

EMPLOYMENT
RELATIONS BOARD

2009 FEB 19 P 1:47

IN THE MATTER OF FACT FINDING

BETWEEN

THE CITY OF MARION

AND

THE FRATERNAL ORDER OF POLICE, OLC

SERB CASE # 08-MED-03-0241 (Supervisors)

ADVOCATE FOR THE CITY:

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ADVOCATE FOR THE UNION:

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INTRODUCTION

The bargaining unit is represented by the Fraternal Order of Police, OLC. (Hereinafter "Union" or "FOP") and the Employer is the City of Marion (hereinafter "Employer" or "City"). The bargaining unit is comprised of approximately sixteen (16) employees who are responsible for first and second line supervision in the City of Marion Police Department. The previous contract between the parties expired June 30, 2008. The parties held multiple negotiation sessions and reached tentative agreement on all outstanding issues at one point. However, the tentative agreement was not ratified by the parties, which led to subsequent mediation and the issuance of this fact finding award. The fact that the parties reached tentative agreement and the circumstances surrounding the ultimate rejection of same were dominate subjects of discussion throughout the mediation phase of fact finding, as was the tentative agreement reached by the Communications Officers and Community Service Technician bargaining unit and the previous fact finding award concerning the patrol officers bargaining unit in SERB Case No. 08-MED-02-0243. A mediation/fact-finding hearing was held on February 6, 2009 over the issues addressed in this report.

Prior to a formal submission of evidence, the fact-finder made a concerted effort to reconcile the differences between the parties over

the unresolved issues. Settlement possibilities were explored with the parties in an effort to find common ground upon which to construct a settlement. The parties were able to reach a tentative agreement on a few issues, but the majority of the unresolved items were presented at the hearing that followed mediation efforts. Both Advocates represented their respective parties well and clearly articulated the position of their clients on the issues in dispute.

CRITERIA

OHIO REVISED CODE

In the finding of fact, the Ohio Revised Code, Section 4117.14 (C) (4) (E) establishes the criteria to be considered for fact-finders. For the purposes of review, the criteria are as follows:

1. Past collective bargaining agreements
2. Comparisons
3. The interest and welfare of the public and the ability of the employer to finance the settlement.
4. The lawful authority of the employer
5. Any stipulations of the parties
6. Any other factors not itemized above, which are normally or traditionally used in disputes of this nature.

These criteria are limited in their utility, given the lack of statutory direction in assigning each relative weight. Nevertheless, they provide the basis upon which the following recommendations are made:

OVERALL RATIONALE FOR RECOMMENDATIONS

In recent months the state of the economy has become almost a daily topic of conversation. Ohio's economy remains uncertain at best, as does the financial outlook for many Ohio public employers. Recently, the Governor outlined the considerable magnitude of Ohio's revenue shortfall both in the current and next biennium budgets, and the necessity of having to take decisive action to reduce costs in order to balance the state's budget. This cost cutting will likely result in layoffs of state employees. Adding to these issues is the overall impact of a national economy in prolonged recession with little certainty of its length or breadth. Recently, the national unemployment rate reached 7.6% (with a loss of approximately 598,000 jobs nationally in the month of January alone. By way of comparison, one year ago, January of 2008 the unemployment rate was 4.9%. Locally, matters are even worse with the unemployment rate in Marion County at approximately 10%. Approximately 225,000 Ohio jobs, many of which were high paying manufacturing jobs, have been lost during the past ten years. A large number of these jobs were lost to outsourcing. Moreover, the woes of the domestic auto industry and its potential direct and secondary ripple effect on jobs in Ohio looms as the auto industry seeks congressional loan

relief. Compounding the problem of job losses is the recent credit crunch and its impact upon housing values.

However, the overall extent to which these serious financial conditions impact the City of Marion was not very clear as of the previous fact-finding with the FOP Patrol Unit. Various public entities in the state are fairing differently, and at that time, the City voiced serious concerns about its ability afford both wages increases and a continued large contribution to health care over the term of the Collective Bargaining Agreement. This concern was contradicted by the Union at that time, who submitted August 2008 affidavits from City's Auditor and Deputy Auditor, both of whom assert the City could afford the wage and health care provisions contained in the original tentative agreement reached in June of 2008.

Yet, to ignore the very real economic jitters that employees and employers are having during these times is to ignore the elephant in the room. The economic outlook in August of 2008 is a distant memory from the events occupying the national scene since September of 2008. The recent rancor over the stimulus package in Washington and political infighting over how the stimulus is to be parceled out, how much will be available, and whether or not it will have the desired effect serves to remind us all of the uncertainty that is abound in these hard times. Additionally, as opposed to the unrealistic, politically motivated

representations of elected financial officials, the reality is that the City of Marion had to spend virtually its entire surplus to merely balance its 2009 budget. With a substantial number of well paying state jobs slated for elimination, it is hard to imagine that anything less than restraint must be exercised in any future negotiations with other City bargaining units. Accordingly, the following recommendation is made with respect to the open issues between the parties:

Issue 1 Article 9, Layoff and Recall/Probationary Period
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Employer's Position

The Employer proposes that current contract language be retained, as was awarded in the patrol fact finding, so that the City continue to have the ability to manage a reduction in force, should the need occur, and ensure that it can keep as many patrol officers on the street in a layoff situation.

Union's Position

The Union asserts it agreed to changes based upon the Employer's initial demands and that it and the Employer were initially satisfied with these changes as evidenced by the tentative agreement reached by the parties. The changes initially sought by Employer involved bumping and according to the Union the parties addressed the issue in the original tentative agreement.

Discussion

In order to maintain internal consistency, it is reasonable that these units have language that mirrors one another. Without this, the language would be at odds with itself, and would create a situation where the interest of the public, allowing the public employer to maintain the greatest number of officers on the street, would be compromised. The Employer's position is awarded.

Determination

Maintain current contract language.

Section 9.3 Layoff

The City shall determine in which classifications layoffs will occur and layoffs of bargaining unit employees will be by classification. Employees shall be laid off within each classification in order of seniority, beginning with the least senior and progressing to the most senior up to the number of employees that are to be laid off. In the event two (2) or more employees began work on the same day, their respective appointment times shall determine seniority listing. Bargaining unit members in Unit A will have the right to bump into the lower ranking Unit B, if their seniority qualifies.

Issue 2 Article 16, Section 10 Compensatory Time Bank

Union's Position

The Union has proposed that the language from the parties' previous tentative agreement be adopted.

Employer's Position

The City's position in this matter is that the parties' previous tentative agreement be incorporated into the Agreement, as was recommended with the FOP Patrol Unit.

Discussion

Since the parties have both agreed to the language for this issue, it is recommended for the new agreement as set forth below.

Determination

Section 16.10 Compensatory Time Bank

Employees, at their option, may accumulate up to four hundred and eighty (480) hours of compensatory time. Time will accumulate at the rate of one and one-half (1 1/2) hours for each hour worked. Upon separation from service for any reason, members shall be paid at their current rate of pay (per Article 17 Section 17.1) for all accumulated hours of time. When a member dies while in paid status in the City Service, any unused compensatory time to the member's credit shall be paid in a lump sum to the surviving spouse or the estate of the deceased.

On July 1st of each year, employees may transfer up to forty (40) hours of compensatory time to either the vacation or holiday time bank.

Issues: 3	Article 19.1 Holidays
Issues: 4	Article 19.2 Holidays Worked

Union's Position

The Union's position is that the tentative agreement increased the amount of holiday time to 10.5 hrs, and should be recommended since they are now working 10.5 hr shifts, up from 8.5 hr shifts. The Union also seeks the same language as granted to the patrol unit, which would provide a nominal amount of compensatory time to a member that works on a designated holiday when City Hall is closed.

Employer's Position

The Employer asserts that the change from a work week of five eight and one-half hour days to four ten and one-half hour shifts did not increase the annual hours of work for bargaining unit employees. The Employer further asserts that the net effect of additional holiday pay and personal days is an additional staggering cost over the life of the agreement. Based on 16 members this is approximately 552 hours of additional compensation, an additional .25% per member. The Employer also opposes adding holiday time not designated in the Agreement.

Discussion

For the reasons having to do with internal parity among police department bargaining units, the recommendation is that current contract language be maintained for Section 19.1 and the same language as was awarded to the FOP Patrol unit be awarded for Section 19.2

Determination

Section 19.1 Designated Days

The following holidays shall be granted to each employee, in Holiday time of eight and one-half (8.5) hours for each listed holiday.

New Year's Day	January 1st
Easter Sunday	
Memorial Day	Last Monday in May
Independence Day	July 4th
Labor Day	1st Monday in September
Thanksgiving Day	4th Thursday in November
Christmas Day	December 25th

Each employee shall be credited with forty two and one-half (42.5) hours of personal time each year. Holiday time and personal time in this Section shall accrue at the rate of 3.92 hours per bi-weekly pay period.

Section 19.2 Holidays Worked

Should any employee be required to work on a holiday, in addition to the holiday time in Section 19.1, the employee shall be paid at a rate of one and one-half (1 1/2) their normal hourly rate if the holiday is normally a scheduled work day. However, the employee may take compensatory time for holiday hours worked as follows: the Employee would accrue five and one-half (5½) hours of compensatory time for each eleven hour holiday worked. Overtime worked on a holiday shall be two times (2x) the employee's regular rate

Should an employee be required to work on a holiday when City Hall is closed but it is not a designated holiday recognized in this agreement, the member will receive 3.33 hours of compensatory overtime.

Union's Position

The Union has proposed the language that was present in the previous tentative agreement, and basis its positions on the same rationale and evidence used in the previous fact-finding for the FOP Patrol Unit.

Employer's Position

The Employer has proposed that this unit accept the same insurance terms as were awarded to the FOP Patrol Bargaining Unit. It supports this position with the information that it submitted previously in the FOP Patrol proceeding and the added argument of internal parity with the terms that were recommended and incorporated into the patrol bargaining unit.

Discussion

Based on the rationale expressed in the FOP Patrol Fact Finding report, issued previously, and the need to treat this unit in a fair and consistent fashion with that same recommendation, the following language is recommended.

Determination

**ARTICLE 21
HEALTH, LIFE, DENTAL, DRUG INSURANCE**

Section 21.1 Insurance

Effective July 1, 2009, the Employer shall pay eighty-five percent (85%) of the insurance premiums and the Employee shall pay fifteen percent (15%) with a per pay cap of \$75 for calendar year 2009, a \$85 per pay cap for 2010, and a \$95 per pay cap for 2011.

Section 21.2 HSA Payments/Contributions

Beginning 1-1-09, HSA payments will be made by the City quarterly. However, if the member's medical expenses are such that additional payments into the HSA fund are needed, the Auditor will be provided an

explanation of the benefits and the additional funds will be placed into the member's HSA account. Effective 1-1-09, the employees shall pay the current rate of contribution into the HSA fund and the City's current contributions into the HSA fund shall not decrease.

Effective January 1, 2010, the employees shall increase their contribution into the HSA fund by an additional \$3.75 per pay for single coverage and an additional \$7.50 per pay for family coverage, with the Employer's annual HSA contribution for 2010 being reduced accordingly.

Effective January 1, 2011, the employees shall increase their contribution into the HSA fund by an additional \$5.00 per pay for single coverage and an additional \$10.00 per pay for family coverage, with the Employer's annual HSA contribution for 2011 being reduced accordingly.

Section 21.3 Insurance Opt-out

Effective July 1, 2002, an employee who "opts-out" of the City provided health insurance plan shall receive one hundred dollars (\$100.00) per month. Such employee must provide proof of insurance coverage from an insurance plan not funded by the City of Marion.

Section 21.4 Insurance Committee

During the life of this Agreement, the City shall continue to use of the function of the "insurance committee." The "Insurance Committee" will be responsible for fulfilling its mission to "determine the insurance benefits provided by the City to all employees, subject to the approval of City Council, and to maintain reasonable control over health care costs.

Section 21.5 Life Insurance

The City shall provide coverage at a minimum of twenty thousand (\$20,000) with a forty thousand dollar (\$40,000) Accidental Death and Dismemberment limit.

Issue 6	Article 17, Wages, Longevity, & Rank Differential
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Union's Position

The Union points out that according to the Commission for Law Enforcement Accreditation the City of Marion has one of the top five police departments in the state of Ohio. In addition, the Union asserts that early in the negotiations process the City Auditor and Deputy Auditor

gave estimates indicating it could afford wage increases and increase in rank differential included in the eventual tentative agreement reached by the parties in June of 2008. This mirrors the argument that was raised by the FOP Patrol Bargaining Unit.

Employer's Position

The City's position in this matter is closely tied to its health care costs, pattern bargaining, and the reality that time has demonstrated that the unsupported projections of an illusory economic recovery have been tested since espoused and found wanting.

The City argues that upon closer examination by its bargaining team, an agreement that would reflect the terms of the tentative agreement reached in June of 2008 would not merely place the City in a very difficult financial position; it would instead be a financial catastrophe. As previously stated this conclusion was at odds with the previously provided affidavits of the City Auditor and Deputy Auditor. Major components of the tentative agreement were a six percent wage increase in the first year of the Agreement (which effectively occurred because of the manner that the rank differential operates), a wage scale compression and substantial changes in the longevity system.

The City avers to the assessment that it has the ability to pay such a package by pointing out the way in which City reserves had to be completely depleted to balance its 2009 budget and the upcoming loss of more state jobs within the community. The City asserts that this unit must be kept in line with what has been issued for other police department units, and if any deviation in the rank differential is recommended, there must be an appropriate bargained for exchange beyond what the patrol unit gave up. The City reminds the fact finder that beyond the police department, circumstances have changed so dramatically, that other employees have been asked to and received less than will be part of the package for the rank unit just by virtue of their rank differential.

Discussion

As is commonly the case in contemporary collective bargaining, this case represents one where the proverbial "tail" (i.e. that is a smaller collective bargaining unit) is seeking to wag the dog (i.e. the larger bargaining unit) in order to break from a settlement that has been reached. At the heart of this dispute is a disagreement on what the City can readily afford regarding both wage increases, the continuation of health care benefits,

and in particular HSA benefits, and what weight if any that the previous tentative agreement should have in the process.

The Union's position relies heavily upon the assurance given by the City Auditor and Deputy Auditor in the summer of 2008. As was noted previously, in the experience of the fact finder, it is rare to have two city officials in positions of financial authority to disagree in such a declaratory fashion with an employer's position in such proceedings.

Making unsupported, broad pronouncements about affordability and revenue growth projections goes beyond stating the hard numbers of historical costs and expenditures or the dollar cost of an economic package, and contributes greatly to the problems that were the foundation for the FOP Patrol Fact Finding and this proceeding as well. Moreover, in calculating package costs, one must be cognizant of funding limitations¹ and roll-up costs for public sector personnel. (i.e. pension, worker's compensation, benefits costs, etc.)

And while it is noted that the Financial Plan and Forecast states in pertinent part, "*there are many factors to consider and as time goes by the forecast should and will be updated,*" allowing those initial pronouncements and projections to go unrevised in this dynamically unstable economy is foolhardy. Coupled with the provision of affidavits to the Union that make no mention of the downturn in economic circumstances since those pronouncements only serves to be all the more troubling.

There is credence to the Employer's concerns that since the settlement of its patrol and communications contracts, circumstances have changed dramatically and it is now extremely concerned about the financial solvency of the general fund if it were ordered to continue with the same wage pattern across all of its other bargaining units. It is noteworthy that the City had to use virtually its entire surplus to balance its 2009 budget, and it would be remiss if it agreed to a wage package that it could not afford, despite the fact that this is a small bargaining unit. Further job losses loom as bad economic news appears to dominate, and during such a downturn any 7 similarly situated City is loath to immediately raise

¹ In one projection of costs provided to the union by the Deputy Auditor a dollar for dollar savings was attributed to the overall package cost from grant funds that only pay for ONE bargaining unit member. The package costs cover the ENTIRE bargaining unit. The grant funds will only subsidize that individual member's increased costs, not the whole unit. Also, counting on contingent funds as a way to subsidize ongoing expenditures is an extremely risky proposition.

taxes or other fees to generate funds without carefully considering what impact it would have on the citizens of Marion.

While the concerns of the Employer are well taken and a legitimate consideration in the collective bargaining context, the Employer must understand that this unit of sixteen (16) members comes on the heels of approximately 60 other employees in the police department covered by two (2) other agreements.

As such, it is only equitable to allow the pattern to continue for this unit only on the basis of (1) the small size of this unit (2) the fact that they are in the same department as the other employees (3) the type of work they perform is related to the police safety forces, and (4) both of the other units in the department are also represented by the FOP/OLC.

The pattern in wages is recommended for this unit only. It should be made clear that the rationale used to reach the decision to continue the wage pattern is uniquely related to this unit and the situation surrounding this distinctive set of circumstances. Were it not for the existence of those criteria and conditions, the decision to continue with this wage pattern may have been different given what may very well become a very different economic mosaic in 2009 and beyond. It would appear that as each bargaining unit in the City begins negotiations it will have to deal with a moving target represented by an ever changing economic climate.

Additionally, the following determination is made based upon the statutory criteria, keeping in mind the parties' negotiations history which created a link between changes in increases in wages and alleged quid pro quo increases in employee health care premiums. This recommendation also accounts for additional consideration to be afforded to the Employer for a slight increase in rank differential in the final 6 months of the agreement by way of an extra 6 months in contract term and the complete elimination of the differential going forward. As noted previously, this recommendation is structured to maintain internal consistency among negotiated settlements involving the same employer in the police department where the final unit is much smaller in number than those that have already settled.

In summary, it must be stated that this fact finding, along with that which was rendered regarding the patrol unit required this fact finder to make some very difficult choices. With what is currently known, and there is much which remains unknown in the economy, it is hard to imagine that the economic realities of these times and the apparent affect that they

have had on the City of Marion's finances could sustain future wage increases without commensurate concessions in other cost areas. In many cities in Ohio this is translating to the harsh reality of having to lay off dedicated city employees who currently may have few immediate options in finding meaningful work. Unfortunately, in some jurisdictions in Ohio layoffs may even occur under circumstances in which employees have already made the painful, but pragmatic decision to take a "wage freeze" and return to bargain in the future.

When a public employer must spend through its reserves to merely balance its budget, the status quo still poses a problem that must be dealt with sooner, rather than later. How that is dealt with remains the question that public employers and unions must address. It is equitable or even possible that all savings necessary to maintain the financial viability of a city can or should to be gleaned from the lessening of services? All of us expect our water to be safe, our safety forces to protect and rescue us, our refuse to be collected, our bills to be processed, and our streets to be maintained in working order. In fact, many members of the public may argue they have a right to expect these things at a minimum? By the same token, what can reasonably be asked of employees and their families who have their own economic realities? Although there is room for cynicism, particularly when it comes to the recent bailouts of Wall Street and Banks, the stark state of affairs facing employers and unions at the local level are very real, require frankness and honest dealing, and compel labor and management to set their differences aside and be willing to jointly find creative solutions to weather the current financial storm.

Determination

Section 17.1 Wages

Effective January 1, 2009 and continuing through January 1, 2011, the wage differential for Lieutenant shall be set at 14.25% above the top patrolman rate of pay, with an entry level/probationary step that is 7.125% less than the permanent rate. The wage rate for Major during this time period shall be set at 13.50% above the Lieutenant rate of pay, with an entry level/probationary step that is 7.125% less than the permanent rate.

Effective January 2, 2011, Wage differential rates for Lieutenant and Major are abolished and converted into fixed hourly rates as follows. Effective January 2, 2011, the Lieutenant wage differential shall be written into the wage scale as a fixed figure that is 15% above the top patrolman rate of pay, with an entry level/probationary step written into the wage scale as a

fixed figure that is 7.125% less than the permanent rate. Effective January 2, 2011, the Major wage differential shall be written into the wage scale as a fixed figure that is 13.5% above the Lieutenant rate of pay, with an entry level/probationary step written into the wage scale as a fixed figure that is 7.125% less than the permanent rate.

Pursuant to this section above, the Bargaining unit members shall be paid according to the wage schedule in Appendix A.

New Article, Longevity.

Effective January 1, 2009, bargaining unit members shall be entitled to receive longevity pay based upon completed years of continuous, uninterrupted full-time service with the City of Marion Police Department as follows:

Longevity	5 Years	10 Years	15 Years	20 Years	25 Years	30 Years
	\$0.20	\$0.35	\$0.45	\$0.60	\$0.75	\$0.90

Issue: 7	Article 27	Duration of the Agreement
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Union Position

The Union proposes that the new agreement run consecutively with the prior agreement.

Employer's Position

The Employer proposes that the new agreement take effect upon execution and run three (3) years prospectively from that date

Discussion

Both parties have proposed a new three (3) year agreement. The question becomes, however, at what point should that agreement begin to take effect. It appears at one point in the parties' negotiation, the parties did discuss breaking the rank differential so that both bargaining units are not as tied to each other, and the previous recommendation on wages reflects that view. In consideration for the change in the rank differential prior to it being abolished and the wage rate written into the agreement as a fixed sum, the agreement should also take effect January 1, 2009 and run three (3) years prospective from that date.

This effective date mirrors many of the effective dates within the Agreement, and reinforces the separation of the two (2) units from one another. Both sides gain from this result. The Union gains an additional .75% in compensation for an entire year that effectively results in the elevation of the differential to 15% between the top patrolman and lieutenant. This is a fair "bargained for exchange" since the Employer in return, eliminates the differential based wages for this unit and receives an additional six (6) month extension of the Agreement at that point. Further, incorporating the change in differential toward the end of the contract term substantially minimizes the overall economic impact on the Employer.

Accordingly, the following language is recommended.

Determination

ARTICLE 27 DURATION OF AGREEMENT

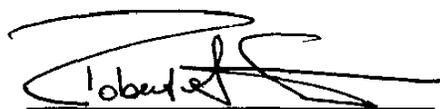
Section 29.1 Duration

- A. This Agreement shall be effective as of the **January 1, 2009** and shall remain in full force and effect until **December 31, 2011**.
- B. If either party desires to modify, or amend this Agreement, it shall give written notice of such intent no earlier than one hundred twenty (120) calendar days prior to the expiration date, nor later than ninety (90) calendar days prior to the expiration date of this Agreement. Such notice shall be by certified mail with return receipt. The parties shall commence negotiations and shall meet to establish the bargaining guidelines within two (2) calendar weeks upon receiving notice of intent.
- C. The parties agree that sections of this Agreement may be amended at any time during the life of the Agreement by mutual written consent.

TENTATIVE AGREEMENT

During negotiations, mediation, and fact-finding the parties reached tentative agreements on various issues. These tentative agreements and any language recommended to remain current are part of the recommendations contained in this report. Any issues, or sub-issues not specifically addressed are also intended to remain current language for purposes of this report.

The Fact-finder respectfully submits the above recommendations to the parties this 18th day of February 2009 in Portage County, Ohio.



Robert G. Stein, Fact-finder