

STATE EMPLOYMENT  
RELATIONS BOARD  
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STATE EMPLOYMENT RELATIONS BOARD  
STATE OF OHIO

IN THE MATTER OF FACT FINDING BETWEEN:

Miami Township Board of Trustees,  
Clermont County, Ohio  
Ohio Public Employer  
  
and  
  
The Fraternal Order of Police,  
Ohio Labor Council, Inc.  
Employee Organization

Case No(s): 01-MED-09-0735  
01-MED-09-0736

**FACT FINDING REPORT**

**Mitchell B. Goldberg,  
Fact Finder**

This matter was heard on December 7, 2001 in Miami Township, Ohio.

APPEARANCES:

For the Union:

Thomas J. Fehr, Staff Representative  
10921 Reid Hartman Highway, Suite 317  
Blueash, Ohio 45242  
Phone: (513) 984-6040  
Fax: (513) 984-9561

For the Employer:

Peter E. Tamborski, Esquire  
Thompson Hine, LLP  
312 Walnut Street, Suite 1400  
Cincinnati, Ohio 45200  
Phone: (513) 352-6555  
Fax: (513) 241-4771

## I. INTRODUCTION AND BACKGROUND

The undersigned, Mitchell B. Goldberg, was appointed by the State Employment Relations Board (SERB) on November 30, 2001 to serve as Fact Finder for the purpose of issuing a report with recommendations on each of the unresolved issues between the parties in their negotiations for their Collective Bargaining Agreement (CBA) to succeed the Collective Bargaining Agreement which will expire on December 31, 2001. The bargaining units consist of approximately 20 members in the patrol officers, specialist, and corporal unit and five (5) members in the sergeant's unit. The units were deemed certified on February 20, 1985. The parties, prior to the hearing, submitted pre-hearing statements pursuant to §4117-9-05 of the Rules of SERB. They engaged in contract negotiations on six (6) occasions in November, 2001.

There were 14 issues that remained unresolved, as identified in the pre-hearing statements. Two (2) of those issues were resolved at the hearing through the process of mediation. The parties agreed that the number of accumulated sick leave hours, as set forth in Article 19, §19.1, shall be limited to 2,080 hours. The parties further agreed to add language to Article 10, §10.7 based on the Union's proposal. The following issues remain unresolved between the parties: (1) Article 8 – Grievance Procedure (Employer proposal); (2) Article 11- Probationary Periods; (3) Article 13 – Layoff and Recall; (4) Article 14 – Hours of Work and Overtime; (5) Article 15 – Wages and Compensation; (6) Article 17 – Holidays; (7) Article 19-6 - Bereavement Leave; (8) Article 22 – Insurances; (9) Article 33 – Health and Safety; (10) Batavia Schools case language (Employer proposal); (11) Work Hours for Canine Officer; and (12) Article 32 – Assignment Above Job Classification. The agreements reached between the parties shall be incorporated into this Fact Finding Report. Consideration in the Report was given to all of the criteria listed in Rule 4117-9-05(J) of SERB.

## **II. UNRESOLVED ISSUES**

### **ISSUE #1: ARTICLE 8 – GRIEVANCE PROCEDURE**

The Employer proposes three (3) changes to this Article. Under §8.6, the employee initially reports a grievance to his sergeant. The Employer proposes that the initial report of a grievance should be made to a lieutenant who is outside the bargaining unit in order to process grievances in a timely manner. This would further remove sergeants from decisions waiving time limits in the processing of grievances.

The Employer further proposes a “loser pay” arbitration provision which it believes will limit the number of grievances being filed to those which have merit. The fire fighters agreement contains this provision.

Finally, the Employer proposes that each side arrange for the payment of their own witnesses. The Union should bear the cost of compensating its witnesses for lost wages because of appearances at arbitration proceedings. The Employer already bears the burden of lost productivity in terms of the rescheduling employees due to the appearance of witnesses at arbitration proceedings.

The Union believes that the grievance procedure and arbitration processes have worked well in the past and that there is no reason to make changes. The Union believes the Employer wants to remove the sergeant from the initial step of the process because it is dissatisfied with past instances when sergeants have agreed that some grievances were meritorious. The change to a “loser pay” provision and language shifting arbitration expenses from the Employer to the Union are unreasonable and unnecessary.

The Employer did not present any specific examples where the existing grievance procedure failed in any material respect. Accordingly, the grievance procedure should remain unchanged, absent mutual agreement between the parties on specific matters.

**Recommendation**

No change.

**ISSUE #2: ARTICLE 11 – PROBATIONARY PERIODS**

The Employer wants to place probationary employees into vacant positions for training purposes in order to provide them with different shifts and assignments. The use of probationary employees to fill vacancies has raised objections from the Union and from officers who wish to bid into the vacant positions on a permanent basis. This dispute led to the filing of a grievance that proceeded to arbitration. Arbitrator Patricia Bittle found in favor of the Union on this issue. The Employer, nevertheless, believes an absolute prohibition to use probationary employees to fill vacancies on a temporary basis would be against the interests of the community because of its need to provide comprehensive training to probationary employees.

The Union, not unexpectedly, agrees with the Bittle decision and believes that probationary employees should be assigned as extra officers on a shift but they should not replace an officer who wishes to permanently bid into the position.

During the hearing, the Union recognized the benefit of using probationary employees to fill vacant positions for short periods of time for the purpose of training. The parties discussed limiting the assignments to specific periods of time such as 90, 60 or 30 days. Also, an employee who wishes to bid into a vacant position should not be prevented from doing so more than once because the position is temporarily being filled with a probationary employee. It is recommended, therefore, that the following language be added to §11.1:

The Employer may assign a probationary employee to fill a vacant position for training purposes, but the assignment shall not exceed the period of 30 days. Employees who are prohibited from filling a vacant position due to the temporary assignment of a probationary employee in the position shall not be deprived of the opportunity to fill the vacant position more than once.

The Union proposed to add language to §11.2 that provides for a probationary employee who is returned to his former position because of unsatisfactory performance shall be returned to his position with no loss of seniority. The Employer did not raise any serious objection to this language being added.

### **Recommendation**

Section 11.2 shall read as follows:

Any employee promoted into a high level position shall be required to successfully complete a probationary period of six (6) months. An employee serving a promotional probationary period whose performance is unsatisfactory, shall be returned to his former position with no loss of seniority.

The Union proposes to add §11.3 which permits an employee who is promoted to a position outside of the bargaining unit to return to the bargaining unit in the event he or she does not pass probation. The Union further proposes that employees may voluntarily return to the bargaining unit within 60 days after the date of a promotion and, under all circumstances, the employee who returns will not lose seniority. The Employer objects to any provision which would guarantee an employee a right to return to the bargaining unit on a voluntary basis or any other provision that would require an employee to carry excess employees in any classification.

### **Recommendation**

Section 11.3 shall be added to the CBA and shall read as follows:

Any bargaining unit employee who is promoted to any position outside of the bargaining unit, but within the ranks of sworn personnel, shall be permitted to return to the bargaining unit upon failure of probation in the higher position. The employee returning to his/her previous position will do so with no loss of seniority.

### **ISSUE #3: ARTICLE 13 – LAYOFF AND RECALL**

The Union proposes language guaranteeing that a displaced employee will not suffer a loss in pay. This proposal was precipitated by circumstances where a discharged employee was ultimately reinstated to his former position after an arbitration award. The employee who filled the position of the terminated employee was then required to be placed in his former position after the terminated employee was reinstated. Arbitrator Feldman held that the displaced employee would receive the rate of pay in his former position and that his higher rate of pay would not be maintained.

The Employer opposes the concept of red-circling the displaced employee's rate of pay because employees should only be paid commensurate with the work they are performing.

Under the specific circumstances surrounding the Union's proposal, the employee who filled the sergeant's position did so with knowledge that a grievance was pending on behalf of the terminated sergeant and that the promotion could be reversed in the event the terminated sergeant prevailed in his grievance. Under these circumstances, it is not reasonable to protect the affected employee when he is subsequently demoted due to the reinstatement of the terminated sergeant. Making the terminated employee whole requires returning the promoted employee to his former pay to achieve the previous status quo.

#### **Recommendation**

No change.

The Union also proposes language in §13.2 which guarantees that sergeants will not be laid off unless there is a necessity for the layoff and that layoffs will not be used by the Employer as a punitive measure or as a form of discipline. The Employer objects to this language because it unreasonably interferes with its management rights to staff the department. Further, if the

Employer laid off sergeants without a valid reason or for improper reasons, the sergeants have access to the grievance procedure to protect their rights.

**Recommendation**

No change.

**ISSUE #4: ARTICLE 14 – HOURS OF WORK AND OVERTIME**

The Employer proposes to eliminate §14.3 which permits compensation in the form of compensatory time off in lieu of overtime pay, holiday pay, court time, and call-out. The Employer believes it has an overall problem of absenteeism that needs to be controlled. The bargaining unit employees work 12-hour shifts and are scheduled seven (7) days in every 14 day period. On average, they attend work only 142 days per year. The Employer is willing to pay employees overtime rather than provide them with time off in order to meet its staffing needs. In 2000, 32 employees used 1,817.5 hours of compensatory time. In 2001, 34 employees used 2,028.5 hours of compensatory time. These figures, together with the figures showing used sick time, personal time, and other leave time, shows that the Employer is being deprived of needed services from the existing workforce.

The Union believes that the Employer's evidence does not support its claim of an absenteeism problem. The allowable amount of compensatory time in this contract is comparable to that provided to other departments in the surrounding area.

In view of the changes which are recommended under Article 19 infra, the existing language under §14.3 should be retained and the employees should be entitled to compensatory time to the same extent as that provided in comparable communities.

**Recommendation**

No change.

The Employer proposes to add language in §14.7 permitting it to assign probationary employees, on a temporary basis, to vacant positions. The Employer's proposed language should be added to §14.7 in order to be consistent with the recommended changes to Article 11, supra.

### **Recommendation**

Section 14.7 shall read as follows:

Except for probationary employees and employees in specialized assignments, employees will be assigned to permanent shifts based on seniority preferences. All employees will submit their requests/bids for their shift preference during the month of December. Employees working a temporary assignment of 120 days or less may not exercise their seniority bid.

### **ISSUE #5: ARTICLE 15 – WAGES AND COMPENSATION**

#### 1. Wages

Each party proposes a three (3) year contract. Through negotiations, the gap between the proposals of each party has narrowed considerably. The Employer proposes across-the-board increases of 6%, 5% and 4%. The Union is proposing 9%, 5% and 5%.

The Union believes that its position is consistent with the desire of the Employer to improve the quality of the Police Department by providing wages higher than the wages paid to comparable departments. The Employer's objective was discussed in a fact-finding report by Daniel N. Kosanovich in 1998. In that case, as in this case, the Employer does not contend it is unable to pay the proposed wage increases. The Fact Finder was persuaded by the Union's arguments that it was necessary to increase compensation levels beyond the normal increases paid throughout Ohio. The Fact Finder recommended increases of 7%, 5% and 4% to bring the wages of the bargaining unit up to those paid in comparable areas. The Fact Finder believed that after the payment of these increases, Patrol Officers would rank third among the five (5) local

agencies which are comparable in the first year, and by the third year the bargaining unit would rank first among the five (5) local, comparable agencies and slightly above average.

The Union further provided evidence that the Employer is interested in providing higher compensation to its public employees in order to increase the quality of services provided to the community. There has been an increased level of business activity and population growth in the Township. For example, the Police Chief received a 5% increase and the only part-time police officer also received a 5% increase. The firefighters received increases from 5% to 19% in order to bring their wages in line with rates paid in other areas with similar populations.

The Employer disputes the Union's evidence relative to wages and compensation paid in the surrounding areas. For example, the Union stated that the top sergeant's pay was \$26.83 per hour, but the Employer states that the figure is \$24.33. The Union states that the top hourly rate for sergeants at Union Township is \$24.13, but the Employer states that it is \$23.15. The Union states that the top hourly rate for sergeants in Milford is \$29.88, but the Employer states it is really \$24.12. The Union's figure for Clermont County is \$25.06, but the Employer states this includes a contribution to PERS; when this is taken out, the actual figure is \$23.86. Any comparison to Pierce Township must recognize Pierce has no sergeants; the first line of supervisors are lieutenants. In Loveland, sergeants and officers are paid the same rate. Loveland should not be used as a comparable because they have historically been the leader in the area insofar as wages and compensation is concerned. The Sheriff's Department in Clermont County is different from Miami Township in terms of the type of services provided. It has considerably more officers and services are provided to a much larger area. The Employer believes that the real comparables are Pierce Township, Union Township, and Milford. In order to bring the bargaining unit to the middle-of-the-pack in terms of wages, it is only necessary to provide

increases of 4% each year. The firefighters received large increases because they were underpaid relative to their comparables.

### **Recommendation**

At one point during the negotiations, taking into consideration proposals made in other areas, the parties were only apart by 1% when negotiations broke down over other issues. The parties then retreated to their former positions. Considering all of the economic issues discussed, and after reviewing the comprehensive evidence, it is recommended that the following across-the-board increases be paid: 2001 - 6%; 2002 - 5%; and 2003 - 5%.

### 2. Corporeal Rank

The Union proposes that the rank of corporal be re-established between the positions of patrol officers and sergeants. It believes that the Employer could save money by having corporals perform work now being performed by Duty Officers and FTO's. The additional rank would increase the morale of the bargaining unit members by adding an additional promotional base. The Union pointed out that the Clermont County Sheriff's Office recently re-established the rank of corporal. The Employer is opposed to re-establishing the corporal rank. This issue was negotiated between the parties and the corporal position has been phased out through attrition. There is only one corporal left. The Employer wants to flatten the organizational structure and create more efficient lines of reporting, communication, and responsibility.

### **Recommendation**

No change.

3. D.A.R.E. and FTO Officers

The Employer proposed increases for D.A.R.E. and FTO officers believing that premium pay is necessary to compensate these specialized officers adequately and to attract persons to fill these positions.

The Union wants to eliminate D.A.R.E. and FTO premium pay and replace these increases with longevity pay. The Union believes it is not necessary to single out these specialized areas for extra compensation and that other specialized officers should receive some increases as well. Under the Employer's proposal, student resource officers, community oriented policing officers, investigators, and traffic safety officers will receive no increases in compensation.

**Recommendation**

The Employer provided persuasive evidence that there is some difficulty in filling the D.A.R.E. and FTO positions because these employees do not have the same overtime opportunities as road officers. There appears to be little difficulty in filling the other specialized positions. Accordingly, the proposal of the Employer is accepted. Section 15.9 shall read as follows:

Selected Specialized Positions shall be paid additional compensation according to the following criteria:

1. Any officer(s) whose principal duty assignment is the D.A.R.E. officer shall be paid specialized assignment pay as follows: For D.A.R.E. duties performed during January 1 through January 30, the assigned D.A.R.E. officers shall be paid the sum of \$1,200 in the first July payroll.
2. For D.A.R.E. duties performed July 1 through December 31, the assigned D.A.R.E. officers shall be paid a sum of \$1,200 in the first January payroll.

3. To qualify for payment, the officer must be a qualified D.A.R.E. officer and must have been assigned as a D.A.R.E. officer for the period involved and performed the D.A.R.E. duties for at least three (3) months of that period.
4. An officer shall be considered "qualified" after completing the following training courses:
  - (a) The 80-hour D.A.R.E. instructor course or equivalent approved by the Chief of Police; and
  - (b) An additional 32 hours of annual re-training in D.A.R.E. related topics, approved by the Chief of Police
5. Specialized assignment pay for the D.A.R.E. officers shall be retroactive to July 1, 1997 and through December 31, 1998.
  - A. Any officer(s) whose temporary field assignment is the Field Training Officer (FTO) shall be paid specialized assignment pay as follows:
    - (1) Any assigned FTO shall be paid an additional sum of one dollar (\$1.00) per hour for each hour in the performance of FTO duties. To qualify for payment, the officer must be a qualified FTO and must have been assigned as the FTO for the period involved and performed FTO duties.
    - (2) An officer shall be considered a "qualified" FTO after completing the following training courses:
      - (a) A basic FTO course of at least 24 classroom hours.

4. Longevity Pay

The Union proposes longevity pay and the Employer objects to this form of compensation. The present system already rewards longer term employees with high wages. Most of the departments in the surrounding areas do not have longevity pay.

**Recommendation**

The Union did not present enough evidence to justify this additional item of compensation. No change.

**ISSUE #6: ARTICLE 17 – HOLIDAYS**

The Union proposes to add Police Memorial Day to the list of paid holidays. Premium pay would be paid for working on this holiday.

The Employer believes that the addition of another holiday is unreasonable and unnecessary. Other employees in the Township receive ten (10) holidays. The additional cost is not justified. The Employer is willing to permit employees to take Police Memorial Day as a holiday, but they should substitute that holiday for another one on the schedule.

### **Recommendation**

No change.

### **ISSUE #7: ARTICLE 19 – SICK/BEREAVEMENT LEAVE**

#### **1. Sick Leave**

The heart of this dispute centers around the Employer's belief that there is excessive absenteeism and the Union's belief that there is no problem. The Employer believes that the existing sick leave provisions are ripe for abuse based upon certain statistics. Specifically, the Employer presented evidence that sick leave use increased when the work shifts were changed from 8-hour shifts to 12-hour shifts. The Employer is willing to return to 8-hour shifts to address this problem. The Employer wants to tighten the requirements for providing medical certification for absences from three (3) days to two (2) days and medical certification would also be required after four (4) sick leave events within any rolling 12-month period. If a statement is not provided, or if the explanation for the absence is unacceptable to the employer, payment for the sick leave may be withheld. Any other arrangements would not be effective in permitting the Employer to monitor the use of sick leave.

The Union objects to any language which would give the Employer complete discretion to decide whether a doctor's explanation is acceptable. This type of language is not in the language of comparable contracts. The Union believes that the use of sick leave time and absences is more of a problem with non-bargaining unit employees than with bargaining unit

employees. Yet, the Employer does not intend to change the policy for non-bargaining unit employees, which is presently a 3-day period before a doctor's excuse may be requested.

### **Recommendation**

It is recommended that the language in §19.2B. remain at three (3) days before medical certification is required. However, medical certification may be required after four (4) sick leave events within a rolling 12-month period. The parties agreed to create a standardized form to be completed by the employee when medical certification is necessary. The form shall include a statement of the diagnosis of the medical condition, an estimate of the expected time off from work, the expected date of return to work, a general description of the treatment plan, and a prognosis of the condition. The form should be similar to the form required for FMLA approval.

Section 19.2 B. shall read as follows:

#### Evidence Required for Sick Leave Usage

Upon return to work, an employee shall complete an application for sick leave on a form identified as Exhibit A, attached hereto, to justify the use of sick leave. The Employer may, when an employee utilizes sick leave for medical appointments or where an absence is for three (3) consecutive days or more, require the employee to furnish a certificate from a physician, dentist, or other medical practitioner. After four (4) sick leave events within any rolling 12-month period, the Employer may require the employee to provide a physician's statement to justify the absence. Falsification of either a written signed statement or a practitioner's certificate shall be grounds for disciplinary action including dismissal.

#### 2. Use of Sick Leave

The Employer proposes to eliminate the use of sick time for death of a family member not covered by bereavement leave. The Union believes that the parties agreed to use one (1) day of sick leave for this purpose before they reached an impasse.

**Recommendation**

No change.

3. Sick Time Sell-Back at Retirement

The Union has proposed increasing the pay-back period from 30 days to 60 days. The Employer opposes any change in the existing language.

**Recommendation**

No change.

4. Funeral Leave

The Employer proposes to change the number of days for funeral leave from consecutive work days to consecutive calendar days. The Union objects to this proposal because certain employees would receive no paid time off under this concept due to their work schedules.

**Recommendation**

No change.

**ISSUE #8: ARTICLE 22 – INSURANCES**

The Union proposes that the Employer pay 100% of the cost of health care under §22.1. The Employer prefers to keep the present system in place. The Employer is not asking for increases even though it is recognized that medical costs are rising. The Employer maintains an excellent plan and the plan applicable to Union employees is the same plan available to other employees within the Township.

**Recommendation**

No change.

**ISSUE #9: ARTICLE 33 – HEALTH AND SAFETY.**

The Employer proposes to institute a mandatory physical fitness testing and training program. The Union opposes the mandatory conditions set forth in the Employer's proposal. The Employer agreed during the hearing to defer this proposal.

**Recommendation**

No change.

**ISSUE #10: BATAVIA SCHOOLS LANGUAGE**

The Employer proposes certain language as a result of the Batavia Schools case decided in the Ohio Courts. The Union does not necessarily oppose this language, but it opposes any language that could be interpreted to be a zipper clause. The parties appeared to reach agreement on this proposal during the hearing.

**Recommendation**

The following language shall be added to an appropriate Article:

The parties have negotiated this Agreement in good faith. Where the Agreement confers a right or benefit, it should be assumed that the parties have considered applicable state law and, to the full extent permitted by law, have agreed that the provisions of this Agreement prevail.

**ISSUE #11: CANINE OFFICER**

The Union wants to include within the language of the CBA the existing practice for canine officers which provides for overtime pay for care of their animals. Presently the officers work 12 hours and received 1-1/2 hours of overtime for care of their animals. The Employer objects to this proposal and wants to eliminate the payment of overtime. The Employer is willing to have the canine officers work 10-1/2 hours and spend 1-1/2 hours of their regular shift for the care of their animals.

**Recommendation**

The Employer should have the management right to control the work schedules of the canine officers to reduce overtime. It is recommended that no change be made to accommodate the Union's proposal.

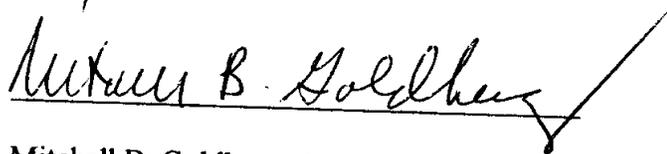
**ISSUE #12: DUTY OFFICER**

The Union wants to incorporate within the language of the CBA the existing practice to pay patrol officers an additional 4% per hour when they serve as a duty officer. The Employer believes that the duty officer premium pay is incorporated within the provisions of Article 32 and it has no desire to discontinue this practice.

**Recommendation**

Section 32.1 should read as follows:

Any employee assigned to duties of a position with a higher pay range than the employee's own rate of pay shall entitle the employee to a pay adjustment for working above their classification. The assignment of an employee above his normal classification shall be a scheduling decision of management and not an automatic assignment based on seniority. It is understood that a patrol officer who is assigned as a duty officer shall receive a 4% increased adjustment to his hourly rate of pay for the time he serves as a duty officer.



Mitchell B. Goldberg, Appointed Fact Finder

Dated: December 14, 2001