

STATE EMPLOYMENT  
RELATIONS BOARD

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STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

FACT FINDING PANEL

SERB CASE NUMBER: 02-MED-03-0240

FRATERNAL ORDER OF POLICE,  
OHIO LABOR COUNCIL, INC.

and

CITY OF FAIRBORN

DECEMBER 4, 2002

## HEARING

The Fact Finding Hearing took place on November 19, 2002 at the training room of the Fairborn Police Department Building and lasted from 11:00 a.m. until 1:45 p.m. Representing the FOP were its principal representative, Thomas J. Fehr; Lodge President, Robert Stager; and Lodge Treasurer, Michael Beaudion. Representing the City of Fairborn were Police Chief, Patrick Oliver; City Manager, Allen Rothermel; Assistant City Manager, Mike Cornell; Personnel Director, Rose Trout; Contract Employer, Dave Spahr; Police Captains, Doctor Plemmons and Dave Jones; Finance Director, Dan Smith; and the City's principal representative, Attorney, Janet Cooper.

## ISSUES REMAINING AT IMPASSE

At the time the Fact Finder entered the dispute, the following issues remained at impasse:

Article 3, Recognition

Article 4, Management Rights

Article 5, Lodge Business

Article 7, Probationary Period

Article 10, Grievance Procedure

Article 13, Personnel Files

Article 15, Personal Absence Days

Article 16, Vacations

Article 22, Overtime

Article 26, Wages

Article 29, Duration

## MEDIATION

Mediation was attempted, but was not successful in resolving any of the issues in dispute.

## CRITERIA FOR DECISION

As provided by the requirements of the State Employment Relations Board, the Fact Finder based his recommendations on the following:

- A comparison of 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, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- The lawful authority of the public employer;
- Any stipulations of the parties; and
- 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 agreed-upon dispute settlement procedures in the public sector or in private employment.

## ARTICLE 3, RECOGNITION

### POSITIONS OF THE PARTIES

The FOP proposed the deletion of the probationary period from the recognition clause, giving the Lodge the right to represent all employees from the date of their initial hire. The Union pointed out that such an action is consistent with SERB requirements. It provided

contractual support for the argument that the comparable communities of Oakwood and Xenia recognize the FOP as the bargaining agent for all dispatchers, regardless of their probationary status.

The City argued that the contractual provision excluding probationary dispatchers from the recognition clause has been in effect for more than twenty years. It said that probationary employees are excluded from dispatcher bargaining units in the comparable communities of Beavercreek, Middletown, Moraine, Sidney, West Carrollton, Xenia, Springfield, Miamisburg, and Vandalia.

#### FINDING OF FACT

The exclusion of probationary employees from the recognition clause in the Contract has been in effect for more than twenty years. The majority of comparable communities exclude probationary dispatchers. (Although contrary to the City's assertion, Xenia does not appear to be one of those communities).

Since Fact Finders are required to base their decisions on the existing collective bargaining Agreement, and the appropriate comparables, it is clear that neither pieces of evidence supports a change in the existing collective bargaining Agreement.

#### RECOMMENDATION

No changes should be made in this provision from the current Agreement.

ARTICLES 4, 15, 16, 22 MANAGEMENT RIGHTS, PERSONAL ABSENCE DAYS

VACATION, OVERTIME

#### POSITIONS OF THE PARTIES

These issues are being discussed together because they are interrelated, and because they were discussed at the same time during the Hearing. All relate to the ability of the

Employer to determine schedules of work.

The FOP proposed the deletion of Sections "H" and "K" of the Management Rights Article, because they claimed that neither the determination of the number of hours worked, nor the changing of work schedules are management rights. With respect to Personal Absence Days (Article 15), Vacation Days (Article 16), and Compensatory Time (Article 22); the FOP proposed that for each of these categories, one Dispatcher be allowed to use their time off per twenty-four hour period. The FOP also proposed that at the request of an employee, compensatory time may be cashed out once per year. The FOP sought to contractually mandate the work schedule at six, twelve hour days, and one eight hour day, every two weeks. Finally, the Union proposed that with the approval of the Employer, Dispatchers could change days off or shift assignments with other bargaining unit members.

The City argued that based on its current staffing levels, and the need for consistency, it is impossible to meet the Unions proposals on these issues. The City said that without additional staff, it is impossible to meet the scheduling proposals of the FOP. They also maintained that it is important to coordinate the schedules of Dispatchers and other police personnel. They said it creates operational difficulties if Dispatchers and other police personnel are not working the same shifts. Finally, the City maintained that the Union's scheduling proposals could potentially create violations of the Fair Labor Standards Act.

#### FINDING OF FACT

As both parties well know, the scheduling of Dispatchers and police and fire personnel is an extremely complicated matter. Despite the excellent presentations and documentation

provided by both parties, the Fact Finder will not pretend that he fully understands the implications of the scheduling proposals made by the FOP. Clearly, some of these scheduling difficulties could be minimized with the hiring of additional personnel, whether full-time, or part-time.

However, based on the potential impact on the delivery of services to the citizens of Fairborn, and the possibility of compliance problems with the FLSA, the Fact Finder is unwilling to support the FOP's scheduling proposals. His recommendation in this area has implications for wages, and this will be discussed in the wage section of this report.

#### RECOMMENDATION

No changes should be made in Articles 4, 15, 16, or 22 of the current Agreement.

#### ARTICLE 5, FAIR SHARE

#### POSITIONS OF THE PARTIES

The FOP argued that a fair share provision should be included in the new Agreement. They argued that based on SERB statistics, 85% of all public sector agreements in the State of Ohio contain a fair share provision. They pointed out that the comparable communities of Moraine, Beavercreek, and Oakwood provide for fair share in their agreements. They also pointed out that it is not inappropriate for fact finders to recommend a fair share in their reports; citing David Stanton and Frank Keenan as fact finders who have made such recommendations.

The City argued that in the geographical area near Fairborn, considerably fewer than 85% of all agreements contain fair share provisions. They argued that the City is philosophically opposed to fair share and it is not present in any of their agreements. They argue that the traditional argument in favor of fair share; that it prevents "free riders",

does not apply in Fairborn because all employees in the bargaining unit are members of the union.

#### FINDING OF FACT

The FOP is correct when it argues that fair share is overwhelmingly the norm in public sector agreements. They are also correct in arguing that there is nothing in SERB procedures to prevent a fact finder from recommending a fair share provision.

Obtaining a fair share provision is of critical importance to unions, to prevent them from continually being in a recruiting mode. It can even be argued that having such a provision enables union leaders to be more conciliatory, because they do not have to constantly prove they are worthy of receiving dues.

In Fairborn, however, it is not appropriate to recommend a fair share provision for dispatchers at this time. All bargaining unit members currently belong to the FOP, so there are no free riders.

Most importantly, fair share is of such importance to a union, that they are typically willing to make significant concessions to achieve such a clause in their Agreement. Because all dispatchers are currently members of the FOP, the fact finder does not believe bargaining unit members should have to make concessions in other areas, in order to achieve a fair share provision.

#### RECOMMENDATION

No changes should be made in the current Agreement.

#### ARTICLE 7, PROBATIONARY PERIOD

#### POSITIONS OF THE PARTIES

The City proposed to increase the length of the probationary period from six months to one year. They argued that six months is not adequate time to effectively judge the performance of unit employees. The City contends that because of the complexity of the job, the fact that unit members serve as dispatchers and jailers, additional time is needed to judge their effectiveness. The City points out that the probationary period for both police officers and sergeants in Fairborn is one year. Finally, the City argued that eight of the thirteen comparable communities have one year probationary periods.

The FOP argues that there are no major problems with the current probationary period of six months. In fact, the FOP contends, the probationary period can be extended to nine months under the current Agreement, which provides, "The six (6) month probationary period set forth herein may be extended up to a period of an additional three (3) months upon the mutual agreement of the affected employee and the Police Chief."

#### FINDING OF FACT

Under the existing Agreement, the effective probationary period is nine months, and not six months. If at the end of the six month probationary period, the Police Chief requests an extension of three months, the employee can either comply with the request or be terminated. In effect, this gives the Police Chief the right to unilaterally extend the probationary period to nine months.

Because the existing contract grants the Police Chief the latitude to extend the probationary period to nine months, and because the evidence from comparable communities is mixed, there is not sufficient justification to change the current Agreement.

#### RECOMMENDATION

No changes in the existing Agreement are recommended.

## ARTICLE 10, GRIEVANCE PROCEDURE

### POSITIONS OF THE PARTIES

The current Agreement grants probationary employees the right to grieve non-disciplinary matters , but makes the decision of the City Manager at the third step of the procedure, final and binding.

The FOP argues that all grievances of probationary employees that do not involve disciplinary matters, should proceed through the complete grievance procedure, eventually terminating in arbitration.

The City contends that no changes are necessary, because no problem exists. They argue that of thirteen comparable jurisdictions, only two allow probationary employees to grieve any issues.

### FINDING OF FACT

This is clearly not an issue of major significance. Under the current Agreement, and the fact finder's recommendations, probationary employees are not represented by the FOP until they have completed ninety days of their probationary period. If the probationary period is not extended beyond six months, this creates a window of only three months during which probationary employees cannot avail themselves of the full grievance procedure.

In addition, because the current Agreement does not allow such grievances to proceed to arbitration, and the fact that the comparables do not support such a change, no change is recommended.

### RECOMMENDATION

No changes in the existing Agreement are recommended.

ARTICLE 13, EXPUNGEMENT OF PERSONNEL FILES  
POSITIONS OF THE PARTIES

Under the existing Agreement, records of oral and written reprimands cannot be considered in future disciplinary matters more than two years after their effective date; and records of suspension, demotion, or discharge cannot be considered three years after their effective date.

The FOP proposed that disciplinary actions resulting in reprimands be expunged after one year, and disciplinary action resulting in a loss of pay to be removed from personnel files after two years. The Union said that their proposed changes are the norm in the comparable communities of Moraine and Oakwood. In addition, in Xenia, oral and written reprimands are expunged after one year. The Union also pointed out that Fact Finder Janet Goulet recently recommended that for Police Officers, records of oral and written reprimands be removed after one year.

The City presented evidence that in Englewood, Middletown, Sidney, Springfield, and Vandalia records of suspensions remain in a dispatcher's file permanently. In Miamisburg, Beavercreek, Fairborn, Huber Heights, West Carrollton and Xenia, the City said, records of suspensions remain in a dispatcher's file for at least three years. For written and oral reprimands the evidence from the City's comparables is more mixed; of the twelve communities cited (excluding Fairborn), seven retain records of reprimands for two years or more.

FINDING OF FACT

With respect to disciplinary matters involving a loss of pay, the evidence is consistent;

the existing Contract and the comparables support the retention of the three year time period before expungement occurs.

However, based on the inconsistent comparables, and Fact Finder Janet Goulet's recommendations regarding the Police Officer's unit, expungement of personnel files for oral and written reprimands after one year is appropriate.

#### RECOMMENDATION

The first paragraph of Article 13, Section 13.03 should be changed to read:

"Records of oral and written reprimands shall cease to have force and effect or be considered in future discipline matters one (1) year after their effective date, providing there are no intervening disciplinary actions taken during that time period."

#### ARTICLE 26, WAGES

##### POSITIONS OF THE PARTIES

The FOP proposes three changes in wages. First, it asks that when employees are performing the duties of a trainer with a trainee, they receive a 10% pay premium, rather than the current 5%, or receive 1.5 hours of compensatory time per twelve hour shift, at the employee's option. Second, the Union seeks to prohibit the Police Chief from placing newly hired Dispatchers above Step C on the salary schedule. Finally, the FOP proposed a six percent across the board increase in wages for each year of a three year Agreement.

The FOP argued that the 5% premium paid to trainers has been in effect for a long time, and it is time to increase this amount. The Union said that in the comparable communities of Moraine, Oakwood, and Xenia all new employees are brought in at the entry level wage; and that administrators do not have the option of placing a new

employee at a higher step on the pay scale. The FOP indicated that it creates a morale problem if new employees are hired in at considerably higher wages than current employees.

The FOP argued that a wage increase in excess of 3% is justified because they are the lowest paid of the comparable communities of Xenia, Oakwood, Beavercreek, and Moraine. Using SERB data, they also argued that under the three year life of their current Agreement their wages increases have been 3.1% below those for police units throughout the State of Ohio.

The City proposed that the 5% pay differential for trainers remain in effect, and that the Police Chief retain the right to hire new Dispatchers above the entry level wage rate. The City argued that the premium paid to trainers is in line with what is paid by comparable communities. The City said that Kettering, Moraine, Sidney, Springfield, and West Carrollton do not pay any premium to trainers, and that payments above 5% are the exception. The City said that of twelve comparable communities, only Beavercreek, and Moraine place limits on the step at which new dispatchers are hired.

In support of its wage proposal of 3%, the City presented evidence that since 1990 the wages of Dispatchers in Fairborn have increased at a rate of 14.1% greater than increases in the cost of living during this same period. While the City did not argue an inability to pay, it did point out that it is currently experiencing difficult financial times. Its sources of revenue are relatively flat, and are considerably below those of comparable communities. As a result of these financial difficulties, they said, a number of community needs are not currently being met.

The evidence presented by the City indicated that if wages of Dispatchers in Fairborn

are increased by the proposed 3%, in 2002 they will be 9.5% below average for comparable communities at the minimum salary, and .14% below average at the maximum wage rate.

#### FINDING OF FACT

Based on the language in the current Agreement, and the comparables, there is no justification to increase the pay of trainers, or to restrict the ability of the Police Chief to hire a new Dispatcher at any step on the wage scale.

On the wage issue, a number of facts are clear. First, the wages of Dispatchers have improved compared with increases in the Consumer Price Index since 1990.

Second, based on evidence provided by the City, wage rates for Fairborn Dispatchers are below average for comparable communities, particularly at the entry level.

Third, it is clear that these are not the best financial times for the City of Fairborn.

Most persuasive in convincing the Fact Finder that an increase beyond 3% is appropriate are the following:

Although their job title is that of Dispatcher, employees in this unit have responsibilities beyond those usually associated with this job title. In fact, in asking that the probationary period be extended, the City argued that unit employees perform a much more complex job than is typically the case for dispatchers. It is therefore, unfair to compare the wages of Dispatchers in Fairborn with Dispatchers in other communities, because the jobs are not comparable.

Second, the Fact Finder is mindful of the fact that because of current staffing levels, the ability of Dispatchers to receive time off when they would wish is somewhat restricted.

The Fact Finder appreciates the scheduling difficulties facing Police administrators given current staffing levels, which is why he made his earlier recommendations regarding Articles 4, 15, 16, and 22. As a result of the difficulties this creates for the personal lives of Dispatchers, however, they are entitled to some additional compensation.

Most important, however, is that an increase beyond 3% is justified because in recent years Fairborn Dispatchers are losing ground compared to other police units around the State of Ohio. Recommending an increase of 3% for each year of a new three year Agreement would result in Dispatchers in Fairborn falling still further behind. SERB Fact Finders are required to base their decisions on a number of criteria; however experienced neutrals and advocates are well aware of the extreme importance of the “average” increases that employees are receiving around the State of Ohio. Three percent was not the “going rate” for increases from 2000 to 2002, and it is not the going rate today.

Although an increase beyond 3% is justified, an increase of 6% is clearly well above the “going rate”, and out of line, considering the City’s very real financial constraints.

This is a City that is doing an excellent job of managing its limited financial resources. However, bargaining unit employees cannot be expected to subsidize the fact that citizens in the community are unwilling to tax themselves to pay the going rate for the excellent services they appear to be receiving.

#### RECOMMENDATION

No changes should be made to Section 26.02, or Section 26.04 of the existing Agreement.

The Wage Rates specified in Exhibit A, in the existing Agreement should be modified to read:

--Wage rates on July 3, 2002 should be increased by three percent (3%)

--Wage rates on July 1, 2003 should be increased by three and one-half percent  
(3.5%)

--Wage rates on June 30, 2004 should be increased by three and three-quarter  
percent (3.75%).

#### ARTICLE 29, DURATION

#### POSITIONS OF THE PARTIES

The FOP proposed that the new Agreement take effect on July 3, 2002, and remain in effect through June 28, 2005. The City asked that the Agreement take effect upon ratification.

They disagreed on whether retroactivity was provided in recent negotiations with the Sergeants.

#### FINDING OF FACT

During the process of negotiating a new Agreement, both parties have the ability to substantially delay the pace of bargaining. If retroactivity is not provided, there is clearly a strong economic incentive for the Employer to delay negotiations as long as possible.

Based on the statutory requirement that the parties negotiate in good faith, the creation of an economic incentive not to negotiate cannot be supported.

#### RECOMMENDATION

The FOP proposal on Article 29, should be included in the new Agreement.

#### FINAL RECOMMENDATION

In addition to the foregoing, the Fact Finder recommends that all Articles tentatively

agreed to, or unopened by the parties be included in the successor Agreement.

This concludes the Fact Finder's recommendations.

*Michael Marmo*

Michael Marmo  
Fact Finder

Cincinnati, Ohio  
December 4, 2002

#### PROOF OF SERVICE

This is to certify proof of service by Federal Express, Standard Overnight Service, to Thomas J. Fehr, FOP, Ohio Labor Council, Inc., 5752 Cheviot Road, Suite D, Cincinnati, Ohio 45247, Janet Cooper, Cooper & Gentile, 118 West First Street, Suite, 850, Dayton, Ohio, 45402, and to SERB, 65 E. State Street, Columbus, Ohio 43215-4213.

*Michael Marmo*

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