

State of Ohio

State Employment Relations Board

In the Matter of Fact Finding	:	SERB Case Number: 2014-MED-04-0564
	:	
Between:	:	
	:	
City of Kettering, Ohio	:	
	:	Date of Hearing: January 09, 2015
Employer	:	Date of Report: February 05, 2015
	:	
And:	:	
	:	
Kettering Professional Firefighters, IAFF, Local 2150	:	Felicia Bernardini, Fact Finder
	:	
Union	:	

Fact Finder Report and Recommendation

Appearances:

For the City of Kettering, Employer

Daniel G. Rosenthal, Esq., Denlinger, Rosenthal & Greenberg, Fact Finding Spokesperson

Emily Gelhaus, Esq., Denlinger, Rosenthal & Greenberg

Mark Schwieterman, City of Kettering, City Manager

Sara Mills, City of Kettering, Human Resources Director

Terry Jones, City of Kettering, Fire Chief

Tom Butts, Assistant Fire Chief

Mitch Robbins, Battalion Chief

Jenny Smith, Human Resources Manager

Patti Missimer, Human Resources Manager

For the Kettering Profession Firefighters, IAFF, Local 2150, Union

Stephen S. Lazarus, Esq., Hardin, Lazarus & Lewis, LLC, Fact Finding Spokesperson

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Dave Parker, Firefighter, Chief Negotiator

Neil Frederick, Union Member

Mike Holbert, Union Member

Robert Knedler, Union Member

Introduction

Case Background

Felicia Bernardini was selected by the parties to serve as Fact Finder in the above referenced case and duly appointed by the State Employment Relations Board (SERB) on November 3, 2014 in compliance with Ohio Revised Code (ORC) Section 4117.14C(3). The case concerns a fact finding proceeding between the City of Kettering, Ohio (hereafter referred to as the “Employer” or the “City”) and the Kettering Professional Firefighters, IAFF, Local 2150 (hereafter referred to as the “Union” or “Unit”).

Prior to the hearing, the parties engaged in contract negotiations on multiple dates beginning in April, 2014 and concluding in November, 2014. The parties were able to reach tentative agreements (TA) on 18 articles. At fact finding, eleven (11) articles remained unresolved. The fact finding hearing was scheduled for Friday, January 9, 2015. Both parties timely filed the required pre-hearing statements.

The day of the hearing, the parties and the Fact Finder discussed whether an effort at mediation prior to moving to the evidentiary hearing might be worthwhile. The parties agreed to proceed directly to the evidentiary hearing.

Daniel Rosenthal represented the Employer.

Stephen Lazarus represented the Union.

Issues

The open issues addressed by both parties at the hearing are as follows:

Article 3: Management Rights

Article 7: Wages

Article 8: Hours

Article 9: Overtime Pay

Article 10: Holidays

Article 11: Vacations

Article 14: Education Assistance

Article 16: Sick Leave and Funeral Leave

Article 20: Insurance (Medical, Dental and Life)

New Article: Continuation of Employment

New Article: Drug Testing

General Background Information

The City of Kettering is located five miles south of Dayton. As of the 2010 census the population was 56,163. The mean household income is estimated to be \$65,628 and the mean per capita income is estimated to be \$30,055.¹ According to the City's website, the annual budget is over \$65.5M; there are 400 fulltime employees, 51 are career firefighters and paramedics. The Unit consists of approximately 10 professional firefighters at the rank of Captain. The Unit was certified by SERB in 2014 and is represented by the Kettering Professional Firefighters, IAFF, Local 2150. This fact finding case pertains to the Unit's first contract with the City of Kettering. However, the parties have a 30-year bargaining history for the non-supervisory firefighters. The firefighter's contract has served as a template for proposed baseline contract language for the Captains.

Positions, Discussion and Recommendations

At the hearing the parties presented their respective arguments on issues ordered and grouped in the following way: Management Rights, Wages, Overtime, Hours and Leave Benefits, Insurance, Education Assistance, Continuation of Employment (Fair Share Fee) and Random Drug Testing. Therefore, the format of this report will follow the same order and grouping of issues.

¹ U.S. Census Bureau, 2008-2012 American Community Survey 5-year Estimates

Below, the position of each party is briefly summarized, position summaries are followed by a brief analysis and discussion, which is followed by the Fact Finder's recommendation.

In analyzing the positions of the parties and making recommendations the Fact Finder is guided by available, relevant evidence and the criteria set forth in ORC 4117.14(G)(7)(a) to (f):

- (a). Past collective bargaining 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 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). Any stipulations of the parties;
- (f). Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

1. Article 3: Management Rights

Employer Position

The Employer proposes to adopt the City's civil service rules pertaining to employees in a probationary status as the contract language. Under civil service rules, a failed probationary regular fulltime Fire Captain may be terminated by the City, or returned via demotion to his/her previous classification only if the position is available and the probationary employee did not engage in conduct that makes it inappropriate to serve in the lower ranks. The Employer maintains that the Union's position could result in the City having to terminate a bargaining unit firefighter in order to allow a failed probationary Captain to return to the firefighter's unit. Furthermore, the Employer is simply seeking to maintain the status quo. The Union's proposal is not found in the firefighter's contract, which has been the model for this Unit's proposals.

Union Position

The Union is seeking a contract provision that would provide a failed probationary regular fulltime Captain the right to revert back to his/her prior position as a firefighter. The Union further proposes language that would provide for the Employer's right to terminate a probationary Captain for just cause. When a firefighter promotes up to the rank of Captain, he/she is a tenured member of the firefighter bargaining unit. The Union maintains that without the protection of being able to revert back to the position of firefighter, there will be a significant chilling effect on firefighters seeking promotional opportunities. From the Union's perspective under the Employer's proposal, failure to pass probation is a professional death sentence. The failed promotional candidate would lose all employment with the Kettering Fire Department, no matter how successful he/she had been as a firefighter.

Discussion and Recommendation

The eventuality that a firefighter, promoted to Captain, would fail the probationary period seems remote. None of the Departmental personnel attending the fact finding hearing (and there was a considerable number of personnel in attendance and some long-tenured employees among them) could recall a situation where a probationary Captain had not been successful. This speaks well of the City and Departmental leadership. It is an indication that thoughtful care is given to the promotional process and only the best prepared candidates are selected for the command ranks. The fact remains however that the situation could arise and it is reasonable to establish an understanding on how such an eventuality would be handled.

A promotional probationary period is unlike an initial probationary period. For many employers, a newly hired probationary employee is technically considered an applicant for employment until the probationary period is successfully completed. For this reason, employees in an initial probationary period do not have the same protections against adverse workplace actions as do tenured employees. However, with a promotional probationary period, an employer is dealing with a tenured employee who presumably has been successful; otherwise the promotion opportunity would not have been offered to the employee. This being the case, it is appropriate to extend existing employment rights to promotional probationers. Article 6 – Work Conditions, in the firefighter's contract provides for a just cause standard for discipline and discharge. I note that this same provision is among the settled articles for the Captain's contract – the signed TA is dated 7/8/14. Thus, both bargaining units – the one out of which a probationer would promote and the

one into which the probationer would move – provide the protection of just cause in an adverse employment action. The promotional probationary period should not be viewed as a ‘no man’s land’ of employment rights. I agree with the Union that the Employer’s right to terminate a promotional probationer under the Captain’s contract should be subject to the standard of just cause. I also agree with the Union that it is common practice in labor agreements to allow a failed promotional probationer to revert back to the prior position.

Recommendation

The Fact Finder recommends adoption of the Union’s proposal in this article.

2. Article 7: Wages

Union Position

The Union seeks a single wage scale for Captains based on the current 605 pay grade, thereby eliminating the new pay grade designated as 605-1. The Union further proposes cost of living increases during the term of the agreement as follows:

- 7% effective January 1, 2016
- 3.5% effective July 1, 2016
- 3.5% effective January 1, 2017

The Union’s understanding of the 2013 classification and wage reorganization was that newly promoted Captains would have fewer responsibilities than existing Captains and therefore justified a new, lower pay scale. According to the Union, this new type of Captain with reduced responsibilities never materialized. Today, Captains in the position prior to 2013 and those hired after the reorganization are all doing the same amount and type of assignments. Therefore, no reason exists to maintain the lower 605-1 pay scale. All Captains are doing the same job and therefore should be paid based on the same, original 605 pay scale. The Employer’s representatives have acknowledged that all Captains are working from the same job description and have the same responsibilities.

As for its proposed cost of living increases, the Union asserts that since the ‘2008 Great Recession’ Fire Captains have seen their purchasing power diminish through a combination of modest pay raises that are insufficient to offset employee cost increases in pension share and insurance share. Pension contributions for uniform personnel have increased by 2.25%, at an annual rate of 0.75% in 2013, 2014 and 2015. Through a combination of point-of-service and prescription

co-pays, and a reduction in Employer funding of HSAs, Unit Members have had significant increases in healthcare insurance costs. The Union calculates that, at a minimum, an annual raise of 2.83% is necessary to retain current buying power for Unit Members. However, such an increase does not improve the Captains financial situation, nor does it make up for the loss of buying power that occurred over the prior three years. The Union's current proposed raises would both maintain the current purchasing power and make up for lost ground during the prior three-year period.

The Employer is in excellent financial condition and is well able to afford the economic proposals made by the Union. The fund balance for the general fund has increased by more than \$7.7 million during the three year period of 2010-2013. The General Fund balance in 2013 was \$47,074,738. It is generally accepted that an adequate fund balance is between 20% and 30% of routine operating expenditures. Kettering's general fund balance was at 76.48% of expenditures in 2010 and has consistently increased to 96.84%, as of December 2013. The City also has very high cash reserves. In 2013 the City's cash to expense ratio was 121.15%. Furthermore, the City has demonstrated a consistent practice of conservative budget projections. Over the last four years, the City has performed substantially better than anticipated with revenues exceeding expenditures in each year.

When considering comparable wages, 'average' is not appropriate in this jurisdiction. Kettering has always paid its employees highly and considerably above average. Some administrative positions in the City are paid as much as 50-95% above their counterparts in other comparable jurisdictions. The Captains do not enjoy wages quite as high as that when compared to other jurisdictions. Today, with the introduction of the new, lower pay scale (i.e., 605-1) Captain pay is much closer to average pay. Furthermore, when one includes salary-based supplements and benefits available in these other jurisdictions but not available in Kettering for a total picture of pay, (such as longevity, and leave benefit sell-back options) Kettering's Captain wages drop even closer to average. The data clearly show that the City of Kettering, which has always prided itself on being at the top of the wage scale and an employer of choice in the region, is losing ground in maintaining its relative position in the local labor market.

Employer Position

The Employer offers a 1.75% wage increase in each year of the three-year contract. The first increase would be effective upon signing. The City's proposal is consistent with cost of living increases provided to non-bargaining unit employees who received a 1.75% increase for 2015. The

SERB wage survey shows that average increases for firefighter units across Ohio was 1.66% in 2013, and the Bureau of National Affairs national salary data show that state and local government wage increases averaged 1.9% in 2014. The City's proposed 1.75% is reasonable given this comparison data.

The City has a two-tiered pay structure for Captains based on a reclassification initiative in September of 2013. In that reclassification, a new classification for shift-wide command responsibilities was created and given the title, Battalion Chief. A new pay scale was created for the Battalion Chiefs (i.e., pay scale 606); it is comparable to Police Lieutenants. Existing Fire Captains were grandfathered into the new structure and permitted to remain in the existing Captain pay scale (i.e., pay scale 605), whereas newly hired Captains have been assigned to a new pay scale (i.e., pay scale 605-1) which is aligned with Police Sergeants. The two pay scales do not represent differences in assignments or responsibilities. The existence of two pay scales is simply the result of aligning frontline supervisor pay across the uniform services (Police and Fire) and a desire on the Employer's part to not take an adverse employment action against existing Captains who have been permitted to remain in the old, higher pay scale. Over time, as that original group of Captains separate from service with Kettering, the old pay scale will be phased out.

Regardless of whether Captains are in pay scale 605 or 605-1, pay is consistently above average in comparison to the local labor market. The City's salary survey of command ranks (i.e., Lieutenants and Captains) in the local area reveals that Kettering's original Captain pay scale (605) is 18% above average for top-step Captain pay, and 26.6% above average Lieutenant pay. Kettering's new Captain pay scale (605-1) is 14% above average for top-step Captain pay, and 22.75% above average Lieutenant pay. By any standard, large across-the-board pay increases such as those proposed by the Union are not warranted for this Unit.

The City's finances are another important factor to consider in determining the appropriateness of a wage settlement. Income tax is the City's largest revenue source for the general fund. Income tax receipts were below the 2008 level in each year from 2009-2011. The combined deficit in income tax revenue for those three years was \$5.6 million. Income tax revenue has rebounded somewhat in 2012, 2013 and 2014. However, the combined overage for the past three years does not exceed the deficit created by the prior three years (i.e., 2009-2011). The State of Ohio has also reduced revenue transfers to local government. The elimination of the Estate Tax has cost Kettering \$3 million annually. Elimination of the Tangible Personal Property Tax has reduced receipts from the State by approximately \$172K in 2014 and a projected \$123K in 2015.

Additionally, the Local Government Fund was cut in half by the State, resulting in reductions of \$729K in 2014 and \$706K in 2015. The City's property tax revenue has also declined. Since 2008, the cumulative decline in property tax revenue has been \$5.3 Million. Property values are projected to be 4% lower in 2015 resulting in a further \$225K reduction in revenue. These lower property values will be in place for the next three years until 2017.

By policy the City Council requires that current year revenues cover current year operating expenditures. The City projects that expenses will exceed revenue in 2015 and therefore, departmental budgets have been reduced accordingly to ensure compliance with City Council's policy. Also by City Council policy, general fund reserves are used for capital improvements – not operating expenses.

Discussion and Recommendation

By all obvious measures, the City of Kettering is in an enviable financial position. The general fund balance, as of calendar year 2013, was \$47M. Currently the general fund balance is about 70% of the operating budget, whereas GFOA standards recommend reserves of 25% or 90 days of operating expenses. Due to a large estate tax settlement prior to the elimination of that tax, the City has an endowment that will fund capital improvements for the City for a very long time. Income tax revenue has steadily increased since its 'low water mark' in 2009 and has been above 2008 levels since 2012. Charted data for both income tax and property tax show that receipts of both taxes were adversely impacted by the recession of 2008, however all public jurisdictions experienced a decline in revenue as a result of the Great Recession of 2008, and Kettering has recovered better than many similarly sized municipalities. Data also reveals that the City is very conservative in its annual budget projections. Charted data shows that the City has consistently projected annual budget deficits in the millions of dollars, and has actually experienced several millions of dollars in excess revenue over expenditures, rather than the anticipated deficits.

I accept the Union's argument that the City of Kettering can afford a better wage settlement than it is offering. In fact I agree that the City could afford to fund the Union's wage proposal. However, I do not agree with the Union that there is a compelling reason to require the Employer to do so. Both sets of comparables, those presented by the City and those presented by the Union, show that this Unit's current wage scale is well above average. The parties differ in how much above average the Unit is, but there is agreement that the Unit is, in fact, above average when it comes to wages. As the Union points out, other jurisdictions have various supplements and benefits that

provide for 'potential additional income' not available in the structure of the Kettering collective bargaining agreement, which has put money directly into base salaries rather than a variety of benefits. Even so, by comparison, Kettering Captains are still paid above average.

As referenced above, the fact finding statutory criteria include the use of comparisons among employees doing comparable work. In this case, a comparison of actual wages does not lead to a conclusion that this Unit needs any wage adjustment beyond that of a basic cost of living adjustment (COLA). Another important source of comparison data is the SERB wage settlement report which provides summary data on wage settlements by geographic region, type of jurisdiction and type of unit. The 2013 SERB Wage Settlement Report shows that wage settlements have recently been growing by 20-28% annually. The SERB Report also shows that the average wage increase for fire units was 1.66% in 2013. The Kettering Captains received a 2.25% increase in 2013. This appears to be the most recent wage increase that this Unit has received. Meanwhile, Kettering firefighters received a 2.25% increase in 2013 and a 2.50% in 2014, and non-bargaining unit employees received a 1.75% increase effective December 15, 2014.

An additional point of reference often used in fact finding is the CPI, which serves as a convenient surrogate for inflation and offers a perspective on the relative standard of living experienced by Unit Members. In recent years the CPI-U has increased as follows: 1.6% in 2010, 3.2% in 2011, 2.1% in 2012, 1.5% in 2013, and 1.6% in 2014.² This is an average of 2% per year over the last five years. Over the past ten years the average annual CPI trend has been 2.3% and over the past 20 years the trend has been 2.5%.³

All of this data on cost of living trends and recent Kettering wage COLAs suggests that a slight enhancement on the Employer's wage proposal would produce a fair and appropriate cost of living adjustment for the Captain's Unit. Rather than adopt the Employer's proposal of flat 1.75% increases across the term of the three-year contract, I recommend a slight annual increase over the three years of the contract consistent with the existing trend in average wage settlements across Ohio and in keeping with the CPI trend data.

As for the Union's proposal that the two-tier pay structure be collapsed into the single, original pay scale (i.e., 605) I see no compelling reason to do so. The reorganization and alignment of positions between the Police and Fire Departments is consistent with accepted human resources management principles. The creation of a new classification for Battalion Chiefs, responsible for

² US Bureau of Labor Statistics, Consumer Price Index, 12-month percent change data tables

³ Ibid

command of an entire shift, makes sense and is not contested by the Captains; they acknowledge that the five Captains moved into the Battalion Chief positions had (and have) increased responsibilities. The remaining Captains serve as frontline supervisors, not unlike Police Sergeants. Although the Police Sergeants have a greater span of control under direct supervision than do the Fire Captains (who may directly supervisor only 2-5 subordinates) Fire Captains have additional project/program responsibilities that offset the difference. It is reasonable for the Employer to have developed a new pay scale that aligns as best it can with the Police Sergeants. The fact that the Employer has chosen to grandfather existing Captains into the new structure by allowing them to remain in their current pay scale creates some inequity within this new bargaining unit, but it is a benefit for the small cadre of Captains who were grandfathered into the new system, and as these few Captains complete their employment with the City of Kettering the 605 pay scale will be phased-out.

Recommendation

The statutory criteria require that the Fact Finder consider comparable public jurisdictions and the Employer's ability to pay. In light of these criteria the Fact Finder recommends the following wage settlement:

- Effective retroactive to January 1, 2015 all wage rates in pay scale 605 and 605-1 will increase by 1.75%.
- Effective January 1, 2016 all wage rates in pay scale 605 and 605-1 will increase by 2.0%.
- Effective January 1, 2017 all wage rates in pay scale 605 and 605-1 will increase by 2.25%.

3. Article 9: Overtime; Article 8: Hours, Article 10: Holidays, Article 11: Vacation, Article 16: Sick Leave and Funeral Leave

Union Position

The Union proposes to maintain current practices with respect to accrual and payment of overtime (Article 9), the designation of the standard hours of work (Article 8), and the accrual and use of various paid time off benefits (Articles 10, 11 & 16).

It is the Union's position that there is no prevailing practice on how overtime is defined and calculated across fire departments locally or statewide. A simple survey of the jurisdictions used in

the wage survey shows that several jurisdictions have practices alike or very similar to the practice in Kettering. Several other jurisdictions in the survey calculate overtime differently than does Kettering. Among the jurisdictions that use a different approach there is no single consistent practice – some calculate overtime in a manner similar to the change proposed by the Employer, while others use a completely different approach.

This is an economic proposal, not an operational one. The City is seeking a major economic concession from Unit Members, and yet has not provided an adequate foundation explaining the City's supposed financial need. For an individual unit member the impact of the proposed change is dramatic. The Employer's proposal would reduce both the rate at which overtime is compensated and the number of hours that would be compensated as overtime. Currently, Captains are compensated at time and one-half the 40 hour work week pay rate for all hours worked outside of their normal shift. The overtime rate for a top-step Captain is \$68.10/hr. The overtime rate proposed by the Employer for a top-step Captain is \$48.65/hr. This is a significant difference of \$19.45/hr. A calculation based on the average amount of overtime worked by Captains results in a possible yearly reduction in compensation for an individual Captain of \$6247.34. Furthermore, the Employer's proposal that overtime be paid only for hours worked above 159 in a 21-day cycle would further reduce compensation for Captains by \$3322.81 annually. These two figures combined equate to approximately a 10% reduction in a Captain's annual compensation. Based on these calculations it is simply wrong for the Employer to deny that this proposal is a demand for concessions.

This is a new Unit and a first contract; however, there is a 30+ year history of using the firefighter current practice when it comes to accruing and compensating overtime hours. The practices were negotiated with the firefighters in 1982 and have remained unchanged since. The practices were voluntarily extended to the Fire Captains when they were Civil Service employees prior to becoming a bargaining unit. The Employer could have unilaterally changed the overtime practice with respect to Captains at any time in the past. They could have made the economic argument during the depths of the recession. Today, the firefighters continue to have the same overtime provision in their contract that the Captains are seeking. The Captains have in fact proposed language taken directly from the firefighter contract which captures current practice. In addition, the non-bargaining unit Battalion Chiefs also enjoy overtime in accordance with the current practice and the City has not made unilateral changes to their overtime calculation, as the City is entitled to do. If the economic conditions of the City are so dire as to require concessions, it would seem appropriate to implement cost savings measures where the City can unilaterally.

In addition to changes in overtime calculations, the Employer is seeking changes to the hours of work and paid time off practices. The Union is seeking to maintain the status quo in these areas as well as and has adopted proposed contract language directly from the firefighter contract which establishes practices for both the 40 hour work week and the 56 hour work week. Throughout negotiations, the Employer made it clear that it intended to maintain its management right to use a 40 hour work week as a scheduling option. This being the case, the Union must seek to adopt language that describes the status quo for both 40 hour and 56 hour schedules.

Employer Position

The Employer proposes an overtime rate and calculation that is consistent with the Fair Labor Standards Act (FLSA) and the way overtime is calculated for other City of Kettering employees. The proposal is to use a rate that is derived from dividing the salary rate by actual paid hours. For Captains, this means that the salary rate would be divided by 2912 hours per year, which is the actual number of work hours for employees assigned to a 56 hour work week. All Captains are assigned to this 56 hour work week – the 40 hour work week has been phased out and is no longer used. This calculation would then be multiplied by the 1.5 factor to determine the overtime rate. To continue to use the 2080 (40 hour work week) annual hour total to calculate the overtime rate is inconsistent with the current standard scheduling practice and creates an extravagant windfall benefit for Captains.

Overtime costs in the Kettering Fire Department are exceptionally high and exceed the annual budget. For this small Unit alone in 2014, overtime costs exceeded \$203K. The City is acting in accordance with its fiduciary responsibility in seeking an overtime provision that complies with the FLSA and is based on the actual current practice of a 56 hour work week, rather than a fictitious 40 hour work week. The current overtime calculation results in several of the Captains actually making more in annual pay than the Fire Chief. The current calculation also results in Captains being paid more than double time for overtime work. Many local jurisdictions calculate overtime in a less generous manner. Several jurisdictions compute overtime pay by dividing the annual salary by scheduled hours worked rather than 2080 hours (annualized hours based on a 40 hour workweek) which is what the Employer proposes. The City further proposes to allow paid time off to continue to count toward the calculation of overtime, except for compensatory time and earned days off (EDO). The City proposes a change from the status quo, but one that is more realistic and yet remains more generous than what is required by the FLSA.

As for the Employer's proposals on hours of work and leave policies, all proposed changes are consistent with the current practice of a 56 hour work week rather than the 40 hour work week.

Discussion and Recommendation

Overtime is a function of the staffing model and staffing level, which are the prerogatives of the Employer. At some point in the bargaining history of the parties (i.e., the City and the firefighters - and by extension the Captains) it was determined that the costs associated with the current overtime calculations were more cost effective than changing the staffing patterns. Although I agree with the Employer that overtime is not an entitlement, it is a negotiated benefit and there were undoubtedly bargained tradeoffs that lead to the current language and practice. It is widely accepted in labor relations that 'concession bargaining' is a negotiation that results in the reduction of wages or benefits, or 'give backs' in work rules or working conditions. I read the Employer's proposal on overtime and the other leave benefits as clearly fitting within this definition. This being the case, the burden is on the Employer to make a credible hardship case and convincingly argue that it cannot financially maintain the status quo. My close review of the hearing record leads me to the conclusion that the City has not adequately made a case of hardship; in fact the City has focused its argument on comparability with surrounding jurisdictions. I understand that the Employer has budget policies that preclude it from using its general fund reserve for operating expenses; and that by Council policy, operating expenses must not exceed current year revenue – which is projected to be low in 2015 – but the City is in as good a financial position as it has been in a long time and the economic outlook both locally and statewide is generally positive. The severity of the City's economic plight is simply not substantiated.

All of the Employer proposals pertaining to hours of work and leave benefits have wording changes and changes in accrual calculations that could reduce benefits from the status quo. Whether they do, or not, is unclear to me. That said, all of these proposals – although described by the Employer as 'necessary' for purposes of consistency with the 24/48 standard schedule – could be concessionary proposals. Without a clear case of hardship for a Fact Finder to rely upon, concessions are better left to the negotiation process where the Union has the ability to gain something of a quid pro quo in return for the concession.

Recommendation

In deference to the longstanding practice of the parties with respect to overtime, hours of work and leave benefits, and the lack of a compelling financial need, I recommend adoption of the Union's proposals in the following articles:

Article 8: Hours

Article 9: Overtime Pay

Article 10: Holidays

Article 11 Vacations

Article 16: Sick Leave and Funeral Leave

4. Article 20: Insurance

Union Position

The Union seeks to adopt the firefighter's medical, dental and life insurance contract language into the Captains' collective bargaining agreement. The Union proposes that all 2013 cost sharing aspects of the insurance plans be continued as they are throughout the three-year term of the contract, with the exception of prescription co-pays. Specifically the Union seeks language that would require the Employer to pay 83% of the medical insurance premium and 90% of the dental insurance premium, and fund 75% of the participating member's health savings account (HSA). The Union's proposal would maintain existing point-of-service co-pays at current levels and would provide for a small increase in prescription co-pays. Deductibles and out-of-pocket maximums would also be fixed at current levels through the term of the contract. The Union's proposal would require the Employer to continue the \$3000/year opt-out provision for medical insurance. The contract language proposed by the Union includes language that describes the basic components of the existing medical plan and requires the Employer to maintain comparable coverage allowing the Employer unilateral authority to change carriers, third-party administrators and other operational components of the Plan as long as the plan and benefits remain comparable to the current ones. The Union's proposed language, taken from the firefighter contract, contains similar details pertaining to dental coverage.

The Union argues that since 2008 the City has made substantial changes to the insurance plans and shifted significant costs to participating Unit Members. These changes saved the City \$2.5

million from 2008-2011. Further savings have accrued to the Employer since switching to a self-insured model in 2012. Despite these significant savings, the Employer has consistently raised premiums each year at higher than necessary rates. The result has been that Kettering employees pay more than statewide comparables, and the City's insurance fund has grown considerably becoming a 'pseudo savings account'. The Employer's planning documents and communications make it evident that further significant plan changes are slated for the coming years. However, according to the SERB Annual Insurance Report, the City is already paying \$700/year less than average in premiums than comparable municipalities are paying. Meanwhile, Kettering employees are paying \$900/year more than average in premiums than employees in comparable municipalities. The Employer cannot be trusted to deal fairly with employees if they are given unfettered ability to change insurance benefits.

Employer Position

The Employer seeks contract language that would give the Employer complete discretion to change plan design and set employee contributions. The Employer's proposal would tie the bargaining unit's insurance coverage to that provided to non-bargaining unit employees in the City. The City asserts that tying the bargaining unit to the insurance program provided to administrative employees is adequate assurance that the insurance plans will be fair and reasonable in both design and cost. Clearly, the City employees who design and administer the insurance programs have a vested interest in maintaining quality and affordability.

The City asserts that the type of managerial discretion it seeks has become the norm. To support this assertion the City offers a survey of the surrounding municipalities used as comparables in the wage discussion. 13 out of 16 surveyed cities have complete discretion over plan design. Out of those cities surveyed only Dayton has no discretion to change the insurance plan during the term of their labor agreement. The type of discretion sought by the City has become the norm for employers in part due to a plan sponsor's (i.e., Employer's) need to be able to deal with the consequences of the Affordable Care Act, and to react to evolving trends in the insurance industry on an annual basis rather than once every three years when contract negotiations are underway. A plan sponsor's ability to react in the marketplace has a direct impact on its ability to manage cost factors associated with plan structure. Changes in provider networks and utilization, cost of care differentials among providers, new medical technology and new treatments all contribute to a plan

sponsor's need for flexibility. Having all City employees under one risk umbrella (i.e., one plan) is the most cost effective and efficient model.

Discussion and Recommendation

I accept the Employer's position that managerial discretion and flexibility are needed to manage the design of the City's insurance plan. I accept the premise that one plan design and one risk pool for all employees provides the City with leverage in the health insurance marketplace to negotiate the best possible benefit structure and discounts. The Employer has focused its argument and supporting documentation on demonstrating that the type of discretion it seeks is comparable to that enjoyed by other municipalities. Upon review of the Employer's Insurance Flexibility Survey (Fact Finding Exhibit 4) it is apparent that several of the municipalities in the geographic area have contract language that allows them to offer/provide to bargaining unit employees the same insurance plans that they have for non-bargaining unit employees. What is unclear from the survey is whether all, or any, of the municipalities in the Employer's Exhibit designated as having 'complete discretion' no longer bargain the economic aspects of their plans with their bargaining units. None of the contract excerpts, with the exception of Centerville and Vandalia, mention premium sharing, cost sharing, or have any reference to who pays and how much they pay. Most of the excerpts specifically refer to managerial discretion as it pertains to plan design or coverage levels, providers and carriers. In this regard, I note that the current firefighter contract language gives the City of Kettering the right to, "...insure or self-insure, and to choose the insurance carriers, third-party administrators, network of physicians or providers, or any other operational components of the Medical and Dental Plans. The Plans and benefits will be comparable. The City may exercise these rights without prior consultation with the Union." This language from the current City of Kettering firefighter contract is not unlike that found in the contract excerpts provided in the Employer's Flexibility Survey. I also note that currently the Employer has discretion to set the annual premium. In terms of comparable managerial discretion, the City of Kettering may already have much of what it seeks.

The current City of Kettering firefighter contract, which the Union seeks to use as its proposal, also has considerable plan detail that may not be particularly relevant given that the current contract language also states in section (a.) 7. "*The above Medical Plan Design is given as a general description. Actual plan design and additional details shall be as specified in the insurance company's or third-party administrator's actual plan description or contract. **Plan design may vary to allow for competitive shopping or if the plan design is changed by the carrier.***" (emphasis added) The same language

is found in section (b.)6. pertaining to the dental plan. Some of the plan detail written into the existing contract language could be eliminated to simplify and clarify the Employer's discretion over plan design.

I also accept the Union's position that insurance benefits are one of the most important economic benefits over which employees have the right to negotiate. In today's world there is no such thing as economic security if the picture does not include access to affordable health care insurance. The Union makes an important point that to eliminate insurance benefits from the collective bargaining process could have the effect of rendering negotiations on other economic matters virtually meaningless. Any personal economic ground gained by employees in wage negotiations could be completely offset by the Employer's unilateral changes to the employee's share of insurance costs. There must be a middle ground that provides the City with the flexibility it needs to act in the health insurance marketplace while at the same time provide for good faith negotiations with the Union over cost-sharing on the plan the Employer offers. Many jurisdictions have found success by moving health insurance plan management into a multi-party committee structure where management representatives and union representatives work together in an 'interest-based bargaining' manner to reach agreement on plan design and costs. The State of Ohio is an excellent example of such a structure. I suggest the parties in Kettering consider this possibility.

To assist the parties reach a contract provision that addresses the fundamental interest of each, I recommend language that expressly provides managerial discretion in designing the City's health insurance plans, and continues to require the parties to bargain over the cost-sharing aspects of the plans. The Unit Members have expressed an interest in using the firefighters contract as its benchmark and my recommendation attempts to capitalize on that approach.

Recommendation

The statutory criteria require that the Fact Finder consider the history of the parties, and the Employer's ability to finance and administer proposals. In light of these criteria the Fact Finder recommends the following contract language regarding Medical, Dental and Life Insurance:

Section 1. The City shall make available to all eligible employees and their dependents health insurance programs to include medical, prescription and dental coverage subject to the applicable carriers' requirements and eligibility. The plan coverage and premium as determined by the City will be the same as that provided to all non-bargaining

unit employees. Deductibles, out-of-pocket maximums, and co-pay structures are components of plan design. As such they will be established by the City and will be the same as those for non-bargaining unit employees. The City has the right to insure or self-insure and to choose the insurance carriers, third-party administrators, network of physicians or providers, or any other operational components of the Medical and Dental Plans.

Similar to administration employees each employee will be provided a term life insurance policy in an amount equal to his base annual salary at the time of death, plus an equal amount for accidental death and dismemberment coverage. Similar to administration employees the City will permit employees to purchase additional life insurance coverage through payroll deduction. The rates and availability of this optional coverage shall be as specified by the insurance carrier selected by the City.

Section 2. Effective January 1, 2015, the City shall pay 83% and the employee shall pay 17% of the premiums for the Medical Insurance Plan. The City shall pay 90% and the employee shall pay 10% of the premium for the Dental Insurance Plan.

Effective January 1, 2016 and for the duration of the agreement employees shall pay the same employee percentages for the Medical and Dental Insurance Plans as that paid by employees covered under the Kettering Firefighter contract.

Section 3. Effective January 1, 2015 the City will fund 75% of the employee's network deductible by placing \$1500/yr. single and \$3000/yr. family into a Health Savings Account (HSA).

Effective January 1, 2016 and through the duration of the agreement the City will fund the employee's HSA at the same percentage of the network deductible as that provided to employees under the Kettering Firefighter contract.

HSAs will be funded quarterly on a prorated basis, under a banking arrangement selected by the City. The City will pay all routine charges for the banking arrangement such as set up charges and routine monthly fees, with the employee responsible for other charges such as overdrafts, checks and investment fees. Once placed in the employee's HSA, the money becomes the possession of the employee, and as such, money the employee does not spend in the HSA for medical expenses is carried forward for future years use and is the employee's to take with him at termination, as authorized by then current IRS and other controlling state and federal regulations. Under circumstances where the employee does not

have adequate funds in the HSA for expenses incurred before the fourth quarter of the year, due to legitimate expenditures to meet the deductible, the City will contribute an amount to the account, at the employee's request, up to the annual City contribution limits specified above.

Section 4. Employees joining the City mid-year, eligible for health insurance coverage, will be placed in a similar High Deductible Consumer Driven Health Plan, but will be enrolled in a Health Reimbursement Account (HRA) with similar amounts available as those specified for HSA Accounts above. For such an employee, the deductible will be covered in the HRA, as specified above, but at the end of the year, any money not spent is retained by the City and the employee is thus enrolled in the HSA in the subsequent year. The HRA system may also be used for other employees who do not qualify for the HSA under IRS provisions, such as those enrolled in Medicare.

Section 5. Employees in an HSA will have available a limited Flexible Spending Account (FSA) with the option for them to contribute up to the maximum allowable limit under IRS provisions. Other controlling aspects of the FSA and health plans, such as timing of enrollment, are subject to provisions of the Medical Plan.

5. Article 14: Education Assistance

Union Position

The Union proposes to double the current education assistance benefit from \$1000.00 annually to \$2000.00. The Union seeks this increase only in the event that the Fact Finder recommends a concession(s) in the Unit's benefits or working conditions from those it enjoyed prior to organizing as a bargaining unit.

Employer Position

The Employer seeks to maintain the current benefit. The current benefit level is \$1000 annually and is the same for all City of Kettering employees, either by function of labor contract language or by city ordinance.

Discussion and Recommendation

The Fact Finder has recommended the status quo in all benefit-related issues, including the insurance article where this Unit, prior to organizing, was subject to Employer's full discretion with respect to insurance plan design and cost-sharing arrangement. Given the way in which the Union framed its proposal on this issue, there is no basis to consider the Union's proposed increase in the Education Assistance benefit.

Recommendation

The Fact Finder recommends adopting the Employer's proposal.

6. New Article: Continuation of Employment*Union Position*

The Union proposes to introduce a fair share arrangement in this Unit's contract. The Union makes this proposal because a fair share arrangement is the prevailing practice in most fire unit contracts both locally and statewide; and because it is a reasonable request given the costs associated with this new Unit's efforts to maintain status quo benefits in the face of the Employer's concessionary approach to negotiations. If none of the Employer's concessionary proposals are recommended in the fact finding report no fair share contract language would be needed.

Employer Position

The Employer opposes the Union's proposal for a fair share arrangement. Such an arrangement would be an outlier in Kettering. No other Union has a mandatory fair share fee in its collective bargaining agreement.

Discussion and Recommendation

The Fact Finder has recommended the status quo in all benefit-related issues, including the insurance article where this Unit, prior to organizing, was subject to the Employer's full discretion with respect to insurance plan design and cost-sharing arrangement. Given the way in which the Union framed its proposal on this issue, there is no basis to consider the Union's proposed fair share fee arrangement.

Recommendation

The Fact Finder recommends adopting the Employer's proposal.

7. New Article: Drug Testing

Employer Position

The Employer seeks to introduce a random drug/alcohol testing program for this Unit. The Employer's rationale is twofold. First the City's employees who hold jobs requiring a commercial driver's license (CDL) are subject to such testing and the Fire Captains are in equally (if not more) sensitive jobs. Second, a survey of surrounding jurisdictions reveals that the majority have a random drug/alcohol testing program, which is evidence of the fact that such programs have become the prevailing practice for fire units.

Union Position

The Union rejects the Employer's proposal regarding random drug/alcohol testing for two fundamental reasons. First, the Employer has failed to present any compelling or credible reason to impose this change in working conditions on this Unit. The Employer acknowledges that there has not been a past problem nor is there a current problem of this nature with Unit personnel. Second, the proposal itself lacks specificity about the procedures and how test results would be handled. Such details constitute working conditions that are subject to negotiation and the Employer's approach has been to draft a broad statement of managerial discretion concerning testing and not engage in bargaining over the details of implementation.

Discussion and Recommendation

For the Employer to prevail in securing this type of change in working conditions either via a Fact Finder's recommendation or via negotiations, the proposal should be accompanied by sufficient information to persuade the audience that the need is genuine. There should either be a problem that must be remedied, or the potential for a problem that could be averted. Comparisons with other jurisdictions are a supporting argument in this arena; they are not the driving factor. Comparables are best used when arguing for specific operational/procedural elements of such a

program. There is insufficient information in the fact finding record to support adoption of the Employer's proposal.

Recommendation

The Fact Finder recommends that the Employer's proposal be rejected.

Conclusion

In this report I have attempted to make reasonable recommendations that both parties will find acceptable. If errors are discovered or if the parties believe they can improve upon the recommendations, the parties by mutual agreement may adopt alternative language.

After giving due consideration to the positions and arguments of the parties and to the criteria enumerated in ORC 4117.14(G)(7)(a) to (f) the Fact Finder recommends the provisions as enumerated herein. In addition, all tentative agreements (TAs) previously reached by the parties are incorporated by reference into this Fact Finding Report and should be included in the resulting collective bargaining agreement.

Respectfully submitted and issued at Columbus, Ohio this 5th day of February, 2015.



Felicia Bernardini,
Fact Finder

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Fact Finder Report was sent by e-mail on February 5, 2015 to:

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