

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF FACT-FINDING)

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CITY OF FOREST PARK)

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and)

Case No. 2015-MED-10-1147

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City of Forest Park Professional Firefighters,)

IAFF LOCAL 3024)

Edward S. Dorsey, Esq., for the Employer
Scott Brown & Kevin Martin, for the Union
Before Matthew M. Franckiewicz, Fact-finder

FACT-FINDER'S REPORT AND RECOMMENDATIONS

This proceeding involves negotiations for a successor to the 2013 - 2015 collective bargaining agreement between the Parties. Pursuant to the provisions of section 4117 of the Ohio Revised Code, the undersigned fact-finder was appointed on November 30, 2015.

The hearing was held on December, 8, 2015 at Forest Park, Ohio. Both parties were afforded a complete opportunity to bring to the fact-finder's attention all the facts and arguments which they desired to present.

Background

Pursuant to the rules promulgated by the State Employment Relations Board, the fact-finder is to take into account the following factors:

1. Past collective bargaining agreements between the parties;
2. Comparison of the issues with those issues involving other public and private employees doing comparable work, with consideration of factors peculiar to the area and classification involved;

3. The public interest and welfare, the ability of the employer to finance and administer the items involved, and the effect of the adjustments on the normal standard of public service;
4. The lawful authority of the employer;
5. Any stipulations of the parties;
6. Such other factors which are normally or traditionally considered in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in public service or in private employment.

In the preparation of this report, I have been guided by the factors listed above.

During the course of the proceeding, the Parties reached tentative agreement in the areas of Safety and Promotions. I shall not repeat those tentative agreements here, but I would make clear that I recommend that all tentative agreements for changes to the predecessor agreement be included in the new collective bargaining agreement.

Analysis and Recommendations

Both Parties envision a three year term for the new agreement. As a housekeeping matter therefore, it will be necessary to change Article XXVII to read as follows:

This Agreement shall remain in full force and effect January 1, 2016 until midnight December 31, 2018, unless either party serves written notice on the other party not less than sixty (60) days prior to December 31, 2018 that it desires to terminate or modify the terms of this Agreement.

* * *

The Union proposes a modification to Article XXIII (Continuing Education). The effect of the proposal would be to require the City to pay the education costs for an employee to acquire an Associate Degree, and to compensate the employee for class time.

An Associate Degree is not required as a condition of hire, nor to retain employment as a firefighter. Recently, an Associate Degree was added to the prerequisites for promotion to Lieutenant or Captain. (Incumbents were “grandfathered.”)

It is generally accepted that additional education provides benefits to both employee and employer. The Union’s proposal would be a substantial benefit, probably worth more than \$10,000, to some employees, who aspire to promotion, but nothing at all to other employees who have no desire for promotion to Lieutenant or Captain. Furthermore, there is no guarantee that the City would enjoy any benefit from the additional expenditure, since nothing would prevent a firefighter from using his or her newly acquired degree to obtain employment elsewhere. In such a case, the City would be paying for an employee to get a raise elsewhere. Moreover, to the extent that the City has to spend money on tuition, less money is available for the salary increases that serve as an incentive for employees to seek promotions.

I therefore do not recommend including the Union's proposal for full tuition reimbursement.

However, the City is currently providing tuition reimbursement to firefighters of up to \$950 per year, although this benefit is not mentioned in the collective bargaining agreement. I do recommend inclusion of the benefit in the collective bargaining agreement, with an increase in the annual maximum to \$1200. This is in keeping with the collective bargaining agreement between the City and the Fraternal Order of Police (Lieutenants and Sergeants), which is available on the SERB website (Case 13-MED-09-0993), and my specific recommendation, which is copied from the agreement in that case, is that the following language¹ be added to Article XXIII:

TUITION REFUND PROGRAM

As a further aid to improve employee proficiency, the City may grant a tuition refund of up to \$1,200.00 per employee per year for completing courses or programs, provided that the following requirements are met:

A. An employee must have had at least two years of satisfactory service with the City and must have, in advance, the written approval of his department head and the City Manager.

B. The course of instruction is related to the employee's current position. The City's share shall be limited to one half of tuition, up to \$1,000.00 per employee per year if the employee makes a grade of "B" or better on the course; if his grade is "C", he is eligible for refund of one third of the tuition cost - not to exceed \$500.00 per employee per year. C. An employee seeking reimbursement under this provision must have approval of the Chief at least six months prior to starting the course or program.

* * *

The Union proposes additional language in Article IX (Discipline). The effect of the Union's proposed additions would be to state explicitly that the City has the burden of proof in discipline cases, to specify certain timelines in the disciplinary process, to defer the imposition of discipline for serious offenses until after the grievance procedure has been exhausted, and to provide an employee with written notice when an allegation has been deemed unsubstantiated.

In my experience, arbitrators uniformly impose the burden of proof on the employer in discipline cases, both in the private sector and the private sector. Arbitrators are divided on the standard of proof to be applied in certain cases (preponderance of evidence, clear and convincing evidence, beyond a reasonable doubt), but the Union's proposal does not address the standard of proof, only the allocation of the burden, whatever that

¹ I notice that there appears to be a typographical error in Paragraph B of that agreement, in that "\$1,000.00" was probably intended to read \$1,200.00. In addition "\$500.00" may have been intended to read \$600.00. It is my intent that the education benefit provided to the firefighters is to be identical to that provided to police officers, and that any corrections or side letters the Parties may have made in this respect to police officers are also to be made for firefighters.

burden may be. The Union's proposal to explicitly state a burden of proof may be unnecessary, in that it would not change what would actually happen at arbitration, but it does no harm, and it alerts both employee and management representatives about the burden of proof that will apply if a case reaches arbitration. I therefore recommend the addition of the following sentence under the heading "Appeal" in Article IX, with the caveat that my recommendation has no effect on the standard of proof (preponderance of evidence, clear and convincing evidence, beyond a reasonable doubt) to be applied by an arbitrator:

In the arbitration of discipline cases, the burden of proof is on the City.

The Union's proposed timelines would be easy to meet in some cases, for example where the proposed discipline is based entirely on a set of email communications, but difficult or impossible in others, such as where multiple civilian witnesses need to be contacted and interviewed, or where evidence must be submitted to an expert for forensic examination. Although many arbitrators find an implied due process requirement of a prompt investigation in discipline cases, and that "stale" discipline should not stand, there is no agreement on how these concepts apply in specific cases. Thus while the principle of just cause may have implications when investigations are unduly delayed, establishment of hard timelines seems to me unwise, especially in the context of a fire department.

I do not recommend adoption of the Union's proposed timelines in discipline cases.

Some collective bargaining agreements specify that proposed discipline will not be imposed until after the grievance procedure has been exhausted. These provisions are sometimes called "justice and dignity" clauses, and they often provide exceptions for certain "cardinal" offenses. My experience is that such clauses do not appear in most collective bargaining agreements. Further, make whole remedies in cases where there has been a financial loss is standard practice in arbitration.

Accordingly, I do not recommend inclusion of the Union's proposed deferral of the imposition of discipline until after the grievance procedure has been exhausted.

The Union asserts that some potential discipline cases have languished, and that the affected employees do not know where they stand, so that employees should be notified when a disciplinary investigation has been concluded. As the City points out, the proposal may cut both ways, in that an employee may prefer no documentation (potentially subject to public or press disclosure under freedom of information requests) that an investigation has even been conducted. It seems to me that the best approach is to leave the question to the employee, so that on request from the employee, the employee shall be given assurance that he or she is no longer in limbo.

I therefore recommend the addition of the following sentence under the "Investigation of Misconduct" heading in Article IX:

- D. Upon written request from the employee, the employee shall be given written confirmation that an investigation has been concluded and discipline is deemed unwarranted.

* * *

The Union proposes new language requiring the City to give 14 days advance notice of any policy change.

The City responds that some policy changes may be urgent, and that changes can always be discussed after the fact at Labor Management meetings.

I believe that in normal circumstances, advance notice of policy changes is desirable, so that employees can adjust to them, and so that questions and ambiguities can be resolved. While nothing precludes discussion of a policy already implemented, typically parties are more flexible and the discussion less adversarial when such conversation takes place before the concrete hardens. Of course situations arise that call for immediate action, and the City needs the latitude to deal with these urgencies. In my view advance notification of policy changes should be the norm, but with the understanding that the City may take prompt action when it needs to do so. Rather than creating a new article, I recommend that the following paragraph be added to Article II (Management Rights):

Except in unusual circumstances where prompt action is necessary, the City shall provide the Union with 14 days advance notice of any policy change before the change is implemented.

* * *

A few firefighters work 40 hour weeks, but the vast majority work a 24 hour shift, followed by 48 hours off. This means that they do not work the same schedule each week, but instead a schedule that repeats every three weeks. They receive additional days off (Kelly days) on a scheduled basis, about which I shall have more to say below.

Currently, there are 20 full time firefighters, two of whom work 20 hour weeks, and the other 18 of whom work rotating turns. The 40 hour positions are a Training Captain, a Fire Marshall and a Risk Reduction Officer, but the last position is currently vacant. This means that there are normally six full time firefighters per shift: a Captain, a Lieutenant, and four full time firefighters. The normal complement on a shift is ten, including the Captain and Lieutenant, so that there are typically four part time firefighters per shift. The minimum complement is nine. If one or more of the full time firefighters is off on a Kelly day, a vacation day, or on sick leave or injury leave, additional part time firefighters may be needed to fill the vacancy, so that a majority of the rank and file firefighters on a given shift may be part time employees. Part time employees are not included in the bargaining unit.

In 2011 the City had a complement of 30 full time firefighters, with eight (a Captain, a Lieutenant and six full time rank and file firefighters) per shift. At that time the City also used a total of 32 part time firefighters.

By 2015, the number of full time firefighters had declined through attrition, to the current 20, with six full time firefighters (a Captain, a Lieutenant and four full time rank and file firefighters) per turn. Meanwhile the number of part time firefighters employed by the City has increased to 45.

The Union proposes a new article with the objective to increase the number of full time firefighters to 27, including the filling of the vacant 40 hour position. The Union seeks to have eight full time firefighters per shift, a Captain, a Lieutenant and six full time rank and file officers.

I doubt that anyone would challenge the assertion that, other things being equal, it is preferable to use full time rather than part time firefighters.

Even where a part time firefighter is as skillful and brave as his or her full time counterpart, a part time employee is not the equivalent of a full time employee. Every team is more efficient and effective when its members are accustomed to working with one another, and know each other's strengths, weaknesses, and tendencies.

The City's fire department would be a stronger one with more full time firefighters. I am sure the City itself would agree with this proposition.

The reason why the City has increased the utilization of part time firefighters can be stated in a single word: cost. A part time firefighter costs less than a full time firefighter.

Recently the voters approved a 5.75 mill increase in the property tax levy for the fire department. The increase is projected to increase revenue by \$1.7 million. But the increased revenue will not be seen until 2016, and for a number of reasons, the actual increase in revenue may fall short of the projection. A higher tax bill may mean a higher rate of non-payments or late payments. The higher rate may induce more property owners to challenge their assessments. It is unfortunate that this report is being written in 2015, before the actual amount of increased revenue from the levy can be known. What is known is that the City has two large pieces of equipment, a ladder truck and an engine, that will need to be replaced soon.

I believe that increased revenue will ultimately permit the City to increase the complement of full time firefighters. But I am most reluctant to lock the City into an obligation to do so, based on what at this date are only predicted, and not actual dollars. Therefore my recommendation is in the nature of a moral, rather than a strict legal obligation. The effect of my recommendation is that after the actual effect of the tax levy has been determined, the City shall attempt to increase the number of full time firefighters by one on each turn. This is short of the two sought by the Union, but of course nothing precludes the City from increasing the number of full time firefighters by two if its financial position permits. It is my belief and hope that the City will conclude that it is able to add full time firefighters during the term of the new agreement, so that by its end there are eight full time firefighters assigned to each shift. At the same time, I recognize that predicted dollars cannot pay actual salaries, and so my recommendation is in the nature of a goal rather than a requirement.

The distinction can be illustrated as a case of "should," which signifies a higher level of obligation than "may," but not as high as "must."

My recommendation relies on the expectation that the City will act in good faith. My sense, based on my admittedly limited interaction with City officials, is that it will do so. My recommendation is subject to the criticism that I am asking the Union members to buy a pig in a poke. But in a sense, that is what the taxpayers did also, relying that the City would not waste the additional revenue.

In my experience some bargaining relationships are contentious, characterized by lack of trust and inability to see the other party's viewpoint. My sense is that this is not at all the case in Forest Park, and that the Parties here recognize that they have differing interests but deal with each other in good faith.

So in some situations it would be futile to issue a recommendation that created less than a binding obligation, since both parties would regard it as meaningless. But I do not feel that this is the situation here.

My specific recommendation is that the following language be added to Article II (Management Rights), rather than creating a new article as proposed by the Union:

In 2017 the City shall attempt to increase the complement of full time firefighters so that there are normally on each shift a Captain, a Lieutenant, and 5 full time firefighters. Although this is not a binding obligation, the City will use its best efforts to bring about this increase in the full time staffing level.

* * *

The Union proposes a number of changes to Article XIII (Hours of Work). For the most part these relate to the Union's goal to increase the number of Kelly days from one every 14 tours to one every 7 tours. If my arithmetic is correct, this would change the current average of a bit under nine Kelly days per year to over 17 Kelly days per year. There were counter proposals back and forth in response to the Union's initial proposal, but none had much appeal to the other Party and I will not address the counter proposals in detail in this report.

The Union also proposes to require a minimum of two hours pay in holdover situations, and to include a provision that the work day begins at 0600, which is the current practice. I shall discuss each of these proposals at the end of this section, but clearly the proposal for additional Kelly days is the big ticket item. Both Parties also contemplate 2.0 percent annual wage increases, which needs to be considered in conjunction with the proposal for additional Kelly days, since these are the main cost factors for the new collective bargaining agreement.

Despite the fact that each Party suggests annual wage increases of 2.0 percent, the notion of any consensus on wages is a mirage, since each Party ties its wage proposal to its Kelly day proposal. (The Employer would not increase the number of Kelly days, and its counter proposal would reduce the number of Kelly days in return for more money.) So, despite the obvious temptation to recommend 2.0 percent annual wage increases, I cannot separate the issues of Kelly days and wages, since when they are considered together, the Parties can be seen as fairly far apart on the main cost items in the new agreement.

It makes sense at this point to ask "what does a Kelly day cost?" One could calculate the cost as the wages to be paid to a part time firefighter who would replace a full time firefighter on his or her additional Kelly day. But as the discussion above about the complement of full time firefighters indicates, although a part time firefighter costs less, a full time firefighter is more valuable.

So it seems to me more realistic to estimate the cost of a Kelly day, as a percentage, and to consider the following question: if a firefighter receives one additional Kelly day in a year, what percentage would that be of the total number of days he or she works in a year? If the annual salary is the same, the resulting percentage would be, in my view, an estimate of what an additional Kelly day "costs" the City.

Unfortunately, the calculation cannot be performed with precision. First, because there are 365 days in a year, the number of Kelly days a firefighter currently receives per year does not work out to a round number.

If my arithmetic is correct, currently a firefighter receives 8.69 Kelly days in a 365 day year (and a little more in a leap year). So if a firefighter has 122 turns per year (usually the case, since $365 / 3 = 121.67$), he or she would actually work about 113 shifts, after Kelly days are accounted for. But there are other days that a full time firefighter does not work. As I compute it, Holidays (article XVI) would account for 4 tours per year; Sick Leave, if all is used, would account for a little over 6 tours per year, and Vacation (Article XV) would account for anywhere from 4 to 10.5 tours per year depending on length of service. So the question of how much a Kelly day costs, in percentage terms, depends on which firefighter we are looking at. Further complicating the calculation is the possibility of Injury Leave (Article XVIII) and other types of leave such as bereavement leave and military leave (Article XIX) which will apply to some firefighters but not others. Taking all of the possible leaves into account, I would estimate that the average full time firefighter physically works approximately 90 shifts in a calendar year (not taking into account overtime, as to which I have no data).

On that basis, an additional Kelly day can be seen to cost the City a little more than 1.1 percent. In view of this calculation, it does not seem to me that the City could afford the additional eight or nine Kelly days per year sought by the Union. Indeed, the only way that I can justify any increase at all in the number of Kelly days is to phase them in over the course of the three year agreement, and in return for a three year wage freeze.

I recommend that each full time firefighter who works the 24 hour on, 48 hour off tour system is to receive an additional two Kelly days in each year of the collective bargaining agreement (2 more in 2016, 4 more in 2017, and 6 more in 2018). I think it best to leave to the Parties how this is to be accomplished in terms of scheduling and determining the number of shifts per Kelly day. If the Parties are unable to agree on the details, I recommend that the additional Kelly days be treated in the same manner as holidays under Article XVI Section 2.

In keeping with this discussion, I recommend no change to Appendix I of the collective bargaining agreement for firefighters on the tour system.

Since 40 hour employees do not receive Kelly days, a three year wage-salary freeze would be unfair to them. As to them I shall recommend, rather than a wage increase, an annual bonus amounting to 2.2 percent in 2016, 4.4 percent in 2017, and 6.6 percent in 2018. This seems simpler to me a simpler system than calculating new rates for 40 hour employees, but of course the Parties may, by mutual agreement, revise my recommendation and craft a system for 40 hour employees that makes more sense to them.

As noted above, the Union also proposes a minimum of two hour pay in cases of holdover. This would be a cost item to the City, and to the extent that additional spending is at issue, I believe the money is better directed elsewhere, specifically to maximizing the likelihood that the City will be able to increase the complement of full time firefighters. I do not recommend adoption of this proposal.

The Union also proposes reducing to writing the current practice that the day begins at 0600. In view of my recommendation regarding policy changes, any change in starting time would be subject to advance notice and discussion, so that specifying the starting time in the collective bargaining agreement seems to me unnecessary. I do not recommend adoption of this proposal.

Specifically, I recommend that the following paragraph be added to Article XIII Section 2:

In 2016, employees subject to the tour system shall receive 2 additional Kelly days per calendar year as compared to 2015. In 2017, employees subject to the tour system shall receive 4 additional Kelly days per calendar year as compared to 2015. In 2018, employees subject to the tour system shall receive 6 additional Kelly days per calendar year as compared to 2015. Unless the Parties agree to a different arrangement, these additional Kelly days shall be treated in the same manner as Holidays under Article XVI.

I recommend that Appendix I be amended to add the following paragraph, but that in all other respects Appendix I shall remain unchanged:

Full time 40 hour employees shall receive a bonus of 2.2 percent of their base salary on December 31, 2016. Full time 40 employees shall receive a bonus of 4.4 percent of their base salary on December 31, 2017. Full time 40 employees shall receive a bonus of 6.6 percent of their base salary on December 31, 2016.

* * *

As to all Articles and Sections for which no changes have been recommended above and which are not the subject of a tentative agreement between the Parties, I recommend that these Articles be retained unchanged from the prior agreement.

Issued December 14, 2015

Matthew M Franchewing

Certificate of Service

I certify that the above Report and Recommendations was served upon both of the above-named parties, and upon the State Employment Relations Board, in accord with SERB rules, on December 14, 2015.

Matthew M Franchewing