

**FACT FINDING TRIBUNAL  
STATE EMPLOYMENT RELATIONS BOARD  
COLUMBUS, OHIO**

STATE EMPLOYMENT  
RELATIONS BOARD

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**IN THE MATTER OF FACT FINDING :**

**BETWEEN :**

**CITY OF CINCINNATI :**

**-AND- :**

**FRATERNAL ORDER OF POLICE, :**  
**QUEEN CITY LODGE 69 :**

**FACT FINDING REPORT AND  
RECOMMENDATION**

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**SERB CASE NUMBER(S):** 02-MED-09-0828

**BARGAINING UNIT:** One(1) Bargaining Unit comprising Sergeants,  
Lieutenants, Captains, and Assistant Chiefs.

**FACT FINDING  
PROCEEDING(S):** January 3, 2003; Cincinnati, Ohio

**FACT FINDER:** David W. Stanton, Esq.

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**APPEARANCES**

**FOR THE CITY**

Donald L. Crain, Legal Counsel  
Joe Scholler, Legal Counsel  
John Hanselman, Assistant City Solicitor  
Tom H. Streicher, Jr., Chief of Police  
Pat DeWine, Council Member  
David Pepper, Council Member  
Rashad Young, Assistant City Manager  
Nicholas Sunyak, Budget Department  
Alice Hctor, Fiscal & Budget - Police  
Tom R. Ammann, Labor Relations Mgr., - Police  
Gregory Baker, Executive Mgr., Police Relations  
Leslie Ghit, Human Resources  
Laura Green, Human Resources  
William E. Moller, Finance Director  
Chuck Haas, Risk Manager

**FOR THE FOP**

Stephen S. Lazarus, Legal Counsel  
Roger Webster, President  
Keith Fangman, Vice-President  
Michael H. Bolte, Negotiations Team  
Robert C. Ruebusch, Negotiations Team  
John Wainscott, Negotiations Team  
Roger W. Wolf, Negotiations Team  
Ed Schindler, Negotiations Team  
Richard F. Biehl, Negotiations Team  
Rodney M. Carter, Negotiations Team  
Herb Haas, Negotiations Team

## ADMINISTRATION

By correspondence dated November 21, 2002, from the State Employment Relations Board, Columbus, Ohio, the Undersigned was notified of his mutual selection to serve as Fact Finder to hear arguments and issue recommendations relative thereto pursuant to Ohio Administrative Code Rule 4117-9-05(j); in an effort to facilitate resolution of those issues that remained at impasse between the above-captioned Parties. The impasse resulted after numerous attempts to negotiate a successor Collective Bargaining Agreement proved unsuccessful. Through the course of the administrative aspects of scheduling this matter, the statutory time frame within which the Fact Finder is required to issue the Report containing the recommendations and rationale therefore, was mutually waived by the Parties, in an effort to continue to negotiate and bargain following the City Council's rejection, by a 7-2 vote, of the Tentative Agreement reached by and between the Parties. As the evidentiary record demonstrates, the Tentative Agreement ratified by both Bargaining Units, both the supervisory and non-supervisory Employees of the respective units, was reached by and between the Parties during the course of the negotiations engaged in by them. The crux of the reasoning why the City Council rejected the Tentative Agreement reached at the table was due, in large part, to "Charter Amendment, Issue V," concerning the removal of the Assistant Chiefs from Bargaining Unit protections. The historical evolution of that issue has been subject to intense and emotional debate and the Parties are diametrically opposed relative to its legal status which served as the basis for the City Council's rejection of the Tentative Agreement. The historical evolution of that very emotional issue will be discussed in greater detail herein.

As previously indicated, the Parties were in agreement to waive the statutory Report issuance requirement beyond the 14-day time frame in an effort to continue negotiations and bargaining following the rejection of the Tentative Agreement reached by and between the Parties. Unfortunately, those efforts did not resolve the impasse and on January 3, 2003, the Fact Finding proceeding was conducted. Prior to the commencement of the presentation of evidence and supporting arguments, the Parties were offered Mediation with the Fact Finder concerning those issues that remained at impasse. A lengthy discussion ensued relative to the procedural aspects of the mediation component of the statutory process and the impact that a resolution may

have. Moreover, after lengthy consideration of mediation as a final resolution to those issues that remained at impasse ensued, the Parties indicated to the Fact Finder, after consultation with their respective clients, that any further efforts would not be productive. Based on the Parties' desire to commence forthright with the Fact Finding proceeding, the Fact Finder recognized such and complied with each Parties' request to so proceed.

During the course of the Fact Finding proceeding, each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced. The evidentiary record in this proceeding is both extensive and thorough, setting forth in great detail the respective positions of the Parties and the supporting evidentiary basis upon which respective positions were taken relative to those unresolved issues. The Fact Finding proceeding lasted nearly 10 hours and at the conclusion thereof, each Party was afforded the opportunity to present written summations concerning the positions taken during the course of the evidentiary proceeding, and this offer was respectfully declined by each advocate.

The evidentiary record of this proceeding was subsequently closed at the conclusion of the Fact Finding proceeding and those issues that remained at impasse are the subject matter for the issuance of this Report hereunder.

### **I. STATUTORY CRITERIA**

The following findings and recommendations are hereby offered for the consideration by these Parties; were arrived at based on their mutual interests and concerns; and, are made in accordance with the statutorily mandated guidelines set forth in Ohio's Administrative Code Rule 4117.9-05(k), which recognizes certain criteria for consideration in the Fact Finding forum, as follows:

- (1) Past collectively-bargained agreements, if any, between the Parties;
- (2) Comparison of unresolved issues relative to the Employees in the Bargaining Unit with those issues related to other Public and Private Employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interests and welfare of the Public and the ability of the

Public Employer to finance and administer the issues proposed and the affect of the adjustment on a normal standard of public service;

- (4) The lawful authority of the Public Employer;
- (5) Any stipulations of the Parties; and,
- (6) Such other factors not confined in those listed above which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed upon dispute settlement procedures in Public Service or in private employment.

It is important to recognize at this juncture that the consideration of enumerated paragraphs 5 and 6 concerning the “stipulations of the Parties,” as characterized, and those “other factors not confined in those listed above that are normally or traditionally taken into consideration in this dispute resolution process under the statute.” As will be discussed in greater detail herein, the Parties reached a Tentative Agreement which, during the course of the Collective Bargaining relationship and consequently the Collective Bargaining process, the Parties sit across the table and exchange proposals which equate to promises to be bound for the duration of the Agreement for each particular issue that is contained in and gleaned from the predecessor Collective Bargaining Agreement. That process enables the Parties to determine and address the expressed terminology utilized in the various provisions and Articles of that Agreement. Based on the respective position taken, either Party is free to negotiate deletions, additions and/or modifications of the terms and conditions of their Collective Bargaining relationship for the duration of the Agreement as it exists. The favorable by-product of that process is what can be gained, at times, through a Tentative Agreement. The impact of the Tentative Agreement reached by the Parties will be discussed in greater detail, but with respect to the statutory criteria, it is often recognized as those “other factors” not confined in the six(6) statutorily enumerated, or as a “stipulation” entered freely between them and commonly recognized in this dispute resolution statutory process.

**II. THE BARGAINING UNIT DEFINED; ITS DUTIES AND  
RESPONSIBILITIES TO THE COMMUNITY ; AND, GENERAL  
BACKGROUND CONSIDERATIONS**

The Collective Bargaining Agreement between the City of Cincinnati and the Fraternal Order of Police/Queen City, Lodge 69, in Article I, titled, "Recognition," thereof, states as follows:

For the contract period December 10, 2000 through December 21, 2002, and for a continuing period thereafter unless either Party gives written notice of its intention to repudiate this clause, the City agrees to recognize the FOP as the exclusive bargaining agent with exclusive bargaining rights for all sworn members of the Cincinnati Police Division holding the ranks of Police Sergeant, Police Lieutenant, Police Captain, and Lieutenant Colonel/Assistant Police Chief, with the exception of sole Lieutenant Colonel/Assistant Police Chief designated to act in the absence of the Chief and authorized to exercise the authority and perform the duties of the Chief.

As set forth in the evidentiary record, there are approximately 235 members of this Bargaining Unit who perform general police and other law enforcement related functions for the City of Cincinnati. The City of Cincinnati is a municipal corporation operating under a City Charter under the Home Rule provisions of the Ohio Constitution Article XVIII, Section 7. As the evidentiary record demonstrates further, these Parties had met on October 23, October 25, and October 31; November 4, 7, 13, 14, 19, 22, 26, and 27, 2002; wherein each Party exchanged proposals and engaged in good faith collective bargaining concerning those issues that remained at impasse. Of particular importance is the fact that the Parties were able to reach a Tentative Agreement for both Bargaining Units that occurred on December 4, 2002 - the Supervisors and non-supervisory personnel recognized in the two(2) separate and distinct Collective Bargaining Agreements. The key issue that proved to be the stumbling block for the Parties involved the Assistant Chief/Charter V issue which, at the time of this Fact Finding proceeding, was the subject of a pending Unfair Labor Practice charge with the State Employment Relations Board; and, which is subject to varying accounts, a lawsuit concerning the legalities of this issue and the impact it has, or may have, on the collective bargaining relationship.

As part of this evidentiary record, the Fact Finder was provided two(2) video-taped copies, one from each side, of the City Council meeting where the Tentative Agreement was

discussed. The impact that Issue V, as it existed, would have on the removal of the Assistant Chiefs from the protections of the Collective Bargaining Agreement, was emotionally addressed.

From a historical standpoint, the voters of the City of Cincinnati on November 6, 2001, voted 52% to 48% in favor of the so-called Issue V. In Article V, Section 5, the City of Cincinnati Charter states as follows:

The positions of Police Chief and Assistant Police Chief shall be in the unclassified civil service of the City and exempt from all competitive examination requirements. The City Manager shall appoint the Police Chief and Assistant Police Chiefs to serve in said unclassified positions. The Police Chief and Assistant Police Chiefs shall be appointed solely based on their executive and administrative qualifications in the field of law enforcement and need not, at the time of appointment, be residents of the City or State. The Police Chief may be removed at any time by the City Manager. After the Police Chief has served six months, he or she shall be subject to removal only for cause including incompetency, inefficiency, dishonesty, insubordination, unsatisfactory performance, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or convictions of any felony. If removed for cause, the Police Chief may demand written charges and the right to be heard thereon before the City Manager. Pending completion of such hearing, the City Manager may suspend the Police Chief from office. The incumbent officers in the Police Chief and Assistant Police Chief positions at the effective date of this Charter provision, shall remain in the classified civil service until their position becomes vacant after which time their position shall be filled according to the terms of this section.

Summarily stated, the Charter amendment indicates that the Police Chief and Assistant Police Chiefs, which number four(4), shall be appointed on the basis of their qualifications in the field of law enforcement and their residency within the City of Cincinnati or the State of Ohio was not required. This amendment also placed the Police Chief in a tenure category after six months and that he be removed "for cause" where the Assistant Police Chief remained in an unclassified position and subject to termination, removing the protections of the Collective Bargaining Agreement and Union status and essentially rendering them employees-at-will. Current Assistant Chiefs were grand fathered and not subject to the terms of the Charter amendment. The impact on the Collective Bargaining Agreement, effective at the time the Charter amendment was approved by the voters, provided both Civil Service protection and binding Arbitration for the Assistant Chiefs, even those hired in the future, unless the Contract

was modified by the Parties to reflect the changes in the Charter amendment.

As the evidentiary record clearly demonstrates, the City and its Police Department have been embroiled in controversy including racial tension that has existed over the past few years prompting the U.S. Department of Justice to conduct an investigation regarding certain use of, and degree of force, issues raised resulting in certain prescribed mandates to occur in response thereto. Moreover, the Parties have implemented in a “collaborative” to address these types of issues to better enable the Parties to recognize and respond to the interests and concerns of all citizens within the City of Cincinnati. This is not to say that the intentions of the Parties have been anything less than having that precept in mind simply that, as is evident from the video-tape of the Council session wherein this Tentative Agreement was discussed, there is need for improvement of this relationship.

Following the conclusion of the evidentiary proceeding, recent events involving the shooting of a burglary suspect and the disciplinary action taken against several officers unfortunately continued to plague the City and its Police Department and the overall perceptions the public has relative thereto have not cast a positive light on the City.

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The numerous issues that remain at impasse were contained in a tentative “package” both to the Bargaining Unit and to City Council. This Bargaining Unit ratified the Tentative Agreement as did the non-supervisory bargaining members. However, City Council rejected the Supervisor’s Tentative Agreement by a 7-2 vote, but voted to accept the Tentative Agreement unanimously for the non-supervisory unit.

It is with this concept and premise in mind that the Fact Finder will address and make a “blanket” recommendation concerning the overall Tentative Agreement reached by and between the Parties concerning those issues that remain at impasse and were the subject of the presentation of extensive evidentiary documentation which has been reviewed and compared with respect to the enhancements, and concessions as they may exist, for each Party. It is important to note the comparisons to the comparable jurisdictions would in many cases not rise to the level of that contained in the Tentative Agreement or be supported by the comparable data provided by the Parties. This is true with respect to economic enhancements, Insurance and

particularly true with the modifications made to the Grievance and Arbitration Article of the Collective Bargaining Agreement.

It is against this backdrop that the Fact Finder, after consideration of this entire evidentiary record and based upon the circumstances of the very emotional Charter amendment issue and those other unfortunate, yet emotionally charged instances that have even occurred in recent weeks following completion of the evidentiary proceeding, has given due consideration as to the impact on the issuance of this Report herein. The Fact Finding level of the statutory process, which is neither final and/or binding, affords a neutral third-party, experienced in public sector, labor relation matters, the opportunity to review and analyze the evidentiary record produced by the Parties and set forth recommendations concerning the structure and complexion of the Collective Bargaining Agreement under which the Parties will bound, supported by rationale as to why a certain position is being recommended. Only those issues that were identified by these Parties are the subject matter for this Report hereunder.

As previously stated, under the statutory process, the Fact Finder is required to consider comparable employee units with regard to their overall makeup and services provided to the members of this respective community. Data has been provided relative to other municipalities and jurisdictions concerning comparable work provided by this Bargaining Unit. As is typically apparent, there is no “on-point” comparison relative to this Bargaining Unit. The *status quo* as it exists at this juncture would be that contained in the Collective Bargaining Agreement tentatively agreed to by and between the Parties at the negotiations table. The Party seeking to deviate from or delete any provision in that Tentative Agreement bears the burden of proof and persuasion to compel the change so proposed. Failure to meet that onerous burden, given the existence of the Tentative Agreement and the current state of the law in Ohio concerning Charter Issue V, will result in the recommendation that the Parties maintain the *status quo*, or in this situation that contained in the Tentative Agreement as it shall be afforded compelling, outcome-determinative weight. Based on the package agreed to by and between the Parties, it is that package that will be discussed in its entirety by the Fact Finder herein.

### **III. RECOMMENDATION**

It is hereby recommended that the Parties adopt, in its entirety, the Tentative Agreement as reached by and between them following the numerous and painstaking hours, as characterized by the Employer reaching some 100 hours of face-to-face negotiations at the bargaining table; wherein, they have manifested their mutual intent to be bound by the terms expressed, both recognizing the spirit and intent thereof, for the period of time so agreed between them. There is no compelling evidence or, in the opinion of the Fact Finder, any other legitimate alternative, that would warrant a recommendation other than that the Parties incorporate into the successor Collective Bargaining Agreement those terms and conditions, including that as it impacts Article V, Charter Amendment V, of the City Charter, into this successor agreement.

#### **A. THE IMPACT OF THE TENTATIVE AGREEMENT**

As the evidentiary record demonstrates, these Parties reached Tentative Agreement on the unresolved issues on or about December 4, 2002, for both Bargaining Units, the Supervisors and non-supervisory personnel. The non-supervisory personnel ratified the Tentative Agreement and City Council voted unanimously to accept that agreed to by and between the Parties. It is critical that the recognition by both Parties to that achieved at the bargaining table by their respective bargaining teams was followed in a convincing fashion - ratified by the Bargaining Unit and unanimously approved by City Council. With respect to this Bargaining Unit, the Supervisors, the sole critical issue that proved fatal to City Council's approval of this Tentative Agreement involved Charter Amendment V. Based on the current structure of City Council, having nine members, a 7-2 vote rejecting that Tentative Agreement would seem overwhelming. However, the undersigned cannot ignore the fact that these Parties have demonstrated and set forth in that Tentative Agreement their manifested intent to be bound by the terms contained therein when they reached this Agreement after numerous, lengthy sessions of face-to-face bargaining. By recognizing the Tentative Agreement and affording to it compelling, if not outcome-determinative, weight is in accordance with the statutory criteria that recognizes those other "factors" normally or traditionally relied upon in this component of the statutory process and provides the cornerstone on which collective bargaining exists, not only under this statutory

process, but generally speaking.

It is incumbent upon each Party to any dispute to place at the bargaining table those individuals that will seek the best available deal and to be assured that its constituents will support what it brings back for final approval. These individuals at the bargaining table are charged with the responsibility, based on the authority bestowed upon them by their selection thereto, to “close the deal” and then importantly be supported for which they have represented as being worthy of labeling “Tentative Agreement.” While the undersigned is indeed mindful and sensitive to the concerns raised by the council members, not only during the Council session where the Tentative Agreement was considered, but also from Council Members DeWine and Pepper who appeared and made statements at the Fact Finding proceeding, I must also recognize and discharge my duties arising under 4117 that necessarily takes into account the manifested intent demonstrated by these Parties with the same commitment and passion as articulated by City Council. Indeed their obligation to uphold the City Charter is noteworthy and based on the oath of office that they have taken, their position is indeed predictable.

As Mayor Luken noted, however, this Tentative Agreement was rejected by City Council based on the impact that Charter V had on, “...three(3) Bargaining Unit members.” Currently, according to the evidentiary record, there exists the so-called “exemption” which contractually allows the City to pursue that which it is attempting to pursue, in a broader scope, by virtue of the Charter V amendment. This exemption, has never been exercised by the City according to the evidence provided to the undersigned which would mean that three(3) of the four(4) Assistant Chief positions would remain under the Collective Bargaining Agreement protections while one(1) could be exempted therefrom.

It is important to note that the stability and trust, which are tantamount to any collective bargaining relationship, can diminish and will erode when good faith is factored out of the equation when Tentative Agreements are not honored or supported. Again, while I am mindful and sensitive to this very emotional issue, it is imperative that the Parties continue to recognize the good faith necessary in establishing and continuing to grow a healthy collective bargaining relationship. Painstaking bargaining preceded this Tentative Agreement as was characterized in the numerous sessions that occurred amounting in approximately 100 hours of face-to-face

bargaining and for this Fact Finder or any other Fact Finder to ignore or discount that which is hammered out at the bargaining table by those selected to represent the respective entities, can only lead to the demise of the relationship between them. These time honored, basic and fundamental principles of the collective bargaining process must be given, and have been afforded herein, significant, compelling and outcome-determinative weight when analyzing the recommendation that affirms the Tentative Agreement reached by and between the respective negotiations teams.

The sanctity of the collective bargaining process must be recognized and upheld by the Fact Finder under this component of the dispute resolution process recognized under the Ohio Collective Bargaining Law. It is clear, and will be discussed in greater detail herein, that the current state of the law in Ohio, in which this Employer was involved with another Bargaining Unit, provides that the Collective Bargaining Agreement provision supercedes a Charter of a municipality, or as in this case, an Amendment thereto . It is clear that the advocates had this legal knowledge in mind at the time that this provision was negotiated resulting in a Tentative Agreement, while recognizing, as the respective team members have indicated during the course of the Fact Finding proceeding, that the historical and emotional impact that this issue would have on the collective bargaining relationship is profound and is likely to require further adjudication in another forum. However, for the purposes of this statutory process, the impact of that Tentative Agreement must carry compelling significance with respect to the role and the function of the Fact Finder under the statutory process particularly in light of the normal and/or traditional considerations and issues that arise under the collective bargaining process that includes the Parties' fundamental ability to reach a Tentative Agreement.

In this regard, there is no compelling evidence that would warrant any deviation, modification, or deletion of the terms contained in the Tentative Agreement and based thereon, it is hereby recommended that the Parties adopt in its totality the terms and the conditions contained in the Tentative Agreement reached by and between the Parties through their respective negotiation teams that was ratified by the Bargaining Unit; however, rejected by City Council.

**B. THE LAW IN THE STATE OF OHIO**  
**CONCERNING THE IMPACT OF A COLLECTIVE BARGAINING**  
**PROVISION ON THE CHARTER OF A CITY OR MUNICIPALITY**

During the course of the Fact Finding proceeding, it became abundantly clear, based on the evidentiary record provided, that certain questions regarding the legality of the Charter V Amendment and the impact on the current Collective Bargaining Agreement would be subject to judicial scrutiny not only in the court system, but through the administrative agency that oversees and polices the Collective Bargaining Law in the State of Ohio. The City takes the position that the “will of the voters” must override the current status of Ohio Collective Bargaining Law. To recommend the City’s position would require that the Fact Finder ignore prevailing law which if recommended based thereon, would render voidable, as a matter of law, those provisions contained in the contractual document. Contracting Parties have never been required to enter a binding agreement that compels illegal activity or sanctions an illegal status. Until the law changes, a negotiated Collective Bargaining Agreement must pre-empt and supercede a City Charter, and any Amendments thereto, as set forth in prevailing Ohio law. This fact simply cannot and will not be ignored.

The Collective Bargaining Agreement became effective prior to the voters consideration of Amendment V that occurred on or about November 6, 2001 which in essence would remove the Assistant Chief classifications from the protections they currently have under the Collective Bargaining Agreement. Apparently, the protections under the Collective Bargaining Agreement concerning the Assistant Chiefs have been in effect since at least 1984 and have been under the auspices of the collective bargaining agreement and the exclusive collective bargaining representative’s obligations to the Bargaining Unit since that time. It is clear, based on the evidentiary record, i.e., the prevailing law in Ohio, that the collective bargaining provision continues to apply to the position of the Assistant Chief; therefore, remaining subject to the terms and conditions of the Collective Bargaining Agreement regardless of any consideration that it be classified or unclassified civil service. The language in the Collective Bargaining Agreement precedes that of the Charter V Amendment. This is exactly what was being sought to be changed by the very existence of the Charter V Amendment that was placed before and approved by the

voters, on November 6, 2001. The pre-existing terms of the Collective Bargaining Agreement must supercede that which is subject to the “will of the voters” prompting the intense and emotional controversy pertaining to this issue.

According to the evidentiary record, the City of Cincinnati has been involved in litigation over this precise issue before the Ohio Supreme Court. In *Cincinnati v. Ohio Council 8, American Federation of State, County and Municipal Employees*, 61 Ohio St. 3<sup>rd</sup> 658, (1991) the Ohio Supreme Court held:

The provisions of a Collective Bargaining Agreement entered into pursuant to R.C. 4117 prevail over conflicting laws including municipal home rule charters enacted pursuant to Section 7, Article XVIII, of the Ohio Constitution except for those laws specifically exempted by R.C. 4117.10(A).

It is clear that there are no laws exempted by R.C. 4117.10(A) in this particular set of circumstances. The Ohio Collective Bargaining Law provides that a municipality may, in fact, negotiate a provision for inclusion in a labor agreement and that provision must prevail over, and supercede the mandates of a municipal Charter even if they are inconsistent. It is clear that the Ohio General Assembly recognized where terms in a Collective Bargaining Agreement conflict with those of a municipal Charter, the Agreement, or “Contract” entered between the Parties, must pre-empt and supercede the terms of the municipal Charter. It is clear that Issue V constitutes an amendment to the Charter of the City of Cincinnati and therefore qualifies under this legal analysis. As was clear, based on the chronological events in question, the terms of the negotiated Collective Bargaining Agreement between the City of Cincinnati and the Fraternal Order of Police, Queen City Lodge 69 provides certain contractual protections to the Assistant Chief who may be terminated and have said action appealed to Arbitration; and, such existed prior to the adoption of Issue V based on the vote of the public.

The fundamental premise upon which that concept has been adopted by the Ohio General Assembly and addressed in the Ohio Collective Bargaining Law, gains its stature prohibiting any law that may be passed that may impair the obligation of contracts. Indeed, the Collective Bargaining Agreement is a “Contract” between two entities - in this case, the City of Cincinnati and the Fraternal Order of Police. The law is clear, based on this legislative policy, adopted by the Ohio General Assembly, and is consistent with this premise that a Labor Agreement may in

fact pre-empt conflicting municipal Charter terms which the Amendment V is recognized to be.

Moreover, it is generally recognized that “laws” cannot be enacted that would, in fact, conflict with or eliminate existing contractual obligations. The FOP Contract existed prior to the adoption of Issue V and based thereon, even though the various legal processes have not been exhausted, the evidence in this record for consideration by this Fact Finder under the Ohio Collective Bargaining Law dispute resolution process, affords compelling weight to further recommend that the Parties adopt the Tentative Agreement which recognizes and continues to affirm the rights of Assistant Chiefs that pre-existed the adoption of Charter Amendment V. The City Charter, including this Amendment thereto, must give way to the negotiated provisions under this Contract which pre-empts the conflicting municipal Charter terms as recognized and adopted under the Issue V Amendment.

It is important to note that currently under the Collective Bargaining Agreement, the City has the ability to “exempt” one(1) of the Assistant Chiefs from their existing status which has not been exercised, according to this record. As Mayor Luken correctly characterized, the entire Tentative Agreement is being rejected based on three(3) positions within the Bargaining Unit comprising approximately 235 members. While I am indeed mindful of and sensitive to the office of City Council and the members who have committed themselves to discharging their duties as a Council Members, including following their oath of office to uphold the Charter of the City, that obligation to discharge those duties also carries with it the obligation to recognize the contractual relationships it has entered prior to, perhaps being elected into office, or as has existed in this Collective Bargaining relationship from years prior. This is indeed an emotional and sensitive issue and those Council members that feel committed to upholding the “will of the people” via the voting process, resulting in the Charter Amendment V, are indeed worthy of praise. However, based on the current status of the law, which has gained recognition from the Ohio General Assembly, and affirmed by the Ohio Supreme Court, affords compelling weight to allow negotiating Parties under a Contract to establish terms and conditions of a Collective Bargaining relationship; and, according to the prevailing law, must pre-empt and supercede that even supported by the will of the voters.

It is clear, and this record certainly supports, a recommendation based on the legality of

this issue in this particular forum that would mandate a recommendation to affirm the terms and conditions of the Tentative Agreement recognizing that this particular issue is the stumbling block for its passage. To reiterate, I am indeed mindful of the sensitivity and emotion attached; however, it is indeed necessary to recognize the contractual obligations entered freely and without duress as set forth in the Collective Bargaining Agreement. As the finder of fact under the statutory scheme, it is the Fact Finder's obligation to provide a rationale to the Parties based on the evidentiary record provided. Given the turmoil that has stifled this City, both in recent times and in the last several years, it is indeed important to set the stage for recognizing certain rights and obligations that can coexist with the will of the voters. Just as City Council members have indicated both in the video-taped council session, as well as, the statements articulated by Messrs. Pepper and DeWine concerning their obligations to uphold the City Charter as written and as amended, the Fact Finder, too, is obligated to uphold the integrity and sanctity of the Collective Bargaining process. And based on this evidentiary record, it would indeed be imprudent and illegal to recommend that these Parties adopt any language that would in fact be counter to the prevailing law in the State of Ohio.

Based thereon, the recommendation again affirming that contained in the Tentative Agreement package is hereby made.

#### IV.

It is important to address certain aspects of the Tentative Agreement which, based on this evidentiary record before the Fact Finder, are worthy of summary analysis. With respect to Wages, it is clear that historically this bargaining unit has received increases of 3% and is coming off a 3% increase for the preceding contractual year. The current package not only provides for such an increase, but also an increase to the OPATA Certification Pay - from 2% to 4% paid at the highest step of a Patrol Officer's base rate - that essentially equates to a 5% increase for each of the two(2) years of the successor Agreement. It is clear, based on the comparable data provided, that the status of the Police Department relative to Wages and other economic enhancements would not adversely impact its overall "rank" among comparable jurisdictions.

Secondly, it is noteworthy to address the Parties' desire, as indicated through the Tentative Agreement and as explained to the Fact Finder during the course of the Fact Finding

process, its intent to address what is being characterized a dispute resolution process in need of “repairs.” It is interesting to note in City Exhibit 54, representing a memorandum from Pat DeWine, Council Member, to John Shirey, then City Manager, addressing the Arbitration process. On page three(3) thereof, he questions the appropriateness of utilizing a certain agency’s Arbitrators. Fact Finders generally are selected from a pool of Arbitrators that typically decide labor disputes arising under a Collective Bargaining Agreement. Arbitrators render decisions based on time honored principles taken from legal standards, as well as, “the common law of the shop,” and it matters not where an Arbitrator resides or from which panel he or she may be chosen. Arbitrators typically apply in a consistent fashion, the standards of the profession that have been the subject to intense debate and obviously have arisen from arbitral law over the course of many years. While I am indeed mindful of the City’s concerns, the arbitration process has not failed these Parties despite the conceptions being debated concerning the manner in which the City of Cincinnati issues discipline to Police Officers. The Arbitrator’s obligation to the process is to adjudicate the matter based on the factual scenarios that exist while applying the time honored standards relative to the labor relations under this time honored process.

It is indeed commendable that the Parties are looking to address discovery. It has been and will continue to be this Fact Finder’s position that the Grievance procedure affords the Parties various steps to complete discovery that may and can lead to avenues to explore settlement. To have a formal discovery process under the Collective Bargaining Agreement, insures that this will be completed and performed and if that fails in some way, since it now becomes a term and condition of the Collective Bargaining Agreement, such, too, can be addressed through the Grievance procedure.

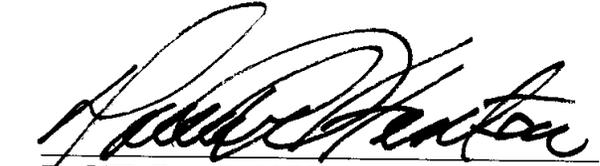
Moreover, the Tentative Agreement also provides that both Bargaining Units have been brought into conformity with the City’s AFSCME Unit regarding Healthcare Insurance premiums contributions which is indeed a significant concession based on the current crisis impacting the health insurance industry, both nationally and on a local basis. Indeed comparable jurisdictions throughout the state are now recognizing some level of Employee contribution relative to healthcare insurance premiums and there is no end to that trend in the near future.

Finally, the Parties agreed to the inclusion of two(2) new Articles for both Bargaining Units to provide an additional Cincinnati Police Training Allowance in an amount equal to 2% of the member's base pay which is to be paid bi-weekly throughout the contractual year. This was prompted by the collaborative Agreement, previously addressed, and to insure the citizens of Cincinnati that indeed the Officers are receiving training in various aspects of the performance of their job duties.

It is indeed imperative to note the significant enhancements, and in some areas concessions, made by both Parties which indeed confirms the concept of collective bargaining. The *quid pro quo* exchange of ideas, concepts, proposals, and promises is evident when the Parties are able to reach a Tentative Agreement as in this case was achieved. It is indeed unfortunate that the impact of Issue V has dampened that collective effort, but the resiliency of these Parties has been exhibited in recent times and in times when the national spotlight has appeared.

#### **V. CONCLUSION**

It is respectfully requested that the recommendations contained herein can be deemed as reasonable in light of the data presented, the representations made by the Parties the sensitivity and emotion attached to the Issue V Amendment and its impact on these Parties while recognizing the painstaking efforts at the Bargaining table that resulted in the Agreement that was ultimately rejected. It is hopeful that the Parties can adopt these recommendations so that the successor Collective Bargaining Agreement can be ratified and this Collective Bargaining relationship, that has experienced its share of turmoil in recent times, can continue without further interruption and turmoil. These recommendations are offered based on the comparable data provided; the manifested intent of each Party as reflected during the course of this aspect of the statutory process resulting in the Tentative Agreement that was subject to ratification and approval by the City Council; that Tentative Agreement reached by and between them; any and all stipulations of the Parties; the positions indicated to the Fact Finder during the course of this statutory process; and, are based on the mutual interests and concerns of each Party to this Collective Bargaining relationship.

  
DAVID W. STANTON, ESQ.  
Fact Finder

Dated: March 11, 2003  
Cincinnati, Ohio

**CERTIFICATE OF SERVICE**

The Undersigned certifies that a true copy of the foregoing Fact Finding Report and Recommendations have been forwarded by overnight U.S. mail service to Donald L. Crain, Frost Brown Todd, LLC, 300 North Main Street, Ste. 200, Middleton, Ohio 45042; Steven S. Lazarus, Hardin, Lefton, Lazarus and Marks, LLC, Suite 915, Cincinnati Club Building, 30 Garfield Place, Cincinnati, Ohio 45202; and, Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213, on this 11th day of March, 2003.

  
DAVID W. STANTON, ESQ. (0042532)  
Fact Finder

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