

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of the Fact-Finding Between:

Ohio Patrolmen's Benevolent Association,)	
)	
Employee Organization)	
)	
and)	Case No. 11-MED-07-0986
)	
City of Vandalia,)	
)	
Employer)	

APPEARANCES:

For the Union:

Joseph Hegedus, Union Representative
Scott Breisch, Police Sergeant
Tom Vallery, Police Sergeant

For the City of Vandalia

Daniel Rosenthal, Employer Representative
Douglas Knight, Chief of Police
Lt. Dan Swafford
Julie Trick, Assistant to the City Manager
Lt. Harry Busse

Before Sarah Rudolph Cole, Fact-finder

The Ohio State University, Moritz College of Law
55 West 12th Avenue
Columbus, OH 43221
Tele: (614) 688-4918
Fax: (614) 292-2035
E-mail: cole.228@osu.edu

Introduction

The Ohio Patrolmen's Benevolent Association ("Union" or "OPBA") represents the bargaining unit at issue in this case. The six member bargaining unit consists of the Vandalia Police Sergeants. These sergeants are responsible for supervising police officers in the City of Vandalia. Prior to this fact-finding, the parties attempted to resolve their remaining issues through mediation with a SERB mediator as well as through mediation with the Fact-finder. Following mediation with the Fact-finder, several issues remained in dispute, including articles related to use of accrued vacation time, overtime, and compensation, including changes to the step schedule and shift differential. On January 5, 2012, the parties met for fact-finding in the Vandalia City Hall. This report addresses issues that remained in dispute following the mediation. All matters not addressed in this report are tentatively agreed to or continue in the parties' successor agreement.

Criteria

Ohio Revised Code § 4117.14(G)(7) specifies the criteria the Fact-finder is to consider when making a decision:

- (a) past collectively bargained agreements, if any, 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;

- (f) such other facts, not confined to those listed in this section, 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 proceedings in the public service or private employment.

Findings of Fact

Of the statutory criteria identified above, the most relevant to the dispute here include the parties' past collectively bargained agreements, the employer's ability to pay, internal comparables and external comparables. The parties presented considerable evidence as to each of these criteria at the hearing, but appeared to focus most heavily on external and internal comparable evidence.

Article XI – Vacation Leave

The OPBA proposes to change the vacation leave language so that the police sergeants can use up to 16 hours of accrued vacation time under the same conditions as are required for use of personal days. In other words, the proposed change would permit the sergeants to provide less notice that they intended to use vacation days than is normally required under the Vacation Leave article. The OPBA contends that this change is appropriate because this benefit is already provided to the Vandalia Police Officers.

The City objects to this change, arguing that it has worked poorly with the police officers, resulting in absences without adequate notice.

Recommendation: The Fact-finder recommends that the vacation leave provision be modified to reflect the language in the Vandalia Police Officers Agreement, which states, "An employee may use up to 16 hours of accrued vacation time under

the same conditions as provided in Section 10.01 of this Agreement for Personal Days, provided that such vacation time is scheduled in not less than four-hour increments and at the beginning or end of the shift.”

Rationale: The statute requires that a Fact-finder consider internal and external-comparables, as well as other factors, to determine whether to grant or reject a change to the collective bargaining agreement. Here, the OPBA noted that the police officers have had this provision in their contract since January 1, 2008 and that the sergeants have been responsible for administering this provision since that time. The City states that the provision has not worked well, but provided no evidence to support this contention. Since the internal comparable evidence supports this change, and neither party pointed to this provision as an outlier for police sergeants in Ohio, the Fact-finder recommends the change.

Article XVI – Overtime

On December 15, 2009 or thereabouts, the City informed the police sergeants that police overtime costs had skyrocketed and that the City needed to change the overtime practice in order to control costs. At the time, the police sergeants maintained a 6/3 (six days on, three days off) schedule, which permitted them to have rotating days off. The City proposed moving to a 5/2 schedule, which would have resulted in 5% additional coverage on each shift, reducing the need for overtime. To avoid moving to the 5/2 schedule, the sergeants agreed to calculation of overtime pay under the Fair Labor Standards Act (FLSA). Under the FLSA language, overtime is paid to law enforcement officers after 171 hours in a twenty-eight day work period. In addition to changing the way overtime was calculated, the chief of police also changed the schedule in order to

reduce overtime. Although the parties disagree as to which change (the FLSA overtime schedule or the change in shift staffing) had the greater impact on overtime costs, it is unquestionable that overtime costs dramatically decreased after both of these changes went into effect. Overtime costs for the police department's patrol section (which includes the sergeants' unit) were \$69,128 in 2011, down over \$145,000 from 2009.

The Union contends that the sergeants agreed to this change to help the department save money, but that it was a temporary change, originally designed to last only one year. The sergeants continued to work under the change until their contract expired two years later and they continue to work under the provision. They contend that the change should not be made permanent and that the police officers acceptance of this change in their most recent contract should not be considered because it was part of a mediated settlement agreement entered into during a fact-finding. The Union emphasized that no other jurisdiction in Ohio has a comparable provision.

The City does not contest that this provision is an unusual one, but emphasizes that the provision works very well, saving the City a considerable amount of money. It also contends that the mid-term modification to the contract is the status quo and, as a result, should be given great weight by the Fact-finder. The City cites *In re West Carrollton City School District*, SERB 86-026 to support its contention that the language is the status quo and argues that the status quo is what is in place now, not what was in place prior to the amendment.

Recommendation: The Fact-finder recommends a return to the overtime rules in Article XVII that were in effect prior to the amendment dated December 15, 2009.

The City relies heavily on internal comparables (that the police officers kept this provision in their new collective bargaining agreement (CBA) and that the fire-fighters maintain a similar provision) and its contention that the amendment became a permanent part of the sergeants' CBA when it was implemented in 2009. Neither argument is convincing in light of the extraordinary dearth of external comparable data supporting the existence of this provision and the plain language of the amendment itself. (Union Ex. 12) (none of 117 organized units use FLSA overtime rules; and only two jurisdictions are paid overtime on a 28-day cycle).

It is true that the police officers have this provision in their agreement. However the parties reached that agreement during mediation. It is unclear what was exchanged in order to convince the police officers to retain the provision. Even considering the police officers' agreement as an internal comparable, the City's argument that the provision should remain is not convincing in light of the amendment's plain language and the external comparable data.

The amendment states, "[t]his amendment will remain in effect for *the duration of the current collective bargaining agreement.*" (emphasis added). The parties would not have used the language "duration of the current . . . agreement" if they had intended the provision to last beyond the expiration of the agreement. The City's status quo argument does not alter the Fact-finder's conclusion because the parties clearly intended the provision as a temporary amendment, not as a permanent change to the CBA. Moreover, the plain language of the amendment, when considered together with the strong external comparable data establishing that no other jurisdiction in Ohio uses this language,

convince the Fact-finder that the provision should not remain part of the agreement going forward.

The City's reliance the *West Carrollton* case is misplaced. In that case, the issue was whether the terms of the collective bargaining agreement remained in effect after it expired and until a new agreement is reached. It is true that a collective bargaining agreement continues after its expiration, for at least some purposes. See *West Carrollton* at 296. Here, however, the issue is whether a temporary amendment to the collective bargaining agreement should survive the agreement's expiration. Because the parties did not intend for this amendment to be a permanent change to the CBA, the Fact-finder will treat it, for purposes of analyzing the provision, as a temporary change to the agreement, one that would be subject to renegotiation after the CBA expired.

Article XX – Compensation

The parties disagree about wage increases for the term of the Agreement. The City proposes a 2.25%/2.25%/2.25% wage increase for the next three years; the Union proposes an increase to wages of 3%/3%/3%. The Union also proposes eliminating language in the current agreement that would place employees promoted to sergeant after the effective date of the contract within the City's merit compensation plan, rather than under the collective bargaining agreement. Finally, the Union proposes a change to the sergeants' shift differential, increasing the payment from \$600 to \$1,000 dollars annually.

The Union argues that its wage increases and shift differential should be adopted in light of the City's sound financial condition and because the City has already given generous wage increases to all other City and non-represented police department employees in 2011 and 2012.

The Union also contends that the language creating a two-tiered wage system (one system for existing sergeants; another for employees promoted to sergeant) will hurt employee morale and deter qualified candidates from seeking promotions. The language appears after the chart in Article 20.02 and states, "Except as provided in the following paragraph, police officers promoted to the rank of sergeant after the effective date of this contract will be compensated under the City's compensation plan adopted in 2009." The Union also notes that no other jurisdiction maintains a similar provision.

The City contends that the Union's proposed wage increases and shift differential are not justified in the current economic climate. Nor, the City argues, are the increases necessary given that the sergeants are paid near the top of the wage scales when compared to sergeants in similarly situated jurisdictions. Moreover, non-unionized employees received a similar wage increase and, more importantly, the police officers agreed to 2.25%/2.25%/2.25% wage increases over the next three years.

With respect to the merit compensation plan, the City claims that it carefully studied compensation issues before it implemented its plan and that both new police officers and firefighters will be subject to this plan. The City proposes adding language to the wage provision that would allow employees to seek review of any denial of a merit increase under the City's plan through the grievance and arbitration procedure of overall performance ratings of two or below; however, such ratings may be reversed only if arbitrary or capricious. The City believes that this additional language will protect newly promoted sergeants from arbitrary and capricious decisions while still permitting the City the ability to make salary decisions based on merit.

Recommendation: The Fact-finder recommends adoption of the City's proposed wage increases of 2.25%/2.25%/2.25% for each year of the Agreement. The Fact-finder recommends rejecting the proposed increase in shift differential from \$600 to \$1,000 per year. The Fact-finder recommends retention of the language that would require newly promoted sergeants to receive merit increases based on the City's merit compensation system but that the parties also adopt the City's proposed amendment to the existing language of Article 20.02 – that permits employees to seek review of any denial of a merit increase under the City's merit compensation plan through the grievance and arbitration procedure of overall performance ratings of two or below; however, such ratings may be reversed only if arbitrary or capricious.

Rationale: Increase in salary at the rate of 2.25% each of the next three years is reasonable in light of the current economic conditions, the internal comparable data and the external comparable data. While the City appears to be in a solid financial condition, and maintains a relatively high unencumbered balance, its conservative approach to its finances seems reasonable in light of the uncertain economic times. Moreover, the police officers as well as the non-unionized employees within the City both received similar or identical wage increases. (City Ex. C and Union Ex. 6) (2011 pay increases for police officers were 2.25% each year and for non-unionized employees predominantly in 2.5% range). Finally, the Vandalia sergeants are paid at the higher end of the scale when compared to sergeants in comparable jurisdictions. (City Ex. G). Thus, imposing the 2.25% wage increase for each year of the CBA is reasonable.

The Fact-finder also recommends rejecting the increase to shift differential. The Union offered little justification for the increase and the City noted that the shift differential in Vandalia is not really a shift differential but rather a lump sum payment that is distributed without regard to the shift the sergeant actually works. In uncertain economic times and in the absence of proof of need, it would not make sense to increase the shift differential.

Finally, the Fact-finder recommends maintaining the current contract language creating a two-tiered pay scale but adding the City's proposed language to that provision to permit newly hired sergeants to contest poor evaluations through the grievance process (see above language). While the language the Union attacks is highly unusual in a collective bargaining agreement, the police officers and firefighters with Vandalia have already agreed to the language, and non-unionized employees are governed by it. No external comparables support the presence of this language. Yet, unlike the overtime amendment, which the parties clearly intended as a temporary measure, the merit-based language is contained in a past collectively bargained agreement. Although atypical, the sergeants' unit agreed to adoption of this language in their last agreement. They must live by their agreement, albeit with the City's new language added (which should ameliorate potential harsh reviews of sergeants), in the absence of evidence of changed circumstances¹ or disparate treatment of their unit.¹

¹ The Union contended that the language will discourage police officers from applying to become sergeants and harm employee morale. The Union did not, however, provide any concrete evidence to support this speculation. Thus, it is merely speculation and does not establish changed circumstances.

This concludes the fact-finder's report and recommendations.



Sarah Rudolph Cole, Fact-finder

Columbus, Ohio
February 2, 2012

CERTIFICATE OF SERVICE

The foregoing document has been served by email to Joe Hegedus, jmhege@sbcglobal.net, Daniel Rosenthal, rosenthal@drgfirm.com, and the State Employment Relations Board, Mary.Laurent@serb.state.oh.us, on the 2nd day of February 2012.



Sarah Rudolph Cole