

2008 DEC 22 P 12: 38

STATE EMPLOYMENT RELATIONS BOARD

STATE OF OHIO

**IN THE MATTER OF FACT-FINDING BETWEEN
WARRENSVILLE HEIGHTS FIREFIGHTERS IAAF LOCAL 1591**

AND

CITY OF WARRENSVILLE HEIGHTS

FINDINGS AND RECOMMENDATIONS

CASE NO: 08-MED-09-0992

DECEMBER 15, 2008

WILLIAM C. BINNING PH.D., FACTFINDER

For Local 1591 International Association of Firefighters:

**James P. Astorino, President
3100 E. 45th Street Suite 214
Cleveland, Ohio 44127**

For the City of Warrensville Heights

**James E. Melle
Buckley King LPA
10 W. Broad Street
Columbus, Ohio 43215**

The undersigned was appointed Fact-finder for this dispute by the State Employment Relations Board (SERB) on December 5, 2008 pursuant to Section 4117.14 (C) (3) of the Ohio Revised Code. The parties did not submit a fact-finding panel selection. This Fact-finder was required by SERB to conduct a hearing and serve the parties with a written report no later than 12/19/2008 unless the parties mutually agreed to extend the period of fact-finding as provided under Ohio Administrative Code Rule 4117-9-05 (G). Upon acceptance of the appointment, this Fact-finder agreed to the terms of the appointment and hand delivered the report to the parties on December 19, 2008.

It is the understanding of this Fact-Finder that the parties did not exchange proposals until after the appointment of this Fact-Finder and never met to discuss any issues until the date of the hearing.

The hearing date was set by the fact-finder for December 15, 2008 at 10:00 a.m. The Fact-finder asked, as he is required to do, if the parties wished to engage in mediation prior to the opening of the hearing. The parties agreed to mediate. They met together with the fact-finder, also met without the fact-finder and then the parties caucused separately with the fact-finder serving as a mediator. The parties agreed to settle one issue –the length of the contract and through mediation agreed to take a number of issues off the table.

HEARING

A formal hearing was opened at approximately 11:45 a.m. and closed at 7:00 p.m. The issues remaining at impasse are the following:

1. Add language to Article III on indemnification of the City
2. Add language on clothing allowance for initial turnout gear
3. Continuing Education Pay-Proposed new language
4. Reduction in Hours of Work
5. Officer in Charge Pay Increase
6. Rank differential Increase
7. Wage Proposals
 - a. Three Reopener proposals for wages, longevity and health insurance

Present at the Hearing:

For the Union:

James Astorino, President NOFF
Shannon Rotondo, President 1591
Frank Marvin, Vice President 1591
Frank Mansi, Secretary 1591
Kenneth Miller, Treasurer 1591

For the City:

James Melle, Buckley King
Clinton Hall, Mayor
Rubin Mourtrie, Finance Director
Stanley Martin, Fire Chief

CRITERIA

In compliance with the Ohio Revised Code, Section 4117.14 (C) (4) (3) and Ohio Administrative Code Rule 4117-9-05 (J) and 4117-9-05 (K), the Fact-finder considered the following criteria in making the findings and recommendations contained in this report:

1. Past Collective Bargaining agreements 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.

ISSUES AND RECOMMENDATIONS

ISSUE 1: ADD INDEMNIFICATION LANGUAGE TO ARTICLE III

The City proposes to add language to the following Article:

ARTICLE III UNION DUES, MEMBERSHIP, AND ACTIVITIES

3:01 The Employer agrees to deduct dues, fees and assessments, in an amount certified by the Treasurer of the Local Union, from the pay of those employees who have authorized the deductions in writing. The full amount of monthly deductions shall be remitted by the Employer to the Local Union Treasurer within fourteen (14) days after deduction. The Union hereby agrees to indemnify and hold harmless the Employer for any/all liability or damages that may arise from the performance of its obligations under this Article.

CITY POSITION

The City proposes to “1. Add to the third sentence of 3.01 the following language at the end of the sentence after the word ‘Article’: ‘provided that, noting herein shall require indemnification for any intentional deprivation of an individual’s constitutional rights by the City.’”

“2. Add to the third sentence of 3.01 the following language after the word ‘damages’ and before the word ‘that’ the phrase ‘including attorney fees.’”

The argument by the City is a legal argument. They argue that “Without this language, there is some question whether the City may enforce its indemnification against the Union in the event of a challenge by a fair share payer or a dues deduction member.” They cite *Weaver v. University of Cincinnati* (6th Cir. 1992). The City’s proposed language is similar to language cited in *Locke v Karass* (D.Me. 2006) which upheld the indemnification. The City points out that the State of Ohio and OCSEA were required to pay plaintiff’s attorney fees in the case of *United States v State of Ohio* (S.D. Ohio 2007) which was a fair share fee case.

The City argues that “The obligation to indemnify the City rightfully rest upon the Union as it is the beneficiary of the funds which are deducted at no cost to the Union as it has already agreed to indemnify the City.”

UNION POSITION

The Union opposes this language, arguing that it is unnecessary. This language is not in any other bargaining unit contract in the City. They did not see the particulars of the cases cited. Their legal counsel has not had time to review this proposal because of the lack of negotiations for this contract. They are suspicious and cite the last sentence of the City's position which threatens that, "If the City cannot achieve the requested language to allow it to enforce its indemnification, it will propose, as a counter, that the dues deduction and fair share fee deduction be removed from the CBA." The Union maintains that this is contrary to State Law.

DISCUSSION AND RECOMMENDATION

The Fact-finder is persuaded that the City raises valid concerns about its liability for a service it performs for the Union, and the City appears to offer language well grounded in recent case law. The Fact-finder is unwilling to recommend imposing this language on the Union, without the Union at least having the time to have its own counsel review all the implications of the proposed language.

Recommendation: The request for the additional language is not recommended.

ISSUE 2: ADD LANGUAGE TO CLOTHING ALLOWANCE ON INITIAL TURNOUT GEAR

UNION POSITION

The union is proposing to add language to an existing article as it relates to the clothing allowance and turnout gear.

ARTICLE XXII CLOTHING AND MAINTENANCE ALLOWANCE

22:04 All newly hired members shall be entitled to clothing allowance of nine hundred (\$900.00) dollars for the first year, in addition to the seven hundred (\$700.00) dollars per year clothing maintenance allowance. Additional money may be approved by the Mayor, if a Fire Fighter is unable to purchase all necessary clothing for nine hundred (\$900.00) dollars.

To the above existing language: the Union wants to add at the end "Initial turnout gear, as referenced in Article 22:08, shall not be purchased with a member's clothing allowance."

The Union maintains that it is just clarifying what already exists in the CBA because in **Article XXII 22:06** it states, "The City shall supply, at its cost all Turn Out Gear (Boots, Bunker Pants, Bunker Coats, Helmet with Shield, Gloves, Suspenders and Nomex Hood) and, from time-to-time, as authorized by the council replace any such gear determined to require replacement due to normal wear and tear."

The Union maintains that this issue of clothing and turn out gear needs clarification because it is applied inconsistently. Often the monies for the clothing allowance (\$900.00) are used to pay for part of the purchase of the Turn Out Gear and then there is not enough money for the required clothes.

CITY POSITION

The City maintains that the Mayor can approve additional funds "if a Fire Fighter is unable to purchase all necessary clothing for nine hundred (900.00) dollars." The City maintains that the proposed language is a not a clarification but a change in language that will result in more cost to the financially strapped City.

DISCUSSION AND RECOMMENDATION

It appears to the Fact-finder that this is not a ripe issue. There were not many examples of cases offered where new hires were deprived of the necessary financial support for station gear clothing and turnout gear.

Recommendation: The request for additional language is not recommended.

ISSUE 3: CONTINUING EDUCATION PAY –PROPOSED NEW LANGUAGE

UNION POSITION

The Union is proposing new language:

Continuing Education: Members shall be entitled to take up to 12 hours at the rate of overtime to meet the requirements to maintain their certifications for Firefighters and EMS.

(Note: If this fact-finding goes to conciliation and the conciliator finds in favor of the union on this issue, it was agreed to by the parties that this be entered as Article 27:06 under Miscellaneous).

The Union is proposing that this language is necessary because of the increased burden on Firefighters as a result of recently passed ORC H.B. 401 that requires continuing education for Firefighters to maintain their certification, as well as the burdensome requirements for EMS.

CITY POSITION

The City maintains that it offers sufficient training for its Firefighters by having its own training officers and, when necessary, it hires trainers (like Tri-C) to come to Warrensville Heights to train Firefighters while they are on duty. This is cheaper and more efficient. The Chief argued that those who hold EMS certification receive an additional stipend of \$2,300 per year and they should make some effort on their own to retain their certification. They can train off duty as well.

DISCUSSION AND RECOMMENDATION

The current Chief does seem very committed to training. A rough calculation of the cost of this provision is \$13,068 in a very difficult fiscal environment. If there is documentation that Firefighters are having a difficult time meeting their training requirements, then this issue should be revisited in the next contract.

Recommendation: The request for this additional contract provision is not recommended.

ISSUE 4: REDUCTION IN HOURS OF WORK

UNION POSITION

The Union is proposing changes to the Hours of Work. They propose to replace existing language which is stricken with a line with the italicized language:

ARTICLE XVII HOURS OF WORK:

17.01 All members assigned to fire suppression and emergency medical services shall work a ~~forty-nine and seven-tenths (49.7)~~ *forty-eight (48)* hour work week. The average week will be based on a ~~twenty-seven (27)~~ *twenty-one (21)* day cycle comprised of ~~one hundred ninety-two (192)~~ *one hundred forty-four (144)* hours. The tour of duty shall be twenty-four (24) hours followed by forty-eight (48) hours off duty. The twenty-four (24) hour shift shall commence at 0800 hours. This change would result in a yearly reduction of 88 hours. This would change total hours worked from the current total of 2,584 to a total of 2,496.

The Union based its position on two points: First, comparables showed some neighboring municipalities with 48 hour work weeks. The second argument was that if wage increases are not forthcoming in contracts, then hours of work reductions is often the substitute.

CITY POSITION

The City responded with a number of arguments. First, a reduction in work hours was granted to the Union in the last contract that was negotiated. Second, that this would cost the City money, since the hourly rate for employees selling hours back to the City would be increased. (That is, by keeping the same pay or higher, but reducing the number of work hours, the pay hour increases.) Third, the Chief argued that it would create management and staffing problems that would have to be addressed, with more overtime hours or hiring of part time workers.

DISCUSSION AND RECOMMENDATION

The comparables, that were offered, provided mixed evidence for the Union's position. The fact that a reduction in hours was part of the last contract, suggests that this issue does not need to be addressed in this new contract.

Recommendation: The language is not recommended.

ISSUE 5: OFFICER IN CHARGE PAY

UNION POSITION

The Union proposes an increase in Officer in Charge pay.

The Union offers the following language change.

ARTICLE XI WAGES

ARTICLE 11:04 The City agrees to compensate each First Class Fire Fighter, temporarily assigned as an "Officer in Charge" or "Platoon Officer" (O.I.C.Pay) at an additional payment of ~~one dollar (\$1.25)~~ two dollars (\$2.00).

The Union offered numerous external comparables and the City's Police Contract as an internal comparable. In neighboring political subdivisions, the pay for the O.I.C. is the pay of the higher ranking officer they have temporarily replaced. Even with the proposed increase,

the pay for O.I.C. s in Warrensville Heights will not receive the pay of the higher officer, even though they are doing the same work. This pay has not been increased in three years.

CITY POSITION

The City raised some questions about the use of the comparables. Their primary argument was that they could not afford to pay the increase.

DISCUSSION AND RECOMMENDATION

The total cost of this proposed language change is minor and it appears to be well deserved.

Recommendation: The new language proposed by the Union raising the hourly rate to \$2.00 an hour, is recommended for the new Contract.

ISSUE SIX: RANK DIFFERENTIAL

UNION POSITION

11:12 A rank differential is hereby established for the rank of Lieutenant. The rank differential will be ~~ten (10%)~~ twelve (12%) percent.

The union argues that their offered comparables support this proposed increase in the rank differential percentage. The rank differentials in the Police Contract are higher than the rank differential in the Fire Department Contract. The Union also argues that Lieutenants in the Warrensville Heights Fire Department often do work above their classification. That is, they take on duties of Captains, a rank they do not have, and also do the work of the Chief when he is not on duty.

CITY POSITION

The City said it could not afford this proposal and would lay out its financial argument when pay raises, the next and last issue, is addressed.

DISCUSSION AND RECOMMENDATION

The Union makes a compelling case for this increase in pay for rank differential. The problem is the current financial problems faced by the City.

Recommendation: The proposed change in language is not recommended.

ISSUE 7: WAGES

BOTH PARTIES OFFERED PROPOSALS FOR THIS ISSUE

UNION POSITION

The Union is proposing a wage increase of 4%, 4%, & 4% for each year of the three year contract.

The Union offered its comparables to show it is behind neighboring municipalities. For the same contract years, Warrensville Heights Firefighters received 8%, while the average in the offered comparables was 8.9%. The Union pointed out that it received no increase in the last year of the current contract. It showed that the wages for Warrensville Heights Firefighters is falling behind the City's Police wages. The Union points out that even area municipalities, that are in or going into Fiscal Emergency (which The City of Warrensville Heights is claiming it is facing), are negotiating contracts and granting modest wage increases to their Fire Fighters. The Union objects to most of the language in the proposed Reopener Clauses offered by the City.

CITY POSITION

The City is offering a wage freeze (0%) for the first year of the contract and then extensive language on a wage reopener which is offered below:

ARTICLE XI

WAGES

1. Amend 11.13 by deleting, in their entirety the columns "Effective 01/01/06" and "Effective 01/01/07" and changing the column date of "01/01/08" to 01/01/09."
2. Amend 11:13 by adding the following""during the period December 15, 2009 through January 15, 2010 either party may reopen 11:13 for the sole purpose of negotiating prospective modifications to the wages referenced in 11:13 by serving timely written notice upon the State Employment Relations Board (SERB) with a copy sent by certified mail to the other party."

3. In the event that 11:13 is re-opened pursuant to 2 and the parties have bargained to impasse, SERB's conciliation dispute resolution procedure in R.C. 4117.14 (G) shall be used; provided, however, that the conciliator shall not have any power or authority to award retroactive wage increases. Wage increases may be effective only at the start of the fiscal year next commencing after the date of the conciliators award.
4. Amend 11:13 by adding the following:"In the event a declaration is made that the City is in Fiscal Emergency, the city may reopen that Article XI for the sole purpose of negotiating prospective modifications to Article XI. The City shall serve written notice upon the State Employment Relations Board (SERB) with a copy sent by certified mail to the Union. In the event negotiations result in impasse, The City, the Union and the bargaining unit members shall be subject to any changes, modifications or amendments to this Article XI which the Fiscal Emergency Governing Authority or its designee exercising fiscal emergency powers and authority has proposed or ordered."

The City also has offered language for Reopening of **ARTICLE XII LONGEVITY** and **ARTICLE XVIII INSURANCE** with the same language as items in 2 and 4 above.

The argument offered by the City for the Reopening language was that if the City found additional revenue, they could reward the Fire Fighters for their labor with the new money. They also said that, if necessary, they could ask for concessions. There was some disagreement over the impact of Fiscal Emergency on existing labor contracts –thus the need for item number 4, which the City maintains would avoid a law suit.

On the issue of wages, the City argues that it has an inability to pay. They also challenged the comparables offered by the Union and offered their own set of comparables.

One of their main arguments was the projected \$1.5 million dollar deficit in the City's FY 2009 budget which begins January 1. This deficit is a product of many factors. One was the surprising defeat of a property tax levy renewal in the recent November election. This will result in a projected loss of \$450,000. The City claimed that there are high numbers of foreclosures, which will reduce the tax base of the City. There is the loss of an anticipated \$65,000 personal property tax, as a result of a change in state tax law. They also showed that their health premiums are going up and not all of these costs have been included in the new budget projections.

One other major cost resulted from the borrowing of \$470,000 in 2008 to pay for the Police Contract and entering that as part of the projected 2009 budget.

The City presented various legal documents from the City Charter, the Ohio Revised Code and Court cases showing that their budget must be in balance or they will not be able to get their new budget certified by the County Auditor.

The above are offered as evidence of the claim by the City of an inability to pay and justification for offering a Zero pay raise in the first year of the Fire Fighters Contract and for the need for the various Reopener Articles.

DISCUSSION AND RECOMMENDATIONS

Discussion: As President-Elect Barack Obama said recently, "We are going through the toughest times since the Great Depression." The economic problems in Northeast Ohio were acute and chronic long before the current national economic collapse. The City fiscal crisis was exacerbated by the unexpected defeat of one of its property tax levies, and then on top of that, the City negotiated a contract with the Police that resulted in the City having to borrow almost a half a million dollars in 2008 to finance that Police Contract. Keep in mind that this was a negotiated contract with the Police. Initially at the hearing, some of the City officials were arguing that this Police Contract was a result of a generous conciliation award. It was a negotiated contract by the parties.

Certainly the firefighters cannot be expected to bear the brunt of the financial woes of the City.

It is also important for the Fire Fighters, all City employees and the City leaders to recognize that the City of Warrensville Heights is reaching the limit of its capacity to generate more revenue. This Fact-finder is taking into account the fiscal challenges faced by the City in 2009, and that accounts for the very modest pay increase proposal, especially in year one.

The Fire Fighters have raised numerous objections to the proposed Reopener language. This Reopener language needed to be negotiated further. This Fact-finder is reluctant to try to fashion Reopener language that would be acceptable to both parties.

Recommendation: All of the proposed Reopener language is **not** recommended.

Recommendation for WAGE increase is: for year one: **2%**, year two: **3%**, year three: **4%**. This will be for a total of **9%** over the three years of the Contract. The Fact-finder will try to display this wage scale in the chart offered below. However, it is above stated percentages that are recommended in the case of a discrepancy with the chart below.

RANK OFFICER	Effective 01/01/09	Effective 01/01/10	Effective 01/01/11
Lieutenant	\$67,061	\$69,073	\$71,836
Fire Fighter First Class	\$60,964	\$62,793	\$65,305
Second Class (2 nd yr probation	\$49,186	\$50,662	\$52,688
Third Class 2 nd 6 months probation	\$38,795	\$39,959	\$41,557
Fourth Class First 6 months probation	\$33,253	\$34,251	\$35,621

ADDENDUM

ARTICLE XXIX

DURATION OF AGREEMENT

The parties agreed to the following language on the duration of this agreement:

Amend 29:01 by changing the duration of the Agreement by deleting "January 1, 2006 to December 31, 2008 and adding "January 1, 2009 to December 31, 2011."

TENTATIVE AGREEMENT

The parties reached tentative agreement on the duration of the Contract and agreed to withdraw a number of issues during the mediation. Those and any other tentative agreements are incorporated as part of the recommendations of this report.

The Fact-finder respectfully submits the above recommendations to the parties this 19th day of December 2008 in Mahoning County Ohio.


William C. Binning Ph.D.
Fact-finder