

STATE EMPLOYMENT RELATIONS BOARD
JUL 12 10 55 AM '99

BEFORE THE
STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF FACT FINDING BETWEEN:

UNION TOWNSHIP TRUSTEES

AND

FRATERNAL ORDER OF POLICE, LODGE NO. 112

S.E.R.B. CASES NOS:
99-MED-01-0053
99-MED-01-0054
99-MED-01-0055

APPEARANCES:

FOR THE TRUSTEES: Charles A. King
Director of Labor Relations
Clemans, Nelson & Associates, Inc.
Cincinnati, Ohio

FOR THE F.O.P.: Frank T. Lambros
Staff Representative
F.O.P., O.L.C., Inc.
Columbus, Ohio

REPORT AND RECOMMENDATIONS OF THE FACT FINDER

Frank A. Keenan
Fact Finder

BACKGROUND:

These cases came on for hearing in Union Township, Clermont County, Ohio, on June 18, 1999. Evidence was revealed, and arguments in support of the parties' respective positions on the issues remaining in dispute and at impasse were heard. What follows is a summary of the more salient of the voluminous evidence; the parties' respective contentions and arguments; the Fact finder's Recommendations; and the Rationale for said Recommendations.

In arriving at the Recommendations, the Fact finder has taken into account and relied upon the statutory criteria set forth below, whenever such factors were put forward by the parties, to wit: the factors of past collectively-bargained agreements; comparisons 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; the interest and welfare of the public; the ability of the public employer to finance and administer the issues proposed; the effect of the adjustments on the normal state of public service; the lawful authority of the public employer; the stipulations of the parties; and such other factors, not confined to those above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed upon dispute settlement procedures in the public service or in private employment.

References to the "current 'contract" more accurately refer to the parties' most recently expired Agreement.

ISSUE #1: ARTICLE 7 - DISCIPLINE

EVIDENCE AND CONTENTIONS:

The current Contract's provisions regarding Article 7, Discipline, comprised of five (5) Sections, Section 7.1 through 7.5, are set forth in Appendix I. The Township would maintain and retain these provisions, with the caveat that, at the option of the Employee, for suspensions exceeding three (3) days, demotions, and discharges, the disciplinary hearing contemplated in Section 7.5 may be conducted by a neutral Arbitrator appointed by the American Arbitration Association, in lieu of the Administrator. The Arbitrator will make Findings of Facts and a Recommendation to the board of Trustees. Said Arbitrators fees are to be borne by the F.O.P.

The F.O.P. would retain Sections 7.1 through and including Section 7.4, and would make some changes to Section 7.5. Thus the F.O.P. would delete the last paragraph of Section 7.5, beginning, "In the event the Board imposes a suspension etc. etc.," and substitute in lieu thereof, as follows:

"Disciplinary action involving suspension, demotion or discharge may be submitted directly to Step 3 of the grievance process."

In other words the F.O.P. seeks binding arbitration (Step 3 of the Grievance Procedure), in place of the current Contract's provision providing employees with the right to appeal suspension, demotion or discharge actions of the board of Trustees to the Clermont County Court of Common Pleas in accordance with Ohio Revised Code Section 585.49, and the employee option of having the Recommendation to the Board of Trustees being made by a neutral Arbitrator, as proposed by the Employer.

Additionally, the F.O.P would add Section 7.6 and Section 7.7, as follows:

"Section 7.6. (New Section)

Bargaining Unit Members can not be required to participate in a polygraph examination, or any other alleged scientific, chemical, mechanical, or other examination which purports to detect the validity of any written, or verbal statement. The parties may mutually agree to such an examination,

"however the results will not be admitted in a disciplinary hearing without prior written stipulation to that specific admission.

Section 7.7. (New Section) Notification of Investigation or Disciplinary Action

Notification of an internal investigation or the results of a disciplinary action will be made through the U.S. Mail, or to the employee during their working hours. Bargaining Unit Members will not be interrupted at their residence, or while at social affairs with disciplinary matters."

In support of its position calling for binding arbitration the F.O.P. asserts, with back-up data, that there are forty-four (44) Township Police Agencies in Ohio with Collective Bargaining Agreements pursuant to O.R.C. 4117. Of these 44 Agencies, forty (40), or 99.1%, have binding arbitration for disciplinary action. The F.O.P. concedes that one of its six comparables, Green Township, Hamilton County, does not. Of some 564 SERB reported public safety employers, some 97% include binding arbitration, the majority of the remaining 3% being Cities with Civil Service Commission appeal procedures. Accordingly, argues the F.O.P., given these comparables, Union Township is "seriously out of step with the norm." The F.O.P. asserts that the standard for resolving work place disciplinary disputes has been arbitration through the services of a neutral. Courts generally lack the expertise to properly address the nuances of discharge, demotion, or suspension of Employees. The Courts make few decisions dealing with labor-management relations. By contrast, argues the F.O.P., arbitrators have expertise with labor and personnel considerations, which considerations are often unfamiliar to the Court. In support of these perceptions the F.O.P. quotes as follows from one of the United States Supreme Court's Steelworkers Trilogy decisions of the 1960s, Steelworkers v. Warrior & Gulf Navigation Co., 80 S. Ct. 1347, 1352-55 (1960):

"... A labor arbitrator performs functions which are not normal to the courts. The considerations which help him fashion judgments may indeed

be foreign to the competence of courts... The ablest judge cannot be expected to bring the same experience and competence to bear upon a termination of a grievant because he cannot be similarly informed."

The F.O.P. also cites numerous Ohio Judicial Opinions sanctioning arbitration of disputes, such as City of Loraine vs. United Steel Workers, C.A. No. 95CV112299 9th Dist. Ct. Apls 4/10/96, and Board of Trustees Shaker Heights v. Ozone Construction Co., (1995) 8th Dist. 100 CA Ohio 3rd 26.

The F.O.P. asserts that of 48 P D employees, since late 1995/early 1996 some eight (8) personnel have been subject to disciplinary action ranging from suspension to termination, a substantial increase in serious disciplinary action as compared to previous years.

Currently a formal reprimand is subject to the grievance/arbitration procedure, whereas, incongruously, the capital punishments of suspension, demotion, and dismissal are not subject to arbitration. And with respect to internal comparables, the Township's AFSCME-represented employees do have binding arbitration on disciplinary matters.

With respect to its polygraph and other tests proposals, the F.O.P. notes that the accuracy of the polygraph has been the subject of many academic and legal debates since its inception, and hence it is opposed to the Township's mandatory utilization of it. The F.O.P. contends that comparable jurisdictions, namely, Colerain, Delhi, Green, Miami, Springfield, and Union Township; Butler County, have no history of the use of the polygraph or similar instruments, and there is no reference to same in their collective bargaining agreements. Delhi Township allows the employee the option.

With respect to its Notice of Disciplinary Action, the F.O.P. perceives and puts forth two instances where employees, to their embarrassment, were served at social

functions with notice of proposed disciplinary action. There was no reason why, asserts the F.O.P., such notice could not wait until the next working day, or be mailed to the employees' residences via regular or certified mail. Furthermore, the Employer has the ability to summon an employee back to the work site, asserts the F.O.P.

The Township resists binding arbitration of suspensions, demotions, and dismissals principally on the grounds that the due process rights of police personnel employed by Townships in Ohio are expressly delineated in the revised code. The Township takes the position that the parties cannot negotiate the jurisdiction of the Court of Common Pleas. In the course of negotiations the Township furnished the F.O.P. with a memorandum prepared for it by its Labor Relations Consultant, which the F.O.P. introduced into evidence. The memo expressly disavows that it is a legal opinion and expressly recommends that the Township seek statutory legal counsel should an official legal opinion be required. The memo sought to answer the question of the Township's Advocate posed below:

"Union Township has a collective bargaining agreement with the F.O.P. that requires appeals of suspensions, demotions or discharges be taken to the Court of common Pleas under O.R.C. Section 505.49 rather than through the grievance procedure. The F.O.P. contends that if the contract allowed for arbitration of suspensions etc., the Contract would prevail over O.R.C. Section 504.49 in accordance with O.R.C. Section 4117.10 (A). The question is whether O.R.C. Section 4117.10 (A) would take jurisdiction from the Common Pleas Court."

The memo concludes that "there isn't a definitive answer to your question, and there won't be until such time as the Ohio Supreme Court rules on this precise issue." The memo further concludes, however, that since the Ohio Supreme Court had a tendency to grant more and more job-protection rights to public employees, it would uphold O.R.C. 505.49. That is to say, notwithstanding O.R.C. 4117.10(A), a contractual final and

binding arbitration procedure for suspensions etc., would not serve to divest the Court of Common Pleas of jurisdiction over said suspensions etc. In this regard the memo notes that O.R.C. 4117.10 (A) states only that the State Personnel Board of Review and the Civil Service Commissions do not have jurisdiction if a grievance is subject to final and binding arbitration. The memo notes that it can be argued that by specifically mentioning only two forums, the Legislature did not intend to deny jurisdiction to any forum not specifically listed, such as the Court of Common Pleas. The memo also recites many Ohio judicial opinions dealing with employee due process rights more generally, which decisions tend to support the memo's conclusions. These decisions, and the statutory provisions highlighted in the memo, constitute the Township's case on the matter of binding arbitration for suspensions etc. before me, albeit the Township has not specifically put forth said memo.

In further support of its resistance to binding arbitration for suspensions, etc., the Township cites Madison Township Board of Trustees v Donohoo, Court of Appeals of Ohio, Second Appellate District, Montgomery County, (October 12, 1994), 1994 Ohio App. Lexis 4595, for the proposition that the Court of Common Pleas standard of review on the substance of the Board of Trustees suspensions, etc., is comparable to that utilized by an arbitrator. In this regard, the Township cites that in said case the Court observed:

" 'the function of a Court of Common Pleas in a R.C. Chapter 2506 appeal differs substantially from that of appellate courts in other contexts.' Cincinnati Bell, Inc. v. Village of Glendale (1975) 42 Ohio St. 2d 368, 370... [T]he Court of Common Pleas... must give consideration to the entire record... and must appraise all such evidence as to the credibility of the witnesses, the probative character of the evidence and the weight to be given it. Dudukovich v. Lorain Metro. Hous. Auth., (1979), 58 Ohio St. 2d 202, 207... Because the common pleas court must examine the entire record plus any additional evidence permitted by R.C. 2506.03 (A) (1-5), its hearing may resemble a de novo proceeding. Cincinnati Bell, Inc.,

supra. But the Court may not 'blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise.' Dudukovich, supra.

Concerning the Township's provision for binding disciplinary arbitration involving suspensions, demotions and dismissals for AFSCME-represented Township employees in their collective bargaining agreement, the Township notes that said employees simply don't have any recourse by statute to the courts, and accordingly, the furnishing of arbitration to AFSCME employees is not a conflicting stance on the part of the Township, and is not an "internal comparable" in the F.O.P.'s favor.

As for the Township's use of polygraph tests, the Township contends that such is just an investigative tool. Noting the contractual silence on polygraph examinations in other jurisdictions, the Township contends that restricting the Township's utilization of polygraph and other scientific tests in the investigatory process is not the norm.

With respect to the F.O.P.'s proposed Section 7.7 concerning service of notice of discipline or an internal investigation, the Township surmises that service at a non-work setting was probably due to particular contractual time constraints for the service of such notice, which constraints are no longer in the Contract.

RATIONALE:

Of the statutory factors to be taken into consideration by the Fact Finder as noted at the outset of this Report, among the most important considerations, and a consideration invariably given a great deal of weight, is that of external comparables. In this regard the undersigned has served as a neutral roster panelist in the capacity of Fact Finder and/or Conciliator since virtually the inception of O.R.C.4117 and conducted numerous Fact Findings and/or Conciliation proceedings. I have never encountered a more formidable

external comparable factor than that present here in the form of the 99.1% of Township Police Agencies providing for binding arbitration of all disciplinary matters. To be sure of the three other jurisdictions who don't so provide, two are relatively geographically near, Fairfield Township in Butler County and Green Township in Hamilton County, but even among the relevant comparables particularly relied upon by the F.O.P., as noted hereinabove, only Green Township does not. Moreover, these external comparables are bolstered by the internal comparable present here, namely, the binding arbitration provisions of the Township/AFSCME contract. In my view the fact that some dispute resolution procedure was necessary in the face of no statutory scheme for the AFSCME bargaining-unit employees, does not detract from the salient point that among the many possibilities the parties negotiated and selected the device of a grievance and binding arbitration mechanism.

Still further on this point, clearly case law required that certain due process protections be afforded to the Township's AFSCME employees. Thus, contrary to the Township's position, I find the Township's contract with AFSCME to be an internal comparable. To be sure the Township has going for it the statutory factor of past collectively-bargained agreements, whereby in the past they have bargained to contractualize the statutory scheme of appeal for serious discipline, but this factor is somewhat eroded by the greater incidence of such discipline in the relatively recent past. This increase creates a changed circumstance which lends some justification for breaking away from past agreements. And while there may be considerable similarity between the standard the Court of Common Pleas applies and that applied by traditional Labor-Management Arbitrators, the F.O.P. makes the valid observation, not specifically

challenged by the township, that nonetheless the typical Labor-Management Arbitrator is more experienced in terms of the volume of disciplinary situations encountered than is the typical Common Pleas Judge, and is typically more experienced in the "nuances" of labor-management relations and discipline. Thus, an amalgam of these statutory (O.R.C.4117) circumstances clearly preponderate in favor of the F.O.P.'s provision for binding arbitration of serious discipline.

The Township emphasizes the statutory factor of the lawful authority of the public employees, contending that the parties cannot negotiate the jurisdiction of the Court of Common Pleas. In my view two points need to be made with respect to the Employer's "lawful authority." One is that nothing has been shown to make unlawful the parties' providing for binding arbitration in their collective bargaining agreement. Secondly, while it is plausible that the judiciary would not view such a contract clause as supplanting the Court of Common Pleas jurisdiction, thereby creating the less than ideal situation whereby the employee would have two-bites-of-the-apple in severe disciplinary matters, such a consequence is by no means a certainty, as the Township's consultant's memo readily acknowledges. In any event all of the comparable jurisdictions have taken on this same potential two-bites risk, making this assumption of risk itself a persuasive comparable.

The foregoing rationale for binding arbitration of serious discipline does not apply to Sections 7.6 and 7.7 sought by the F.O.P. Thus, as the Township points out, contracts of comparable jurisdictions generally are simply silent with respect to the use of polygraphs and other allegedly scientific tests in investigations, and this circumstance greatly undermines the F.O.P.'s position. Additionally, in the event this Report is

accepted and binding arbitration of serious discipline becomes a part of the parties' Contract, this circumstance alone provides some measure of protection in that a clear majority of Labor Arbitrators are skeptical of reliance on polygraph results to establish misconduct. To establish the limitations the F.O.P. seeks in Section 7.6 would constitute a significant incursion into traditional managerial prerogatives not demonstrated to be necessary at this juncture.

As for F.O.P.'s Section 7.7, again it appears that the past instances relied on by the F.O.P. to justify this proposal were aberrant and not likely to arise again. The Fact Finder feels he would be remiss, however, were he not to caution the Township that continuance of service of notice in non-work settings would greatly strengthen the appeal of the F.O.P.'s proposal in future impasse situations.

In view of the foregoing the F.O.P.'s proposed Section 7.6 and 7.7 will not be recommended.

RECOMMENDATION:

It is recommended that the parties retain the provisions of Article 7 - Discipline of the current contract except for the last paragraph of Section 7.5, which begins: "In the event the Board imposes a suspension, etc...", which last paragraph shall be stricken and in lieu thereof the following inserted:

"Disciplinary action involving suspension, demotion or discharge may be submitted directly to Step 3 of the grievance process."

ISSUE #2 - ARTICLE 24 - WAGES

EVIDENCE AND CONTENTIONS:

The F.O.P. proposes an across-the-board increase of 5%, 4%, and 3% effective April 1, 1999, April 1, 1999, and April 1, 1999, for Section 24.1. No change is sought for Sections 24.2 and 24.3. The F.O.P. would add a new "Section 24.4 - Longevity," calling for 1% above top pay at 5 years of service; 2% above top pay at 10 years of service; 3% above top pay at 15 years of service; and 4% above top pay at 20 years of service.

The Township proposes an across-the-board increase commencing effective with the effective date of the Contract of 5% the first year of the Contract; 3% the second year of the Contract; and 2.5% the third year of the Contract. The Township proposes no changes to Sections 24.2 and 24.3 and resists the F.O.P.'s proposal for longevity pay in a new Section 24.4.

In support of its proposal the F.O.P. contends that if one deducts the highest and the lowest raises given since 1987, then the average historic raise given is 5.8% for Dispatchers; 4.8% for Patrol Officers; and 4.1% for Sergeants. The F.O.P. contends that by these averages Dispatchers are currently 2.8% below comparable jurisdictions; Patrol Officers are currently 6% below comparable jurisdictions; and Sergeants are 4.3% below comparable jurisdictions. In this regard the F.O.P. points to the following Townships as its "comparables": Colerain (Hamilton County); Delhi (Hamilton County); Green (Hamilton County); Miami (Clermont County); Springfield (Hamilton County); and Union (Butler County). These Townships vary in population from a high of 56,000+ (Colerain) to a low of 28,000+ (Miami). Relying on auto registration and other data concerning the Township the F.O.P. contends that the Township's population is considerably greater than the official census.

The F.O.P. also relies on a pattern of increased calls for police services as reflecting increased work loads which justify its wage and longevity proposals. Additionally it points to recent generous managerial compensation increases.

With respect to longevity pay, the F.O.P. asserts that while not common 4/5 years ago, it is now. Three of its "comparables" have some form of longevity pay, asserts the F.O.P., namely, Delhi; Springfield, and Union-Butler. The F.O.P. also contends that the Township's AFSCME contract has longevity in the form of a 5, 10, 15, and 20 year pay grade/step. The F.O.P.'s longevity proposal parallels this same formula. The F.O.P. also contends that historically the Township has never opposed retroactivity.

The Township counters that in utilizing "averages" the F.O.P. puts forth no logical reason for excising the highest raise and the lowest raise, and hence its "averages" analysis is flawed. The Township also contends that AFSCME's pay steps were part and parcel of their compensation long before collective bargaining and hence are not truly "longevity" provisions such as those sought here. As for managerial raises, the Township contends that they are essentially irrelevant.

In support of its wage proposal the Township contends that its proposal exceeds the CPI, exceeds SERB reported norms, and comports with the undersigned's wage recommendations in other Fact Findings during 1999. The Township, relying on BLS Statistics, asserts that in the recent past the Consumer Price Index both nationally and locally has been below 3%, and often significantly so.

The Township also points to SERB data showing that 1998 Contracts of three years duration averaged 10.3% over the three years, and that 1998 wage rates averaged 3.43. Police wages averaged 3.56 in 1998.

For the "comparables" the Township relies on twelve townships and some other geographically-near jurisdictions. Thus, the Township relies on the following townships: Autsintown (Mahoning County); Boardman (Mahoning County); Colerain (Hamilton County); Delhi (Hamilton County); Green (Hamilton County); Jackson (Stark County); Miami (Clermont County); Miami (Montgomery County); Perry (Stark County); Pierce (Clermont); Springfield (Hamilton County); and Sylvania (Lucas County). The Township additionally points to: Batavia; Clermont County Sheriff's Department; Loveland; Mason; Milford; and New Richmond. These latter jurisdictions are geographically close to the Township. With these comparables, for 1999-2000, Dispatchers would rank 5/9 on entry salary and 4/9 on top salary (many jurisdictions have no dispatchers); Patrol Officers would rank 10/19 on entry salary and 13/20 on top salary; and Sergeants would rank 9/18 on entry salary and 11/18 on top salary.

The Township contends that its proposal puts it well into the pack of comparables.

The Township also compares its historic P.D. wage increases back to 1993 and the CPI as follows:

	<u>"CPI INCREASE</u>		
		<u>US Cities</u>	<u>Cincinnati-Hamilton</u>
1993	5% 1.	2.7%	2.7%
1994	5.5% 1.	2.7%	3.3%
1995	5.5%	2.5%	2.7%
1996	4% 2.	3.3%	2.3%
1997	3%	1.7%	1.7%
1998	2%	1.6%	2.0%

1. Dispatchers received 6%.
2. Dispatchers had \$200 added to their base before the percentage increase was added."

With respect to longevity, the Township asserts that the current trend is away from longevity pay.

In rebuttal the F.O.P. points out that several of the Township's comparable townships have far less population than the Employer here. It also notes that the Sheriff's Department in Clermont county is the lowest paid law enforcement entity in Clermont County. In surrebutal the Township notes that Delhi township competes directly with the City of Cincinnati and that it therefore cannot realistically compete with Delhi.

RATIONALE:

Both parties point to flaws in their counterparts' comparables: different population bases; different geography; different labor markets. These are valid criticisms. On the other hand both parties have relied principally on townships, clearly valid comparables. The point to be made is that often it is difficult to ascertain just what may be properly looked at as truly "comparable." In this circumstance greater reliance on past collectively-bargained contracts; the CPI; and more generic statewide statistics on wages is in order. These latter guidelines lend greater support to the Township's proposal than to that of the F.O.P. Thus in the recent past the bargaining units have experienced more modest across-the-board increases than the "fives" of 1993, 1994, and 1995. And statewide statistics compiled by S.E.R.B. support the undersigned's judgment, as noted by the Township, in the other Fact Finding Reports in 1999 to the effect that settlements in the "threes" in the late nineties have been the norm. Suffice it to say that no circumstance peculiar to the

Township has been brought forth to undermine the applicability of that judgment here. I note that given the front end loading of the Township's proposal, due to the compounding effect thereof, its 3rd year proposal of 2.5% more accurately is effectively at 3%, or nearly so.

As for longevity, such represents a dramatic departure from past collectively-bargained agreements. And while some inroads with respect to longevity pay have been made in arguable comparables, as the F.O.P. notes, these inroads have been far more modest than that urged here. None are expressed as a percentage formula and such is significant as the percentage formula produces a far more costly benefit. As for the AFSCME internal comparable, I believe that the Township makes a valid point when it notes that historically the step plan long antedated collective bargaining and simply became an integral part of the wage structure. In sum in my view the case has not been made for longevity pay at this point in time.

In conclusion the Township's wage proposal represents a reasonable resolution of the parties' dispute in light of the applicable statutory factors.

RECOMMENDATION:

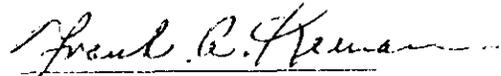
It is recommended that the wage scales currently reflected in Section 24.1, effective April 1, 1998, be improved by an across-the-board increase of 5%, effective April 1, 1999; that an additional across-the-board increase of 3% be effectuated April 1, 2000; and that an additional across-the-board increase of 2.5% be effectuated April 1, 2001.

It is recommended that no changes be made to Sections 24.2 and 24.3.

The F.O.P.'s proposed Section 24.4 proposing longevity pay is not recommended.

This concludes the Fact Finder's Report and Recommendations.

July 9, 1999


Frank A. Keenan
Fact Finder