

FACT-FINDING REPORT

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

April 16, 2015

In the Matter of:

City of Massillon)	
)	
and)	Case Nos. 2013-MED-04-0511
)	2014-MED-05-0777
Massillon Fraternal Order of Police,)	
Henderson Lodge)	

APPEARANCES

For the City:

Leslie Kuntz, Attorney
Kathy Catazaro-Perry, Mayor
Kenneth Koher, City Budget Director/Tax Administrator
Laura Brown, Project Manager, Auditor of State
Steve Moomaw, Assistant Project Manager, Auditor of State

For the Union:

Mary Lou Sekula, Attorney
Jason Gohlike, President
Thomas Rogers, Sergeant

Fact Finder:

Nels E. Nelson

BACKGROUND

The instant dispute involves the City of Massillon and the Massillon Fraternal Order of Police, Henderson Lodge. The city has a population of 32,183 (2013) and a median household income of \$38,142 (2009-2013). The union represents approximately 36 patrolmen, sergeants, and lieutenants.

In November of 2012, the city and the union agreed to a collective bargaining agreement effective July 1, 2012, and expiring on June 30, 2015. It called for wages to be frozen at their current level through June 30, 2013, but included wage reopeners for wages to be effective July 1, 2013, and July 1, 2014.

On April 10, 2013, the union filed a Notice to Negotiate with the State Employment Relations Board to negotiate wages to be effective on July 1, 2013. The parties met on a number of occasions between May 29, 2013, and September 18, 2013, but were unable to reach agreement.

On October 8, 2013, the city was declared to be in Fiscal Emergency. It was then subject to the oversight of a Financial Planning and Supervision Commission, which is responsible for reviewing revenues and expenditure estimates, approving debt issues, and overseeing a five-year recovery plan. Negotiations were discontinued when the city indicated that it could not discuss wages until it had more information regarding the Fiscal Emergency.

On March 21, 2014, the Fact Finder was notified of his appointment for the dispute regarding the reopener for wages to be effective July 1, 2013. He conducted a fact-finding hearing on May 5, 2014, at which time the parties presented testimony and evidence in support of their positions regarding wages. However, at the conclusion of the hearing, the parties agreed

to adjourn the hearing until after a November 4, 2014, vote on a proposal to increase the city's income tax from 1.8% to 2.0%.

When the income tax increase was rejected, the parties resumed negotiations but were unable to agree upon wages. As a result, the parties selected the Fact Finder to hear the dispute regarding wages to be effective July 1, 2014. A hearing was held on March 10, 2015, for wages to be effective July 1, 2013, and July 1, 2014.¹ At that time, the union demanded 3% wage increases to be effective July 1, 2013, and July 1, 2014, and the city proposed continuing the wage freeze through June 30, 2015. In addition, the city argued that the Fact Finder did not have the authority to "grant retroactive wage increases without an executed waiver as provided for in Section 4117.14(G)(11) of the Ohio Revised Code.

At the conclusion of the hearing, the Fact Finder requested the parties to submit post-hearing briefs addressing the city's claim regarding a Section 4117.14(G)(11) waiver and their positions regarding wages. The parties' briefs were received on March 31, 2015, and this report was prepared.

The recommendations of the Fact Finder are based upon the criteria set forth in Section 4117-9-05(K) of the Ohio Administrative Code. They are:

- (a) Past collectively bargained agreements, if any, between the parties;
- (b) 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;
- (c) 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 standard of public service;
- (d) The lawful authority of the public employer;

¹ On March 9, 2015, the Fraternal Order of Police, Ohio Labor Council, Inc., which had become the bargaining agent for the city's police officers, filed a Notice to Negotiate with SERB for a successor agreement to the one due to expire June 30, 2015.

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed upon dispute procedures in the public service or in private employment.

RETROACTIVITY

A threshold issue is the city's claim that the Fact Finder does not have the authority to recommend wage increases to be effective July 1, 2013, or July 1, 2014.

City Position - The city argues that the Fact Finder does not have the "authority to grant retroactive wage increases without an executed waiver provided for in Ohio Revised Code Section 4117.14(G)(11)." (City Post-Hearing Brief, page 4) It points out that this provision states:

Increases in rates of compensation and other matters with cost implications awarded by the conciliator may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award; provided that if a new fiscal year has commenced since the issuance of the board order to submit to a final offer settlement procedure, the awarded increases may be retroactive to the commencement of the new fiscal year. The parties may, at any time, amend or modify a conciliator's award or order by mutual agreement.

The city notes that "in the present case, the parties have not even completed Fact Finding let alone gone to statutory final offer settlement procedure, a.k.a., conciliation." (City Post-Hearing Brief, page 5)

The city maintains that three Ohio Court decisions support its position. It observes that in SERB v. Barberton, 1990 WL 608231 (1990), the court held that statutory language clearly indicates that any Conciliator's award can take effect only at the beginning of the following fiscal year unless SERB ordered the parties to submit to a final offer of settlement procedure and a new fiscal year began after SERB's order.

The city also relies on Jefferson Cty. Sheriff v. Ohio Patrolmen's Benevolent Assn., 2006 WL 556222 (2006). It states that in that case, the court agreed that the statute prohibited retroactive awards. The city indicates, however, that in the case, the court found that "the Sheriff had waived his claim that the Conciliator lacked authority because the issue was not raised during the hearing and because the Sheriff had consented to retroactivity by also proposing a retroactive wage increase, and by entering into an extension agreement." (Ibid.)

The city cites Columbus v. SERB, 1985 WL 263516. It points out that in that case, the court found "that the Legislature only granted SERB the authority with respect to retrospective relief being limited to the commencement of the new fiscal year." (Ibid.)

The city contends that "it is clear that in order to warrant retroactive wage awards during the statutory dispute resolution process in Ohio Revised Code Chapter 4117, there must be a written waiver agreed to by the parties." (City Post-Hearing Brief, pages 5-6) It claims that "since it is undisputed that there is no waiver in the present case, such an award should not be granted." (City Post-Hearing Brief, page 6)

Union Position - The union argues that there was no need to execute a G-11 waiver. It points out that it filed a Notice to Negotiate on April 10, 2013, and the parties met to negotiate several times between that date and September 18, 2013. The union notes that on October 8, 2013, the State Auditor declared the city was in Fiscal Emergency.

The union contends that once Fiscal Emergency was declared, the city refused to negotiate. It states that the city claimed that it could not discuss wage increases until it had more detailed information regarding the Fiscal Emergency, the oversight committee was formed, and recommendations were made. The union indicates that "all negotiations ... stopped at the City's insistence." (Union Post-Hearing Brief, page 2)

The union maintains that the ORC establishes the steps to be taken when a city is declared to be in Fiscal Emergency. It observes that Section 118.13 states that appropriations cannot be contrary to the financial plan; Section 118.07 specifies the powers and duties of the commission or financial supervisor; and Section 118.06 requires a city to submit a detailed financial plan to the commission.

The union complains that at a November 18, 2013, meeting, the city told the union that it could not meet until the oversight committee was formed and it had received guidance from the committee. It states that it did not get a final offer from the city at the meeting. The union adds that it did not get a final offer from the City until January 30, 2014.

The union argues:

... O.R.C. 118.06, 118.07, 118.13 and laws related to the Fiscal Emergency took precedence over pending contract negotiations ... [and it] was so advised by the City. Nowhere in these ordinances does it state that the entity may continue with additional appropriations through contract negotiations until the commission is formed and the financial plan is in place and approved. The City is therefore estopped from arguing now that a G-11 waiver is needed to proceed with any increases for the prior year. The City itself indicated that it was estopped from proceeding with contract negotiations until the Commission and financial plan were in place. Subsequent to that, negotiations were recommenced. (Union Post-Hearing Brief, page 3)

Analysis - The Fact Finder rejects the city's argument that he does not have the authority to recommend wage increases to be effective July 1, 2013, or July 1, 2014. Section 4117.14(G)(11) of the ORC states in part:

Increases in rates of compensation and other matters with cost implications awarded by the conciliator may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award; provided that if a new fiscal year has commenced since the issuance of the board order to submit to a final offer settlement procedure, the awarded increases may be retroactive to the commence of the new fiscal year.

While this language prohibits a Conciliator from awarding a retroactive wage increase, it does bar a Fact Finder from recommending a wage increase. If an employer is opposed to a Fact Finder's recommendation for a retroactive wage increase, the employer can reject the recommendation as provided for Section 4117.14(C)(6) of the ORC.²

WAGE REOPENERS

Union Position - The union argues that the Fact Finder should recommend its demand for 3% wage increases effective on July 1, 2013, and July 1, 2014. It points out that Section 4117.14(C)(4)(e) of the ORC calls for the consideration of the following:

(3) The interest 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.

* * *

(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 in private employment.

The union offered the following:

1 - The cost for a 3% wage increase in 2013 is \$97,005.55, including pension contributions and other items; \$120,625.27 for a 3% increase in 2014; and \$272,591.35 for 3% increases in both 2013 and 2014. (Union Exhibit 20)

2 - In the past two years, new businesses, including Premier Industrial Supply, R.T. Hampton Plumbing & Heating, Baker Hughes Corporation, Atlas CDL Testing Company, Poly-Pro Solutions, Affinity Medical Center, Freshmart, and Shearers have made major expansions greatly increasing the realized and potential revenue. (Union Post-Hearing Brief, page 4)

3 - Regardless of what any certificate shows at any given time during the year, that certificate is amended several times during the year as the monies are collected from

² The Fact Finder recognizes that if the city rejects his recommendations and the union requests conciliation, the city may argue that the union's failure to obtain a G-11 waiver prevents a Conciliator from awarding a wage increase on July 1, 2013, or July 1, 2014.

various sources, so that a Certificate in April may be totally invalid as to income for that year. (Ibid.)

4 - General Fund revenue increased by \$1,919,002 from 2012 to 2013 and by \$812,795 from 2013 to 2014. (Ibid.)

5 - Income tax collections increased by \$413,000 from 2013 to 2014 and the increases should continue because the city has become more aggressive in collecting overdue taxes. (Ibid.)

6 - The negative balance for 2013 is misleading because the 2013 budget included a double pension payment of nearly \$1 million, which will not be recurring. (Ibid.)

7 - The unexpended balance at the beginning of 2015 was over \$1 million with \$785,455 of it unencumbered. (Ibid.)

8 - Police Department salaries declined from \$2,721,307 in 2010 to \$2,322,215 in 2014 and were down \$640,000 between 2011 and 2013 or \$300,000 when compensatory time and overtime are included. (Ibid.)

9 - Income tax collections increased by \$2,345,328 between 2010 and 2014. (Ibid.)

10 - In 2013 and 2014 several police officers retired and were not replaced. Even if they are eventually replaced, the replacements' salaries will be lower so that the city will save \$810,773. (Ibid.)

11 - The city retired a Lincoln Phase III debt in 2004, which will result in a \$350,000 savings. Other debt Phases will drop off in the future resulting in additional savings. (Ibid.)

12 - General Fund income increased from \$16,491,000 in 2010 to \$20,238,000 in 2014. (Union Post-Hearing Brief, page 5)

13 - The city's insurance costs decreased 10% between 2012 and 2013. (Ibid.)

14 - "The city met Statutory criteria 5 for fiscal emergency from \$135,906 which essentially was the additional the city paid to catch up the Fire and Pension fund which caused them to marginally meet criteria 5." (Ibid.)

15 - The State Auditor's report assumes that health care costs will increase 13% each year from 2015 and 2018 even though costs have gone down in recent years. The Police Department's health care costs decreased by \$193,727 between 2012 and 2014. For the city as a whole, they decreased from \$3,282,563 to \$2,436,341. (Ibid.)

16 - The State Auditor assumes that employees who retired or resigned would be replaced by similar employees while employees were not replaced or were replaced by lower paid employees. (Ibid.)

17 - The State Auditor estimates that there will be no increases in income taxes from 2014 through 2018 even though there have been “substantial increases” in the last few years. The Auditor estimated that income taxes would increase \$100,000 between 2013 and 2014 but they increased by \$342,000. (Ibid.)

18 - Police officers have not received a wage increase since 2008 even though other city Employees received increases.

19 - A March 19, 2014, SERB Benchmark Report reveals that the average entry wage for a patrolmen in 31 comparable cities is \$45,584 compared to \$43,035 in the city. The union observes that the average top wage is \$64,319 compared to \$56,596 in Massillon. (Ibid.)

20 - The Mayor received a raise from \$64,747 in 2012 to \$69,445 in 2014 -- an increase of more than 7% while police officers have not received a wage increase since 2008. (Ibid.)

21 - Other law enforcement agencies in Stark County have received pay increases so that the “public interest is thwarted by the poor morale of their police officers.”³ (Union Post-Hearing Brief, pages 5-6)

The union concludes:

Despite all their gyrations to attempt to show the City in the state of doom and gloom, income is up, new business is booming, there is approximately a million carryover in the General Fund and there is no indication that these increases will stop. They have not replaced many retiring employees, even the ones replaced came in at lower salary and benefits. The amount saved by retirement of the Lincoln Phase III debt alone saves the City \$350,000 a year. Insurance costs have been down for several years and are leveling off thanks to the unions agreeing to cost-sharing in their last contract. The police department has come in under budget. (Union Post-Hearing Brief, page 6)

It asks the Fact Finder to recommend its demand for 3% wage increases effective July 1, 2013, and July 1, 2014.

City Position – The city argues that its demand for a wage freeze should be recommended. It points out that even if the wage schedule is frozen, members of the bargaining

³ The union provided no data to support this claim.

unit will still receive longevity as set forth in Appendix A of the collective bargaining agreement.⁴

The city contends that no funds are available to offer any increase in compensation. It states that it is in a state of Fiscal Emergency as declared by the State Auditor. The city indicates that the recovery plan, which has been approved by the Financial Planning and Supervision Commission, does not include or authorize wage increases for the Police Department. It asserts that the Commission, as the acting fiscal officer for the city, must authorize any increase in wages.

The city maintains that the increases in income tax collections cannot be used to grant a wage increase. It observes that while income tax collections have increased, it has lost revenue from the personal property tax, the real estate tax, and the Local Government Fund. The city acknowledges that it received additional income, including inheritance taxes and a Workers' Compensation rebate, but indicates that "one-time sources of income are not recurring and should not be used to grant continuing wage increases." (City Post-Hearing Brief, page 3)

The city argues that its proposed wage freeze mirrors the one in place for other city employees. It points out that AFSCME and the IAFF have agreed to wage freezes in 2013 and 2014. The city notes that non-bargaining unit employees have had furlough days and cuts to educational stipends and have not received longevity increases.

The city concludes that "its proposal of wage freezes is supported by the financial data and is a reasonable offer given the financial status of the City." (City Post-Hearing Brief, page 4)

Analysis - The instant case involves two wage reopeners. SERB case no. 2013-MED-04-0511 relates to wages to be effective July 1, 2013, and case no. 2014-MED-05-0777 is for

⁴ While nearly all police contracts include separate wage and longevity schedules, the city and the union have combined wages and longevity in a single schedule with an entry wage and step increases at 1, 2, 3, 5, 10, 15, 20, 25, and 30 years.

wages to be effective July 1, 2014.⁵ The city proposes wages remain frozen until the contract expires on June 30, 2015. The union seeks 3% wage increases effective July 1 of 2013 and 2014.

An important criterion in fact finding involves the comparison of employees' wages to the wages of employees in comparable cities. In the instant case, the union submitted a SERB Benchmark Report dated March 19, 2014, showing the entry and top wages for patrolmen in 31 cities with populations from 25,000 to 40,000. (Union Exhibit 11)⁶ The report indicates that the average entry wage for patrolmen in those cities was \$45,584 compared to \$43,039 in Massillon. It shows the average top wage to be \$64,319 versus \$56,596 in the city.⁷

The union's data does not establish that the city's police officers are paid less than police officers in comparable cities. First, the data overstates the differences in wages. Article 22, Section 22.7, requires the city to pay 10% of police officers' pension contributions. Since few cities pay a portion of the required employee pension contribution, 10% must be added to the wages of the city's patrolmen to make their wages comparable to the patrolmen in the other 30 cities. This makes the entry level wage in the city \$47,343 compared to \$45,584 in the other cities and the top wage becomes \$62,256 compared to \$64,319 in the other cities.

Second, in another respect, the data supplied by the union understates the differences in wages. The figures in the SERB's Benchmark Report are for wages alone but the city's wage schedule, contained in Appendix A of the parties' contract, combines wages and longevity. If longevity payments are added to the wages of police officers in the other 30 cities, the wage gap will be increased. The Fact Finder does not have the data to adjust the data in Union Exhibit 11.⁸

⁵ Since Article 22, Section 22.9, provides that Sergeants' wages will be 15% above patrolmen and Lieutenants' wages will be 22.5% above patrolmen, the sole issue for the Fact Finder is the wage for patrolmen.

⁶ The wages of 11 of the cities are for 2014, 13 are for 2013, and 7 are for 2012 or earlier.

⁷ The average wages shown in the SERB Benchmark Report include Massillon.

⁸ The Fact Finder recognizes that wages and longevity are only two elements of total compensation and that many police officers receive other compensation, including uniform allowances, shift differentials, firearms proficiency payments, and education bonuses.

Third, the 30 cities offered by the union are not entirely comparable to Massillon. It is generally recognized that the wages paid by a city reflect the income and wealth of a city. If wages in Massillon are lower than some other cities, it may reflect the fact that the median household income in the city is \$37,272 compared to \$48,2346 in Ohio. (City Exhibit 4) In addition, SERB's Benchmark Report includes a number of wealthy suburbs of Cincinnati, Cleveland, and Columbus, where the median household incomes exceed the state average.

Another significant consideration in factfinding are the wage demands of the parties compared to wage increases granted to other employees. The union submitted two exhibits showing wage changes. It submitted a March 19, 2014, SERB Wage Increase Report for police officers in cities with a population between 25,000 and 40,000. (Union Exhibit 12) While neither SERB nor the union attempted to summarize the settlements listed in the report, it appears that in 2013, 15 cities granted increases of at least 2% but 6 granted no wage increases. For 2014, 10 cities reported wage increases of at least 1% and none reported wage freezes.

The union also provided SERB's 2012 Annual Wage Settlement Report (Union Exhibit 9) It shows that in 2012 the average wage settlement was .72% in the Akron-Canton region, 1.18% for cities, and 1.20% for police units. The Fact Finder notes that the 2013 Annual Wage Settlement Report shows that average wage settlement was 1.46% in the Akron-Canton region, 1.61% in cities, and 1.66% in police units.

Internal wage comparisons, i.e., the wages increases granted to other employees in a city, are generally given considerable weight by Factfinders. In the instant case, the city pointed out that non-bargaining unit employees have had their wages frozen, have had furlough days, and have been denied longevity increases. Much more to the point, AFSCME and the IAFF accepted wage freezes for 2013 and 2014.

In the instant case, the most important factor is the city's ability to pay. It is clear that the city experienced significant financial difficulties and as a result on October 8, 2013, the State Auditor declared the city to be in Fiscal Emergency. As result, the city is subject to the oversight of a Financial Planning and Supervision Commission, which is responsible for approving a financial recovery plan, reviewing revenue and expenditure estimates, and monitoring and approving city expenditures.

The city's situation was made worse by the failure of the citizens on November 4, 2014, to approve an increase in the income tax from 1.8% to 2.0%. Unfortunately, the levy was defeated by a 2 to 1 margin. The Factfinder is unaware of any attempt to place another tax increase on the ballot.

While the city's finances have improved, it still faces considerable limits on its ability to pay. First, income tax receipts have grown slowly. City Exhibit 3, page 4 and updated City Exhibit 5 show income tax receipts have increased as follows:⁹

2011	\$11,414,054
2012	\$11,801,231
2013	\$12,792,565
2014	\$13,225,591

Hopefully, the declines in income tax collections in the first two months of 2015 will be reversed in the balance of the year. (Updated City Exhibit 6)

Second, the city has lost a number of important sources of revenue. The state has eliminated the personal property and inheritance taxes and drastically reduced Local Government Fund payments for the cities. Unless the city's voters approve higher income taxes to replace the lost revenue, cuts in services appear inevitable.

⁹ The figures for 2011 and 2012 differ somewhat from those shown in Union Exhibit 6, which is identical to City Exhibit 5.

Most importantly, the city's General Fund ending cash balances indicate an inability to pay. (City Exhibit 3, page 14 and City Exhibit 18, page 1) The city's ending balances are as follows:

2011	\$417
2012	(\$989,762)
2013	(\$368,654)
2014	\$1,074,232

The 2014 \$1,074, 232 ending balance should be reduced by the \$497,437 the city received as its last inheritance tax payment, which would leave the city with a cash balance of \$576,795.¹⁰

Given forecasted 2015 General Fund expenditures of \$17,513,628, the year-end balance may be inadequate to cover expenditures early in 2015 let alone any unexpected expenditures. (City Exhibit 3, page 15)

Based on the above analysis, the Factfinder must recommend that wages remain frozen through June 30, 2015. First, while the data may suggest that wages in the city are less than in comparable cities, the size of any gap is not clear. Second, the fact that AFSCME and the IAFF have accepted wage freezes for 2013 and 2014 strongly supports the city's demand that the wages of FOP members remain frozen through June 30, 2015. Third, recommending a wage increase is not consistent with the city's continuing financial problems and the fact that it remains in Fiscal Emergency. Finally, the parties' collective bargaining agreement expires on June 30, 2015. This gives the city and the union the opportunity to reconsider wage adjustments as the city's development and finances become more certain.

¹⁰ The city's unencumbered ending balance for 2014 was \$785,455, including \$497,437 of inheritance taxes.

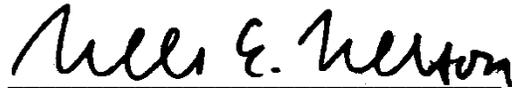
RECOMMENDATIONS

Case No. 2013-MED-04-0511

The wages shown in Appendix A shall remain frozen from July 1, 2013, through June 30, 2014. However, members of the bargaining unit shall advance on the wage schedule as provided for in Article 22, Section 22.5.

Case No. 2014-MED-05-0777

The wages shown in Appendix A shall remain frozen from July 1, 2014, through June 30, 2015. However, members of the bargaining unit shall advance on the wage schedule as provided for in Article 22, Section 22.5.



Nels E. Nelson
Fact Finder

April 16, 2015
Russell Township
Geauga County, Ohio