

**FACT-FINDING REPORT**

STATE EMPLOYEE RELATIONS BOARD 2002 NOV 15 P 2:33

Fraternal Order of Police ) CASE NO. 02-MED-03-0242  
Ohio Labor Council, Inc., )  
Employee Organization ) DATE OF HEARING: October 25, 2002  
 )  
and ) DATE OF REPORT: November 14, 2002  
 )  
City of Fairborn, )  
Employer ) FACT-FINDER: JANET C. GOULET

**PROCEEDINGS**

Mediation of several issues was attempted without success. The hearing commenced at 10:05 a.m. in the Training Room of the Fairborn Police Department. The issues covered by this fact-finding report are based on those submitted in the pre-hearing statements and the exhibits submitted during the hearing. The parties presented witnesses, evidence and testimony and each was given the opportunity to fully present arguments and proofs in support of their respective positions. All evidence, testimony and arguments were carefully considered in reaching a recommendation whether or not all are specifically set forth or discussed herein.

**APPEARANCES:**

Those listed below were present for at least a part of the hearing.

**For the Employer:**

Janet Cooper, Esq.  
Rose Trout

**For the Union:**

Thomas J. Fehr  
Matthew Picketts

Dan Smith  
Michael Cornell  
David Spahr  
Doctor H. Plemmons  
David Jones  
Dan Nuys  
Patrick Oliver, Chief  
Alan Rothermel, City Manager

David Hiles  
Karen Kordish

ISSUES AT IMPASSE:

ARTICLE III: RECOGNITION

ARTICLE IV: MANAGEMENT RIGHTS, Section 4.01 (H) and (K)

ARTICLE V: LODGE BUSINESS, Section 5.04 (C) and (E), and  
5.06 - 5.14

ARTICLE VI: DISCIPLINE, Section 6.09 and 6.10

ARTICLE XIV: PERSONNEL FILE, Section 14.03

ARTICLE XVI: PERSONAL ABSENCE DAYS, Section 16.03

ARTICLE XVII: VACATION, Section 17.08

ARTICLE XVIII: SICK LEAVE, Section 18.09

ARTICLE XXII: CALL-IN, Section 22.05

ARTICLE XXIII: OVERTIME, Section 23.09 and 23.11

ARTICLE XXVII: WAGES, Section 27.05, and 27.06

ARTICLE XXX: Duration

ARTICLE XXXI (New): SHIFT BID

ARTICLE XXXII (New): HEALTH AND SAFETY

EXHIBIT A: WAGES

CRITERIA:

The Fact-Finder, in resolving the above issues, shall take into consideration all reliable information relevant to the issues and the criteria listed in Rule 4117-9-05(J) of the State Employee Relations Board. All contractual issues, other than those set

forth above, are considered settled and the entire labor contract will be completed with the acceptance of this report.

#### BACKGROUND

The City and this Union have a long history of collective bargaining. Most of the Agreements over the past several years have been completed with the use of the SERB dispute resolution procedures, both fact-finding and conciliation. This Fact-finder has held several of these hearings over the years and issued the fact-finding reports. Many of the issues were finally resolved by a conciliator. In this current set of negotiations the parties met four times. The Union brought new issues to the table and sought to include some current practices in the Agreement. It also sought changes in some leave articles with the intention of allowing the members of the Bargaining Unit to have both more leave and more control over their leave taking. The City is reticent to include language in the Agreement about practices that are currently effective and have been trouble free. Furthermore, it resists what it views as incursions into management rights where the Union seeks a contractual guarantee on the circumstances in which leave will be granted and new officers hired.

In the past the Sergeants have been included with the patrol officers within the same Collective Bargaining Agreement (CBA). The Sergeants are now covered by a separate Agreement which may require changes in this patrol officers agreement. These and the remaining issues at impasse will be discussed with my recommendations below.

## RECOMMENDATIONS

**ARTICLE III: RECOGNITION.** The Union wants to include probationary officers in the bargaining unit. It would strike the phrase found in the definition of employees in the bargaining unit: " A. . . . who have completed their probationary period." The City sees this as a change in the composition of the bargaining unit which can only be done by SERB. The Union claims that the probationary officers are full time employees and therefore entitled to the protection of the Collective Bargaining Agreement (CBA). The Union wants them as members during the probationary period. Furthermore, this is not a change in the composition of the bargaining unit. It is simply a language change according to the FOP/OLC.

The City presents information from comparable police departments which show that the majority of them do not include probationary employees in the Contract. Those that do include them do so after 60 days with the caveat that they can be discharged without just cause. The current language has been in this Agreement since 1986 and there has been nothing to indicate that it is a problem. If the parties agree, they can jointly petition SERB for a change and there is nothing in SERB law to prevent it. In this situation the parties do not agree.

**Recommendation:** Maintain the language in the current contract. There is no compelling reason to include probationary officers in the bargaining unit. Furthermore, this language has survived for 15 years without a problem. While the Union sees this as a simple

change it is significant and should have the approval of both parties.

**ARTICLE IV: MANAGEMENT RIGHTS, Section 4.01 (H) and (K)**

The Union contends that (H) which states the determination of the number of hours any operation may be carried on is not a management right but rather that "hours" is a mandatory subject of bargaining under SERB law. Furthermore, (K) is the establishment and changing of work schedules and assignments. The FOP states that hours is not listed as one of the management rights delineated in the law but the "effects" bargaining section mentions hours. The Union argues that when the City agreed to the memorandum of understanding entered into with the bargaining unit for the 12 hour day it gave up having hours as a management right.

The City points out that this language has been in the contract since 1986. The memorandums of understanding about the twelve hour day and the change back to the eight hour day, which took place during the term of this contract, show that the hours language works well.

The City points out that the Fairborn Police Department along with police departments throughout the United States have become very specialized. Officers volunteer to be trained as D.A.R.E. officers, special resource officers, bike patrol, etc. The City needs to be able to determine hours and schedule this group of specialized officers in order to provide appropriate police services for the citizens.

**Recommendation:** Retain the current language. The effective

management of the police department requires that it retain the right to schedule and assign officers and determine hours per day and week that operations are carried on. The effects bargaining requirement in 4117 and the notification requirement in the current contract protects the bargaining unit against arbitrary and capricious changes in hours and schedules. Furthermore, employers can bargain constraints on their rights without giving up those basic rights.

**ARTICLE V: LODGE BUSINESS Sections 5.04 C & E and Fair Share.**

The Union seeks to have additional hours for Union officials to attend state and national meetings and training and educational contract related business in 5.04 (C). The state FOP meetings are typically four days while the national are held every other year. Sending four officers to the state meetings uses the 96 hours completely and no hours are left for the national meeting. The Union argues that the Sergeants seldom used these hours and the members of the bargaining unit have run out of hours in the past. The officers need an increase in hours to attend to these meetings. In addition, it wants forty hours for FOP release time for members of the bargaining unit to attend FOP conventions, seminars, etc. in Section 5.05 (C).

The City responds that this contract is the first in which the Sergeants are covered by a separate Agreement. The number of hours should be cut back rather than increased because it is now a smaller bargaining unit. Yet, the FOP is proposing to double the number of hours that officers will be away from their duties to

attend FOP meetings. This is not the only instance where time is allowed for FOP business. See, for example 5.04 (A,B and D), where paid time is available for local meetings, district meetings and contract negotiations. The bargaining unit already has a good amount of time for union business. In addition, the FOP proposes to add a new category of release time in 5.04 (E). The police department needs its officers on the street. There is personal leave and vacation time available for officers to use to attend conferences and other FOP activities. The City of Fairborn is very generous compared to other jurisdictions with paid lodge hours.

**Recommendation:** Maintain the current 96 hours in **Section 5.04 (C)** and do not add **Section 5.04 (E)** to the Agreement. The comparables show that the City is more than generous when the total number of paid hours for lodge business is considered. Furthermore, vacation and personal absence days are available for FOP meetings, conferences, etc. The recommended 96 hours takes into consideration that the bargaining unit does not include the Sergeants and is in effect an increase in leave hours on a per person basis.

**Fair share. Sections 5.06-5.14.** The FOP/OLC, Inc. wants to include this section in all of its contracts. It has been awarded in other contracts by fact-finders. The City responds that every officer eligible for membership in the FOP is a member. The fair share fee is not necessary. Furthermore, the City council is philosophically against it.

**Recommendation:** Fair share fee is not recommended. This is an

important issue and one that needs to be bargained to agreement between the parties. While the FOP/OLC may want it in all of its contracts, this bargaining unit must be willing to "horse trade" for it. This bargaining unit does not need a fair share fee provision because all the eligible officers are members of the FOP.

**ARTICLE VI DISCIPLINE, Sections 6.09 and 6.10.** The Union proposes in Section 6.09 that discipline needs to be initiated within a sixty day calendar period and that immediate written notification of complaints by citizens, with specific details, be given to the employee. Members of the bargaining unit have had to wait for two and a half to six months for discipline to be initiated. It is burdensome for the officer to have this concern for that long a period of time. In addition, the Union wants all criminal proceedings complete before disciplinary action is started.

Section 6.10 forbids the use of "truth verification tools" unless requested by the employee. The Union points out that the police officer should not have a higher restriction placed on him than other citizens. Furthermore, polygraphs and some of the other techniques are not often accepted in court.

The City views this series of proposals as unwarranted restrictions on its right to effectively manage the department. The FOP has sufficient protection for the bargaining unit members with the just cause clause for discipline. Criminal charges and employee discipline are two very different things. Discipline has a much lighter standard of just cause. Criminal procedures require

proof beyond a reasonable doubt. Officers who face criminal charges are given "Garrety" rights prior to any investigation. No additional protection is needed for employees who face discipline and are charged with a crime.

The City agrees that investigations should be conducted in a timely and judicious manner, however, each case differs and a one time period requirement does not fit all situations. Many times the officer requests that a hearing be delayed or sick leave and vacation mitigate against a timely resolution. In addition, the investigating officer may need more time to do a thorough investigation.

Polygraphs are addressed in the General Orders and give the officer protection as does the body of arbitral decisions whereby the employee can challenge the validity of the polygraph examination.

The Union requests immediate notification of complaints. The City argues that this is a vague time specification and when a complaint is received it requires investigation to determine if it is even valid.

**Recommendation:** The Union proposals under this Article 6, Discipline sound appealing for the officers, however, some are administratively unworkable and others are unnecessarily burdensome. Protections are available for the employee who is involved, both from the criminal justice system and the grievance procedure. Current language is recommended.

**ARTICLE XIV PERSONNEL FILE, Section 14.03,** The Union proposes

that the time limits that oral and written reprimands stay on a members record be reduced to one year from the current two years. More serious discipline such as records of suspension, demotion or discharge be in force for a period of two years rather than the current three year time period.

The City as well as the Union presented comparables on this proposal which for lessor discipline range for one year to permanent inclusion in the personnel file. The comparables for more serious discipline are weighted more heavily toward the three year time period.

**Recommendation:** Based on the comparables: Reduce the time limit on less serious discipline to one (1) year as proposed by the Union and keep the more serious discipline at three (3) years as found in the current language.

**ARTICLE XVI: PERSONAL ABSENCE DAYS, Section 16.03, ARTICLE XVII AND ARTICLE XVIII.** The Union proposes that a new section be added to the Agreement. It requires the Employer to allow one officer per shift to be able to use a personal absence day which cannot be denied because it would result in overtime. The Union has put forward three articles that it would change to include this language so that leave must be granted: Article 16, Personal Absence Days, Article 17, Vacation and Article 18, Sick Leave. The Union points out that there is a great deal of stress on the officers because they are unable to get leave time. Officers need time off to be recharged so that they can do the job. Some officers have worked six weeks straight without leave. There are currently

several open slots on the schedule some of which cannot be filled because of military leave or sick leave, etc. When open positions are filled there is a long period of time between when an officer is hired until he is ready to be put on the street. When new officers are hired the training takes about six months. The Union is not wedded to its language but is concerned about the need for leave time by the officers.

Several ideas for granting leave were advanced by the Union: Minimum staffing levels may need to be altered in order to give officers some leave time. The City could post time off for voluntary overtime. Or, it might increase the number of officers who can be off from one to two when other officers are off on sick leave or for educational purposes. This is a serious issue for the members of the bargaining unit.

The City realizes that this is a complicated issue, however, these proposals could require that four officers be granted off on each shift. Article 16 says one officer per shift for a personal day. Article 17 requires one officer to be able to use a vacation day. The sick leave article says that if the officer does not use sick day he gets one paid absence day which he can use and it cannot be denied because of the need for overtime. Currently, there are two vacancies and three positions that cannot be filled. Replacements have been hired this year.

The City argues out that the Union is seeking the comp time standard to be applied for these types of leave. Comp time is governed by FLSA and the leave request must be honored unless it

interferes with the standard of service. FOP is proposing that all leave time meet the comp time standard. The current policy is that one officer per shift can be off due to vacation or personal leave. A second officer's request for such leave may be granted such leave at the discretion of management if there are extenuating circumstances. The current policy allows officers to have the needed time off. The City responds via Capt. Plemmons that the Union proposal could reduce what is now a 5 or 6 officer shift down to a 2 officer compliment which is well below minimum manning standards. In effect the police department management would have to order officers to come in to fill in for those officers off on voluntary leave. This would defeat the Unions purpose in granting leave. The City presented a chart showing that nearly all officers had used many hours of the different categories of leave over the last three years.

**Recommendation:** Maintain current contract language for Articles XVI, XVII, and XVIII. The language put forward by the Union could result in more problems for the bargaining unit and potentially cause management to offer a reduced standard of service for the community. The evidence shows that a large number of officers have used a variety of types of leave time and that it has increased over the previous two years. This is an issue which might be worked out in the labor management committee meeting.

Article XVIII, Section 18.09 asked for an additional sick leave incentive based on 120 calendar days. The current agreement already has a generous sick leave incentive in Section 18.06 which

gives comp time to employees who meet the criteria. No arguments were advanced or problems mentioned as reasons to change it.

**ARTICLE 22: CALL-IN, Section 22.05** The Union proposes that phone calls to off duty officers dealing with police business be compensated and that any call-in or check voice mail or e-mail requirements also be compensated. The phone calls are intrusions into off duty time and the Union wants them stopped. In addition, the court now requires that the officer, who is under subpoena to testify in a case, call in the night before to check the voice mail to find out if he/she is required to testify. This requires the officer to take his/her time to check. This requirement may cause the officer to be committed on a day off until the night before the case. He/she is unable to make plans for off duty time.

The City responds that the telephone calls to off duty officers are from other officers seeking information in order to do their job. When an officer has a specialized job it may require that he/she respond to inquires while off duty. Management cannot control one officer calling another. In addition, the comparables show that no jurisdiction pays for off duty phone calls.

The court sets up the call in system for subpoenaed officers and it is beyond the control of the City. This is the same system that potential jurors use. Furthermore, it is the police officers responsibility to check e-mail, voice mail, etc. on off duty time. It would be difficult to assign a block of time and then an appropriate wage payment for telephone calls or court call-in.

**Recommendation:** Retain current contract language and discuss

potential solutions in labor management committee meetings.

**ARTICLE XXIII: OVERTIME Section 23.03, 23.05, 23.09 and 23.11.** The City wants to delete section 23.03 and 23.07 because it does not set a limit on the amount of comp time that the employee may use. If an employee uses eight hours he/she can earn another eight hours. The City points out the comparables which show that a few jurisdictions put limits on it. Four have no comp time and seven have on going accumulation like Fairborn. Comp time seems to be a problem for the City because the officer has control over when it is taken. In addition, a large number of hours are used.

**Recommendation:** Retain the current contract language for Sections 23.03 and 23.09. This comp time issue is related to the three proposals of the Union above (Articles XVI, XVII, XVIII) as well as overtime. My recommendation (above) to retain current contract language on the three "leave" articles was based on the ability of the officers to use several types of leave, one of which was comp time. Furthermore, without comp time, overtime payments could increase. The comparables show that most jurisdictions have some form of comp time and the majority of them have ongoing accumulation.

The additional language for **Section 23.05** was proposed by the Union. This Section binds management to allow one officer per shift off and the necessity of using overtime would not be a valid reason for denying this leave.

**Recommendation:** Retain current contract language. Comp time is governed by the Fair Labor Standards Act. The ability to deliver

normal standards of service requires that management be able to control the number of officers who work a shift.

The Union proposes to change **Section 23.09**. The current language says that the City will first meet with the Lodge not less than 10 days prior to implementing any change. The bargaining unit went through two significant changes using this language without any problems.

**Recommendation:** Retain current contract language.

**Section 23.11** is a new section proposed by the Lodge. It provides that employees may exchange days off with other employees. The proposal language begins with the admonition that the exchange needs to have prior approval of the Employer. The City resists this proposal because of concerns about the young age of the patrol officers and needing experienced officers on each shift. It also points out that the specialized training of each officer would make it difficult to have the correct combination of skills on each shift.

**Recommendation:** Adopt the Union proposal for Section 23.11. This addition to the Agreement allows the officers some flexibility in meeting unexpected and unplanned demands on their time for events or activities. It also allows the City to control the mix of officers on each shift because it has prior approval. This clause is not unusual in police contracts. The City and Lodge can try it for three years and if it creates problems it can be changed at the next negotiation.

**ARTICLE XXVII: WAGES Sections 27.05 and 27.06.** Current

contract Section 27.05 applies to detectives and gives them the option of receiving \$100 per month or taking a car home. If the detective takes the car, he/she is required to live within a 10 mile radius of the station. The Union proposes that the detectives receives \$200 and take the car home. The City will extend the distance to within a 20 mile radius. Section 27.06 in the current contract allowed the Chief to bring in new people at a pay rate commensurate with their experience. The Union proposes to limit the amount of pay that a new employee may be brought in to no higher than the level of step "C" of pay scale.

The Union proposes to increase the pay to \$200 **and** take the car home in Section 27.05. Currently, the detectives all take the car home because it is a significant benefit for them. No one takes the money. The Union does not want to eliminate the possibility that someone will want to take the money in the future and would like to have both. The City does not want to add an economic benefit

**Recommendation:** Retain the language in the current contract with the change from 10 mile radius to 20 mile radius. This provision is a recent addition to the Agreement. It is working well and only needs the "tweak" of the jointly agreed 20 mile radius. If the additional compensation were added to the detectives pay it treats them differently than patrol officers. This is a distinction that is not desirable for the bargaining unit from a morale perspective. It may imply that detectives are valued more than patrol officers.

Currently, Section 27.06 allows the Chief to bring in new

employees at the level commensurate with their qualifications. The Union proposal would limit the pay grade to "C" for new employees. This limits the Chief's ability to recruit and hire at a time when the department is now concerned about filling vacancies. The Union argues that lateral transfer could be a morale issue among the officers in the bargaining unit. The comparables show that about half have limitations stated in their contracts.

**Recommendation:** Retain the language in the current contract. An officer hired at a pay level commensurate with his or her experience level should not cause a morale problem. This has not been a problem in the past but future "good will" depends on the sound judgement of the Chief.

**ARTICLE XXX: RETROACTIVITY.** The Union proposes a three year contract with retroactivity citing consistency with other bargaining units. The City responds that retroactivity is a question and is a wage issue.

**Recommendation:** Retroactivity is recommended on the grounds of consistency with the other bargaining units.

**ARTICLE XXXI: SHIFT BIDS Section 31.01** The Union wants to have current practice incorporated into the Agreement. The policy is that shift bid takes place in November and shifts are awarded by seniority preference after operational needs are met. The City responds that it has shift bid covered in a policy and does not want to incorporate it into the Agreement. The process works well as it is and no problems with the current system were brought forward. Most officers received their choice of shift. This

language is unnecessary.

**Recommendation:** Do not adopt this new article. It is not unusual for shift bid to be included in the contract. However, with no reasons advanced to change the current system, this Fact-finder is reluctant to recommend change.

**ARTICLE XXXII: HEALTH AND SAFETY.** The Union proposes to add this new article to the Agreement. The City responds that it has a safety committee where any safety issues can be addressed. The FOP has representation on that committee. In addition, there is a state statute which sets up a system where safety violations can be reported to a state agency which will investigate.

**Recommendation:** Do not add the health and safety article to the Agreement. It is vague and reads like "boiler plate". Systems are established to deal with these problems if they occur.

**WAGE RATES: EXHIBIT "A".** The Union proposes a 6% wage increase for each year of the Agreement. It points to the contracts and average wages and wage scales that show increases from 12% to 16.1% with the average increase of 13.7% for three years. The City responds that 3% is a realistic offer. The City does not claim inability to pay but points out that it has the lowest effective millage of any city in the area. Street repairs have been postponed and the fire department is facing budget cuts. The City claims that it is facing a severe financial challenge.

Fairborn has a history of doing more with less revenue. The General Fund of the City is used to pay wages to police and other employee groups. Sixty seven percent of the General Fund is used

for police, fire and courts. Of that amount the police department takes the largest share. A comparison of Fairborn patrol officer's wage increases with the Consumer Price Index shows that they have had significant increases in real wages over the past eleven years. The wage increase of 3% would give them a real wage increase of 1.5% based on the 1.5% estimate of inflation for 2002. In addition, it projects small revenue increases with larger increases in expenditures over the next budget period. Millage increases have been defeated at the polls and income tax revenues are flattening out.

**Recommendation:** Three percent per year wage increases are recommended. This wage increase moves the officers up in the rankings (at both the minimum and the maximum pay levels) with the City's comparable group. Budget discussions indicate that the non-represented employees will not be given a wage increase for the first six months of 2003. Furthermore, the City has not increased the cost of health insurance to the officers even though the insurance expense to the City has increased significantly.

Signed

Janet C. Sault

Date

November 14, 2002