

**STATE OF OHIO
BEFORE THE OHIO STATE EMPLOYMENT RELATIONS BOARD
IN THE MATTER OF THE FACT FINDING PROCEEDING IN
CASE NO. 12-MED-09-0975**

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1145

and

THE CITY OF BROOKLYN, OHIO

FACT FINDING REPORT

**Submitted by John F. Lenehan
FEBRUARY 19, 2014**

TO:

VIA E-MAIL

Union Representatives

Employer Representative

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FINDING AND RECOMMENDATION

I BACKGROUND

On October 30, 2013, The State Employment Relations Board (SERB) appointed John F. Lenehan as the Fact Finder in the case of the International Association of Firefighters, Local 1145 and the City of Brooklyn (Case No. 2012-MED – 09 -0975). A Fact Finding Hearing was held at 10:00 A.M. on January 23, 2014, at the Brooklyn City Hall, 7619 Memphis Avenue, Brooklyn, Ohio 44144. The International Association of Fire Fighters (“IAFF” or “Union”) was representative by Kelly A. Gallagher, Esq., who presented the case on behalf of the IAFF, and James Astorino, President of the Northern Ohio Fire Fighters, who represented the IAFF throughout negotiations and mediation and testified at the hearing. The City of Brooklyn (“City” or “Employer”) was represented by Patrick J. Hoban, Esq., Zashin & Rich Co. L.P.A. Also, in attendance and testifying on behalf of the IAFF was Lieutenant Jeff Lee. Testifying on behalf of the City were: the Chief of Police Scott Mielke, the Finance Director Dan Enovitch, the Law Director Scott Clausen and the Fire Chief Joseph Zemek.

Prior to the commencement of the hearing the parties attempted to mediate the two outstanding issues. As a result, one issue was resolved. The City withdrew its proposal to change the language of Section 18.04 of Article XVIII of the current agreement to reduce the number of employees that could be scheduled off on any one shift from three (3) to two (2).

The Fact finding Hearing then proceeded on the remaining issue. Testimony and documentary evidence was presented by the parties in support of their respective positions. At the conclusion of the hearing, the parties agreed that the Fact Finding Report would be issued via email to the parties’ representatives and SERB on February 19, 2014.

A. Description of the Parties and Bargaining Unit

The parties are the International Association of Fire Fighters and the City of Brooklyn. The City of Brooklyn is located in Cuyahoga County, Ohio, bordered by Cleveland, Parma and the City of Lindale. According the 2010 U.S. Census, the City has a population of 11,169 (down 3.8% since 2000) comprising, 5,153 households and 2,926 families. For the period of 2007 to 2011, the annual per capita income for the City residents was \$21,874 (Ohio’s per capita income

was \$25,618 for that same period) and the median household income was \$40,991 (Ohio's median household income was \$48,071 for that period).

The City operates a number of departments through which it provides services to its residents and visitors; these include Police and Fire, Senior Center and Recreation Departments. In providing these services, it has bargaining relationships with four (4) unions representing seven (7) different bargaining units. For the January 1, 2013 through December 31, 2015 contract period, the City has reached final agreements with all of the employee bargaining units except the IAFF.

The IAFF bargaining unit is composed of twenty-five (25) employees, consisting of six (6) Lieutenants, fifteen (15) Firefighter/Paramedics and four (4) Firefighter/EMT –Basics. Excluded from the bargaining unit are the Fire Chief and Part-time Firefighters/Paramedics.

B. History of Bargaining

The current Collective Bargaining Agreement (“CBA”) was effective from January 1, 2011 through December 31, 2012 and remains in effect until the parties reach a new agreement or either party gives notice of termination as provided in Article XXXVI of the CBA. The parties met on a number of occasions and engaged in bargaining. In addition, they presented various proposals via electronic mail and held numerous telephone conference calls. Concluding that the parties were at impasse on core issues, the City on October 17, 2013, requested a fact finder panel. As a result of this request, the parties selected this fact finder on October 30, 2013. The parties continued intermittent negotiations while scheduling a fact finding hearing date. They last met on January 8, 2014. On January 17, 2014, the parties participated in a conference call that resulted in a tentative agreement on the following articles.

1. **ARTICLE XXVIII – COMPENSATION**
2. **ARTICLE XXX –INSURANCE**
3. **ARTICLE VII – EMPLOYEE RIGHTS**
4. **ARTICLE XVIII – DUTY HOURS**
5. **ARTICLE XX – HOLIDAYS**
6. **ARTICLE XXI – VACATION**
7. **ARTICLE XXII –SICK LEAVE**
8. **ARTICLE XXVI – INJURY LEAVE**
9. **ARTICLE XXXI – LONGEVITY**

10. **ARTICLE XXXIII – MISCELLANEOUS**

11. **ARTICLE XXXVI – DURATION OF AGREEMENT**

All tentative agreements reached by the parties are incorporated in this report. The foregoing tentative agreement left two City proposals open at the commencement of the fact finding hearing. As a result of mediation, the City’s proposal on Article XVIII –Duty Hours was withdrawn. Thus, the only issue remaining for determination by the Fact Finder is the Employer’s proposal to delete the Letter of Understanding (“LOU”).

II CRITERIA

Pursuant to the Ohio Revised Code, Section 4117.14 (G) (7), and the Ohio Administrative Code, Section 4117-95-05 (J), the Fact Finder considered the following criteria in making the recommendations contained in this Report.

- 1) Past collectively bargained agreements between the parties;
- 2) Comparison of unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employers in comparable work, given consideration to factors peculiar to the area and the classifications involved;
- 3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect on the normal standards of public service;
- 4) Lawful authority of the public employer;
- 5) Stipulations of the parties; and,
- 6) Such factors as not confined to those above which are normally and traditionally taken into consideration.

III ISSUE

LETTER OF UNDERSTANDING – PART-TIME FIREFIGHTERS/PARAMEDICS

The Letter of Understanding, which is part to the current CBA, is set forth below.

Title: Letter of Understanding

Subject: Utilization of Part-Time Firefighters/Paramedics

Date: January 1, 2011

This is letter of understanding between the City of Brooklyn and Brooklyn Fire Fighters IAFF Local #1145 concerning the utilization of part-time firefighter/paramedics. All “all available open time” that needs to be filled in order to satisfy the minimum manning requirement shall be offered to part-time fire fighter/paramedics first. Available time that is not filled by part-time personnel shall then be filled by full-time members on overtime. Part-time fire fighter/paramedics will not be eligible for “backfill” time unless a departmental recall is needed.

No more than one (1) part-time fire fighter/paramedic shall be on duty at any one time. At no time shall less than five (5) full-time personnel be on duty.

Part-time personnel who are absent from monthly group drill without prior authorization shall lose the privilege for picking scheduled available open time for the following month, but shall be eligible to work any other available open time as it occurs.

Part-time personnel picking scheduled available time shall pick in twelve (12) hour shifts.

There shall be no more than sixteen (16) part-timers employed at any time. No part-timer may be employed more than thirty-six (36) hours per week.

CITY OF BROOKLYN

**THE INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS –LOCAL 1145**

By: _____

By: _____

CITY'S POSITION

In its pre-hearing statement, the City proposes the deletion of the foregoing Letter of Understanding (“LOU”) concerning part-time firefighters in order to restore its management right to effectively and efficiently staff its Fire Department. It seeks the flexibility to augment its full-time Fire Department employees with part-time employees to enhance service to the public and control costs. The City claims the LOU significantly limits the City’s ability to employ part-time firefighters to flexibly address staffing pressures, and its limit on total number of part-time firefighters the City employs may result in significant liability under the Federal Affordable Care Act. In addition, the City states in its pre-hearing statement that while it is the City’s intention to maintain minimum daily fire department staffing at six, the LOU mandates that at least five full-time fire fighters work each shift. The elimination of the LOU would allow, according to the City, much needed flexibility in maintaining adequate staffing with controlling overtime costs.

In support of its position, the City submitted into evidence twenty-one (21) exhibits and the testimony of four (4) witnesses. The first witness to testify on behalf of the City was Dan Enovitch, the City’s Finance Director. He testified to exhibits 1 through 7 which related to the financial condition of the City, its fund balances, revenues, expenditures, capital improvements, cost of a full-time and part-time firefighters and pending delayed expenditures. It was his opinion that because the City had only two years of revenue on reserve it was not in a position to spend freely. He testified that the pending exodus of American greeting will result in reduction of more than four million dollars or twenty percent (20%) of the City’s total income tax revenue. Although the City has implemented an austerity program to cover the American Greeting departure, it likely would have to explore other options in the future, such as, reducing capital improvements and closing unnecessary facilities.

On cross examination of Mr. Enovith, it was brought out that the City’s financial condition at this time was fairly safe without unforeseen contingencies, and if necessary many of the pending expenditures could be delayed. Also, there was no fiscal crisis because of wage increases granted to non- bargaining unit employees of 5% and to AMSCME and other bargaining units of 3.25% for 2013.

The second witness called to testify for the City was Police Chief Scott Mieke. He testified that there was no requirement in the Police Departments collective bargaining agreements for minimum staffing. He also explained the overtime funding for the Police Department. Accordingly, not only is overtime for police officers paid out of the General Fund,

but it is also paid from two special funds under grants (POPAS - for Extra Patrol and Traffic Enforcement; and HIDTA for High Intensity Drug Trafficking). This he testified can be explained by examining City Exhibits 8 and 9. According to City Exhibit 9, the total overtime paid from the General Fund to Fire Department was higher than the total overtime paid from the General Fund to the Police Department for the period 2011 through 2013. However, overtime paid during 2013 from the General Fund for the Police Department was higher than that paid for the Fire Department due to retirements of Police Officers.

On cross examination the Police Chief testified that the Police Department did not hire part-timers and never used them to cover overtime of full-time employees because of the difficulty in retaining and training part-time employees. Also, the City has not allowed the Department to hire part-time dispatchers.

Law Director Scott Clausen was the third witness to testify on behalf of the City. Mr. Clausen having been involved with negotiations with all the City's bargaining units gave a brief history of negotiations. He testified that prior to the passage of the increase in the income tax in 2009 from 2% to 2.5%, the city's expenditures were exceeding its revenues. To correct this, the City reduced staffing through layoffs and early retirement incentives. Although, it should be noted there were no layoffs in the Police and Fire Departments. In addition, funding was reduced in all departments, including police and fire. All bargaining units agreed to some concessions during labor negotiations as reflected in City's Exhibits 10 and 11. The IAFF agreed to not taking a scheduled increase in 2009. Mr. Clausen also testified concerning City's Exhibit 12, American Greeting moving to Westlake, Ohio, and the impact on the City of losing 2,000 employees.

City's Exhibit 13 consists of applicable overtime provisions and Letters of Understanding on the Utilization of Part-time Fire Fighters contained in the CBAs for the periods: January 1, 2003 through December 31, 2004; January 1, 2005 through December 31, 2007; January 1, 2008 through December 31, 2010. City's Exhibit 14, dated March 3, 2010 reflects an amendment to the LOU dated January 1, 2008.

The testimony of Mr. Clausen and the CBAs for January 1, 2002 through December 31, 2004 and January 1, 2005 through December 31, 2007 and the Letters of Understanding attached to those agreements establish that there was no limit on the City using more part-time firefighters. The LOU attached to the CBA for the period January 1, 2008 through December 31, 2010 contained a provision limiting to one the number of part-time firefighters that could be on duty at any one time. The subsequent LOU dated March 3, 2010 (City's Exhibit 14), mandated:

“At no time shall less than five (5) full-time personnel be on duty”. In addition, to the limitation to one, the number of part-time firefighters that could be on duty, and staffing at the minimum of five (5) full-time fire fighters, the current, CBA and LOU effective January 1, 2011 through December 31, 2012, limits to sixteen (16) the number of part-timers that may be employed at any time, and the number of hours they may work per week to thirty-six (36). Apparently, the current language of the LOU, dated January 1, 2011 was the result of Fact Finder Nels E. Nelson’s recommendation in the Matter *City of Brooklyn and Brooklyn Firefighters*, Case No. 10 – MED – 09-1115 (City Exhibit 15).

Mr. Clausen was asked on cross examination whether there could be a replacement for American Greeting. Also, it was brought out on cross examination that the third paragraph of the original LOU dated October 27, 2003 in City’s Exhibit 3 could be a limitation on the use of part-time firefighters.

The fourth and final witness to testify on behalf of the City was Fire Chief Joseph F. Zemek. He testified as to the cause and high cost of overtime under the current LOU. City Exhibits 16, 17, 18 and 19 are the records of overtime usage by the firefighters. According to the Chief allowing two part-time employees to be assigned to each shift, instead of the current one, would reduce costs for an annual savings of \$100,000 and make it easier to schedule. City Exhibit 20 supports the Chief testimony. It is a comparison of the total actual overtime hours for the calendar years 2011, 2012 and 2013 under the current LOU allowing one part-time fire fighter and the reduction in overtime usage that would occur by allowing two or two and half part-time firefighters to be assigned to shifts for overtime usage.

The Chief also testified that other departments do not restrict the use of part-time employees to cover for overtime. In support of his testimony, he referred to City Exhibit 21, which is a comparison of ten other fire departments in North East Ohio.

On cross examination the Chief testified that there were additional costs for training and equipping part-time employees, that the use of part-time fire fighters would not go above two, that the savings each year would be \$100,000.00, and that other departments for mutual aid do not use part-time fire fighters.

The City also submitted three Fact Finding Reports and one Conciliation Report from SERB in support of its arguments.

UNION'S POSITION

The Union asks the Fact finder to reject the City's proposal to eliminate the LOU from the CBA. It also asks the Fact Finder to reject the City's proposal to increase part-time employee use and instead to recommend the current contract language be retained. In support of its position, the Union in its prehearing statement submitted the following arguments.

1. *Past Bargaining Agreements.* Since the negotiated of a LOU regarding the utilization of part-time employees in the CBA almost twenty years ago, no more than one (1) part-time employee was permitted on duty at any one time. The City is now seeking to change a long-standing operational procedure without sufficient justification.
2. *Internal factors.*
 - a. Comparing the IAFF bargaining unit with the Police Department bargaining unit, part-time employees do not replace full-time employees in the Police Department. Also, the Police Department's overtime usage is higher than the Fire Department's.
 - b. *Costly Excessive Part-Time Use.* The City scheduled part-time employees on shift for one thousand five hundred an seventy two point five (1,572.50) hours for a total cost in 2013 of twenty thousand four hundred forty two dollars and fifty cents (\$20,442.50).
 - c. *Recent Contract with MFLU.* The City recently negotiated a contract with the MFLU and agreed to limit part-time employee use.
 - d. *IAFF Cost Savings/Reduction in Work Force/Increase in Call Volume.* The number of IAFF bargaining unit members has decreased by five (5) during the past ten years, resulting in a cost savings of approximately \$500,000.00 per year. In addition, the City took additional steps to cut costs by decreasing the minimum number of personal on duty per day from seven (7) to six (6).
 - e. *Management's Contractual Alternative to Additional Part-Time Use.* The City has the ability to curb overtime by transferring employees to balance shift strength. Furthermore, unless a full-time member is injured or ill, one (1) part-time employee is sufficient to cover any overtime generated by minimum staffing levels.
 - f. *Problems Associated with Part-Time Use.* The IAFF argues that increasing the number of part-time employees on duty per day will negatively impact the citizens of Brooklyn.

g. Tentative Agreements with the City Will Curb Overtime. The elimination of the contractual obligation requiring one (1) bargaining unit member off per day, as well as the option for vacation buyout will reduce overtime use.

3. *External Factors.* Part-time employees are not utilized in the surrounding communities, viz., Parma, Parma Heights, Cleveland, Brookpark, Berea, Middleburg Heights, Strongsville, Lakewood, Westlake, Rocky River, North Olmsted, and North Royalton.
4. *Interests and Welfare of the Public/ Effect on the normal Standard of Public Service.*
5. *Ability of Employer to Finance.* Although the City will argue that the departure of American Greetings will have enormous consequences to the City's budget, it will not impact the duration of this contract. The City's General Fund balance at the end of 2013 was \$8,370,294.47. In addition the City received \$16,773,585.04 in income tax revenue. Finally, the City recently completed negotiations with the OPBA dispatchers, resulting in a 3.25% raise for the highest paid dispatchers in Cuyahoga County.

In support of its position the Union submitted into evidence the testimony of James Astorino, President of the Northern Ohio Fire Fighters, and Lieutenant Jeff Lee, and the settled CBAs between the City and the Municipal Foremen and Laborers' Union Local 1099 and OPBA. Mr. Astorino as the Chief Negotiator for the IAFF testified that during contract negotiations there never was any discussion about eliminating the LOU. There were discussions, however, about modifying the number of part-time fire fighters. The employer proposal's was for an unlimited number. There were counter proposals and discussions on allowing an extra part-time fire fighter after a number of consecutive shifts of absence. The Union accused the City of bad faith bargaining concerning its proposal to eliminate the LOU.

Lieutenant Lee testified that part-timers do not have the dedication, experience, training and the consistency of working with a regular crew. According to Lieutenant Lee, Part-timers are like a revolving door and because not regularly assigned to the same shift, they do not become an integral part of the team or unit which is essential to the duties of a fire fighter.

FINDING AND OPINION

The parties have thoroughly and professionally stated their positions. The issues of overtime, staffing and part-time employees are not unique among fire departments. The City has a legitimate concern with providing efficient, effective fire protection services at reasonable

costs. The Union has a legitimate concern with a fair and reasonable system of compensation for overtime work, maintaining or protecting the integrity of the bargaining unit and a safe work environment.

The City's proposal to delete the Letter of Understanding from the CBA cannot be supported, and therefore, should be rejected. A letter of understanding involving the use of part-time fire fighters has been a part of the parties CBAs for a number of years. The LOU has evolved over the years to the provisions contained in the current LOU. Through negotiations limitations were placed upon the use of part-time fire fighters to cover for absences and the number of part-time fire fighters that could be employed. Also, a provision was incorporated into the LOU of minimum staffing per shift for full-time fire fighters.

Other than the City's desire for maximum flexibility, there was not sufficient evidence that there should be any changes to the provisions relating to the number of part-time fire fighters that could be employed and minimum staffing per shift of full-time fire fighters. The argument that these are inherent management rights that were permissive subjects of bargaining and should now be deleted is without merit. The parties have bargained and negotiated these provisions over the years. There was insufficient evidence that this was a problem for the City.

However, it is the opinion of the Fact Finder that the City does have a case for modifying to some degree the provision in the LOU limiting the use of part-time fire fighters to one per shift. The City has submitted evidence of the cost of overtime and the savings that could be had with the use of two rather than one part-time employee to cover absences per shift. Long term absences of full-time fire fighters have resulted in a high and costly use of overtime. While the City would be able to pay for overtime under the current LOU for a period of a couple years, or the term of the proposed agreement, its financial future is unpredictable, especially considering the exodus of the American Greeting Card Company.

Certainly, the Union has a legitimate concern with the additional use of part-time fire fighters being assigned to cover absences. Under the current CBA and LOU their use is limited and the bargaining unit is protected. Also, the Union's argument that the City has other contractual alternatives to control the use of overtime should be considered and acted upon by the City.

Provisions in CBAs limiting management rights regarding contracting out, non-bargaining unit employees doing bargaining unit work, and entitlement to overtime are common. Although, such are in conflict with management rights, normally, some balance is reached by the parties to these agreements. That is what is being suggested in this case.

A review of City Exhibits 17, 18, 19 and 20 indicate that a few employees have been absent for long periods of time because of illness or injury. Where absences exceed twenty consecutive shifts or twenty, twenty-four hour consecutive assignments, the City should have the discretion of assigning a second part-time fire fighter if needed. This will protect the interests of the Union in maintaining its bargaining unit and having a reasonable system of assigning overtime. It will also provide the City with some relief on overtime pay.

RECOMMENDATION

Therefore it is recommended that the City's proposal to delete the LOU be rejected and that the LOU be modified to read as follows:

Title: Letter of Understanding

Subject: Utilization of Part-Time Firefighters/Paramedics

Date: January 1, 2011

This is letter of understanding between the City of Brooklyn and Brooklyn Fire Fighters IAFF Local #1145 concerning the utilization of part-time firefighter/paramedics. All "all available open time" that needs to be filled in order to satisfy the minimum manning requirement shall be offered to part-time fire fighter/paramedics first. Available time that is not filled by part-time personnel shall then be filled by full-time members on overtime. Part-time fire fighter/paramedics will not be eligible for "backfill" time unless a departmental recall is needed.

No more than one (1) part-time fire fighter/paramedic shall be on duty at any one time, **except two (2) shall be allowed when a full-time employee has been absence for more than twenty consecutive shifts or twenty, twenty-four hour consecutive assignments and available open time needs to be filled in order to satisfy the minimum manning requirement.** At no time shall less than five (5) full-time personnel be on duty.

Part-time personnel who are absent from monthly group drill without prior authorization shall lose the privilege for picking scheduled available open time for the following month, but shall be eligible to work any other available open time as it occurs.

Part-time personnel picking scheduled available time shall pick in twelve (12) hour shifts.

There shall be no more than sixteen (16) part-timers employed at any time. No part-timer may be employed more than thirty-six (36) hours per week.

CITY OF BROOKLYN

**THE INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS –LOCAL 1145**

By: _____

By: _____

IV

CERTIFICATION

The fact finding report and recommendations are based on the evidence and testimony presented to me at a fact finding hearing conducted January 23, 2014. Recommendations contained herein are developed in conformity to the criteria for a fact finding found in the Ohio Revised Code 4717(7) and in the associated administrative rules developed by SERB.

Respectfully submitted,

/s/ John F. Lenehan
John F. Lenehan
Fact Finder

February 19, 2014

V

PROOF OF SERVICE

This fact-finding report was electronically transmitted this 19th day of February, 2014, to the persons named below.

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/S/ John F. Lenehan
John F. Lenehan

