to supercede and replace any state and local laws on the subjects covered by this Agreement.

Union Position

This is a normal part of any CBA and is authorized by law.

City Position

City officials take an oath of office to uphold the Constitution, laws of Ohio and ordinances of the City. In accord with their oaths, they cannot agree that a CBA supercedes the ordinances.

Discussion

Ohio Revised Code Section 4117.10(A) states:

An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs wages, hours and terms and conditions of public employment covered by this agreement.

This statute goes on to list a number of exceptions where the CBA does not have control over other laws such as civil rights, unemployment and workers' compensation, all of which are immaterial to the issue raised by the City.

The law is clear. The CBA controls. As this is the law of Ohio, a city official does not violate their oath by agreeing to this clause. An example of the application of this statute is found in the case of *Ste Marie v. City of Dayton* (S.D. Ohio 2000) 109 F. Supp2d 846. In that case the city charter provided for a six month probationary period for police officers but the CBA specified a nine month probationary period. The officer was discharged in his eighth month without a hearing. The Federal District Judge held the discharge was proper as the longer nine

month probationary period set forth in the CBA controlled over the shorter period set forth in the city charter.

Recommendation

Adopt the first sentence of Section 2.1.

Article 3
Recognition

Agreed as attached.

Article 4
FOP Security

Agreed except Section 4.5 which was to be (and has been) clarified by the Fact Finder.

Article 5
FOP Representation

Agreed as attached.

Article 6
Non-Discrimination

Agreed as attached.

Article 7
Management Rights

Agreed as attached.

Article 8
Rights of Bargaining Unit Members

Union Position

It needs a detailed specification of members rights. A City policy that may be unilaterally changed is not sufficient.

City Position

The City has been mismanaged for years. The current administration has been in office less than two years. It is working to clean up the mess created by years of mismanagement. It needs the flexibility of working with a clean slate and as this is a new bargaining unit; this, in the City's view, is not a mandatory subject for bargaining. The City offers to recognize bargaining unit members rights under ORC 4117.03 and nothing more.

Discussion

The City wants virtual complete freedom in dealing with the members of the bargaining unit. However, even under ORC 4117.03, members have the right to “Bargain collectively . . . to determine wages, hours, terms and other conditions of employment. . .”. ORC 4117.03(A)(4).

Similarly, under ORC 4117.08(A), “All matters pertaining to wages, hours, terms and other conditions of employment. . . are subject to collective bargaining. . .”.

In the view of this Fact Finder, employee rights are a mandatory subject for bargaining. Further, though there is no contract between these parties, under OAC Section 4117-9-05(1) the Fact Finder is required to consider “past collectively bargained agreements”. The existing FOP Gold Contract and the former agreement with the OPBA both contain an employee rights clause. Further, such clauses are common.

Also, while the current city administration appears to be thoughtful and well-intentioned, elections do occur every fourth year. While one hopes for good government, there is no assurance what the next election may bring.

Recommendation

The attached language is based, in part, on the Union's requested language with substantial changes including deletion of the Union's redlined language in 8.2, complete deletion of 8.3(3), edits and deletions in 8.5, 8.7, 8.10, 8.11, and complete deletion of 8.13 and 8.17.

Many of these edits and deletions are recommended because the language either duplicates or conflicts with other language or other provisions.

Article 9
Discipline

Union Position

Same as under Article 8.

City Position

Same as under Article 8.

Discussion

Same as under Article 8.

Recommendation

The Fact Finder has drafted a Discipline Article.

The detailed policy on Discipline which the Union sought has not been included.

Article 10
Grievance Procedure

Agreed as attached.

Article 11
Labor Management and Safety Committee

Agreed as attached.

Article 12
Communicable Diseases

Union Position

Desires a detailed provision with firm time lines for notification, responses and treatment relating to being exposed to communicable diseases.

City Position

This whole area should be dealt with by a policy outside the CBA.

Discussion

The Union position as expressed in its proposal does not appear workable. The first sentence of the Union's 12 subsection proposal requires that members will be provided with "information on all communicable diseases to which he may have routine workplace exposure." This can be anything from the common cold to ebola.

The proposal demands that the health care facility give information about a patient to the member. HIPPA would prohibit giving any patient information.

Recommendation

The City should develop a policy.

Article 13
Seniority

The parties agreed to Sections 13.1 - 13.4.

Union Position

Section 13.5 requires the City to post the seniority list once every six months. The City has the records. This is not a burden and keeps the members informed.

City Position

Posting the list is an undue burden.

Discussion

The list exists now. The information is in the City's hands. Posting the list twice yearly allows members to see where they stand in seniority and allows the opportunity to correct errors in the list.

Recommendation

Adopt Section 13.5 as attached.

Article 14
Layoff and Recall

Union Position

The Union's proposal follows the commonly accepted practice of basing layoff and recall on the basis of seniority.

City Position

Seniority should not be the basis of layoff and recall. The City wants to use the best person, not simply the most or least senior.

Discussion

The language of the two proposals is the same except the City uses "may" where the Union uses "shall". The City's proposal would make seniority meaningless. This is totally contrary to accepted labor contracting norms.

Recommendation

As set forth in Article 14 attached.

Article 15
Personnel Files

The parties agreed to Section 15.1 and 15.2.

Union Position

As to Section 15.3, the personnel records have been physically kept in the police department. That is where they should stay. The Union fears unauthorized access to their personnel records.

As to Section 15.4, the parties agreed to the first sentence which deletes warnings and reprimands after 12 months. The Union advocates deletion of more severe discipline after 18 months.

City Position

As to Section 15.3, the City is trying to be efficient and economical by establishing a central repository for all personnel files in the Human Resources Department. Clerks in that department are trained and will receive additional instruction to educate them to the particular rules governing personnel files of safety forces.

As to Section 15.4, if there has been a matter that resulted in a suspension, it should remain in the personnel file.

Discussion

The City's position on centralizing personnel files is reasonable.

Indefinite retention of all suspensions in the personnel file despite a reasonable period of good behavior is not reasonable and is contrary to commonly accepted practice.

Recommendation

Personnel files may be kept in the Human Resources Department.

Suspension should be of no effect after a reasonable period of time.

See attached Article 15.

Article 16
Outside Employment

Union Position

A detailed set of criteria pursuant to which the Chief may allow a member to accept outside employment.

City Position

This should be handled by a policy to be developed by the City.

Discussion

In this and the next two articles, the City asserts that, as these are not mandatory subjects for bargaining and as there is no existing contract between the City and this bargaining unit, it does not have to negotiate contract terms regarding the subject of this and the following two articles.

In the view of the Fact Finder, the City is misreading the statute. As previously cited, in relevant part, ORC 4117.08(A) reads:

All matters pertaining to wages, hours or terms or other conditions of employment. . . are subject to collective bargaining.
(Emphasis added)

Further, as previously cited, OAC Section 4117-9-05(1) requires consideration of “past collectively bargained agreements”.

Whether a member can take an outside job is a “term or other condition of employment”. This is a proper subject for bargaining.

The Union's proposal appears reasonable to both parties.

Recommendation

Adopt attached Article 16. Note change from the Union's proposal of the word "Employer" to "City" in Section 16.1(e) and in the last paragraph.

Article 17
Probationary/Promotional Periods

The parties disagreed on this article for the same reasons set forth above.

Recommendation

Adopt attached Article 17. Note changes in Section 17.1 from Union's proposal.

Article 18
Drug/Alcohol Testing

The parties disagreed on this article for the same reasons discussed under Article 16.

Discussion

The City wants to deal with this subject through its Drug Free Workplace Policy of January 2007. The problem with policies is that they may be changed unilaterally.

The prior contract with the OPBA contained a detailed provision on this subject. Such provisions are common in collective bargaining agreements.

Recommendation

Adopt attached Article 18.

Article 19
Overtime Compensation/Duty Hours

The parties agreed to all the language in the attached Article 19 except Section 19.2. The City wished to omit Section 19.2.

Recommendation

It is the recommendation of this Fact Finder that Section 19.2 be retained.

Article 20
Sick Leave

Agreed as attached.

Article 21
On-Duty Injury Leave

Attached Article 21 was agreed except the City requested Section 21.4 be amended so that approval must be obtained from the Chief and the Mayor. That seems redundant. The Chief is unlikely to give an approval to which the Mayor objects.

Recommendation

Adopt Article 21 as attached.

Article 22
Leaves of Absence

Agreed as attached.

Article 23
Vacations

Agreed as attached.

Article 24
Holidays/Personal Days

Agreed as attached.

Article 25
Clothing Allowance

After much negotiation with several proposals and counterproposals, the parties agreed to an allowance for clothing (new, cleaning, and repair), shoes and weapon maintenance of \$1,025

per year. Receipts to be submitted and reimbursed quarterly provided the receipts were submitted at least 30 days prior to the beginning of the quarter.

Leather goods and bullet proof vests, now numbered Section 25.3 and 25.4, were agreed.

See attached Article 25.

Article 26

Wages

After much negotiation, the parties agreed to no changes in wages for 2007 from 2006.

Wages for 2008 are agreed.

The parties agreed to wage reopeners for 2009 and 2010.

See attached Article 26.

Article 27

Shooting and/or Training Time

The parties agreed to Section 27.1.

Union Position

On Section 27.2, the Union requested a 2% bonus for qualification with their weapon.

The Sergeants received this 2% bonus for 2007.

As to Section 27.3, this is a benefit in the OPBA contract.

City Position

The 2% bonus to the Sergeants was a one time payment in exchange for a one year contract. Officers have to qualify with their weapons in order to maintain their status as a police officer.

As to the Training Allowance, the \$500 a year is acceptable but the 1½ hours comp time is excessive and unwarranted.

Discussion

In this instance, the City's position appears reasonable.

Recommendation

Article 27 as attached.

Article 28
Longevity

This article was agreed.

Article 29
Stand-By/On-Call Status

This article was agreed.

Article 30
Health, Dental and Life Insurance

Union Position

The Union wants the plan that was in effect prior to the present plan. It has filed a ULP over the City's unilateral switch to a new plan, which is a Kaiser plan. Certain members have incurred substantial out-of-pocket expenses they would not have incurred under the old plan.

City Position

The City is and has been in financial emergency. It needed to reduce expenses wherever possible.

It engaged an outside consultant who recommended the switch to Kaiser. That consultant, Tyrone McGuinea of the Pinkney Perry Agency, testified that he shopped the market. Aetna, Anthem and Qual Choice declined to bid. Only Medical Mutual, which was providing coverage, and Kaiser bid. Medical Mutual declined to offer a choice between itself and Kaiser as, with a relatively small group, it feared adverse selection as its benefits were higher.

Under the Medical Mutual Plan, employees who took the higher level of coverage paid about 16% of the premium. This amounted to \$147.50 per month for family coverage. Under the Kaiser PPO, employees pay \$55.82 for family coverage, which is 6% of the premium. This is a savings of about \$1,100 per year per employee in the employee's share of the premium. This is offset, in some cases, by co-pays and in that some doctors and some facilities may not be covered by Kaiser.

All non-safety forces have been under Kaiser since January 1, 2005. Police and fire came under Kaiser effective January 1, 2007. That move resulted in a reduction in the City's expense for health care insurance of about \$90,000.

Discussion

The firefighters took this issue to arbitration where the City's action in moving Kaiser was upheld. All non-safety force employees are and have been under the Kaiser plan.

Anytime there is a change in carrier, some employees will benefit and some will find their health care costs increased.

On the whole, it appears the benefits under the Kaiser plan are comparable to those available under the former plan.

Further, the Fact Finder is required to consider the economic impact on the City. OAC Section 4117-9-05(3).

Recommendation

See Article 30 attached, which, essentially, is the City's proposal

Article 31 **Liability Coverage**

Agreed.

Article 32
Educational and Other Benefits

Agreed.

Article 33
Miscellaneous

Agreed except as to Section 33.3.

Union Position

Residing in the City should not be a condition of employment. This provision was in the previous contract with the OPBA. A trial court and a court of appeals have already ruled city charter residency requirements are unconstitutional.

City Position

The City Charter requires residence in the City. That is the local law which the City's officials are required to uphold.

Waivers of this requirement have liberally been granted in the past and no present member would be affected.

Discussion

The question of whether a provision in a CBA controls over an ordinance or charter provision was discussed at Article 2.

Further, while the City asserts that the provision of the former contract with the OPBA should have no weight in this hearing, OAC Section 4117-9-05(1) requires the Fact Finder take "past collectively bargained agreements" into consideration.

Recommendation

Article 33 attached.

Article 34
Agreement Copies

Union Position

The Union wants the City to provide members with copies of the CBA.

City Position

The Union should provide its members with copies.

Discussion

Generally, CBAs are drafted by the City. How they are printed or produced is up to the City. It is common practice for the City to produce sufficient copies.

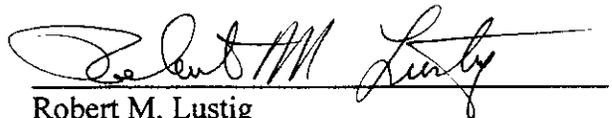
Recommendation

Article 34 is attached.

Article 35
Duration of Agreement

Agreed.

Finally, a signature page is attached so that the parties can view a complete draft Agreement.

A handwritten signature in black ink, appearing to read "Robert M. Lustig", is written over a horizontal line.

Robert M. Lustig
Cleveland, Ohio
November 30, 2007

CERTIFICATE OF SERVICE

A copy of the foregoing Fact Finding Report with the attached draft agreement was emailed November 28, 2007 and was sent by ordinary U.S. Mail, postage prepaid, November 30, 2007 to:

City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112
Attn: Almeta A. Johnson
Law Director
ajohnson@eastcleveland.org

FOP/OLCI
Attn: Otto J. Hom, Jr.
14918 Triskett
West Park, Ohio 44111
email c/o Scott Gardner
Scott@constantprotective.com


Robert M. Lustig

EMPLOYMENT
RELATIONS BOARD
2010-3 2 1:10

AGREEMENT

BETWEEN

THE CITY OF EAST CLEVELAND

AND

THE EAST CLEVELAND POLICE DEPARTMENT
FRATERNAL ORDER OF POLICE, LODGE NO. 39
OHIO LABOR COUNCIL, INC.
PATROL OFFICERS

(BLUE CONTRACT)

Effective January 1, 2008 through December 31, 2010

Article 3
RECOGNITION

Section 3.1. Under this Agreement, the Employer hereby recognizes the FOP/Ohio Labor Council, Inc., as the sole and exclusive bargaining agent for all employees listed below:

All regular sworn full-time Patrol Officers excluding the rank of
Sergeant and above.

Section 3.2. Said recognition is for the purpose of collective bargaining on any and all matters relating to wages, hours, terms and other conditions of employment for all members of the bargaining unit pursuant to the Ohio Public Employees Collective Bargaining Act.