STATE EMPLOYMENT RELATIONS BOARD
2003 FEB 10 A 10:49

IN THE MATTER

OF

FACTFINDING

BETWEEN THE

CITY OF MIAMISBURG, OHIO

AND

TEAMSTERS LOCAL UNION NO. 957

Date of Hearing:	October 30, 2002
Location:	City of Miamisburg; Administrative Offices
Case No.:	~~02-MED-05-0546~~ 02-MED-05-0567
Date of Award:	February 7, 2003
Finding:	Recommendations on each issue is more fully set forth below.

Union Representative:

Susan D. Jansen
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Dayton, Ohio 45402-1156

Employer Representative:

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OPINION AND AWARD

Michael Paolucci
Arbitrator

Administration

By letter dated July 16, 2002, from Dale A. Zimmer, the Administrator with the Bureau of Mediation at the State Employment Relations Board (SERB), the undersigned was informed of his designation to serve as Factfinder in a procedure as mandated by R.C. 4117.01, et seq. On October 30, 2002, a hearing went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed upon the submission of final arguments and the matter is now ready for final recommendations by the undersigned.

Resolved Issues

Prior to the hearing, the Parties were able to reach tentative agreement on numerous issues. These agreed to issues are incorporated herein, and made a part hereof by reference. The agreed to issues are not specifically listed but can be assumed to be all those not specifically addressed in the unresolved issues section below. In addition, at the hearing, several issues were settled or otherwise resolved, and are briefly referenced as follows:

1. Fair Share Fee. Although some indication was made that the Union planned to make a fair share fee proposal, such was not done in writing and is considered to have either been withdrawn, or was not made as required procedurally.
2. Tool Allowance - The Parties agreed to increase the yearly allowance by $25.00 beginning 1/1/03 and by an additional $50.00 on 1/1/04.
3. Meal Allowance - The Parties agreed to increase this benefit to $5.50 per day, effective 1/1/03.
4. Safety Shoe Allowance - The Parties agreed to increase this benefit to $100.00 per year effective 1/1/03.
5. Prescription Safety Glasses - The Parties agreed to increase this benefit to $100.00 reimbursement per year effective 1/1/03.
6. Vacation - The Union withdrew their proposal that would have increased the vacation benefit after twenty five (25) years of service.
7. Funeral Leave - The Union withdrew its proposal to modify the Funeral Leave benefit in such a way as to include more extensive family members.

Unresolved Issues presented

The following twenty (20) issues were presented for recommendation:

1.	Article 3, Section 3	-	Recognition and Dues Deduction, Management Rights
2.	Article 3, Section 4	-	Recognition and Dues Deduction, Part-time and Seasonal Employees
3.	Article 6	-	No Strike/No Lockout
4.	Article 7	-	Grievance Procedure
5.	Article 8, Section 1	-	Policies and Procedures, Work Rules
6.	Article 8	-	Pre-disciplinary Hearings
7.	Article 8	-	Imposition of Discipline
8.	Article 8	-	Length of time Discipline in Employee File
9.	Article 9, Section 1	-	Compensatory Time, Double Time
10.	Article 9, Section 3	-	Hours of Work and Overtime, Overtime Opportunities
11.	Article 9, Section 8	-	Lunch Break
12.	Article 9, Section 11	-	Transportation and Pay for Department Training
13.	Article 12, Section 4	-	Standby Pay
14.	Article 12	-	Wages
15.	Article 16	-	Holidays
16.	Article 16, Section 5	-	Sick Leave, Employees Responsibility
17.	Article 17	-	Insurance
18.	Article 19	-	Call-Back, Call-In Pay
19.	Article 20, Section 1	-	Other Leaves, Military Leave
20.	Article 22	-	Training
21.	Article 26	-	Retirement Benefits
22.	New Article 25, Section 1	-	Longevity
23.	New Article	-	Drug Testing
24.	New Article 10	-	Subcontracting
25.	New Language	-	Crew Leader Proposal

* * *

Each issue is addressed below, giving consideration to all of the necessary statutory elements.

Factual Background

The City is located in Montgomery County just south of the major city in the county Dayton; its full-time Utility, Maintenance, and other General Operators are represented by the Union. Although the bargaining unit has been involved in collective bargaining with the City for some time, it has only been represented by this Union since April 25, 2002, when it was certified as the exclusive bargaining representative. Prior to the current Union, the bargaining unit was represented by the Miamisburg Independent Employees Association under a contract dated from January 1, 1999 through December 31, 2001. The current Union replaced the prior by virtue of an election that was certified on May 2, 2002. The Parties began negotiating for a new Agreement subsequent to that election.

The City has a population of approximately twenty thousand (20,000) and is located just south of Dayton. Besides this bargaining unit, some of the other hourly employees are represented by the Fraternal Order of Police (Patrol Officers and Sergeants); and the International Association of Fire Fighters (Fire Fighters and Paramedics).

The City focused on what it described as a past history of harmonius and fruitful bargaining with the past bargaining unit. It described the past collective bargaining agreements as classic in its balance between management and union. It provided this characterization as a contrast, in its view, of what the current bargaining unit is requesting. It asserts that the proposals currently being made were extreme in the amount of change requested between the Parties and asks that the dramatic changes requested be measured against the Parties history. Although the City made this characterization, the new Union was elected almost unanimously by the bargaining unit (twenty six (26) for this union versus eight (8) for the prior, independent union) thus countering the claims that

the Parties relationship was completely stable and satisfactory to both sides.

Although the City viewed the past relationship as more stable than that which it faces now, it claimed that the past agreement contained unusual provisions. These included a meal allowance, retiree health insurance, a sick leave incentive, eight (8) hours of standby pay on weekends even when no call-in takes place, and certain holiday benefits. Despite these unusual, and in its view excellent benefits to the bargaining unit, the City claimed that the Union asked for an extreme number of changes as represented by its approximate sixty (60) proposals. Moreover, it claimed that the proposals, if granted, would result in costs to the City and loss of control over the management of the employees. In response, the City made forty (40) proposed changes to the Agreement because of what it viewed as an unusually beneficial agreement already in place. The City also offered to revert to the old Agreement, in the alternative.

The City has used four (4) cities as comparables: Troy, West Carrollton, Fairborn and Piqua, all small, full-service cities in and around Montgomery County, Ohio. The City argued that since other similarly sized cities have contracted out one or more of the main services (street and highway maintenance, parks and recreation, water and sewer services, vehicle maintenance and trash collection, and recycling), then they were distinguishable.

As a general background, the City pointed out that the national, state, and local economy are all suffering. Since its ability to pay is tied directly to these poor economic conditions, then it argues that its financial future is in doubt. It contends that although its size allows it to attract major employers to the area, the loss of any one could result in serious financial consequences for the City. The City cited current events for the assertion that future economic improvement is not likely. More specifically, the City contends that its General Fund anticipates a decrease of $200,000 - $300,000

(4.4%-6.7%) in 2002; and $576,000 (13%) in 2003. It cites these numbers even though it concedes that a "demutualization" of Anthem stock brought a one-time addition to the General Fund of $203,000 in 2002. Without this addition, it contends it would have fallen that much shorter in revenues. Moreover, it claims that current projections for the budget are that income tax revenue will be lower than expected. Since this is 50% of the source of revenue for the General Fund, then it claims that its budget is under significant pressure.

The City cited other pressures on the General Fund, including a decrease in the Local Government Fund, due to the freezing of the Fund by the State; a reduction in the state inheritance tax which may be in the process of elimination; loss of interest income due to the continued decrease in the interest rates by the Federal Reserve; a reduction in water and sewer revenues; the cost of improvements to the Wastewater Treatment Plant; a reduced increase in the street and state highway fund; and extreme increases in health care costs to the City, as cited in detail below. The City also cited the loss of some high paid jobs by the moving of some operations by the Department of Energy. The City summarizes by claiming that 2002 was bad, and 2003 is expected to be worse. It asks that these financial concerns be measured against the cost of the Union's expensive proposals.

The City cites the fact that the Union has done well in recent years when compared to the CPI. Since the CPI for the past three (3) years has been only 18.1%, and since the Union's wage increases have been 24.5% in the same period, then it argues that the bargaining unit has been able to keep up fairly well. The above is provided as a background against which the remaining positions are made.

Contentions of the Parties and Recommendation of the Factfinder

As a general background for each of the proposals, it is necessary to state that the undersigned has not attempted to solve the Parties negotiation problems. It is viewed by the undersigned to be beyond his scope of authority to make judgments as to right and wrong in the methods chosen for negotiating this Agreement. The Parties have a short history behind them and a long, perhaps difficult, one ahead. If the Parties choose a volatile relationship, that is their prerogative.

The problem with the relationship, at this point, is that it causes the Parties to present many issues, only some of which are important. The risk is that the undersigned will be unable to distinguish between the truly serious issues and those which are merely presented as a posture against which the more substantive issues are expected to rise above. Each issue has the potential of being serious and the inability of the undersigned to appreciate which is more serious is the risk that is taken when this many issues are presented. It is with this forewarning that the following recommendations will be made.

The following issues were presented at the hearing:

1. Article 3, Section 3 - Recognition and Dues Deduction, Management Rights

The City proposes including specific rights within the provision that would include those rights described in Ohio's Collective Bargaining Law (R.C. 4417). (Employer Exhibit - 14)

The Union proposes the *status quo* on management rights.

Union Position

The Union claims that there is simply no need to change the management rights section. There have been no disputes; there have been no grievances; the language has worked; and therefore there is no need to change the provision. Based on the lack of any showing of a problem, it argues that there is no evidence of a justifiable change.

City Position

The City contends that the new language is essential to the efficient operation of the City; that without the language it will be forced to operate at lower efficiency; that such will have an impact on its financial condition; and that the Union's proposal as it pertains to part-time employees will increase its operating costs. To counter that proposal, the City proposes changes to the management rights section that would give it more control.

Recommendation

A review of the current language shows that it sufficiently reserves to management the rights necessary to efficiently manage the workforce. It has historical stability; has a background against which future actions may be measured; and lacks nothing that is critical to the City's ability. Moreover, the language proposed by the City contains some provisions that would reduce benefits to the employees that may affect their working conditions and which would better be obtained through bargaining rather than through the recommendation process hereunder. Based on the

foregoing, the current language must be recommended.

2. Article 3, Section 4 - Recognition and Dues Deduction, Part-time and Seasonal Employees

The Union proposes increasing the number of full-time positions and proposes a prohibition against using part-time and seasonal employees to handle temporary workload increases.

Union Position

The Union proposes changes that it believes will better protect the bargaining unit from the incursion of seasonal employees who take away their work.

City Position

The City argues that its workload is ever-changing and unpredictable. When the workload increases, the City insists that it must be able to hire part-time and seasonal employees to assist it. It asserts that if the Union's proposal were adopted, its ability to maintain staffing flexibility would dramatically increase costs; would require the hiring of many new full-time employees who would only have enough work to keep them busy part-time; and would increase the City's unemployment costs.

Recommendation

A review of the current language shows that it gives the bargaining unit a sufficient amount of protection. Absent specific evidence that a problem exists, there is no justification for changing the provision. Moreover, a review of the comparables shows that use of seasonal employees is common for public employers. Therefore, it is recommended that the language remain as currently written.

3. Article 6 - No Strike/No Lockout

The Union proposes deleting the entire provision. Indeed, it refuses to "participate" in any no -strike language based on the City's proposal to change the arbitration procedure to an advisory procedure by a neutral arbitrator.

The City proposes the *status quo.*

The current provision requires the City to give notice to the Union that a contractually prohibited strike has occurred; that requires it to give written notice as to the perceived violation; that gives it the right to appeal the matter to the American Arbitration Association; and that provides for an emergency arbitration hearing to be held within forty eight (48) hours.

Union Position

The Union contends that its proposal is based on the City's proposal as it pertains to the Grievance Process that would make arbitration only advisory. It argues that the City is attempting to place shackles on it through the management rights proposals, and other changes proposed. It argues that this is its *quid pro quo* for the Company's proposed changes.

City Position

The City contends that this provision has been in the Parties' agreement for a long period; that the Union has failed to give a good reason for changing the provision; and that the current language properly motivates the Union to stop an illegal strike whereas the Union's proposal give the Union an ability to be protected as long as its position is against the illegal strike. Since the Union has failed to give a valid reason for changing the long standing language, it asks that the provision remain.

Recommendation

For whatever reason, the Parties have chosen to make proposals that would result in dramatic and unnecessary modifications to the past agreement. Since the undersigned is charged with reviewing the proposals as compared to other bargaining units and their employers, and since dramatic changes to an agreement will reasonably be expected to move the bargaining unit away from the comparables, then it is beyond the scope of authority of the undersigned to endorse such changes as part of the recommendations. Moreover, although these type of changes are proposed with a specific set of expectations that would result, when they are so significant, it is reasonable to believe that unexpected results outside the specific intent will occur. This would add more volatility to an already chaotic relationship. That is not what the process of factfinding is supposed to achieve, and all attempts at avoiding that result will be the goal of the undersigned.

In reviewing this specific proposal, it must be found that deleting the entire provision is not reasonable. Since the basis for the Union's request was the City's change to the arbitration clause, and since no change to advisory arbitration is made below, then this proposal must be similarly rejected. Moreover, without a specifically identifiable problem, it is not justified to delete this provision.

4. Article 7 - Grievance Procedure

The City proposes some changes to the Grievance Procedure. It claimed that it wants it to remain, for the most part, unchanged. However, it does propose changing the arbitration step to a non-binding, advisory only step, but represented that it would withdraw that proposal if it gets the management rights language.

The Union proposes changes to the time limits of filing the Grievance Procedure and proposes that whenever a supervisor fails to timely respond would result in a granting of the grievance. Multiple proposals were made with regard to other changes to the provision.

Union Position

The Union argues that its only proposal is that supervisors be required to timely respond to grievances. It argues that its proposal is based on the frustration it has experienced, especially at the fourth (4th) step, when the City takes too long to respond to grievances. In order to more timely respond, it contends that its language would better motivate management to act.

City Position

The City maintains that the best argument for the current language is that the Parties know it, understand it, and have enforced its meaning for many years. There being no legitimate reason to modify the language, it asks that it stay current.

The City contends that its proposed changes are based on the updated status of personnel, and new titles; is based on outdated references to personnel whose positions no longer exist; and to make all grievances arbitrable instead of only those for less than five (5) days of suspension. Since this is the only bargaining unit that uses the civil service commission for resolving disputes, it argues that all matters should be submitted to arbitration.

However, it could not agree to binding arbitration unless the management rights clause it asks for is implemented. Since the result of an arbitration could be costly, it worries that making all such grievances binding would be detrimental. If the management rights clause that it requests is granted, it concedes that the binding arbitration clause proposed by the Union would be acceptable.

The City objects to the use of FMCS due to its perception that the arbitrators out of FMCS

are less qualified than those from American Arbitration Association.

Recommendation

The Parties have made numerous recommendation with regard to this language. Although all has been reviewed, a fine-tooth-combing has not occurred. A general recommendation is that wherever the City has made proposed changes that are based on the actual practice of the Parties; and that are based on new titles of personnel, those changes should be made. Language should always be modified when the Parties have agreed to new methods; or when changes to personnel have been made. There is simply no reason not to change the language to match the practice. Moreover, there is some risk in having the language differ from the practice in the event there is some dispute in the future.

As to the Union's proposal on time, the only change recommended is that *business* days be used, and that *holidays* be exempted from counting the timeliness. These are modest changes and reflects the reality of employees and managers only having work, and grievances, on their mind while they are at work. To better reflect this reality, a modest increase in time is justified.

As to the City's proposal that arbitration be non-binding, that proposal must be rejected outright. Without regard to its management rights proposal, it is not reasonable to take away one of the best methods to resolve disputes – especially when it is reasonable to conclude that this relationship will have its share of disputes arising. To make the final step non-binding would only worsen the situation.

Finally, as to the need to motivate both sides answer at different steps of the Grievance procedure, it is felt that both sides should be treated the same. Thus, where a grievance can be

automatically rejected or automatically sustained by the failure of one side or the other to timely respond, it is fair to treat both sides the same. A choice must be made: either the grievance are denied or sustained for failure to timely respond, or it must be able to be processed to the next step of the grievance procedure. As it is always better to have the merits decided, it is better to make the grievance automatically appealed to the next step when a response or appeal has not been timely made.

Based on this brief analysis, it is recommended that the provision be changed throughout so that grievances are automatically processed to the next step of the grievance procedure if either side fails to timely respond as required. Moreover, it is recommended that the language require the side using the automatic appeal process to give notice to the opposing party that the matter has been so appealed. Finally, in the event the Parties, on their own, decide to include language that would result in the automatic granting or denial of a grievance, it is recommended that new language be included that would require notice to the untimely party that the opposing side was invoking that right and that a one (1) day extension of the time limits would follow from the receipt of the notice. The ultimate goal is to motivate the Parties to act timely; to attempt to resolve grievances themselves; but that if either is acting to delay, then to provide the other side with a resolution that still allows for the merits of a grievance to be heard by an arbitrator.

5. Article 8, Section 1 - Policies and Procedures, Work Rules

The Union proposes new language that would mandate providing copies of work rules that have been reduced to writing to all employees.

Union Position

The Union is concerned because of past situations where employees have been threatened with discipline for violating work rules. As an example it cited a situation where employees were required to carry pagers and were threatened with discipline if they did not. Because of this incident, the Union proposes making all such changes to work rules to be written down and given to employees.

City Position

The City argues that it did issue the changed policy, in writing, to the employees. It argues that this issue, like all new issues, are discussed in the Labor/Management meeting. However, it does not want it to be limited in its operations by having to first write everything down, and then provide copies to all employees before it can impose discipline for disobedience.

Recommendation

While it is a good idea to provide written general work rules, there are simply too many rules that management must enforce to require all to be written down. Based on the Parties current relationship, there is a significant, and reasonable, worry that the employees would simply use this type of language to refuse to obey orders to perform work. It is not the goal of the undersigned to create new forms of ammunition from which the Parties may fight with. Since this language does little other than impose new restrictions on management, it is unnecessary and unwise.

Finally, while the failure to give a manual, new policy, or such other important information to an employee is significant, it is observed that it provides a legitimate defense to any employee disciplined because of the violation of said policy/manual. Since just cause always carries with it the requirement of due process, and notice, then the City's failure to do what the Union's proposal

mandates would only result in harm to it. As a result, including this language in the Agreement is felt unnecessary.

6. Article 8 - Pre-disciplinary Hearings

The Union proposes changing the language so that the hearing officer in constitutionally mandated pre-disciplinary hearings are conducted by an independent third party.

Union Position

The Union argued that the hearing officer used in past hearings has been unfair; has automatically sided with the City; has embellished the facts as alleged by the City; and has generally been biased against the Union. It argues that the Parties would be better served, and more trust would result, if the City were not merely meeting the minimum requirements of *Loudermilk.*

City Position

The City counters the Union's arguments by citing both SERB, following a ULP filing, and a prior arbitration decision where the hearing officer is praised for her professionalism and objectivity. It cites *Loudermilk* for the proposition of law that the hearing officer does not need to be neutral – the only mandate is that the Grievant be given an opportunity to be heard. Since the hearing officer has been the same person for this and other bargaining units, and since the final decision is by an arbitrator who is neutral, then it contends that the Union's proposal serves no purpose.

Recommendation

There is simply no reason to guarantee that any other step than arbitration is conducted by

a neutral. Query, if this were guaranteed at this step, why not guarantee a neutral at some earlier step? Why not a neutral at every step? While such could result in a huge volume of work for neutrals, it would fairly impede an employer's ability to conduct business. The final step of arbitration is good enough. The Union's proposal can not be recommended.

7. Article 8 - Imposition of Discipline

The Union proposes that the language be changed so that discipline is not imposed until the grievance procedure is exhausted.

Recommendation

This issue is most easily handled by noting that the undersigned has never heard of such a benefit in the public sector. While it may exist elsewhere, no other existence of the benefit has been cited. Thus, based on experience and based on lack of evidence, the Union's proposal can not be recommended.

8. Article 8 - Length of time Discipline in Employee File

The Union proposes reducing the length of time discipline remains in an employee's file depending on the type of discipline imposed.

Union Position

The Union argues that lower level discipline should not be in an employee's personnel file for very long. It contends that its proposal recognizes that discipline is relevant for a period of time, but after some period becomes less relevant. In order to protect management's right to progressively

discipline, it argues that its proposal gives that ability to management while at the same time allows an employee to move on without having past problems continually hang over their career. It also cites an arbitral decision where the arbitrator relied on ten (10) year old discipline.

City Position

The City argues that the Union's proposal is the most restrictive its ever seen and contends that it would interfere with the City's ability to get rid of bad employees. It argues that it does not give enough time to discipline and argues that the comparables have nothing like it.

Recommendation

While the Union's proposal goes too far, the arbitral decision gives pause. Although it is not clear, there is some indication that ten (10) years of an employee's disciplinary record was referenced, if not actually considered. Although the current time limits are reasonable, having been bargained over in the past, they require an employee to request for removal of discipline before such is done. Because it is very difficult to not consider very old discipline once it is reviewed, it is better to insure that such is taken out of a file and to place the burden on human resources to do so. Therefore, it is recommended that the language be modified so that discipline "is removed" from an employee's record following the current time limits. This should be easily accomplished by removing the portions of the current language where it states that it will be removed "upon request." Removal of that portion would accomplish the goal of making it the employer's burden to remove old discipline.

More importantly, it would make it clear that old discipline is not to be part of the employee's record. To underscore the importance of this element, it is also recommended that new language

be included that would make it clear that any discipline older than that permitted to be considered, not be considered when imposing current discipline even if it happens to have remained in the personnel file.

9. Article 9, Section 1 - Compensatory Time, Double Time

The Union proposes new language that would pay employees double time for work that continues for twenty four (24) straight hours; that would give employees the right to convert compensatory time to cash; and that increases the compensatory time cap from 40 hours to 100 hours. The Union proposed other changes in the article similar to these.

Union Position

The Union argues that each of its proposals are reasonable; gives benefits to the employees based on how much work they perform; and insures that employees are fairly compensated for the extra time they give to the City.

City Position

The City opposes all proposals of the Union that would cost it money. It rejects the idea that bargaining unit members should be permitted to convert compensatory time to cash at will; it rejects the double hourly rate payments when an employee is required to work for twenty four (24) hours straight; the double hourly rate for worked holidays; and absolutely rejects accrual of sick and vacation benefits at the overtime rate during overtime hours. It contends that some of the proposals are unheard of; were not rationally explained by the Union during bargaining; and are evidence of their unreasonableness during the whole process.

The City concedes that some increase in the compensatory time cap is reasonable, but the

increase from 40 hours to 100 hours, as proposed by the Union, is extreme. Moreover, it asserts that there is simply no reason to limit the City's ability to reject compensatory requests. Since the remaining City employees outside of this bargaining unit are treated similarly, it maintains that there is no reason to carve out an exception for these employees.

Recommendation

It is recommended that the compensatory time balances be increased to fifty (50) hours. No other changes are recommended.

10. Article 9, Section 3 - Hours of Work and Overtime, Overtime Opportunities

The Union makes several proposals. It first proposes changing the wording of "Department Head or his designee." to "supervisor." It proposes flipping two (2) sentences that apply to overtime assignments. The result would be that the City would have to exhaust the seniority list first, and only then be able to offer the overtime to any bargaining unit employee available. Finally, the Union proposes making errors in assignment of overtime corrected by paying overtime instead of just placing them at the top of the overtime list for the next assignment.

The City makes several proposals. It first proposes changes that would allow it to change the employees' work schedules from season to season. Next the City wants to remove certain non-worked, paid hours, from the overtime calculation.

Union Position

The Union argues that the changing of the wording reflects current practice and therefore is justified.

The Union argues that the flipping of the two (2) sentences would go a long way in correcting

a problem that exists in the bargaining unit – the use of favoritism in assigning overtime. It argues that the management has continually abused the rights of bargaining unit employees and it asks that such be considered when determining whether new language is necessary. It contends that the failure of management to correct overtime assignments in the past justifies both of its proposals as it applies to overtime.

City Position

The City contends that the current language is very lucrative for the employees in that it requires full-time employees to work weekend shifts at an overtime rate or receive compensatory time, if the weekend is not part of their regular schedule. The City points out that this is much different than comparable cities that use seasonal and part-time staff to fill in during busy seasons. It contends that the current language has been in the Agreement for over twenty (20) years; that it was included when overtime work on weekends was not as much an issue; and that it is no longer workable. Although it was appropriate language when the city was much smaller, with fewer needs, it contends that the larger population and attendant increased needs make the provision a significant hindrance. It contends that its current budget makes its need to improve the City services achievable only if this language is changed to match that of comparable cities. It argues that since the City would be able to do the same amount of work for much less money, then this is a very important issue.

The City contends that the current method of using leave hours, or non-worked paid hours, in the calculation of overtime is inappropriate and expensive. It asserts that the FLSA does not require it; the comparables do not have it; and the financial crises in the City justifies changing the benefit to save money. Therefore, its proposal is that the non-worked hours not be included in the

calculation.

Recommendation

There are too many issues in this section to give detailed explanation as to each recommendation. What has been attempted is a general recognition of the problems each party has described and has persuasively set forth. Further, both Parties propose extensive changes to the Agreement. It is beyond the abilities of the undersigned to go through and parse each appropriate proposal from the remainder of the language, and to then somehow merge the current language, the new language from each side, and any other recommendation that is made. Therefore, only general recommendations are made with regard to the general language that should be included. The recommendations are as follows:

1. The Union's proposal with regard to proper term usage of "Supervisor" was persuasive. As noted earlier, where practice or terminology has changed, it is appropriate to modify the language to match same. Therefore, it is recommended that this proposal be adopted.

2. The Union persuasively argued that the bargaining unit should be offered the work first before giving it to other qualified employees. However, such should not be required when an emergency exists. As the City pointed out, in certain circumstances it is unrealistic to require the use of a seniority list. Exigent circumstances are the most obvious condition in which a seniority list should not be required. Therefore, it is recommended that the work be given to the bargaining unit in order of the overtime list; then to the bargaining unit; and then management may order in from the bottom of the seniority list.

3. While the Union was correct in arguing that management has a duty to follow the overtime list, its resolution was too severe a punishment for failure. If an employee is passed over for an overtime opportunity, it is fair that they receive the next overtime assignment. If a second failure to properly follow the overtime list results for the same employee while that same employee is at the top of the list, he should then be entitled to pay for the lost work. Thus,

it is recommended that an employee who is mistakenly passed over for an overtime opportunity should be returned to the top of the list for the next overtime assignment. It is also recommended that if, while at the top of this list following a mistake, he is again passed over in violation of the language, he is then to be paid for the lost overtime opportunity of the second mistake.

As for a repeat within a specific time period, it is more reasonable to protect the employee from discrimination if a mistake occurs four (4) times within any one (1) year period. Only if it happens four (4) times in any one (1) year period could it be reasonably argued that proof of discrimination has occurred. Therefore, while the Union's proposal asks for too much, the principle is correct. It is management's duty to not play favorites and to properly motivate it, it is reasonable to include language that protects employees. This is what this recommendation attempts to accomplish.

4. The City is correct in its assertion that time spent not-working should not be counted toward calculating overtime. Overtime is intended to be motivation to an employer to not work employees for too many hours. Although confusing the original intent of overtime as a punishment to an employer rather than a benefit to employees occurs often, it does not make it correct. Therefore, in order to bring the use of overtime in line with the intent of overtime, it is recommended that the City's proposal with regard to use of non-work time in calculating overtime be adopted.

5. The City provided overwhelming support for the claim that the current method of scheduling requires change. The ability of the employees to work overtime is excessive; goes against the purpose of overtime, as just noted; is opposite the overwhelming comparables; and has given the employees an historical windfall in overtime/compensatory time for simply working weekends. The reality of employment is that many employees have to work some weekends. This should not require an employer to automatically pay overtime. There is no other comparable that would justify continuing the practice and, in light of the City's financial problems, some significant changes are justified.

Based on the foregoing, it is recommended that the City not be required to schedule employees five (5) days per week, Monday through Friday; that regularly scheduled weekend work be permitted; and that use of part-time and seasonal employees be permitted. Moreover the portion of the language that forbids the use of the schedule to avoid overtime payments is unique and no longer reasonable. While some protection from transferring historically performed bargaining unit work to part-time and seasonal employees is reasonable, the use of these employees to avoid overtime to the

bargaining unit is not the proper method to protect the work. Therefore, it is recommended that the language be changed, that the City's proposals be adopted as addressed above, and that the prohibitions on use of the schedule to avoid overtime be included in the new agreement. However, in order to preserve the predictability of the schedule, it is recommended that the setting of the schedule only occur twice per year.

11. Article 9, Section 8 - Lunch Break

The Union proposes changing the provision so that, instead of a supervisor having the ability to choose not to allow a thirty (30) minute lunch break, the employee can choose to work through lunch.

Recommendation

The Union's proposal confuses the functions of manager and employee. It is management's responsibility to control the workforce. To prevent reversal of these roles, the Union's proposal, and other language like it, must not be included in the Agreement.

12. Article 9, Section 11 - Transportation and Pay for Department Training

The Union proposes increasing the maximum amount of travel time paid from two (2) to four (4) hours.

Union Position

The Union contends that its proposal pays for time spent in transit for training required by the City. Since employees are spending their own time in transit, then it argues that pay is deserved.

City Position

It argues against the Union's proposals and for the removal of the language altogether.

Recommendation

It is recommended that the maximum amount of pay be increased to three (3) hours. If an employee has to be driving beyond the regularly scheduled work day because of mandatory training, such is work within the normal meaning of the word. As such, it is reasonable to compensate for and a modest increase is thus justified.

13. Article 12, Section 4 - Standby Pay

When an employee is on stand-by during the evening, they receive $8.00 per shift. If stand-by occurs during the daytime, usually on holidays or weekends, they receive eight (8) hours straight time pay. If the employee on standby actually works, the pay is for two (2) hours minimum, overtime if at night, and half-time pay for all hours worked on weekends and holidays.

The City proposes reducing the weekend benefit to an amount that reflects, as it views the situation, the current modern availability of employees due to the existence of cell phones and pagers.

The Union proposes making standby shifts optional; tripling the night pay; increasing the daytime pay to time and a half on Saturday and double time on Sunday and Holidays; and by increasing the minimum call out from two (2) hours to four(4).

Union Position

The Union argues that the provision has not been changed in many contracts and is time to be increased. Since the employees are hampered by their ability to use the time as personal time,

then it argues that better pay is deserved.

City Position

The City argues that the benefit is currently too generous. Since employees are not as affected by being on standby as they used before the advent of pagers and cellular phones, then there is not a great a justification for the extra pay earned simply by being available. Moreover, it argues that the Union's proposals, when translated to real dollars, comes out to over $56,000.00, or a two (2) percent wage increase. It contends that the current benefit is double that received by any other comparable city.

Recommendation

It is recommended that the minimum call-in time be increased to three (3) hours from two (2). It is recommended that no other changes be made.

14. Article 12 - Wages

A. General Wage Increase

The City proposes a 2.75% wage increase in each year of a three (3) year contract. In addition, the City requests that the bargaining unit be given a ratification bonus rather than requiring retroactive pay.

The Union proposes a 6.5%, 5.75%, and 5% wage increase in each year of a three (3) year agreement.

B. Step Scale

The City proposes language that will prevent an employee from moving to a higher step on the wage scale if that employee does not receive a satisfactory performance evaluation or receives

discipline for any reason.

C. Plus Rating

The Union proposes an increase to the Plus Rating benefit to $2.00 per hour. The City countered with a proposal of an increase to $0.50 per hour. The Plus Rating is used to pay employees for higher functions within a particular pay grade. The Union also proposes changing the length of time it takes before the increased rating occurs.

The Union proposes including a mandate that a new position be created if an employee fills another position for more than thirty (30) days.

D. Supervisor-in-Charge Pay

The current benefit pays employees that are not supervisors an additional $1.00 per hour for each hour worked in a supervisory capacity. The Union proposes increasing the amount.

E. Pagers

The Union proposes a new benefit that would give employees $1.50 per hour for wearing pagers during working hours.

Union Position

A. General Wage Increase

The Union asks that the FOP contract be referenced when determining what the appropriate wage increase should be. It argues that the economy can change at any time and can do so quickly. It argues that this bargaining unit has historically received between 3% and 5% and that the City has known about the decline in the general fund since 2001. Since it still continued its spending, then it argues that this bargaining unit is being asked to absorb the entire cost of the declining revenues.

B. Step Scale

Although the Union initially proposed changes that would move certain classifications up in the pay scale, the documents submitted to the undersigned show that that proposal was not contained therein.

The Union rejects the idea of allowing management to withhold step-pay based on its evaluation of an employee. If an employee performs poorly, it cites other portions of the Agreement that would allow it to take the necessary action to correct the behavior. It argues that the proposal is too subjective and argues that it has no place in this Agreement.

C. Plus Rating

The Union argues that its proposals are reasonable since the benefit has not been increased in a long time. Based on its historical low wages, and because this benefit has not changed for a great deal of time, it argues that it is time to increase it. The Union argues that the thirty (30) day provision would prevent the City from avoiding hiring new employees by simply making claimed temporary transfers that are actually permanent assignments.

D. Supervisor-in-Charge pay

The Union argues that the Supervisors in Charge are benefits that are being reserved to those favored employees and as a result are causing dissension in the unit. To avoid this, it wants the appointment to rotate. It also argues that an increase is due.

E. Pagers

There was some indication that a proposal for additional pay for being forced to carry a pager while working was offered. Such was not formally submitted to the undersigned.

City Position

A. General Wage Increase

The City argues that it can only afford a total of 3% in increased benefits, including wages. It argues that its budget can only afford the 2.75% assuming certain other benefits will be nominally increased. Although it concedes that it gave 3.5% to other employees, it argues that such was done before the current economic and financial problem it has. Moreover, it argues that its proposal will maintain the Union's position with respect to comparable jurisdictions.

The City argues that the signing bonus is due to the extreme amount of time that will be necessary for retroactivity to be calculated. To avoid the estimated eighty (80) hours of time being spent, it asks that a lump sum be ordered. It points out that a similar situation arose with the FOP unit, and was agreed to in that negotiations. Since these negotiations have taken much longer, then it argues that the lump sum paymeant is appropriate.

B. Step Scale

The City argues that its step-pay restriction be adopted as a incentive for employees to work hard and maintain acceptable behavior. It argues that such is commonly found in contract and would provide it with a tool that will lead to less discipline.

C. Plus Rating.

As to the Plus Rating, the City concedes that some adjustment is necessary since no increase has been made recently. It argues that its proposal of a modest increase, of $0.50, translates to a 20% increase. It contends that the Union's proposal, in the 400% range, is excessive and must be rejected. It argues that the Union's proposal would translate to a .5% across the board wage increase.

The City contends that the thirty (30) day proposal is simply too expensive.

D. Supervisor-in-charge pay

The City contends that the Union's proposals would result in a 350% wage increase; is out of line with the FOP contract; and is not supported by any evidence. Indeed, it contends that since the benefit is the same as that received by officers, and since it is better than any outside comparables, then no reason was set forth that would justify a change. Moreover, it argues that the Union's proposed language would make the supervisor-in-charge appointments to be assigned on a rotating basis. Since this would result in unqualified employees becoming supervisors, it contends that it would result in poor management of its operations. It argues that it needs to maintain control over its operations and asks that it not be recommended that it be forced to place unqualified individuals in supervisory capacities.

E. Pagers

The City opposes any pager payment as too expensive.

Recommendation

A. General Wage Increase

It is recommended that a 3.5% wage increase in each year of a three (3) year contract be made. This recommendation recognizes the City's ongoing financial problems but also recognizes the wage increases given to other internal bargaining units. Since some relief would come with the overtime changes, it is felt that the general wage increase is reasonable, is in line with historical increases, and is in line with internal comparables.

While the notion of a signing bonus has appeal, it is difficult to make a recommendation without giving the Union an opportunity to critique the calculations that were provided by the City.

Because of the large number of issues, it is recommended that the Parties agree to allow the City to avoid the amount of time it would take to exactly calculate retroactive pay and that such be done through negotiating a rounded amount that would be paid in lieu of retroactive pay and that such be done similar to the method used in the City's Exhibit - 20.

B. Step-Pay

The City's proposal would result in employees potentially being doubly punished for misconduct. The City could reasonably be expected to both discipline an employee, and to withhold the progression through the wage scale. This is the industrial version of double-jeopardy and must be rejected.

C. Plus Rating

Because of the City's persuasive evidence of its financial condition, only modest increases are recommended for any benefit. An increase to $ 0.55 per hour is modest, is reasonable, and accounts for the length of time since the benefit increased.

As to the thirty (30) day proposal, no evidence was offered in support and it must be rejected.

D. Supervisor in Charge

The Union proposal is too extreme. The current payment is reasonable and an increase is not supported by any evidence. Moreover, as a management position, even if only temporarily, it should not be appointed on a rotating basis. Management must reserve to itself the ability to appoint those who will join its ranks. To convert this to a situation where it has no say in who manages employees would turn the concept of management on its head and let the group be led by committee. To avoid this circumstance, the Union's proposal, on both the increase and the rotation, must be rejected.

E. Pagers

Although some issue existed before with issues, nothing of substance was submitted and it is recommended that no pay for carrying pagers while working be made.

15. Article 16 - Holidays

The City proposes changing one of the holidays from President's Day to Martin Luther King Day. The Union proposes adding an additional holiday to make both days a holiday.

City Position

The City contends that the changed holiday schedule will match the other bargaining units who agreed to the change to Martin Luther King Day and that such helps celebrate the diversity of its population and its workforce.

It argues that the Union's proposal is to expensive; is not justified by either the internal or external comparables; and is more evidence of the Union's unreasonable and unsupportable proposals.

Union Position

The Union does not disagree with the City's proposal, but argues that employees should be given the option of which to choose from. Moreover, it argues that both days are recognized as legitimate basis upon which to set a holiday and therefore both should be celebrated.

Recommendation

It is recommended that employees be given the choice of either Martin Luther King or President's Day. Moreover, since exercising the choice would mean that the day is only a holiday

for those who so choose, then the City would save money by having those employees who do not choose that day as a holiday work at a regular rate rather than at a holiday rate. The only employees who would receive extra pay would be those who chose one of the two (2) holidays, but then had to work his/her choice. Since such saves the City the money, then it is reasonable and is recommended.

16. Article 16, Section 5 - Sick Leave, Employees Responsibility

The City proposes the elimination of sick leave accrual benefits for employees who are on a leave of absence without pay.

The Union proposes changes that would benefit employees who are sick and obtain doctor's excuses; and that would reduce the chance of discipline if an employee fails to properly report absences.

Union Position

The Union argues that the current language causes confusion and could result in an employee being disciplined *ex post facto*. Moreover, it objects to the fact that no standards exist as to when an employee must get a doctor's excuse. Since it is solely up to the supervisor as to when it is necessary, then it argues that it is open to discriminatory enforcement.

City Position

The City argues that its proposal is reasonable since the taxpayers should not have to fund benefits to employees who are doing nothing to earn them.

The City argues that the remainder of the Union's proposals are unusual, are outside any comparables, and would cost it a great deal of money. Since it is in financial trouble, it argues that each proposal is not justified.

Recommendation

It is recommended that the provision remain as written.

17. Article 17 - Insurance

The City has paid 95% of the bargaining unit employee's insurance premiums for the last three (3) years. The City proposes increasing the contribution to the health insurance premium paid by employees to 7.5% as of 1/1/03, and to 10% as of 1/1/04.

Union Position

The Union argues that the current benefit is sufficient and is comparable to the other employees. It argues that only the FOP Agreement has the 7.5% proposed by the City. Moreover, it maintains that the cost increases discussed by the City will more harshly impact the employees than it will the City. It argues that it is unfair to impose the costs on this bargaining unit only.

City Position

The City contends that Health Insurance has been particularly harmful to its finances. It asserts that the double digit increase in the cost of health insurance are the second year in a row for such increases, and it cites authority for support of its claim that double digit growth can be expected for many years to come. Moreover, of the areas in the country where health care is expected to increase the most, it claims that Cincinnati is among the highest. It claims that the City's costs have increased as follows: 8.57% in 2000-01; 13.89% in 2001-02; and 232.6% in 2002-03. It argues that its insurance broker has represented that costs are expected to increase by 25% in 2003-04, and 18% in each of the next three years thereafter.

Recommendation

The Health Care Premium issue has become the most significant issue between parties to collective bargaining agreements and is the source of much dispute. Experience informs that a 10% contribution is not unusual. This experience is supported by the evidence submitted by the City. Not only has the contribution become accepted, it is reasonably argued as a new standard because of continually rising health care costs. This has occurred even though, as the Union cited, certain factfinders as recently as 1998 recognized 5% as a standard. Five (5) years is a long time in today's environment where health care costs are spiraling upward with no end in sight. Since there has been no entity that is either willing or able to cure the problem, then it is reasonable to expect that standards as recent as five (5) years ago have changed.

Notwithstanding these observations, it is fundamentally unfair to ask this bargaining unit to pay more than other employees, especially non-bargaining unit employees. The City's argument thus succeeds on every level except internally. In order to assist the City in converting this bargaining unit to an acceptable standard; while at the same time protecting these employees from being some of the only employees to pay a higher share of the premiums; it is recommended that the City's proposal be adopted but that its imposition be delayed until the non-bargaining employees make the same contribution. Once those employees make a similar contribution, and since the FOP already does make that percentage, then it is fair to include this bargaining unit's employees in the group that must pay 7.5% and 10% of the premiums. Since it is expected that the IAFF will join the group once their negotiations end, then it is recommended that this bargaining unit be included once the non-bargaining employees are changed. If that change has already taken place, then it is recommended that the new Agreement contain the City's proposals as written.

18. Article 19 - Call-Back and Call-In Pay

The current benefit pays employees a minimum of three (3) hours pay at time and one-half whenever they are called in to work. The Union proposes changing this benefit to a minimum of four (4) hours at two (2) times the hourly rate.

Union Position

The Union argues that the current benefit does not account for the inconvenience caused.

City Position

The City claims that the Union's proposal is completely inconsistent with the internal comparables. It cites the FOP contract that gives those employees three (3) hours of pay at straight time unless their normal overtime hours have been reached. The firefighters either receive three (3) hours of minimum pay at straight time for call-ins, and receive two (2) hours minimum at straight time for an emergency call-back. In addition, it contends that the outside comparables show that this bargaining unit receives more than any other comparable city. Since this bargaining unit already exceeds all internal and external comparables, it argues that there is no justification for the Union's proposal

Recommendation

There was not adequate justification made for modifying the current benefit. It is reasonable and consistent with all comparables as currently written.

19. Article 20, Section 1 - Other Leaves, Military Leave

The Union proposes removing the limitation from the current military leave benefit. The current benefit pays employees the difference between their military pay and their regular pay during

periods in which the employees are absent from work during military leave. The benefit is for 31 days and the Union proposes increasing that to an unlimited period of time.

Union Position

The Union argues that the military is an important function of government and this employer should recognize that a soldier's pay is an important part of that service. To preserve the employee's ability to serve his country, the Union asks that the benefit be extended to an indefinite period.

City Position

The City contends that, while it is sensitive to the needs of the military, it must be equally sensitive to the needs of the taxpayers. Since the benefit will only affect one employee, and since the current benefit is the same as police officers and better than fire fighters, then it argues that no change is necessary.

Recommendation

It is recommended that the current benefit remain unless it is extended for any of the other employees, bargaining and non-bargaining alike. Thus, if either the FOP, IAFF, or non-Union employee receives additional military pay, then it is recommended that this bargaining unit receive the same benefits.

20. Article 22 - Training

The City proposes eliminating the portion of this language that addresses training and required seminars.

City Position

The City contends that the current language is unusual and has no place in a collective

bargaining agreement

Union Position

The Union argues that the current language gives it protection.

Recommendation

It is recommended that the training language remain. The City's proposal is denied since deleting entire portions of an Agreement is an unusual act that would need significant justification. If the language were appropriate to include when the City originally agreed to its inclusion, then it is appropriate for it to remain. Moreover, the Parties have had to focus on too many issues to give adequate consideration to removing this language. If the City is correct and the language gives nothing, then it does not harm to have it continue. The City's concerns are better left for another time when the issue can be given fair consideration and it is recommended that no change take place.

21. Article 26 - Retirement Benefits

The City proposes elimination of health insurance benefits for retired employees.

The Union proposes increasing the benefit. The current benefit obligates the City to pay one year of premiums for each ten years of service. The Union proposes increasing this to two (2) years of premium payments for each ten (10) years of service.

Union Position

The Union makes this proposed as a reasonable increase to the benefit.

City Position

The City contends that this benefit is an old one; is no longer supported by the extreme

increased costs in health care; most employers do not provide the benefit; and it is unprecedented in this area. It argues that its proposal is reasonable since most retirees have other sources upon which to depend that supply the same benefits and since it will not affect any employee retiring after January 1, 2005.

Recommendation

There was not sufficient reason to recommend the increase or to eliminate the benefit. The recommendation is for the *status quo*.

22. New Article 25, Section 1 - Longevity

The Union proposes including longevity language that would pay employees additional hourly amounts based on their years of service with the City.

Union Position

The Union argues that long service deserves additional rewards and asks that its modest proposal be recommended.

City Position

The City contends that this proposal should be rejected because it does not exist in any other agreement it has with any other bargaining unit; it has no history in this bargaining unit; and it would cost it $35,000.00 in the first year and $110,285.00 over the life of the Agreement. Since the proposal has no support, either internally or externally, the City contends it should be rejected.

Recommendation

The external comparables along with the City's current financial condition establish that it is not the right time to institute a new benefit as proposed by the Union.

23. New Article - Drug Testing

The City proposes a provision that would allow drug testing after an accident, or at random. The proposal references a drug policy which would be unilaterally changeable by the City.

City Position

The City argues that its proposal simply incorporates the current policy into the Agreement. It argues that the Department of Transportation rules require certain testing and that it is simply following those rules. Moreover, it argues that it needs to be able to test for additional reasons.

Union Position

The Union argued that since it has not yet been given a copy of the proposed policy, then it can not adequately respond to the policy itself. It argues that since the policy is still in development, it is not ripe for consideration in the fact finding setting. Moreover, since the police and fire fighters do not have such a provision in their Agreement, then there is no reason that it should be included in this bargaining unit. It argues that the *status quo* policy of "reasonable suspicion" testing is adequate.

Recommendation

A review of the positions of the Parties shows that the City is adequately protected by the current standards. Reasonable suspicion allows the City to test if the circumstances allow such. The one circumstance that should always be tested is when an accident occurs. Since the City is not prohibited from testing whenever an accident occurs, it is felt that the new provision is not necessary absent more bargaining. Further, since the safety forces do not have mandatory testing; and since the safety forces are in a much more sensitive position; then making this bargaining unit include such

mandatory testing language is not justified. The City can continue working on the policy and give the Parties an opportunity to negotiate over its contents. In sum, the issue is not yet ripe and it is recommended that it not be included in the next Agreement.

24. New Article 10 - Subcontracting

The Union proposes new language that would preserve work historically performed by the bargaining unit to the bargaining unit. The provision proposed would prohibit such work from subcontracting, leasing, or conveyance.

Union Position

The Union claims that the City has been subcontracting more and more work that the bargaining unit could perform. It argues that when the bargaining unit could perform the work, it should have the work. It simply wants to stop the City's tendency to subcontract out work that it could do and cites a landscaping job as an example.

City Position

The City contends that it is impossible for it to ever agree to the type of language as proposed by the Union. If such were done, it argues that it would never be permitted to subcontract out work. Since its duty is to provide necessary services to its citizens at the most reasonable cost, then it would be violating that duty if it would include the Union's proposal into the Agreement. Moreover, it asserts that only one external comparables has a subcontracting clause, and it is much weaker.

Recommendation

Subcontracting work is often prohibited when its overriding use or result weakens the bargaining unit. Such is necessary to prevent an employer from subcontracting most of the work it has and thus do away with a bargaining unit. It is more often found in private employment situations. Moreover, when done in public employment settings, it is weaker, and more specific, than that proposed by the Union here. Since the Union's proposal is too broad, it can not be recommended at this time.

25. New Language - Crew Leader Proposal

The Union proposes limiting (or clarifying) the use of "crew leaders." The City eliminated the use of certain "on-street" supervisors in late 1998. Instead, the City began use of "crew leaders" – bargaining unit members that had decision making authority on site. Before the reorganization a supervisor managed 15-16 employees and following the crew leaders managed 6 to 9 employees. The use of crew leaders was ultimately arbitrated and was approved by an arbitrator.

Union Position

The Union contends that the use of Crew Leaders is not clear and needs to be clarified. It argues that the use of Crew Leaders has resulted in the loss of bargaining unit work and it wants to prevent management from doing bargaining unit work. To prevent such, it argues that the language needs to be modified.

City Position

The City resists the return of the organization of the City leaders since it needs the ability to more effectively supervise the street workers. It contends that the Union lost the issue and should

not now be granted the benefit that it lost in arbitration.

Recommendation

The Union's proposal interferes with management's right to manage the workforce. As the language has already been clarified by an arbitrator, and since there was no evidence of work being lost, it is recommended that the current language remain.

February 7, 2003
Cincinnati, Ohio

Michael Paolucci