

STATE EMPLOYMENT  
RELATIONS BOARD

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD Dec 20 9 54 AM '95

In Regard to the Matter of the Fact-Finding Between:

JACKSON TOWNSHIP BOARD OF TRUSTEES ) 96-MED-09-0707  
)  
-AND- )  
)  
JACKSON TOWNSHIP PROFESSIONAL )  
FIREFIGHTERS LOCAL 2280 )

APPEARANCES

For The Trustees

Robert J. Tscholl, Esq., Attorney  
Craig C. Snee Trustee  
Ted R. Heck Fire Chief

For The Union

Edward C. Maher, Esq., Attorney  
Gary H. Martin Union President  
Tracy R. Hogue Chairman/  
Neg. Committee  
Frank M. Krauss Neg. Committee  
Ray A. Green Neg. Committee

-----  
BEFORE ALAN MILES RUBEN, FACT-FINDER  
-----

Cleveland-Marshall College of Law  
Cleveland State University  
1801 Euclid Avenue  
Cleveland, Ohio 44115  
Tele: (216) 687-2310  
Fax: (216) 687-6881

FIRST EXPOSURE DRAFT  
CONFIDENTIAL

BACKGROUND

Jackson Township, in Stark County, Ohio, through its Board of Trustees, provides local governmental services to its residents, including fire suppression and emergency medical response service. The Township covers an area of thirty-six square miles with a resident population of more than thirty-six thousand. During work-days, because of extensive industrial and commercial development, some one-hundred thousand persons visit the Township.

The Township's professional Firefighters, all of whom are certified Paramedics, are exclusively represented for Collective Bargaining purposes by the Jackson Township Professional Firefighters, Local 2280, I.A.F.F. The forty-four members of the bargaining unit include thirty-four classified Firefighters/Paramedics and ten Captains.

The history of labor relations between the parties extends back to 1985 when the first three-year Contract was entered into. Subsequent Contracts were negotiated in 1988 and 1991.

The presently operative Agreement was entered into as of December 31, 1993, for an initial term ending on December 31, 1996.

The parties met on five occasions to negotiate a Successor Agreement, but could not resolve all disputes over its terms and declared impasse.

A S.E.R.B. appointed mediator was unable to bring the parties together.

Accordingly, on November 12, 1996, the undersigned was appointed to serve as Fact-Finder by the State Employment Relations Board.

The parties mutually agreed to extend the period of fact-finding as provided under Ohio Administrative Code Rule 4117-9-05(G).

The parties continued to negotiate but were unsuccessful in reconciling their differences. As a result, at the direction of the parties, a fact-finding hearing was held at the Jackson Township Hall, Stark County on November 29, 1996.

Timely in advance of the hearing the parties submitted, and the Fact-Finder reviewed their position statements as required by Ohio Administrative Code 4117-9-05(F).

Remaining in dispute were proposals of the parties relating to the following existing provisions of the Contract: Article XVI, Section 2 - Wages; Article XVI, Section 6(A) - Shift Schedule; Article XVI, Section 6(C) - Overtime Computation; Article XVI, Section 8 - Annual Vacation Leave Accumulation; Article XVI, Section 10 - Health Insurance; Article XVI, Section 11 - Temporary Assignments To Higher Rank and Pay; Article XVII - Duration of Agreement. In addition, proposals for the following new terms were put at issue: Alcohol and Drug Testing; Layoff and Recall; Part-Time Employees; Trading Of Shifts; and Notice of Change In Working Conditions.

The Fact-Finder attempted mediation and his efforts resulted in the following set of Agreements:

1. All provisions of the 1993 Agreement, except as amended or supplemented below, are to be carried forward and incorporated into the successor Agreement, mutatis mutandis.

2. Article VI, Section 3 is amended to read as follows:

"Section 3. Any rule changes or directives which substantially affect the working conditions of the Local shall be put in writing and submitted to the Local President prior to implementation."

3. Article XII is amended by adding a new Section 5 to read as follows:

Section 5. It is agreed that prior to the implementation of a lay-off of bargaining unit personnel, the Township will meet and confer with the Local to consider alternatives.

4. Article XVI, Section 2, Subsection A is amended to read as follows:

Section 2

A. The base salary schedule as set forth in the prior Agreement and effective with the first full pay in January, 1996, shall be increased by two and nine tenths (2.9) percent across-the-board commencing with the full first pay period in January, 1997. The resultant salary schedule shall be subsequently increased by an additional two and nine tenths (2.9) percent across-the-board in each succeeding year of the Contract effective with the first full pay period in January of each such year.

In addition, each member of the Bargaining Unit will receive a lump sum, non-recurring payment of \$1,000.00, subject to all appropriate deductions, with the payment for the first full pay period in January, 1997.

In each year of the Contract the Township shall continue to pay the employee's present required ten (10) percent contribution to the Police and Firemen's Disability and Pension Fund with the express understanding between the parties to this Agreement that any increase in the required employee's contribution percentage to the Police and Firemen's Disability and Pension Fund shall be paid by the employee and further that the employees shall not make any claims for lost compensation should the present required 10% employee contribution rate be reduced.

5. Article XVI, Section 6 is amended by adding a new subsection (G) to read as follows:

G. Part-time Firefighters will not be used to supplement or fill vacancies when there are twelve (12) or less career (full-time) positions per shift, excluding Assistant Chiefs. Existing part-time positions (duty assignments) will not be affected.

6. Article XVI, Section 10 is amended to read as follows:

Section 10. The level of benefits for hospitalization, major medical, and drug insurance coverage will be as set forth in the amended Jackson Township Medical Plan Benefit Summary, appended hereto as "Appendix I" and such level of benefits shall be maintained during the term of the Contract. An employee shall be entitled to the same percentage discount as given by the provider to the Township with respect to the employee's co-insurance obligation for out-of-pocket expenses. The level of benefits for dental and vision insurance coverage shall be the same as those in effect as of December 31, 1996.

The Board of Trustees shall be entitled to make changes in the present health benefits plan during the term of the contract provided the majority of all bargaining unit employees consent. Nothing in this Article shall prohibit the board of trustees from providing alternative health insurance programs to its employees as long as such alternative plans remain optional.

7. Article XVI, Section 13, first sentence is amended to read as follows:

"When an employee is injured or suffers an occupational disease in the line of duty while actually working for the employer, employees working the 52 hour work week shall be entitled to 720 hours of disability leave pay and employees working a 40 hour work week shall be entitled to 520 hours of disability leave pay."

8. Article XVI, is amended by adding a new Section 15 to read as follows:

Section 15. Trading of Shifts:

The current practice of trading of shifts as reflected in the Department's Procedures Manual shall be continued with the approval of such trades to be at the discretion of the Fire Chief.

9. Article XVII, Section 1 is amended to read as follows:

Section 1. This Agreement shall be effective January 1, 1997 and shall remain in full force and effect until December 31, 1999. The parties agree to convene negotiations for a successor Contract not later than July 1, 1999.

10. The parties further agree that "notwithstanding the provisions of O.R.C. Section 4117.14 (G) (11) or any other provision of law prohibiting the retroactivity of financial benefits should a Conciliator not be appointed prior to December 31, 1996, such prohibition should not apply to the current Fact-Finding proceedings between the parties regardless of whether any Findings or Recommendations of Fact-Finder Alan Miles Ruben are accepted or rejected by any party."

All other proposals and demands of the parties have been withdrawn, except for the Township's proposal to institute a drug and alcohol testing policy.

The Fact-Finder therefore turns to consider this remaining issue.

The purpose of the Township's proposed plan for substance abuse testing is described in the following terms:

"This policy applies to all bargaining unit employees. It will be implemented in a consistent, nondiscriminatory manner. All employees will be provided a copy of the Township's drug testing policy prior to its implementation and will be provided information concerning the impact of the use of alcohol or drugs on job performance. Employees shall be trained to recognize the symptoms of drug abuse, impairment and intoxication. All employees will be informed of the causes for testing, how well the tests perform and what tests will be conducted."

The policy would test for consumption of alcoholic beverages (those containing more than one-half of one percent of alcohol by volume) and "controlled substances" as defined by either Chapter 3719 of the Ohio Revised Code or Section 202, Schedules I-V of the Federal Controlled Substance Act.

by either Chapter 3719 of the Ohio Revised Code or Section 202, Schedules I-V of the Federal Controlled Substance Act.

The policy provides for "reasonable suspicion" post-accident and "random" testing.

Reasonable suspicion requires:

"a conclusion by trained personnel based on personal observation of specific objective instances of employee conduct and documented in writing, that an employee is exhibiting aberrant or unusual on duty behavior which is the type of behavior that is recognized and accepted as a symptom of intoxication or impairment caused by controlled substances or alcohol and is not reasonably explained as a result of other causes such as fatigue, side effects to prescription or over the counter medication, reaction to fumes, smoke or other job related causes or factors. Such behavior may include, but is not limited to, a substantial drop in the employee's performance level, impaired judgment or reasoning, decreased level of attention or sensory abilities, or other behavioral changes.

"Reasonable suspicion shall be based upon personal observations by a trained supervisor that must be documented in writing at the time of the observation. Reports of drug abuse or abnormal behavior which are not confirmed in writing by a trained supervisor will not constitute reasonable suspicion. Anonymous reports shall not constitute grounds for testing."

In the event a Supervisor has reasonable suspicion that an employee is unfit for duty because the employee appears to be under the influence of an illicit drug or intoxicated, the employee may be summarily suspended.

The "post-accident" policy contemplates that employees who are involved in an accident resulting in an injury while

operating a Township vehicle, or who receive a moving violation citation, and employees who are responsible for an accident in the work place that produces injury requiring medical attention, may be subject to both alcohol and controlled substance testing.

The "random testing" provision contemplates that up to 50% of the work force will be tested annually for drug usage and up to 25% will be tested annually for alcohol consumption.

The testing procedure for controlled substances follows the standard, established protocols and requires:

"collection of a urine specimen by medical personnel and a laboratory analysis of that specimen by Enzyme Immunoassay (EMIT) screening and confirmatory testing using the Gas Chromatograph/Mass Spectrometry (GC/MS) methods and procedures, or the most current and appropriate technology."

The collection of the urine specimen is to be done in the presence of the employee and a Union representative, if available, who will observe the collection, bottling and sealing of the specimen.

With respect to alcohol testing, a technician is responsible for collection of breath samples through an approved testing device.

Positive results are determined by a "Medical Review Officer" and reported to the Administration after verifying that "there are no valid medical explanations for the positive results."

Employees who are found to test positive for alcohol or drugs will be removed from a "safety sensitive position," but given an opportunity to participate in, and successfully complete, a rehabilitation program as recommended by a "Substance Abuse Professional" who will also schedule follow-up testing if the employee returns to duty.

If an employee believes the positive result is in error he may request that the "split sample" be forwarded by the first laboratory to another, independent and unrelated approved laboratory for confirmation testing. If the second test is positive and the employee then wishes to utilize the rehabilitation option, the employee or the Union would have to reimburse the Township for the cost of the second test before the employee enters the rehabilitation program.

Employees who are permitted to return to work after successful participation in a recommended "after care program" will be required to provide a negative drug and/or alcohol test result, and will thereafter be subject to at least six unannounced tests in the first twelve months following their return to duty, and may be subject to follow-up testing for an additional two years.

An employee who enrolls in a recommended treatment program may be permitted to work so long as the program does not prevent his regular attendance. However, his continued employment would be dependent upon documentation of continued, successful participation in the recommended after-care program.

A employee who voluntarily enters, as an in-patient, a medically supervised rehabilitation facility may request to use vacation, paid sick leave or medical leave of absence entitlements.

All records regarding an employee's rehabilitation progress are required to be kept in confidential files, separate from the ordinary personnel files of the Township, and all test results are treated as confidential medical records.

An employee who fails to participate in, or successfully complete a rehabilitation program, or, who subsequently again tests positive, will be subject to discipline "up to and including discharge." An employee who refuses to undergo an alcohol or drug screen will be subject to similar discipline.

The most controversial feature of the proposed policy is its random drug and alcohol testing program to which all employees in the unit would be subject. The Township supports this provision by noting that Firefighters, whether operating fire equipment or emergency medical response vehicles, must exercise an unimpaired judgment at all times if they are to protect the public and fellow workers. A random drug testing policy helps assure that any users of controlled substances and abusers of alcohol, who, by definition may lack such judgment, are either monitored and successfully rehabilitated, or else discharged from employment.

The Union insists that such a policy constitutes an unacceptable invasion of employees' privacy and casts an unwarranted aspersion upon their conduct and character.

The Union points out that of four Fire Departments in Stark County for which information is available, three have only "reasonable suspicion" drug testing policies, and one has no such policy at all.

More extensive information concerning the number of fire departments in Ohio which have drug and alcohol testing policies, the nature of the testing in those jurisdictions, and the sanction systems applied to Firefighters who have tested positive, was not made available to the Fact-Finder by the parties.

The Union argues that any employee who has a drug or alcohol problem would be readily detected by the members of the Department with whom the employee works and, who for their own safety, if for no other reason, would bring the offending employee's condition to the notice of supervision.

The Township responds that a recent experience in the Fire Department of the nearby City of Canton shows the opposite to be true. There, so counsel writes, a Fireman who was not only a drug user but a drug dealer apparently operated openly out of the Fire Station without anyone blowing the whistle on him. Although a subsequent criminal prosecution was unsuccessful, his discharge was upheld in arbitration.

On the other hand, the Township acknowledges that there were no known incidents of drug use or alcohol abuse, nor did

it have any reason for believing that any Firefighter has a drug or alcohol problem.

While the Union does not, in principle, object to "reasonable suspicion" based testing, it opposes some features of the proposed program. It insists that "in order to have uniform decisions and centralization of responsibility ... only one person be designated [as the Supervisor of the program, and that this person be the Township Administrator]."

The Union also disagrees with the policy's separately administered disciplinary procedure, and, instead, suggests that process set forth in the Collective Bargaining Agreement be exclusive.

Next, the Union recommends that there should be no limit on the number of retests, and that all tests should be performed at the expense of the Township.

Finally, the Union would reduce the period during which the test results may be retained by the Township.

In the absence of more comprehensive comparative information on the extent to which random drug and alcohol testing policies have been adopted by Fire Departments in Ohio, and more specific experience-based data supporting the establishment of such a divisive and costly random testing program, the Fact-Finder believes that, at the present time, there is no persuasive reason to adopt the random testing policy proposed by the Township.

There is, however, every good reason, the Fact-Finder concludes, to adopt a "reasonable suspicion" substance abuse

and post-accident testing policy which requires testing of any member of the bargaining unit whose conduct or performance warrants an inference that the employee was under the influence of alcohol or a controlled substance.

However, the specific policy suggested by the Trustees, which appears to have been drawn from a program developed for truck drivers, contains features which may be open to thoughtful reconsideration, and fails to include features found in other programs which are worthy of scrutiny. Perhaps because the parties were required to spread their attention over so many issues, their research on alternative substance abuse detection systems was not as comprehensive and thorough as it might have been.

The Fact-Finder believes that further investigation by, and discussions between, the parties are likely to lead to at least a narrowing of their differences and a refinement of the terms of a reasonable suspicion and post-accident drug and alcohol testing program. He therefore considers it appropriate that the parties have an opportunity to engage in such a collaborative effort. For this purpose he will suggest that the issue of a reasonable suspicion and post-accident drug and alcohol testing program be remitted to the parties for a period of sixty (60) days after which time, if no agreement has been reached, the Contract may be reopened for the purpose of permitting the parties to utilize the fact-finding and conciliation process, as may be necessary, to finally resolve the matter.

Accordingly, the Fact-Finder finds and recommends that the following Article XVIII be added to the present Contract:

"Article XVIII. Drug and Alcohol Testing Policy"

Promptly upon the execution of the present Contract, representatives of the parties will meet to consider the development of a "reasonable suspicion" and "post-accident" drug and alcohol testing policy. In the event no agreement is reached with respect to the terms of such a policy, by March 1, 1997, then, upon notice by either party, the Contract shall be reopened for the sole and limited purpose of negotiating the terms of a "reasonable suspicion" and post-accident drug and alcohol testing policy, and upon impasse being declared in such negotiations, either party may refer any and all disputes over the terms of such a policy to the mediation, fact-finding and conciliation process as may be necessary.

Findings and recommendations respectfully submitted this 18th day of December, 1996.



Alan Miles Ruben  
Fact-Finder

AMR:l jg

"Appendix I"

JACKSON TOWNSHIP  
MEDICAL PLAN BENEFIT SUMMARY

IN-HOSPITAL COVERAGE (Network or Non-network)

In-Hospital Medical Expense Benefits ...80/20 U,R&C\*  
Maximum Daily Benefit.....Semi-Private Rate  
In-Hospital Miscellaneous.....80%  
Intensive Care Unit.....U,R&C\*

OUTPATIENT COVERAGE (Network or Non-network)

A. Outpatient Surgeon and Assistant....U,R&C\*  
B. Outpatient Anesthesiologist.....U,R&C\*  
C. Outpatient Diagnostic Lab & X-Ray...U,R&C\*  
D. Outpatient Radiation Therapy.....U,R&C\*  
E. Outpatient Emergency Room Benefits..80%  
Sudden & Serious/Treatment  
within 24 hours.....100%  
Accidental Bodily Injury/Treatment  
within 24 hours.....100%  
F. Outpatient Mental/Nervous and/or  
Alcohol/Drug Addiction.....50% of U,R&C\*  
Maximum Benefit Combined\*\*\*.....Maximum \$1,100 per  
Calendar Year  
G. Physician Visits.....\$10.00  
H. Generic Drug Plan.....\$ 5.00

MAJOR MEDICAL COVERAGE

Deductible.....\$150.00 Single  
.....\$300.00 Family  
  
Co-Insurance.....80/20 to \$2000.00  
Maximum out of pocket for Individual....20% of \$2,000 (\$400)  
Maximum out of pocket for Family.....20% of \$4,000 (\$800)  
  
Lifetime Maximum per person.....\$1,000,000  
Mental & Nervous/Alcohol &  
Drug Addiction.....80%  
Annual Restoration.....\$1,000.00

\* - Usual, Reasonable and Customary