

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD 2009 FEB 23 P 1:47

February 20, 2009

In the Matter of the Fact Finding Between

CITY OF STOW)	CASE NO. 07-MED-08-0797
)	
and)	FINDINGS
)	AND
OHIO PATROLMEN'S BENEVOLENT)	RECOMMENDATIONS
ASSOCIATION)	
)	

MELVIN E. FEINBERG, FACT FINDER

APPEARANCES

FOR THE EMPLOYER:

John A. Earle, Chief Labor Negotiator
City of Stow
Robin L. Bell, Esq., Regional Manager
Clemens, Nelson, & Associates, Inc.
Patrick J. Graham, Human Resources Director
City of Stow

FOR THE UNION:

S. Randall Weltman, Esq.
Attorney for the OPBA

SUBMISSION

This matter concerns the fact finding proceeding between The City of Stow (herein also referred to as Stow or the Employer) and the Ohio Benevolent Patrolmen's Association (herein also called the Union or the OPBA.) The State Employment Relations Board (herein also referred to as SERB), in accordance with the Ohio Revised Code Section 4117.4, duly appointed the Undersigned as Fact Finder in this matter by letter dated November 26, 2008. Pursuant to the Parties' mutual agreement regarding time extensions, this matter went to fact finding hearing on January 21, 2009. Prior to the hearing, in accordance with SERB rules, the Parties timely filed complete position statements with the Fact Finder. The proceedings were conducted pursuant to the Ohio Collective Bargaining law as well as the rules and regulations of SERB. Mediation was attempted but was unsuccessful. Thereafter, a hearing was conducted.

BACKGROUND

The Union is recognized as the exclusive bargaining representative of approximately fifteen (15) individuals employed in the following unit:

1. Full-time Dispatcher (see Article XVII for modification of dispatcher classification, effective January 1, 1994)
2. Full-time Communication Specialist/Dispatcher I (also generally referred to as dispatcher)
3. Full-time Communications Specialist/Dispatcher II (also generally referred to as dispatcher)
4. Full-time Communications Specialist/Dispatcher Coordinator¹

The Parties' most recent Collective Bargaining Agreement (herein also known as the Contract) was in effect from January 1, 2005, through December 31, 2007, and was by their mutual agreement extended thereafter, pending negotiations for a successor agreement. The Parties engaged in extensive and productive negotiations prior to the

¹ The Dispatcher Coordinator position is now a supervisory position and is no longer in the bargaining unit.

hearing and arrived at tentative agreements regarding all provisions of the newly proposed Collective Bargaining Agreement but one.

ISSUES AND CRITERIA

The only contractual issue which the Parties could not resolve was a provision on seniority, dealt within their 2005 – 2007 Contract under Article XXXIII Seniority. Both the Employer and the Union presented very different complete proposals regarding seniority and reached a total impasse on the adoption of any proposal on the matter. Consequently, seniority remains the only issue for the Fact Finder's consideration.

A full hearing was conducted in this case. The Parties both argued orally and presented witnesses who were subjected to complete examination.

The Fact Finder, in making his recommendations, has been guided by the Parties' oral and written presentations on the issues, by the testimony of the witnesses, by the evidence presented during the proceedings, including the exhibits in the record and the record as a whole, and by the following factors set forth in the following Ohio Revised Code provisions set forth in O.R.C. Section 4117.14(C) (4) (e) and (G)(7) (a)-(f) and O.A.C. Rule 4117-9-05(K):

1. Past collectively bargained agreements, if any, between the parties;
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 interests 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;
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 the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

THE EMPLOYER'S POSITION

In August, 2008 the City of Stow, pursuant to an agreement with the City of Tallmadge became responsible for all of Tallmadge's police, fire, EMS and general service dispatching. Pursuant to an agreement, Stow on August 29, 2008 hired five (5) Tallmadge dispatchers and integrated them into the bargaining unit with their own eleven (11) Stow dispatchers. The Dispatch Coordinator, who originally was but is no longer in the unit, supervises the dispatchers. While they were employed in the City of Tallmadge, the Tallmadge dispatchers were covered under a labor agreement with the Fraternal Order of Police. The former Tallmadge dispatchers should receive full seniority and service credit in Stow for all of their prior employment service in Tallmadge as if it were Stow service. The future collective bargaining agreement between the Parties should contain a provision which has that effect. The "merger and consolidation" of the two (2) dispatch staffs was accomplished in accordance with the Employer's management rights set forth in Article III, Section 3.02, Paragraph 11 of the 2005-2007 Contract.

The former Tallmadge dispatchers, who became part of the Stow dispatchers unit on August 29, 2008, are as competent, qualified and experienced as the Stow dispatchers and they have demonstrated that they are as deserving of this seniority credit for their experience as are the Stow dispatchers. They perform identical jobs and that without their experience the new dispatch center could not have been established and successfully operated.

Furthermore, if the Employer would not have agreed to hire and to protect the seniority of Tallmadge's former dispatchers, there would have been no agreement with Tallmadge to provide it with dispatch services. To lessen the impact of integrating

Tallmadge dispatchers with full seniority into the Stow unit, Tallmadge and Stow agreed that Tallmadge seniority would be applicable only on assignments for a single, newly-created Tallmadge seat and would not apply to the two existing Stow seats or a fourth seat if it were to be created. The new Tallmadge seat would not exist except for the merger of Tallmadge employees into the bargaining unit. Consequently, Stow dispatchers have no preferential claim to assignments on the Tallmadge designated seat to the exclusion of former Tallmadge dispatchers.

No argument "...would justify unequal, disparate treatment among employees in the same bargaining unit who have equal experience, the same qualifications and are performing the identical jobs side-by-side in the same workplace for the same employer."

The protection of the seniority of former Tallmadge dispatchers is in the best interests of the taxpayers and fosters regional cooperation.

The Employer proposes that Article XXXIII Seniority be altered to add the following new section, 33.04:

33.04 Effective August 29, 2008, for the purposes of this labor agreement, prior Tallmadge service (employment) time for the Tallmadge Dispatchers who became City of Stow employees on or about August 29, 2008 as a direct result of the merger of the Stow and Tallmadge Dispatch Departments on August 29, 2008 shall be equivalent in all respects to City of Stow service (employment) time. Such prior Tallmadge service (employment) time shall apply and be applied in the same equivalent manner as City of Stow service (employment) time to all employee compensation, benefit, seniority, economic and non-economic provisions of this agreement. Where City of Stow service (employment) time is referred to in any provision of this agreement, it shall be deemed to also refer to and include, equivalently, Tallmadge service (employment) time as described herein.

THE UNION'S POSITION

During 2007, the Parties engaged in negotiating a 2008-2010 successor Collective Bargaining Agreement. On December 4, 2007, the Employer entered into a Memorandum of Understanding with Tallmadge and Mogadore, which required it to provide dispatch services to them. Pursuant to that Memorandum, the Employer agreed to hire the five (5) full-time Tallmadge dispatchers and to recognize and credit them with "... seniority for their Tallmadge employment as if during this time they had been employed by Stow." Stow, over the objections of the Union, formally committed itself on May 27, 2008, to the Telecommunication Service Agreement with Tallmadge by which it agreed to credit Tallmadge dispatchers with all of their Tallmadge seniority for all contractual purposes as if they had always been Stow employees.

The Union objects to the Employer's commitment "... to provide brand-new employees with seniority greater than existing employees." Seniority is "... crucial to each member because it is the primary factor in determining vacation, holiday and shift preference." It also affects their ability to obtain prescheduled time off, such as vacations and holidays.

Initially, during negotiations, the OPBA was willing to have the Employer utilize the new employees' Tallmadge seniority for the purposes of computing their pay, their longevity, and allowing them the immediate use of vacation time. However, the Employer insisted that the new employees receive Tallmadge credited seniority for all contractual purposes. Consequently, the Union believes that the language of Article XXXIII Seniority, Section 33.01 should remain in the proposed new Contract as it does in the 2005-2007 Contract which reads as follows:

33.01 Seniority shall be all employees' length of service with the City subject to any modification referred to and identified in any article of this Agreement. Newly-hired covered employees shall have no seniority during their probationary period. However, upon completion of the probationary period of 180 days, seniority shall be computed from the last date of hire.

ANALYSIS AND FINDINGS

Seniority is an important benefit established in and protected by the Collective Bargaining Agreement. It is noted in Employment Discrimination Law:

“Seniority systems allocate employee rights and benefits in the workplace based on some measure of length of employment. The use of seniority is deeply rooted in the American workplace. Seniority often is used to determine who is promoted and who is laid off, and it commonly affects entitlements to benefits ranging from the length of vacation to the amount of an employee’s pension.”²

It was observed in How Arbitration Works that arbitrators “...generally hold that employees cannot be credited with seniority for any service performed prior to entry into the bargaining unit.”³ While the aforementioned observations are not controlling in this matter, they are instructive. The Employer's successful efforts in a time of economic uncertainty to "regionalize" dispatch services for Stow, Tallmadge and Mogadore in order to improve service at a financial advantage for all of those political entities are commendable.

The Memorandum of Agreement between those entities, executed December 4, 2007, and the Telecommunications Service Agreement executed May 27, 2008, required the Employer to provide dispatch services to Tallmadge and Mogadore at set fees. The Employer agreed with Tallmadge to hire Tallmadge dispatchers and to credit them with their full Tallmadge seniority as if they had been employed by Stow. There is no

² Barbara Lindemann and Paul Grossman; Editor-in-Chief C. Geoffrey Weirich, et.al, Vol. I, 4th ed, Washington, D.C.: BNA Books, 2007, p. 1180.

³ Elkouri & Elkouri, How Arbitration Works, 6th ed., 2003, p. 627.

evidence that the Employer bargained with the OPBA over this seniority issue, although its 2005-2007 Contract with the Union was still in effect. It apparently did notify the OPBA of the Memorandum of Agreement and of the Telecommunications Service Agreement, but those Agreements appear to constitute a "fait accompli." The Employer asserts that since the Parties can withdraw from those Agreements by mutual consent, under certain circumstances, they are not final or irrevocable.

It would appear that there was no "merger" of bargaining units as the Employer argues. Stow hired Tallmadge's dispatchers and contracted to provide Tallmadge and Mogadore with dispatch services. No new joint employer bargaining unit was formed. Stow remained the Employer of all the dispatchers in the augmented, but intact, bargaining unit represented by the OPBA.

Under these circumstances, it was reasonable for the original bargaining unit dispatchers employed before August 29, 2008, and for their Union, to expect that the seniority rights and benefits of the original dispatchers in the unit would be protected and preserved in any new contract.

The testimony of the Union's witnesses dealt with the vagaries and complexities now encountered by them in working under a system where their original seniority dates – which had been by past practice taken into account – were no longer being followed in the same way in many cases. The original Stow unit employees' former seniority had previously, prior to August 29, 2008, dictated their benefits in the areas of shift preference, vacation preference and layoff protection. Those seniority protections would be diluted if the Employer's proposed new contract language is adopted. The positions of

the original Stow dispatchers on the seniority list were in many cases set lower due to the integration of the seniority, i.e. dovetailing, of the Tallmadge dispatchers into the unit.

I am not unmindful of the Employer's argument that the Tallmadge dispatchers brought experience and expertise to their jobs, and I am positively disposed toward the financial benefits and service improvement achieved by the political entities involved in this undertaking.

Nevertheless, as the Union's evidence reveals, other political entities of comparable size in the nearby geographic area – such as Twinsburg, Norton, Macedonia, Fairlawn, Copley, Barberton, and Tallmadge – have in the past and/or do now recognize the importance of various provisions protecting seniority of dispatchers in their employ, who, most likely, perform comparable duties to the dispatchers in this case. There is no greater financial burden imposed upon the Employer if it continued to honor the seniority of its original unit dispatchers over its newly hired Tallmadge dispatchers in accordance with the seniority provision contained in the 2004-2007 Contract.

During discussions and during testimony of the Union's witnesses, the Union gave some indication that it might again find acceptable a provision regarding seniority which accorded newly hired Tallmadge dispatchers with their Tallmadge accumulated seniority solely for certain contractual economic benefits. The Union and its witnesses expressed genuine concern for the economic welfare of the newly hired Tallmadge dispatchers, but still insisted that in all other contractual areas the seniority privileges of the original Stow bargaining unit employees deserve protection.

RECOMMENDATIONS

I conclude that the Union's general position, with modifications, whereby it seeks to protect the seniority status of all of the original bargaining unit dispatchers employed before August 29, 2008, to be the preferable position in this case.

The Employer's proposal to credit the former Tallmadge dispatchers employed on August 29, 2008, with their former Tallmadge seniority and to make that seniority equivalent in all respects and for all purposes to Stow service time is unreasonable. That proposal undermines the seniority benefits of the original unit of Stow dispatchers. Moreover, since the Employer has expressed an interest in seeking to perform dispatching duties for other additional nearby communities, adopting its approach to seniority might set a future destabilizing precedent for seniority benefits accorded to all current dispatcher unit employees.

I recommend that the language of Article XXXIII Seniority, 33.01 be left unchanged, but that Section 33.04 be added and should read as follows:

33.04 (a) Effective August 29, 2008, for the purposes of this labor agreement, prior Tallmadge service (employment) time for Tallmadge dispatchers who were newly hired by Stow on or about August 29, 2008, shall only be recognized and applied for the purposes of computing the following economic benefits and for no other contractual purpose:

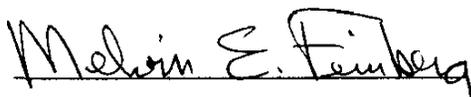
1. Wages and Wage/Compensation Schedule
2. Longevity Pay
3. Vacation Leave Entitlement, including Length of Service Adjustments and Vacation Payment, but not for Vacation Scheduling
4. Sick Leave Pay

(b) Former Tallmadge dispatchers, who were hired by Stow on August 29, 2008, shall be exempt from the probationary period requirement of 180 days set forth in Article XXIII, 33.01. Their seniority, except for the purposes set forth in 33.04(a), shall be computed from the day they were hired by Stow.

CONCLUSION

In conclusion, this Fact Finder hereby submits the above recommendations on the outstanding issue presented and further incorporates by reference into those recommendations all adopted tentative agreements reached by the Parties, along with any sections of the current Contract not changed, all of which should be included in the resulting Collective Bargaining Agreement.

Respectfully submitted and issued at Richmond Heights, Cuyahoga County, Ohio,
this 20th day of February 2009.


Melvin E. Feinberg, Fact Finder

CERTIFICATE OF SERVICE

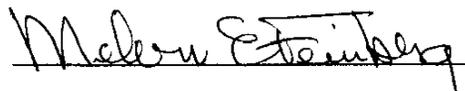
The undersigned hereby certifies that a true copy of the foregoing Fact Finder's Report and Recommendations in SERB Case No. 07-MED-08-0797 on February 20, 2009, and was served by facsimile transmission and overnight mail upon The City of Stow and The Ohio Patrolmen's Benevolent Association and by regular mail on the State Employment Relations Board. Copies were served upon the following:

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February 20, 2009

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Re: SERB Case No. 07-MED-08-0797
Findings and Recommendations
Hearing Date: January 21, 2009

Mr. Turner:

Enclosed please find a copy of my Findings and Recommendations in the above case.

Sincerely,


Melvin E. Feinberg, Fact Finder

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STATE EMPLOYMENT
RELATIONS BOARD