

STATE OF OHIO
STATE EMPLOYEE RELATIONS BOARD

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RELATIONS BOARD

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IN THE MATTER OF THE FACT-FINDING) BEFORE CONCILIATOR:
Between) JAMES E. RIMMEL
CITY OF ELYRIA, OHIO) SERB CASE: 09-MED-03-0195
and) HEARD: 22 SEPTEMBER 2011¹
ELYRIA, OHIO
ELYRIA POLICE PATROLMEN'S) ISSUED: 5 JANUARY 2012²
ASSOCIATION (EPPA))
.....) FILE NO.: 11.05146

APPEARANCES

FOR THE CITY:

Robin Bell,
Clemans, Nelson & Associates

Christopher Eichenlaub
Safety Service Director

Duane Whitely
Chief of Police

FOR THE EPPA:

Robert M. Phillips
Faulkner, Hoffman & Phillips

Tom Baracskaz
President

William Witt
Negotiating Member

Richard Buckway
Negotiating Member, Treasurer

BACKGROUND

This matter comes on for fact-finding following impasse in the parties' negotiations of a

¹ While SERB's 15 April 2011 Notice of Fact-Finder Appointment called for a report to be issued "no later than 4/29/2011," the parties mutually agreed-to waive this requirement to allow for further negotiations/fact finding in this and other bargaining units.

² At the request of the parties, this record was left open so that a pending conciliation decision could be submitted. Ms. Ruben's 24 October 2011 in Case No.: 09-MED-06-0677 was forwarded by e-mail to me on 26 October 2011. This record was thus closed as of the latter date.

successor collective bargaining agreement, negotiations that initially commenced more than two (2) years ago.³ To this end, the Ohio State Employee Relations Board (SERB), under Revised Code Section 4117.14(C)(3), appointed the undersigned to serve as Fact-Finder in the subject matter. Specifically, I was charged “to conduct a hearing and serve the parties with a written report no later than 4/29/2011, unless the parties agreed to extend the period of fact-finding as provided under Ohio Administrative Code Rule 4117.9.05(G).” The parties did enter into a number of extension agreements.

While there appears to have been a number of reasons for the delay in this process, both parties, in typical fashion, blame the other for the lack of meaningful progress and successor Agreement. The reality is either one did not push for earlier, meaningful negotiations, including fact-finding and, if necessary, conciliation. In any event, given the economic climate that existed at the time, little was accomplished toward the consummation of a new Agreement.⁴ It does appear, however, the parties opted to hold their efforts in abeyance until a sister local Union, International Association Firefighters, Local 474, held a fact-finding hearing before the Honorable Alan Miles Ruben, said hearing/mediation commencing on 20 July 2010.

Initially, Fact-Finder Ruben engaged in several mediation sessions which apparently led to agreement on a number of impasse issues. Thereafter, Mr. Ruben held a hearing on the remaining unresolved impasse issues over three (3) days, i.e., 21 October; 15 and 17 November 2010. It was on 26 May 2011 that Fact-Finder Ruben issued his report in SERB Case No.: 9-MED-06-0677. In his 96 page report, Mr. Ruben set forth a comprehensive analysis⁵ of the City of Elyria’s overall financial/employment picture. He also noted at footnote 2 of his report the “negative outlook” assigned to Elyria by Moody’s Investors Service in discussing this City’s financial condition.

Now, it is no secret that the City of Elyria and many other Northeast, Ohio communities have been hit hard by the prolonged downturn in the economy; significant decline in

³ The parties’ efforts to negotiate a successor agreement also included an FMCS mediation session on 10 March 2011.

⁴ Over this two (2) year period, including at hearing, the parties consummated five (5) tentative agreements, namely, Article 8, Pledge Against Discrimination; Article 9, Rules and Regulations; Article 12, Sections 12.4, 12.7 & 12.12 Overtime; Article 26, Employee Rights; and, New Article, Personnel Rights.

⁵ While the findings of Mr. Ruben in his Report are informative, they cannot be deemed conclusive/binding in the matter before me since EPPA was not a party in the Ruben case. I would be remiss, however, if I were to totally ignore such given their comprehensive nature and the City being a party in both cases. As such, I will take judicial notice of Mr. Ruben’s findings to the extent they may be relevant here.

manufacturing employment via relocations/shutdowns; negative population migration, especially among those in the work force; loss of tax base; and, much, much more. It is also true, as argued by the Association, that the reduced police complement is currently faced with more demands for their services where the potential for more serious crimes is greater. In fact, the Association claims the inherent dangers associated with police work have been compounded by the “steady decline in training, poor equipment, lack of equipment and personnel losses....”

The fact-finding hearing on this matter was held on 14 July 2011 in the City’s offices in Elyria where both parties were provided the opportunity to proffer supporting documentation/testimony, with both availing themselves to such. At the conclusion of the hearing, the parties indicated they wished to defer my recommendations in this matter until after Conciliator Susan Grody Ruben issued an Award in the above-referenced firefighter case. Ms. Ruben’s Award was issued on 24 October 2011. In any event, in arriving at my recommendations in this case, I have reviewed the parties pre-hearing submissions as well as the evidence/argument proffered at hearing/post-hearing. These data were considered in accord with criteria set out at ORC Section 4117.14C(4)(e), said criteria reading:

- a) Past collectively bargained agreements ... between the parties;
- b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- c) 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;
- d) The lawful authority of the public employer;
- e) The stipulations of the parties; and
- f) Such other factors, not confined to those listed ... which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact- finding, or other impasse resolution procedures in the public service or in private employment.

As noted earlier, several contract articles/provisions had been agreed-to prior to fact-finding with the parties agreeing at hearing to the proposed language under Sections 12.4, 12.7, 12.8, 12.11 and 12.12. This Agreement left Section 12.1 under Article 12 in dispute, i.e., provisions dealing with the calculation of overtime pay. Additionally, other unresolved issues at fact-finding were: Article 13—Wages; Article 19—Sick Leave; Article 28—Procedure for Scheduling Days Off; and, Article 36—Duration.

ANALYSIS/RECOMMENDATIONS

ARTICLE 12, SECTION 12.1:

UNION POSITION: Here, the Union seeks the inclusion of longevity pay in the City's calculation of overtime for actual hours worked by police officers. It concludes that its position is consistent with that presently done in two (2) other City bargaining units and is mandated under the Fair Labor Standards Act (FLSA or Act); Court case precedent; and, applicable regulations/opinions of the Wage and Hour Division of the U.S. Department of Labor. It emphasizes that longevity payments are a product of collective bargaining and, as such, are required or nondiscretionary payments. Likewise, it contends relevant police department comparables reflect that longevity pay is included in the calculation of an officer's "regular rate" when paying overtime. It contends not including longevity with base pay deprives an Elyria police officer of between \$4.00 and \$5.00 per hour compared to their peer group(s).

CITY POSITION: The City seeks to maintain the status quo contending that it simply cannot see any sound bases for including various forms of employee bonuses in an officer's "regular rate" in calculating overtime pay. It strongly suggests the formula employed by City payroll officials in paying police officers an overtime rate of pay is consistent with contractual mandates and in accord with that called under the FLSA. Likewise, it contends the requested change would only serve to stretch its' limited revenue resources requiring even further staff and other forms of reduction in order to pay for this added expenditure.

DISCUSSION: Now, the Union places significant emphasizes on the fact that the City includes longevity pay in its calculation of overtime pay for employees in several other bargaining units. It believes this fact alone warrants approval of its requests for benefit “parity.” I do not agree, leastwise on this record. The reality is that without a historical record of cited comparisons, these types of references are arguably no more than “cherry picking.” In any event, I believe the conclusion of Fact-Finder Ruben in this regard is relevant here, Ms. Ruben holding at 7 of her Report as follows:

The Fact-Finder finds that ‘internal comparisons’ are inappropriate. While the Union would relate Firefighter wages, benefits and conditions of employment to those of the members of Police Department Bargaining Unit, there has been no history of ‘parity’ between the two Units. The Police Officers’ qualifications, duties, wages, schedules, time-off, benefits and working conditions have always departed in material respects from those of the Firefighters.

What does, however, control the disposition of this issue is that the FLSA and Court of Appeals Decisions⁶ appear to require the inclusion of this type of contractually mandatory payment in an employee’s “regular rate” in the calculation of overtime payments. In this regard, the Act defines an employee’s “regular rate” as “all remuneration for employment paid to, or on behalf of, the employee.” 29 U.S.C. # 207 (e). There does not appear to be any valid argument that the contractually provided for longevity pay represents “remuneration for employment.” This is precisely the conclusion arrived at by the Sixth Circuit Court of Appeals⁷ when it affirmed a lower District Court’s Decision granting the Plaintiffs’ Motion For a Summary Judgment when it held, in relevant part, as follows: “For the reasons stated, we AFFIRM the District Court’s grant of summary judgment for the plaintiffs on the basis that Section 7(e)(2) of the FLSA does not permit the exclusion of shift differentials, hazardous duty pay, bonuses for education degrees, and *longevity pay* from the overtime rate...” (*Emphasizes Added*)

It is also noteworthy that the Court held it was irrelevant that the challenged exclusion of longevity pay from the overtime calculation was the product of collective bargaining. Specifically, the Court stated: “... there is no collective-bargaining exemption from the FLSA.... Therefore, we find unpersuasive the City’s argument that because the Agreement was

⁶ See *Featsent v. City of Youngstown*, 859 F. Supp 1134 (N.D. Ohio 1993, 70 F.3d 900 (6th Cir. 1995), *Local 359 Gary Firefighters, AFL-CIO-CLC V. City of Gary*, 1995 WL 934175 (N.D. Ind. 1995) (unpublished opinion).

⁷ The City of Elyria, Ohio is within the jurisdiction of the Sixth Circuit Court of Appeals.

the product of a negotiating process, its provisions should be judicially respected.”

While there is little true option available to me in dealing with this issue, it is troubling that the Association has not offered any cogent cost estimates in advancing this issue. While its Advocate did suggest it would cost the City between \$4.00 and \$5.00 per overtime hour worked, these figures do little to inform me as to what the City’s total costs will be or the equivalent percentage of employment costs that will increase as a result of this requested change. To seek any type of increase in the financial environment that exists here without knowing precise cost numbers is arguably irresponsible. Last minute guesses simply do not suffice as cogent evidence in this regard.

RECOMMENDATION: It is recommended that Article 12, Section 12.1 should be amended to include the following language: “In addition, for all hours actually worked, the overtime rate shall include longevity entitlement effective January 1, 2012.”

ARTICLE 13-WAGES

UNION POSITION: Here, the City seeks the following in the form of increases in the base rate for its members: one percent (1%) effective July 2, 2009; one and one-half percent (1 1/2%) effective July 2, 2010; and, two percent (2%) effective July 2, 2011. It argues such modest wage adjustments are more than reasonable given the fact that these officers have not had any increase since mid-2009. It argues also the City has recently realized a modest improvement in revenues over expenditures allowing for a similar improvement for police officers. It acknowledges that Fact-Finder Ruben only recommended 0%, 1% and 1.5% increases over the term of a new three (3) year successor Agreement for the City’s firefighters but suggests there were other “hidden” improvements in that contract. Likewise, it argues that a reduced cadre of police officers is being required to do much more in the consummation of their duties with poorly conditioned equipment, less training and short staffing of shifts. Finally, it suggests its offered comparables⁸ of Northeast Ohio cities cogently demonstrate that the requested wage adjustments are reasonable and should be affirmed by me.

⁸ Association Exhibit No.: 4 appended to its pre-hearing statement reflecting SERB published data from 25 cities.

CITY POSITION: Given what it views as continuing financial hard times for Elyria presently, and for sometime to come, the City requests that I adopt its wage freeze proposal under the terms of the successor Agreement. Additionally, it seeks all police officers hired after 31 December 2010 be excluded from any longevity payments. In other words, it requests I grandfather longevity pay for those officers who were hired on or before 31 December 2010. In any event, it contends cited comparables cogently show that Elyria police officers are fairly compensated versus their peers in other similar cities.⁹ While it does acknowledge Fact-Finders Ruben and Mancini¹⁰ recommended increases for employees in the respective bargaining units before them, it contends its position here is nonetheless appropriate and necessary given the continuing financial problems being faced by the City.

DISCUSSION: In Conciliator Ruben's 24 October 2011 Award in dealing with the wage issue before her, Ms. Ruben succinctly held: "The record of evidence shows the City's proposal to delay the Fact-Finder's recommendation by 6 months is a \$31,000 item. Given the Union's agreement to accept a wage freeze for 2009 and 2010, the Conciliator finds the Fact-Finder's recommendation/Union proposal to be appropriate." As noted, the City in the Firefighters case adopted as its position in conciliation the Fact-Finder's wage recommendation but suggested a six (6) month delay in the initial effective date. The point is that for this unit, the City offered some adjustment to wages. And, while this may have been simply the product of sound strategy given the Fact-Finder's recommendation, it nonetheless undermines somewhat its claims here relative to the need for a wage freeze. In contrast, while the Association seeks a greater increase than obtained by the Firefighters and Dispatchers, it has failed to offer sufficient reason for why its members should be treated differently/better. It is true that the respective units are different as well as their bargaining histories but the reality is the Association has failed to cogently show why its members should receive more liberal wage adjustments in this case. Here again, while the Association did, in this instance, endeavor to calculate the cost of its proposal, that offered was simply an estimation with little being offered in support of same. Likewise, the Association appears to have ignored the cost import of its longevity overtime proposal, a proposal I have

⁹ The City suggests the following nine (9) cities serve as reasonable comparables to Elyria: Euclid, Cleveland Heights, Cuyahoga Falls, Lakewood, Warren, Youngstown, Mansfield, Lorain and Canton.

¹⁰ Mr. Mancini served as Fact-Finder for the City of Elyria and FOP Dispatchers in SERB Case No.: 10-MED-02-0143, his Report being dated 24 August 2011.

recommended be adopted. In any event, if I were to adopt the City's proposal, it would mean that its police officers would be required to work with no increase in wages over a period of four (4) years. Such a request is simply unreasonable under the record before me.

RECOMMENDATION: Effective 1 July 2011, the base wage rate for Elyria police officers be increased by one percent (1%). Effective 1 July 2012 the base wage rate for Elyria police officers be increased by one and one-half percent (1 1/2%). To offset the cost impact of this recommendation, it is recommended that all police officers hired after 31 December 2011 be considered ineligible for longevity pay.

ARTICLE 19, SECTION 10 - SICK LEAVE

UNION POSITION: The Union seeks what it describes as "modest improvement" for this benefit in the form of additional compensatory time credits for employee non-use of sick leave. It suggests this enhancement would be beneficial for employees and the City in promoting the non-use of sick leave. It claims, moreover, while the existing incentive under the sick leave program has worked well for the parties, this added inducement would be even better. Finally, it suggests this change would bring police officers more in line with other City safety personnel.

CITY POSITION: The City objects strongly to any change in this area save for a housekeeping item in the existing language that presently incorrectly references another section of the Agreement. It contends the existing proviso already provides for a generous incentive program when taken advantage of by employees. Stated simply, it contends that far too many employees are not taking advantage of that which currently exists given their excessive use of sick leave.

DISCUSSION: While the proposed enhancement would prompt some employees to be more willing to forego sick leave for minor illnesses/injuries, the Association has not shown this change would, in reality, cause those who regularly use this benefit to do otherwise. Likewise, with the already reduced cadre of police officers, additional comp time would only increase the need for overtime to cover for employees taking comp time, a reality simply ignored by the Association in its proposal/hearing presentation. And, while the City appears to have

acknowledged that supervisors presently have a more liberal program, it notes that supervisors are simply not provided the same level of opportunities to accrue comp time as are police officers.

RECOMMENDATION: The current contract language under Article 19, Section 10 should be carried over into the parties' successor Agreement. The parties, however, should amend the existing language to correct any existing incorrect reference(s) to other contractual provisions.

ARTICLE 28 - PROCEDURE FOR SCHEDULING DAYS OFF

CITY POSITION: Here, the City seeks to add additional language under this Article reading:

If overtime is needed to permit an employee to take requested compensatory (court) time off, the employee requesting the compensatory (court) time off shall assist with finding a replacement worker and the court time request shall not be approved until a replacement employee has agreed to work the requested time. The replacement employee working the overtime may not choose compensatory time in lieu of overtime payment.

It suggests this new language would allow departmental supervisors to manage time off and manning requirements far more efficiently. In any event, it contends that a "paid overtime only" provision would prevent compensatory time off from pyramiding into more compensatory time. As for an earlier proposal of the Association relative to required manning levels, the City strongly objects to any such limitation on the rights of its Supervisors. It contends, moreover, this latter subject has long been considered a "permissive subject of bargaining" and is simply not rightly before me here.

UNION POSITION:¹¹ The Union opposes the above-quoted proposed language contending that it simply seeks to deny police officers certain rights they had previously secured through give and take collective bargaining. It claims the City has not cogently shown that this change is

¹¹ The Union did not address the subject of minimum staffing either in its pre-hearing submittal or at hearing. I thus need not consider this issue herein or address the City's "permissive" subject argument further.

necessary or warranted at this time.

DISCUSSION: While the City has clearly articulated a somewhat convincing rationale for why the proposed language might be appropriate, especially given its reduced level of staffing, the reality is it has, for the most part, only advanced argument on the issue. No cogent evidence has been offered showing the basis for this proposal or the adverse impact of the current system. And, while I could speculate as to what is occurring versus what the proposed change would provide, it simply is not good practice for any Fact-Finder to base his recommendation on speculation.

RECOMMENDATION: The proposed additional language under this Article 28 should not be included into the parties' successor Agreement. The existing language under this proviso should be carried over into the parties' successor Agreement.

ARTICLE 36 - DURATION

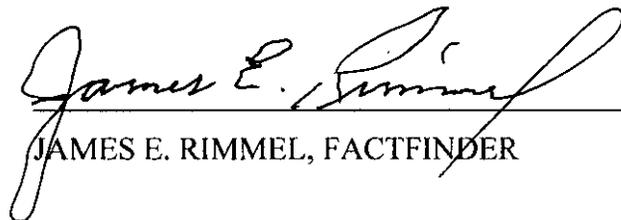
UNION POSITION: The Association seeks a three (3) year successor Agreement running from 2 July 2009 through midnight 1 July 2012. It requests all other terms and conditions under this Article remain unchanged and carried over "as is" into the parties' successor Agreement.

CITY POSITION: The City seeks a three (3) year successor Agreement running from 1 July 2010 through 30 June 2013. It contends that to do otherwise or, as the Union proposes, would have the parties' right back into negotiations on yet another successor Agreement before the ink was dry on that at issue here.

DISCUSSION: There can be no question that the circumstances surrounding these negotiations, especially the City's financial situation, contributed significantly to an atypical and extended negotiation process. While either party could have arguably taken steps to accelerate the process, such was not done for reasons not completely of record. The reality is that mediation efforts did not occur until March 2011 with my appointment by SERB as Fact-Finder occurring in April 2011. And, while this appointment called for a hearing and report to be issued within

fourteen (14) days, the parties, as was their right, mutually agreed to extend this time line. Even at hearing, the parties decided to defer the issuance of my report until Conciliator Ruben's Award in the above-mentioned firefighters matter was issued. Ms. Ruben's Award is dated 24 October 2011. Reference to this chronology of events is to highlight that both parties opted to proceed in this atypical/extended fashion either by expressed choice, lack of affirmative action or otherwise. In any event, given the reality that the present environment, financial and otherwise, in Northeast Ohio, including the City of Elyria, providing for a successor Agreement that would expire in roughly six (6) months, would be truly ill-advised and only serve to further impact this less than good relationship between these parties. It should be emphasized, moreover, that certain of the recommendations made above quite possibly would have been modified if I had opted to recommend that proposed by the Association here.

RECOMMENDATION: The existing first sentence under Article 36, Section 36.1 should be amended to read "the period of July 1, 2010 through June 30, 2013..." Likewise, under the second sentence of this Section, the parties should substitute "June 30, 2013" for the present date of "July 01, 2009."



JAMES E. RIMMEL, FACTFINDER

Date

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5 January 2012

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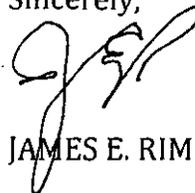
RE: Elyria Police Patrolmen's Association and City of Elyria
SERB Case No 09-MED-03-0195

Counselors:

Enclosed please find my Fact-Finders Report in the subject SERB matter.
Also, please find my statement of fees in connection with this matter

With kind personal regards,

Sincerely,

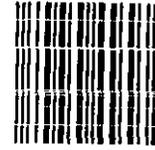


JAMES E. RIMMEL

JER;j
Enclosures
cc: J. Russell Keith
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