

**FACT FINDING REPORT  
STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
July 25, 2001**

In the Matter of:	)	
	)	
The Tuscarawas County	)	
Engineer	)	
	)	
and	)	00-MED-12-1349
	)	
AFSCME Ohio Council 8	)	
Local 3118	)	
	)	

**APPEARANCES**

**For Local 3118:**

- Joe Bourne, Bargaining Committee**
- Charles Crites, Bargaining Committee**
- Mike Herbert, Bargaining Committee**
- Jim Meafer, Bargaining Committee**
- Larry Stump, AFSCME Bargaining Agent**

**For the Engineer:**

- Joe Bachman, County Engineer**
- Wayne Crilow, Assistant County Engineer**
- Martha Campbell, Engineer's Office Manager**
- Richard Gortz, Employer's Bargaining Representative**

**Fact Finder: Dennis M. Byrne**

### Background

The Fact Finding involves the members of the Tuscarawas County Engineer's Department represented by AFSCME Local 3118 and the County Engineer. Prior to the Fact Finding Hearing, there were numerous negotiating sessions between the parties. However, the parties were unable to come to an agreement and ten (10) issues remain on the table. The issues are wages, union dues, holidays, conversion of sick leave, hospitalization, longevity pay, vacancy/promotion procedures, vacation cash in, letters of understanding, and expiration date.

Prior to the hearing the Fact Finder conducted a mediation session in an attempt to find agreement on some of the issues. However, even though there was a meeting of the minds on a number of minor issues, the parties were unable to come to an agreement on a new contract. Consequently, the entire list of issues remains before the Fact Finder. During the mediation session the parties had a frank discussion about their area(s) of disagreement. The main problems relate to the level of compensation, especially the payment of a longevity bonus, a serious difference over the collection of a Fair Share Fee from nonunion members of the Engineer's Department, and a question about the way promotion requests should be evaluated. These three issues proved to be intractable; and while there was some movement toward an agreement, the parties were unable to bridge their differences.

The discussion of the entire range of issues during the mediation effort was thorough and complete; consequently, the parties requested that the formal hearing be waived because it would simply be a rehash of their previous discussions. The Fact Finding took place on July 5, 2001 at the Tuscarawas County office building. The mediation/fact finding started at 10:00 A.M. and adjourned at approximately 2:30 P.M.

The Fact Finder wishes to state that he appreciates the courtesy with which he was treated. Both parties conducted the Hearing with the greatest professionalism. In addition, the conduct of the parties toward the Fact Finder and each other was exemplary.

The Ohio Public Employee Bargaining Statute sets forth the criteria the Fact Finder is to consider in making recommendations. The criteria are set forth in Rule 4117-9-05. The criteria are:

- (1) Past collectively bargained agreements, if any.
- (2) 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.
- (3) The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards of public service.
- (4) The lawful authority of the public employer.
- (5) Any stipulations of the parties.
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agree-upon dispute settlement procedures in the public service or private employment.

The report is attached, and the Fact Finder hopes the discussion of the issues is sufficiently clear to be understandable. If either or both of the parties require a further discussion, however, the Fact Finder would be glad to meet with the parties and discuss any questions that remain.

**Introduction:**

The genesis of this dispute is to a large extent philosophical. The Engineer does not believe that nonunion members of the department should be required to pay a Fair Share Fee. The Engineer states that some members of the department were hired with the understanding that they would never have to pay the fee and, therefore, to negotiate a Fair Share Fee into the contract after the fact is not right. The Union, of course, disagrees. This single issue seems to be the one that keeps the parties apart. Both sides feel strongly about their respective positions; and without an agreement on this issue, they were unable to agree on other issues. This is not meant to imply that this is the only area of concern: there are a number; rather, over time this issue became a litmus test for each side about the other party's willingness to negotiate a new contract.

Without an agreement on this issue, nothing else could be resolved. Therefore, while there were major areas of agreement on many other issues, the parties could not, ultimately, reach consensus on any other issue(s).

In addition, there are two other areas of sharp disagreement. First, the Union has data that show other county employees enjoy have a longevity pay provision in their contracts. The Engineer is opposed to longevity pay and does

not want a longevity clause in the contract. This position is based on the belief that the employees are reasonably paid for the work they perform and they should not be rewarded for coming to work and staying on the job. The Engineer believes that the employees have good jobs. In other words, the Engineer has a philosophical opposition to longevity pay.

The employees, on the other hand, believe that they are unfairly treated in this regard, and they see the Engineer's position as simply a way to deny them something that they deserve. They believe that the Engineer is being unreasonable to their detriment. While there was discussion of this issue, there was no resolution.

The last of the major divisive issues relates to promotions. The Engineer promoted an individual during the life of the existing contract. The Union membership believed that the promotion did not follow the contract, especially with regard to the weight that seniority should have in promotion decisions, and filed a grievance. The Arbitrator found for the Union. As a consequence, the Engineer has not promoted anyone from the unit since the date the Arbitrator's award was published. As a result, there are positions that could be filled and there are people to fill the openings, but nothing is happening. Clearly, there should be some way for the parties to craft an agreement that benefits both. However, given the lack of trust that currently exists, the parties cannot agree on even the most basic issues, much less an issue as important as promotions.

The Fact Finder believes that the parties themselves crafted the outline of an agreement on most issues at impasse, but because of both philosophical

differences and the history of their relationship, they were unable to sign off on any issues even when they themselves had worked out an agreement.

Therefore, the Fact Finder believes that the parties need to work on their relationship. The Fact Finder urges the parties to continue to discuss their differences during the life of the proposed agreement. The contract contains a provision relating to Labor/Management meetings and the parties could use that provision as a vehicle to discuss their respective positions about specific issues, as well as a broader discussion about their overall relationship. If the parties need assistance in working through their problems, the FMCS or some neutral third party might be of assistance.

**Issue:** Letters of Understanding

**Engineer's Position:** The Engineer wishes to have the letters of understanding between the parties that are attached to the back of the contract incorporated into the body of the document.

**Union Position:** The Union wants to keep the letters as attachments to the contract and does not want the understandings contained in the letters to become part of the text of the document.

**Discussion:** A discussion of this issue is beside the point because the Engineer agreed to keep the letters of understanding as letters attached to the back of the contract.

**Finding of Fact:** The parties reached an agreement on this issue.

**Suggested Language:** None

**Issue:** Article 29 Wages/Longevity

**Note:** Currently there is no longevity provision in the contract. The issues will be discussed together because the parties linked the discussion of the two issues in the mediation/hearing.

**Engineer's Position:** The Engineer offered percent (3%) in each year of the proposed contract. In addition, the Engineer rejected the Union's demand for a longevity provision.

**Union's Position:** The Union demand is for a five percent (5%) increase in each year of the prospective contract. In addition the Union has proposed a longevity provision that would pay each employee two cents (\$.02) per hour per year up to a maximum of fifty cents (\$.50) per hour. The longevity payment would take effect after an employee has five years of continuous service with the engineer's office.

**Discussion:** The Engineer objects to the payment of a longevity bonus on philosophical grounds. The Engineer believes that he pays a reasonable wage and there is no reason to reward employees for coming to work. The Union, on the other hand, pointed out that longevity pay is a standard in many contracts and sees no reason why its members should not have this benefit. In support of its position, the Union presented other contracts from Tuscarawas County and contiguous jurisdictions that contain longevity pay provisions. Therefore, the Union as a matter of equity, believes that the membership is entitled to a longevity provision.

At this point, the parties began to discuss the economic position of the union membership. After an examination of the relevant wage data and some serious negotiations, the Engineer raised his wage offer to four and one-half percent (4.5%) in the first year, four percent (4.0%) in the second year, and four percent (4.0%) in the third year of the proposed contract. In addition, if the Union desired, the Engineer agreed to modify the offer to include a smaller base rate increase and add a longevity payment. That is, the total amount on dollars on the table would not change, but the distribution of the dollars between a base rate increase and a longevity payment would change. At the same time, the Engineer continued to insist that he would prefer not to have a longevity clause in the contract.

The parties continued to discuss the wage/longevity issue and ultimately, the Union agreed that the Engineer's offer was acceptable. The question then became how to split the offer between a base wage increase and longevity payment. There was no agreement on this issue.

The Fact Finder understands the Union's position on longevity. However, it is an accepted practice in industrial relations that one side or the other can "buy themselves" out of a situation. In this instance, the data on wage increases from other contracts both inside the County and from adjacent areas shows that the Engineer's offer is generous. Therefore, the Fact Finder believes that the Engineer has offered a wage increase that in effect incorporates the longevity payment demanded by the Union into the base rate.

**Finding of Fact:** The wage offer by the Engineer is a reasonable offer judged by any standard for Tuscarawas County and surrounding locations. In addition, the offer could be modified to include a lower base rate increase and a longevity payment. However, based on the Engineer's objection to the inclusion of longevity into the contract, the Fact Finder believes that the entire increase should be placed in the base rate.

**Suggested Language:** The wage rates listed in Article 29 shall be changed to show a 4.5% increase in the first year of the contract, a 4.0% increase in the second year, and a 4.0% increase in the third year.

**Issue:** Article 26 Conversion of Sick Leave

**Engineer's Position:** The Engineer has proposed a method whereby the employees, at their option, can convert some of their unused sick leave into cash. The Engineer proposes tying the conversion rate to attendance according to the following schedule.

Sick Leave Hours Used During the previous Year	Conversion Rate
0 – 16	80%
17 – 24	70%
25 – 40	60%

Only 64 hours of sick leave per year can be converted into cash and only hours over a minimum of 480 hours can be converted. In other words, an employee's sick leave bank must contain 480+ hours to be eligible for the program.

**Union Position:** The Union has demanded a revision of the current buyout provision that restricts the amount a union member receives when he/she leaves the County's payroll. The Union demands that the current language that restricts the buyout to two hundred and forty (240) hours at twenty-five (25%) percent be changed to a system with no hours restriction and a buyout rate of fifty (50%) percent.

**Discussion:** The two positions are aimed at different aspects of the same issue. The Engineer's position is based on the concept of using sick leave conversion as an incentive to promote good attendance. The Union, on the other hand, has proposed a change in the way the sick leave bank is cashed out when an employee leaves the department.

One point must be made at the outset of the discussion. First, the language in this contract is identical to the language found in many contracts. The buyout provision of payment for one quarter (1/4) of the accrued hours up to a maximum of nine hundred and sixty (960) hours, i.e., a buyout of two hundred and forty (240) hours, is based on the civil service regulations. The problem with this language is that employees with a large bank of accrued sick leave often become "ill" in the months before they retire in order to use up the accrued leave. This leads to staffing problems and overtime pay for other workers.

Employers, however, adamantly reject an increase in sick leave buyout because it can become prohibitively expensive when a long-term employee retires. Consequently, this contract provision generates hours of discussion, but usually remains consistent with Civil Service regulations.

The Union's demand is not realistic. To increase the payout to fifty (50%) of all accrued hours would in some years take so much of the engineer's budget that it would impact his ability to provide service to the citizens of the county. Therefore, the Fact Finder cannot accept the Union's position.

The Engineer's offer is one that actually provides a benefit to both parties. The employees can run their sick leave bank down to four hundred and eighty hours (480) and be paid more for their unused sick leave hours than they currently receive. In addition, the employees can elect to use the buyout language at their discretion. It is hard to see how the proposal harms the employees in any way.

The Engineer has tied the language to attendance as an incentive to encourage the Union membership not to use sick leave. This is understandable. However, sick leave abuse is a separate problem from sick leave conversion. Sick leave should be used when employees are sick. Given the duties that the department's personnel perform, it is reasonable to expect that some (most) of the workforce will be ill at one time or another during the year. To tie the buyout to the Engineer's attendance schedule will minimize the employees' ability to convert excess sick leave hours to cash.

The provision does benefit the Engineer even without the attendance control features. First, the amount of sick leave in an employees bank when he/she retires may be reduced, which will lower the buyout payment upon separation. Second, the incentive to run down the sick leave bank when an employee nears retirement is reduced. This will ameliorate scheduling problems

and reduce overtime costs. Moreover, if the conversion rate is less than one hundred percent (100%), the Engineer will pay less to buy out the hours than he would pay if the employee calls off in an attempt to reduce the size of his/her bank.

Consequently, the Fact Finder believes that the proposed buyout language can work to the benefit of both parties. The real questions concern the size of the buyout and whether it should be tied to attendance. The Fact Finder does not believe that the Engineer's proposed attendance policy should be included in the contract. If an employee is abusing sick leave, the contract allows the Engineer to discipline the offending employee.

In addition, the conversion rate must be less than one hundred percent (100%) if there is to be a benefit to the County. The Fact Finder believes that a conversion rate of seventy-five percent (75%) is reasonable based on the parties' discussions at the hearing. This rate is within the parameters set by the Engineer's proposed language. It will save the Engineer twenty-five percent on sick leave hours bought out. Moreover, there is an incentive for the employees to cash in their excess hours of sick leave.

**Finding of Fact:** The Engineer's proposal of a sick leave buyout can work to the benefit of both parties. The Union's proposal on this issue is prohibitively expensive and cannot be justified.

**Suggested Language:** Section 26.2 Prior to November 15 of each year, employees on the active payroll (not on sick leave or unpaid leave of absence as of November 1) are eligible to convert to cash unused sick leave earned in the

prior year (November through October). The maximum amount of sick leave which may be cashed in any one year is sixty-four (64) hours, and sick leave cash out may not reduce the employee's balance below four hundred and eighty (480) hours. The conversion rate shall be seventy-five percent (75%) of the employee's current straight time hourly rate.

Section 26.3 Employees who have used sixteen (16) or less hours of sick leave in the prior year, as defined in Section 26.2 above, and excluding any hours for which the employee was granted Family and Medical Leave under the Employer's FMLA policy, shall be eligible to convert eight (8) hours of sick leave to personal leave. Eligible employees must use the personal leave in the year November 1 through October 31, and must receive approval of the supervisor a minimum of one work day prior to use of the personal leave. Personal leave must be used in eight (8) hour increments.

**Issue:** Article 23 - Vacation Cash In

**Engineer's Position:** The Engineer has proposed a vacation cash in provision whereby an employee, at his/her discretion, can cash in any hours of accrued vacation time after using eighty hours (80) of vacation time.

**Union Position:** The Union rejects the Engineer's proposed article.

**Discussion:** During the mediation phase of the Fact Finding the Engineer and the Union discussed this issue and there was an agreement in principle on the matter. The parties agreed that, because the cash in is at the employees' discretion it is a benefit to the Union membership. The Fact Finder agrees. The

timing of the pay out is close enough to the Christmas holiday that the money can be used for holiday expenses, if the employee so desires. This can be a significant benefit to the workers.

The Union membership's problems with both cash in proposals, the sick leave buyout and the vacation cash in, is that they are concerned that the County will decide that there is no need for either sick leave or vacation time if the employees have such large banks that they desire to cash in unused time. This is an understandable, but overstated, concern. There was no indication that the Engineer was attempting to sneak in a proposal that will lead to a demand for less sick time and vacation accrual in the future. Rather, the plans were presented as a way for the employer to save money and give the employees a choice about how to get the best value for their accrued time.

**Finding of Fact:** The Engineer's proposed vacation cash in is a benefit to the employees.

**Suggested Language:** An employee who has used a minimum of eighty (80) hours of vacation leave in the previous twelve (12) month period (November 1 to October 31) may convert to cash any vacation balance to his/her credit as of the end of the pay period prior to November 1 by completing a Vacation Cash-In Request Form and submitting it to the office prior to November 15. Upon approval of the Engineer, payment will be made in a separate pay on or before December 15. The Engineer's approval is subject to budgetary constraints.

**Issue:** Article 19 - Checkoff

**Engineer's Position:** The Engineer rejects the Union demand for a Fair Share Fee.

**Union Position:** The Union demands a Fair Share Fee payment from all members of the bargaining unit who are not members of Local 3118.

**Discussion:** This issue is a throwback to the early days of bargaining under ORC 41177. The issue of a Fair Share fee has made its way to the U. S. Supreme Court on a number of occasions. During those protracted litigations the arguments both, pro and con, about the payment of a fee for service by non-union members of a workforce have been exhaustively examined. The result is a consensus that a fee for service is a reasonable middle ground between a union shop and right to work situation. In other words, the fee is a payment for services rendered by the Union to all employees when the Union negotiates the wages, hours, terms, and other conditions of employment and for services rendered during the life of a contract.

In this situation the Engineer argues that certain members of the bargaining unit were hired with the understanding that they would not be forced to join the union or pay dues. Without getting involved in the question of whether a Fair Share Fee is synonymous with union dues, the Engineer believes that the conditions under which some employees were hired cannot or should not be changed during the course of their employment. The Fact Finder understands this position, but disagrees with it.

A Fair Share Fee is a fee for service. When a Union is able to win a concession during the course of negotiations, a concession that would not be enjoyed by the workforce in the absence of the union; all bargaining unit members enjoy the benefit. In no situation of which the Fact Finder is aware do some members of the labor force refuse to accept a benefit because it was negotiated into a labor agreement by a union. All members of the labor force enjoy all the benefits of the contract. Therefore, there is a classic "Free Rider" problem inherent in allowing some employees to reap the benefit of unionization without contributing to the cost of bargaining, conciliation, arbitration, etc.

The Union's position is that all workers should contribute for the benefits that they receive. This is the standard Union position on Fair Share Fees and this view has become the accepted wisdom over time.

It goes without saying that this issue has contributed to the ill will that exists between the parties. The Union members claim that there is some dissention within the labor force over this issue because the employees who do not pay anything to the union "laugh at" their colleagues who pay dues. In addition, the membership believes that the Engineer's position is unreasonable given the history of bargaining over fair share fees since the inception of collective bargaining in Ohio.

The Engineer, for his part, simply states that this is a matter of principle. He does not believe that employees who hired on with the understanding that they would not have to pay union dues should be forced to pay the fee. The

Engineer believes that he gave his word to the effected employees and that he must keep his promise.

The Engineer did make an offer to accept a Fair Share Fee for all new hires. That is, he will “grandfather” current members in their current situation, but will agree to collect either union dues or a Fair Share Fee from all new hires. Given the entire record of negotiations, the Fact Finder believes that this is a reasonable compromise. The Union membership will not be satisfied with this solution; they believe that all should pay for services received. At the same time, the Engineer would prefer no language in the contract on this issue. In this situation, at this time, the Engineer’s offer is the best compromise position on this issue. The next round of negotiations is the place for the Union to try to change this policy.

**Finding of Fact:** While “Fair Share Fees” are a standard part of most contracts, the Engineer’s position, based on his statements to some employees at the time they were hired, has led to an impasse. The compromise solution of all new hires either joining the union or paying a Fair Share Fee is reasonable.

**Suggested Language:** (add to Section 19.2) Employees hired into a bargaining unit position on or after July 1, 2001 shall be required, as a condition of employment, to have deducted from their pay, either voluntary union dues, or an involuntary “fair share fee”, in an amount determined by the Union and transmitted in writing to the Employer. Such dues or “fair share fee” shall be effective the first pay period following the end of the employee’s initial

probationary period. Employees who are members of the Union on July, 2-001, and who resign Union membership, shall be required to pay a fair share fee.

**Issue:** Article 27 - Hospitalization

**Engineer's Position:** The Engineer wishes to change the language in the contract to reflect the fact that the Engineer offers the same health insurance plan to his employees that is offered by the Commissioners to all county employees.

**Union Position:** The Union rejects the Engineer's demand and wants the current language to remain in the contract.

**Discussion:** The Engineer presented this demand as a way to make the contract conform to reality. That is, the County buys a health insurance plan and offers that plan to all County employees. The Engineer does not have a separate plan for his employees. The Engineer believes that the current language simply does not accurately portray the situation in Tuscarawas County.

The Union desires to keep the current language in the contract. This language compels the Employer to maintain a standard of care at the current price. The Union is not aware of any proposed changes to the current health plan, but fears that something may happen during the course of the agreement that will negatively impact its membership.

An examination of the language proposed by the Engineer shows that the Employer agrees to provide the same coverage at the same cost that the County provides to all non-bargaining unit members of the County labor force. The real

question then becomes will the County Commissioners either change the coverage or raise the cost to the employees of health care in a material way.

If the Commissioners radically change the insurance plan for County employees, there must be a good reason. Given the political nature of the Commissioners' jobs, they would face an angry group of voters if they changed the plan either in terms of coverage or cost in an unreasonable way. Moreover, if the Commissioners change the plan during the life of the current agreement, the language in the Engineer's contract will protect the employees only for the life of the agreement, i.e., three years. If financial considerations or some other exigency causes the Commissioners to make major changes in the insurance plan, then the next contract between the Engineer and Local 3118 will reflect that changed environment.

Consequently, the Fact Finder believes that the changes proposed by the Engineer, while substantive, are reasonable given the fact that the Engineer simply offers his employees the County health plan. If there is a change in the coverage or cost, it is incumbent on the Commissioners to prove that the changes are needed. Therefore, given the facts of the situation, the Fact Finder believes that the changes proposed by the Engineer are reasonable.

**Finding of Fact:** The change in the language proposed by the Engineer simply reflects the fact that the Engineer does not offer a separate medical plan for his employees; rather, there is one plan offered by the County Commissioners that covers all County employees.

**Suggested Language:** Section 27.1 For the duration of this Agreement, the Employer shall provide to employees the same health benefits plan at the same cost as provided by the Board of County Commissioners to non-bargaining unit employees of the Employer. Should the County change the cost or benefit coverage during the term of this agreement, the Employer will notify the Union thirty days (30) prior to such change. Upon request by the Union, the Employer will meet with the Union to discuss the change and any alternatives.

**Issue:** Article 15 – Vacancy and Promotion

**Engineer's Position:** The Engineer desires to change the wording of Article 15.4. Currently the provision contains a list of nine factors that must be considered when promotions are considered. The Engineer wants to change the language to read, "with due consideration to qualifications, ability, and seniority."

**Union Position:** The Union wants to maintain the status quo and demands that the current language stay in the contract.

**Discussion:** In 1991 the Union filed a grievance promotion procedures. The Union claimed that the Engineer promoted a junior employee over a more senior, qualified applicant. The parties' disagreement led to an arbitration hearing and award. The arbitrator found that the Engineer had violated the contract. As a consequence, the Union membership believes that they must be vigilant and make sure that promotions are earned and awarded according to the language of the contract. The Engineer believes that he followed the language in the agreement and lost the arbitration because the word seniority came first in the

laundry list of qualifications listed in Article 15.4. It should be noted that the Fact Finder believes that the award was based on the fact that the Arbitrator found that the more senior employee was qualified to fill the position, or that individual deserved the right to have some training and a probationary period in the position. If he passed the probationary period, then he had the right to the job. The Fact Finder does not believe that the award was based solely on seniority considerations.

Regardless, there have been no promotions in the department since the Arbitrator handed down his decision. Both sides agree that there is a need for a process to fill vacancies and that the current de facto freeze on promotions harms both.

There are two questions that need to be addressed in this context. First, does the proposed language put forth by the Engineer work to the detriment of the employees? Second, does the proposed list of qualifications negate the Arbitrator's decision because the word seniority comes last in the list of factors considered when a promotion is earned?

The first question cannot be answered affirmatively. The current language in the contract lists a number of qualifications for promotion including items, e.g., mental and physical capabilities and skill, which are nebulous enough in practice to lead to a situation whereby a qualified individual may be disqualified for a position for the wrong reason(s). The suggested language simply states that a person's qualifications, ability, and seniority will be considered when a vacancy is to be filled.

This language is more concise and clear than the present language in the contract. At the same time, it is also open to interpretation. There is no way that a contract provision can ensure that the “right” person is promoted. That is why there is a grievance procedure in contracts. If one side or the other believes that there is a reason to question the promotional procedure or outcome, then that party can avail themselves of the grievance procedure.

The second question is whether the proposed language negates the Arbitrator’s decision. In general, the Union desires the most senior, qualified person be promoted. Management usually wants the most qualified person to be promoted with seniority being the deciding factor if the candidates are equal in qualifications. In other words, management wants seniority to be considered along with other qualifications that a candidate for promotion possesses. These classic positions are the ones taken by the parties in this instance.

Seniority is a protection for employees. It gives them certain rights for years of loyal service. It is used to bid vacations, etc. It also must be a factor in promotion decisions. In the past seniority was almost the sole criteria considered in promotions and that situation was summed up in the phrase, “minimally qualified, most senior.” Over the years that philosophy has changed as both parties realize that it works to their joint advantage to have the best people in the most responsible positions. In general, this has come to mean that seniority plays a part in promotion decisions, but it is never the only consideration and sometimes not even the most important consideration. This is the transition the parties are struggling with. The Arbitrator’s decision has

recognized that seniority is an important criterion in promotions. This cannot be taken to mean that seniority is the most important factor in all promotions, however.

The Fact Finder believes that the current situation, one in which no promotions are taking place, is inimical to the interests of both parties. The Fact Finder believes that seniority is an important consideration in any promotion procedure. However, it cannot be considered the most important consideration *carte blanche*. Each promotion decision must attempt to balance the qualifications and ability of the applicants, the needs of the position, and other germane factors including seniority.

Given all the facts of this situation, the Fact Finder believes that language suggested by the Engineer is unobjectionable. It should lead to a situation where three factors are weighed in the promotion decision. Realistically, each factor should be given a roughly equal weight. However, in this circumstance, given the history behind this issue, the Fact Finder recognizes that there is a degree of distrust between the parties. Therefore, the Fact Finder suggests that the language be rewritten to read, "...qualifications, seniority, and ability." If the parties wish to read the language in a way that ranks the factors to be considered in order of importance according to the way the factors are listed in the contract, then qualifications would be ranked first, seniority would be second, and ability third. It must be restated that the Fact Finder believes that a more fruitful way to look at the situation is that there are three criteria that are considered for promotions. If the parties disagree about a specific promotion

decision, then they always have recourse to the grievance procedure. To restate the obvious, a contract cannot always compel either party to follow a certain course of action, and the other party must always have the right to protect its interests.

The Union also believes that the Engineer may try to promote a “favorite son” rather than the most senior qualified individual. This situation may have some historical validity depending on which party is explaining what occurred over a decade ago. However, the result of the parties’ conflict on this issue is that the department has been unable to promote anyone in the intervening period. The Fact Finder would urge the parties to discuss this issue in Labor - Management meetings during the life of the prospective contract and find a way to come to an agreement that benefits both.

**Finding of Fact:** The language in Section 15.4 is unwieldy. The language proposed by the Engineer is more reasonable and should not work to the detriment of his employees.

**Suggested Language:** Section 15.4. All timely filed applications shall be reviewed with due consideration to qualifications, seniority, and ability. If two (2) or more employees are considered substantially equal in meeting the criteria outlined in Section 4, seniority shall govern in awarding the position.

**Issue:** Article 23 – Vacations

**Engineer’s Position:** The Engineer wants current language, i.e., no change in the number of vacation days.

**Union Position:** The Union has demanded four personal days and two extra holidays be added to the contract.

**Discussion:** The Union's testimony on this issue proved that the Engineer's employees have fewer vacation days than other county employees and employees in other jurisdictions. Generally, the vacation provision in other Tuscarawas County contracts lists from 10.5 to 13 vacation days. The spread is similar in surrounding jurisdictions. Therefore, the Union argues that the data proves that the Union membership deserves more vacation time as a matter of equity.

The Engineer did not dispute the data, but he stated that his employees often receive more vacation days than the contract specifies. The Engineer proffered that he gives his employees a half-day off at different times during the year, and that this often adds up to an extra day of vacation. The parties both agree that this is a true statement. However, the discussion also made the point that sometimes the employees get a half-day off and sometimes they do not. Consequently, this extra time off is at the Engineer's discretion to mete out as he sees fit.

The data do show that the Engineer's employees are behind in this benefit compared to other workers both in Tuscarawas County and in surrounding jurisdictions. While it is true that sometimes the Engineer gives his employees extra time off, there is no surety of the time off. The employees cannot plan on using the time to visit family, etc. because it is unclear if the time off is forthcoming. In addition, the fact that the Engineer does give extra time off

proves that the Union's demand for extra time can be accommodated. On the other hand, the Union's demand for two extra holidays and four personal days is excessive.

Given the entire record, the Fact Finder believes that the Union proved its position that its membership has fewer holidays than other employees both inside the county and in surrounding jurisdictions. Therefore, the Fact Finder is recommending that one extra holiday, the day after Thanksgiving be added to the contract. This will not move the employees to the top of the comparables list on this issue, but it will move them off the bottom of the list.

**Finding of Fact:** The Union proved that the Engineer's department holiday schedule is substandard compared to other jurisdictions in Tuscarawas and surrounding counties.

**Suggested Language:** The day after Thanksgiving shall be added to the list of holidays contained in Article 24. (Note: The day after Thanksgiving is a holiday contained in most of the comparable contracts supplied by the parties.)

**Issue:** Article 44 – Term of the Agreement.

**Engineer's Position:** The Engineer wants the agreement to run from June 30, 2001 to July 1, 2004.

**Union Position:** The Union desires to have the agreement run from March 2, 2001 to March 1, 2004.

**Discussion:** There was little discussion of retroactivity in the discussion of this issue. Basically, the Engineer argued that the contracts between the parties

always had a moving expiration date. In other words, the term of the contract ran from the date of signing the new contract for three years. The Union agreed that this was sometimes true, but not always. Therefore, past practice in this agreement is for the new expiration date to be set from the date the agreement is signed (or close to the date) for three years. In other words, the expiration date of a contract has little to do with the term of the new agreement, rather the signature date sets the term. This is unusual.

The expiration date usually sets the time frame for negotiations and the question of retro pay is sometimes a thorny issue. The Fact Finder is unsure how the parties handle the retroactivity issue. In this case, however, the testimony of both parties shows that the signing date is the date that sets the term of the contract. Therefore, the Fact Finder believes that the Engineer's position is consistent with past practice.

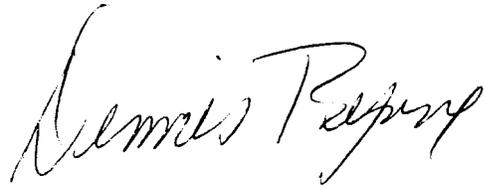
Expiration dates can influence negotiations in a number of ways and there is a vast literature on the importance of expiration dates. In this instance, the Fact Finder would urge the parties to carefully consider the question of a realistic expiration date when the next agreement is negotiated. In addition, given the lack of discussion about retroactivity, the Fact Finder believes that the change in the pay scale should be made retroactive to March 3, 2001, i.e., the day after the current agreement ended. However, given the specifics of this situation, the Fact Finder recommends that the prospective agreement run from June 30, 2001 until midnight June 30, 2004. This corresponds to the last day of the most recently completed month. Given the vagaries of ratification etc., it is

unclear when the contract will actually be ratified. This is a way to give both parties a firm understanding of the term of the agreement.

**Finding of Fact:** It is the past practice for contracts between the Engineer and his employees to run for three years from the date of signing a new contract.

That is, the date moves depending on the length of negotiations.

**Suggested Language:** The expiration date of the current contract be midnight June 30, 2004.

A handwritten signature in cursive script, appearing to read "Dennis P. [unclear]".