

STATE EMPLOYMENT RELATIONS BOARD
STATE OF OHIO

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2009 MAR 19 P 1:07

In the matter of Fact Finding between:)	SERB No. 08-MED-10-1069
)	
THE CITY OF URBANA, OHIO)	
)	
and)	Hearing: March 4, 2009
)	at Urbana, Ohio
THE FRATERNAL ORDER OF)	
POLICE, THE OHIO LABOR)	Date of Report:
COUNCIL, INC.)	March 19, 2009

FACT FINDING REPORT

Appearances:

Mitchell B. Goldberg, Appointed Fact Finder

For the City:

Todd Allen,	Consultant, Clemens-Nelson & Assoc., Inc.
Christina Boettcher,	City Accountant
Bruce Evilsizor,	Director of Administration
Gil Weithman,	Director of Law
Pat Wagner,	Chief of Police

For the FOP:

Brenda Goheen,	Staff Representative
John Purinton,	Sergeant
Ed Burkhammer,	Sergeant

I. Introduction and Background.

The State Employment Relations Board ("SERB") appointed the undersigned as the Fact Finder for this public employment labor dispute on November 24, 2008. The parties agreed to extend the time limits for holding a hearing and issuing a report. The agreed upon hearing was held on March 4, 2009 at the City's administrative offices. The

parties agreed that the report should be issued on March 19, 2009, by mailing the same to SERB by U.S. Mail, first class, on that date.

The parties complied with their statutory obligations by timely submitting pre-hearing statements to the Fact Finder before the commencement of the hearing. They presented their respective positions on the unresolved issues, and each party submitted documentary exhibits.

The bargaining unit consists of four employees in the sergeant classification. The Employer is a municipality that operates a law enforcement agency. The collective bargaining agreement expired on December 31, 2008. The parties engaged in negotiations for a successor agreement on November 12, 17 and 19.

The Fact Finder considered all of the required factors and standards set forth in the Ohio Revised Code, the Ohio Administrative Code, and the SERB guidelines in issuing the following recommendations on the unresolved issues. All unchanged language from the expired CBA and all items and issues tentatively agreed upon between the parties before and during the hearing are hereby adopted for purposes of this Report, and are hereby incorporated herein. The proposals agreed upon through mediation at the hearing are: (1) Management proposal on Article 10, Seniority reduction of seniority during unpaid LOA; (2) Management proposal on Article 13, Special Scheduling; (3) Management proposal on Article 15, Grievance Procedure; (4) Management proposal on Article 17, Holidays; (5) Management proposal on Article 19, Sick Leave; (6)

Management proposal on Article 23, Medical, Hospital and Life Insurance Benefits; (7) Management proposal on Article 24, Drug & Alcohol Policy; and (9) the parties agreement on Article 30, Duration and Termination, a three year agreement beginning January 1, 2009.

The parties further agreed that a new memorandum of understanding relating to Attendance/Safety Incentive Program proposed by the City will be incorporated into the CBA provided that the language is identical in all respects to that agreed upon and contained in the CBA between the City and the patrol officers. All of the following monetary and economic benefits recommended below shall be retroactive to January 1, 2009. The CBA will expire on December 31, 2012.

II. Unresolved Issues.

(I) Article 16, Wages and Benefits

The FOP is proposing across the board wage increases for a 3-year contract, retroactive to January 1, 2009. It proposes 3%, for year one, 2.25% for year two, and 2.25% for year three. The City has countered with a proposal of 2.0%, 2.0% and 2.0%. However, the City altered its proposal at the hearing to 2.25%, 2.25% and 2.25%. This is the same increase received by the patrol officers in their CBA. Accordingly, the parties are each proposing packages that are only .75% apart over three years – the only difference is the up-front increase in the first year proposed by the FOP.

The economic evidence shows that the wages paid in Urbana for police services are roughly in the middle of the wages paid in Ohio cities of comparable populations. Urbana is in the top group of pay range when compared to cities in the nearby geographic area. These facts explain the relative similarity between the parties' proposals.

The FOP has not made its case that a .75% bump in the first year is necessary to cure some disparity with comparable police forces. There is no reason why the City's proposal matching the raises provided for the patrol officers should not be provided to *this small group of sergeants*.

Recommendation: I recommend that the City pay across the board increases to this unit of 2.25% in year one, 2.25% in year two and 2.25% in year three, retroactive to January 1, 2009.

(2) Article 10, Bidding Days Off

The FOP proposes new language that protects the rights of sergeants to bid on their days off during the workweek, based upon their seniority. This is a change from the present management policy of requiring sergeants' days off to be taken on Sundays and Mondays. The City rejects this proposal on the grounds that it unreasonably restricts *its management rights in Article 5, Section 5.1 to determine work schedules*.

The FOP believes that the sergeants should be provided the same benefit as that provided to patrol officers, those with a lower rank and less seniority. They have the

right to choose their two off days during the week. Moreover, the right to select days off has been granted to sergeants for many years before the recent change that fixes off days on Sundays and Mondays. In the past, sergeants have, with management's agreement, regularly picked Saturdays and Sundays as off days. During another period of time the most senior sergeant was permitted to choose Thursdays and Fridays as off days to accommodate his personal circumstances.

The evidence shows that the most senior sergeant took Saturdays and Sundays off in 1999 and 2000. Beginning in 2001, the senior first shift sergeant began taking off on Thursdays and Fridays with approval from his superiors. This continued in 2002 and 2003. In 2004, Sgt. Reese took Saturdays and Sundays off on the first shift. Sgt. Lingrell continued with this schedule in 2005, 2006 and 2007. Sgt. King followed the same schedule in 2008.

The FOP believes that this evidence establishes a binding past practice that has developed into an unstated contract term, which must now be included within the CBA language so that the benefit may be protected. The City disagrees that it ever relinquished its managerial rights to schedule the work force as it sees fit, although it admits that it attempted to accommodate sergeant requests in the past.

A binding past practice is defined as a pattern of prior conduct undertaken in recurring situations so as to evolve into an understanding between the parties that the conduct is the appropriate course of action. The determinative elements are (1) clarity

and consistency of the pattern of conduct; (2) longevity and repetition of the activity; (3) acceptability of the pattern; and (4) mutual acknowledgement of the pattern by the parties.¹ The most difficult elements to prove are the “acceptability” and ‘mutual acknowledgement ones. This case is no exception.

There is no dispute that management agreed to permit the most senior first shift sergeants to select their consecutive days off over a long period of time. This pattern was sufficiently clear and repeated. Apparently, before 1991, the Lieutenant determined the days off without any input from the sergeants. Moreover, when four sergeants are staffed, the Lieutenant must schedule days off regardless of preference due to the unique staffing requirements. Nevertheless, notwithstanding the long period when three sergeants were scheduled and their preferences for off days were honored, the City contends that it never specifically agreed or consented to relinquish its right to decide to return to its decision to schedule Sundays and Mondays as mandatory off days for the first shift senior sergeants when in its opinion, that schedule serves the department’s best interest.

The evidence supports the finding that there was no specific relinquishment of the City’s managerial rights in this area. There have been multiple contracts over this period without any change in the language in Article 5, Section 5.1. The parties have had numerous opportunities to carve out an exception to the City’s scheduling rights on this subject, but the broad management right to schedule has remained in tact. While repeated

¹ See Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961).

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accommodations were made along the way, the FOP has not proven that the accommodation has developed to the point where the benefit has become fixed as a binding contractual right. It cannot point to any statement, memorandum or other evidence showing that the City's management right in this area was relinquished to the sergeants' scheduling determination.

The absence of a finding of a binding past practice, however, does not end the discussion over this issue. The Fact Finder may nevertheless recommend in the FOP's favor if there is a finding that its position is more reasonable than the City's position. One must therefore examine the City's reasons for changing its position that now requires Sundays and Mondays as mandatory days off for the first shift senior sergeants, instead of permitting them to select their days off, as in the past.

The argument that management can make the change "just because we can do so based upon the expired contract language" rings hollow. There must instead be a rational basis for the change in terms of operations – the decision to change must not be arbitrary. *The stated reasons are (1) that supervisors are not present on Saturdays and Sundays, and it is a better practice to schedule the second day off on Monday when supervision is present, instead of having two consecutive days off without the presence of supervision; and (2) the belief that the public would expect this schedule to exist as a matter of good police practice.*

The FOP believes that these reasons lack merit. Sergeants have been off on Saturdays and Sundays for years without any operational problems. When the sergeant is off, a senior patrol officer assumes the role as acting sergeant for the day, a job that involves a premium in pay for the added responsibility. The situation already occurs every Sunday. The Lieutenant and the Chief never are consulted for supervisory instruction or guidance when they are present during the workday. When an emergency arises, sergeants are called in off duty. Moreover, as a practical matter, sergeants can take off on Saturdays anyway be taking a leave day, leaving the department with an acting sergeant the same as if it were a selected day off. The FOP believes that the Lieutenant who decided upon this change is just asserting his presumed authority when there is no compelling reason for the change.

The City argues that the decision is a sound one from a managerial and operational standpoint. Sunday is the lowest activity day and therefore the best day to schedule an off day for the sergeant. It is then reasonable to piggyback on to that day a Monday when both the Lieutenant and the Chief are working and can respond to an acting sergeant/patrol officer. The alternative would be Saturday, leaving two consecutive days with an acting sergeant/patrol officer and no available Lieutenant or Chief. Moreover, this selection situation only occurred when three sergeants were staffed. The sergeants were used to receiving mandatory days off assignments when four sergeants were on staff.

The FOP points out that response to resistance studies gathered in 2008 show that the busiest days when force was required to be used was on Tuesdays and Wednesdays. Mondays had the least amount of such incidents. Fridays and Saturdays were among the lowest number of such incidents. Having available supervision on Saturdays is less important for the City. The City discounts the importance of these studies. It believes the more important statistics are the number of calls for service.

I find that the City's position is an arguable one from an operational standpoint, notwithstanding that the FOP shares a different view. More importantly, this type of managerial decision typically resides with management in the labor relations field, both in the public and private sectors. Since the right to schedule the workforce is such an embedded management right, I find that better evidence must be established to show that the City voluntarily relinquished this reserved right.

Recommendation: No change.

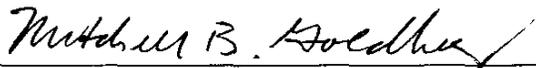
(3) Article 25. Personal Property Replacement

The City proposes to add language that allows for a maximum monetary benefit of \$250 per incident for the replacement of damaged or loss of property while on duty. The FOP agrees with the language except for the wording "per incident." Instead, the FOP believes that better language would be "per item."

The identical language as the City proposes appears in the patrol officers' contract. I understand the FOP's argument that a damaged watch or other valuable personal item could be worth more than \$250 and that this limit might not provide for full compensation. However, considering that the patrol officers' contract contains the words "per incident," I believe the sergeants' contract should be the same. Moreover, knowing this limit, both officers and sergeants may protect their valuables by choosing not to carry or wear items that are worth more than the limit.

Recommendation: The language on personal property replacement should mirror the language contained in the patrol officers' CBA.

Date of Report: March 19, 2009



Mitchell B. Goldberg, Appointed Fact Finder

Certificate of Service

I served this Report upon the following persons by U.S. Mail, First Class on March 18, 2009:

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