

Fact Finder's Report State Employment Relations Board

In the Matter Of:

Fraternal Order of Police
Ohio Labor Council, Inc

And

The City of Wilmington

Case Number: 12-MED-09-0903

Before Fact Finder: Floyd D. Weatherspoon

Appearances:

For Fraternal Order of Police, Ohio Labor Council, Inc.

Mark A. Scranton
FOP/Ohio Labor Council, Inc.
222 East Town Street
Columbus, OH 43215

And

For The City of Wilmington

David S. Blaugrund
Blaugrund, Herbert, Kessler, Miller, Myers & Postalakis, Inc.
300 W. Wilson Bridge Road, Suite 100
Worthington, OH 43085

This fact finding arises pursuant to Ohio Revised Code Section 4117.14 between the Fraternal Order of Police, Ohio Labor Council, Inc. (Union) and The City of Wilmington, (City), Floyd D. Weatherspoon was selected to serve as the impartial Fact Finder, whose report is issued below.

The Fact Finding Hearing was held on April 24, 2013. It is noted at the outset that the parties engaged in mediation and were able to resolve a number of issues. After the mediation, the parties identified the following issue as being unresolved:¹

1. Article 18 - Wages

The Ohio Public Employee Bargaining Statute sets forth the criteria the Fact Finder is to consider in making recommendations. The criteria are set forth in Rule 4117-9-05. The criteria are:

1. Past collectively bargained agreements, if any.
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 interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards 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 issues submitted to mutually agreed-upon dispute settlement procedures in the public service or private employment.

Issue

Wages – Article 18 -- Step Increases

¹ The parties agreed that Article 17 and Article 24 will remain as in the current contract language.

Union Proposal

The Union proposes that the bargaining unit members should receive a step increase on their anniversary date throughout the duration of the contract.

Union Position

The Union proposes a step increase in accordance with the contract for the members that have not reached their top step. The Union contends that the City has the ability to fund its proposal. The Union maintains that it is not the City's inability that hinders the step increase, rather it is City's unwillingness to give the step increase. The Union maintains that the bargaining unit members have had no wage increase, through cost of living or step since 2009.

The Union maintains that the City has begun its economic recovery. In support of this contention, the Union states that according to Ohio Department of Job and Family Services, the unemployment rate for Clinton County has gone from 12.1% in October 2011 to 10.9% as of February 2013. (FOP Tab 3.3)

The Union contends that the City has the ability to fund its proposal

According to the Union, the cost of its proposal is \$18,470 or \$22,626.24 with roll-ups factored in. (FOP Tab 3.15).² In support of its position, the Union emphasizes that the City enjoys a General Fund carryover of \$2,720,361.58 from 2012 to 2013. The Union emphasizes that the carryover has increased from the prior year of \$2,538,741.48 from 2011 to 2012 . (FOP Tab 3.18).

In further support of its position that the City has the ability to fund the requested step increases, the Union stresses that the City received an unexpected inheritance tax of \$146,000 that has not been appropriated for use. (FOP Tab 3.24).

² The Fact-finder understands that the "roll-up" costs to be additional costs associated with the increase, such as increased retirement costs, etc.

Comparable Data

The Union maintains that steps are an industry standard. (FOP Tab 3.11). The Union states that no other comparable agency has frozen steps. The Union stresses that the City acknowledges that the money is there. The Union contends that it is not that the City cannot fund step increases, according to the Union the City is not willing.

The Union maintains that comparable agencies within the same geographic location are still receiving step increases in accordance with their collective bargaining agreements. The Union provides comparable data, including step language from the relative collective bargaining contracts. The comparable agencies listed by the Union are City of Blue Ash, City of Cheviot, City of Forest Park, City of Franklin, City of Greenville, City of Monroe, City of Montgomery, City of Mt. Healthy, City of North College Hill, City of Springdale, and the City of Xenia. (FOP Tab 3.11). The Union emphasizes that no other comparable agency has its steps frozen.

The Union stresses that the City has in the past justified its failure to give raises by using the City of Moraine as a comparable because it suffered the closing of a GM plant. The Union contends that the City no longer is using City of Moraine as a comparable, because the City of Moraine received step increases. The Union maintains that now the City attempts to justify its lack of willingness to give a raise by using DHL's closure.

*Would the City have to give **all** City employees a step increase*

The Union states that despite the City's claim that it has to treat all city employees the same, the Union maintains that there is no mandate that step increases have to be given to all city employees.³ The Union states that the City's rationale hinges on the campaign promise of the Mayor to treat all City

³ The City maintains that it has a policy that when one bargaining unit receives a raise of any kind that the remaining bargaining units, as well as the non bargaining-unit employees, receive the same treatment. In other words, the City maintains that it would have to give all City employees step increases, if the employee has not reached the top step in his/her pay range.

employees the same. The Union contends that a campaign promise is not one of the statutory factors for consideration in a fact-finding.

The Union acknowledges that some collective bargaining agreements provide that the members will enjoy the same increase as any other bargaining unit or non-bargaining unit employee.⁴ The Union further acknowledges that when a cost of living increase is given, it is to be given across the board. However, the Union stresses, it is not the cost of living increase at issue, rather it is step increases. The Union maintains that there is no contractual language or written policy that would require the City to give step increases to other city employees just because this bargaining unit received step increases.

The Union further emphasizes that reviewing the City agreements with it's Police Officers and Firefighters also shows why these steps would not have to be given across the board. In other words, according to the Union, even with in the contracts that contain the "me too" language, the City would not have to give a step increase. Specifically, the Union points to Section 18.1 of the Police Officers contract and 19.1 of the firefighter's contract, that states, in part, "[t]his provision [me too] does not apply in situations where the Employer grants individual employees wage increases due to wage corrections, enhanced compensation for out of classification or other extraordinary work assignments, or similar increases in compensation addressing unique situations of individual employees."

The Union maintains that this provision applies because the longtime Chief of Police for the City retired last year and the Assistant Chief tested and was promoted to Chief. As a result, the position of Assistant Chief was not filled. The Union contends that these duties and responsibilities have been placed on the Sergeants and the Chief Detective of this bargaining unit. The Union stresses that no other department within the city of Wilmington has lost a position at a level equivalent to the Assistant Chief.⁵

4 This contractual provision is what the parties call the "Me Too" provision or language.

5 The City notes that while the Union emphasizes that some of the duties of the former Assistant Chief have been

City's Proposal and Position

The City proposes no step increase for 2013 and that the issue may be reopened during wage reopener negotiations for the 2014 and 2015 contract years.

Ability to Fund the Union's Proposal

The City maintains that the recovery since the 2008 economic recession has been slow. The City stresses that the Clinton county unemployment rate remains high, and at 10.9%, it is one of the highest of the Ohio counties. (Employer Exh. 1). The City emphasizes that few if any local businesses are giving raises.

The City contends that it has lost a significant revenue source since the closing of DHL. The City explained in detail the impact of DHL's closing had on the City of Wilmington's local economy. Deputy Auditor Mary Kay Vance testified that the City had annexed the land near the airport, including the DHL operations which increased the City's tax base, as well as its service area. This annexation allowed the City to reserve approximately four million dollars. The City contends however, that the unexpected closing of DHL in 2008, and the loss of approximately 3,000 jobs devastated its local economy. The City contends that their four million dollar reserve is steadily eroding and the City has often had to resort to deficit spending. Therefore, while the City acknowledges that it has a carryover balance; the City maintains that it cannot afford to fund the Union's proposal with the uncertain economy due to its declining revenue sources.

The City further contends that the Union's proposal will cost much more than stated by the Union because of the City's policy of internal economic equality. The City maintains that it has an obligation to treat all City employees the same. The City contends that to give the step increases to all

assumed by the Sergeants. The City stresses that this is occurring throughout the City, as it has laid off non-essential personnel and not replaced employees that have left. The City emphasizes that the remaining employees have taken on the additional responsibilities of positions that have been eliminated or remain vacant. In other words, the Fact-finder interprets the City's statement to say that the Union's point does not excuse the City from adhering to its practice of giving all employees the raise.

city employees would cost \$178,288.97 or more than \$200,000 with the "roll-up" retirement costs, for 2013 alone. Not, the \$22,626,24 that the Union claims its proposal will cost.

Comparable Data

The City maintains that the Union's reliance on supposedly comparable data from other jurisdictions is misplaced. The City contends that none of the comparable jurisdictions relied on by the Union have lost 10,000 jobs virtually overnight and continue to have area unemployment rates in excess of 10%. (City's post-hearing brief, pg. 5).

The City further acknowledges that it relied upon the City of Moraine as a comparable jurisdiction in its last fact-finding. However, the City contends that the City of Moraine is no longer a comparable jurisdiction, not because the employees are receiving step increases, but because,

"Moraine lies in Montgomery County, a county now enjoying a relatively healthy unemployment rate of 7.9% -- just slightly above the State average of 7.6%. (See Exhibit 1). Wilmington on the other hand, lies within Clinton County, which has an unemployment rate of 10.9%-- among the ten counties with the highest rates in Ohio. In short, Moraine lies within an area of Ohio that has begun to enjoy a local economic resurgence. Wilmington does not." (Id. at 6).

The City maintains that Wilmington's local economy has not improved to the point where tax receipts support the granting of step increases to City employees.

Discussion

As with all levels of government, the City of Wilmington is also facing the decreased revenues and decreased funding that has impacted the nation. The Fact-finder also recognizes that employees have also been impacted by the economic downturn, with no increases and an increase in living costs. The Fact-finder is mindful of the economic dynamics that face both sides and why both sides are passionate about the subject. The primary criteria that normally will impact the Fact-finder's recommendation of step increases are the City of Wilmington's ability to pay and the comparable data.

The fact-finder notes that there is a huge disagreement between the parties as to the cost of the

Union's proposal. The Union contends that the proposal will cost \$22,626.24; whereas, the City contends that the Union's proposal will cost \$294,685.77, in 2013. The City contends that it is obligated to give all City employees the same step increases. Thus, the huge disparity between the cost of the proposal.

If this bargaining unit gets a step increase, is the City bound to give all City employees a step increase

For purposes of the Fact-finders recommendation only, the Fact-finder has to determine whether the City could potentially become bound to give all City employees step increases.

The parties present different accounts of the City's obligations with regard to "me too" provisions. The evidence on the record indicates that the City is likely obligated through a few collective bargaining agreements. However, the Union stresses that there is no written policy mandating that the City give step increases to all city employees. On the other hand, the City stresses that the Mayor has promised to treat all City employees the same. The Union vehemently states that this is not a valid consideration for the Fact-finder, as a campaign promise is not binding on the City. Nonetheless, Deputy Auditor Vance testified that it has been a long-standing past practice and that the City intends to match any raises given to other City employees. The past practices of parties are binding. Therefore, the fact-finder has to treat the Union's proposal as if it would extend to all City employees. Thus, the Fact-finder also has to rely on the City's figures for the cost of the Union proposal.⁶

The evidence supports the City's contention that it is spending more than its revenue stream is generating. In other words, even though the City maintains a carryover, its incoming revenues for the past several years have not been enough to cover the City's expenditures. (City Exh 2). While the City

⁶ Normally, the Fact-finder also relies heavily on the comparable data when determining wage issues. However, here the primary factors relevant to the recommendation are the ability to fund and the actual cost of the proposal.

took in more revenue in 2012 than it spent, the City presented sufficient evidence that this was due to an almost \$900,000 estate tax settlement that the City received. This one-time settlement allowed the City to stay on the positive side of spending. However, as the City notes, if it were not for this one-time settlement, the City's expenditures for 2012 would again have been greater than its incoming revenues. Deputy Auditor Vance also testified that the City will no longer receive an estate tax, because the State of Ohio has done away with the estate tax.

Deputy Auditor Vance talked about how the City's surplus or carryover at the end of the year is what pays the City's expenses for the 1st quarter of the next year, as revenues do not start to come in and are not available for the 1st quarter expenses. Deputy Auditor testified that the City relies upon real estate taxes which are collected in February and July. Therefore, the City does not typically receive any real estate tax revenue until March. The City also relies on income tax revenue which typically comes in April 15. Therefore, while the evidence establishes that the City has a surplus or carryover, the City presented evidence that a certain amount of carryover is necessary.⁷

Recommendation:

The Fact-finder hesitantly recommends no step increase for 2013. However, the Fact-finder recommends that it is given serious consideration for the re-opener for years 2014 and 2015. The Fact-finder understands that financial position that the City has faced and is slow to an economic recovery. However, the economic recovery has been felt by all involved, including the employees that have not had increases for many years. However, the City has provided sufficient evidence that its expenditures are greater than its revenues for the past several years, even though the City enjoys a surplus. Thus,

⁷ The Union questions the validity of some of the City's numbers. For example, the Union notes that Ms. Vance gave a rough estimate that the jobs lost by the closing of DHL was 10,000 and the number the City put forth in its pre-hearing statement was closer to 3,000. The fact-finder notes the discrepancy. The City's post-hearing brief uses 10,000 and the pre-hearing statement uses 3,000. The Fact-finder believes that Ms. Vance said the number tossed around in public was 10,000, but the Fact-finder understood her to say that she had reason to question that number, in any event, the end result is that DHL's closing had a negative impact on the local economy. The Union also points to a mistake in the City's exhibit. This mistake was corrected by the City during the fact-finding hearing. Although there were mistakes in the numbers, the fact-finder still finds the exhibits relevant and probative.

while, the Fact-finder hopes that the City doesn't withhold wage increases much longer, the Fact-finder recommends no step increase for 2013.

After giving due consideration to the positions and arguments of the parties and to the criteria enumerated in ORC Section 4117.14, the Fact Finder recommends the provisions as provided herein.

Respectfully submitted and issued this 17th Day of June 2013.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Fact Finders Report was served by email upon Mark A. Scranton, FOP/Ohio Labor Council, Inc., markscranton.fopolci@yahoo.com; and David S. Blaugrund, Blaugrund, Herbert, Kessler, Miller, Myers & Postalakis, Inc., dsb@BHMLaw.com and Donald M. Collins, General Counsel & Assistant Executive Director, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213 on this 17th day of June 17, 2013.



Floyd D. Weatherspoon
Fact Finder