

STATE OF OHIO

STATE EMPLOYMENT  
RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD

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FACT FINDING PANEL

SERB CASE NO. 02-MED-09-0919

HAMILTON COUNTY DEPUTY SHERIFF  
SUPERVISORS ASSOCIATION and  
HAMILTON COUNTY SHERIFF

FACT FINDER'S REPORT AND RECOMMENDATIONS

MICHAEL MARMO

FACT FINDER

FEBRUARY 5, 2003

## HEARING

The Hearing took place on January 10, 2003 at the Sheriff's Building on Hamilton Avenue, and lasted from 9:00 a.m. until 2:00 p.m. Representing the Association were Theodore Sampson, the Chairman; John S. Murray, Vice-chairman; team members, Stephen J. Toelle and Ernest F. Grote, Jr.; and their principal representative, Stephen S. Lazarus. Representing the Sheriff were Administrative Assistant, Gail Wright, Human Resources Manager, Kim Serra; Director of Corrections, Joseph Schmitz; and their principal representative, Mark Lucas, a consultant with Clemans, Nelson, and Associates.

## ISSUES REMAINING AT IMPASSE

At the time the fact finder entered the dispute, the following issues remained at impasse:

Article 2- Association Security

Article 6- Non-Discrimination

Article 7- Grievance Procedure

Article 8- Discipline

Article 9- Personnel Files

Article 10- Probationary Period

Article 11- Seniority

Article 12- Vacancies and Promotions

Article 13- Layoff and Recall

Article 18- Hours of Work and Overtime

Article 19- Wages

Article 20- Court Time/Call-In-Time

Article 21- Insurance

Article 22- Holidays

Article 24- Sick Leave

Article 26- Donated Time

Article 27- Uniforms and Equipment

Article 29- Training

Article 30- Leave of Absence

Article 34- Residency

Article 35- Duration

Article 36- Performance Evaluations

Article 37- Physical Fitness/Weight Standards

#### MEDIATION

Mediation was attempted, and resolved Article 13, Layoff and Recall, and Article 20, Court Time/Call-In Time.

#### CRITERIA FOR DECISION

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

--A comparison of unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

--The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustment on the normal standard of public service;

--The lawful authority of the public employer;

--Any stipulations of the parties; and

--Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

#### ARTICLE 2, ASSOCIATION SECURITY

## POSITIONS OF THE PARTIES

The Employer proposed to delete the fair share provisions in Section 2.4 of the current Agreement. They believe that if they were not required to pay union dues, some members of the bargaining unit would prefer not to support the Association. The Employer argued that historically, union security arrangements have been applied mainly to rank and file employees, but not supervisors.

The Association argued that the attempt to remove the fair share provision is an attempt to weaken, and eventually eliminate the Union. They said it would be difficult for them to be on even footing with the Sheriff, if denied financial support from all of the bargaining unit members they represent.

## FINDING OF FACT

The Employer is correct when it argues that historically, union security provisions have predominantly been applied to rank and file union member, and not to supervisors. The reason for this difference, however, is that unions overwhelmingly represent rank and file employees, rather than supervisors. The same arguments in favor of, and against, union security provisions in collective bargaining agreements appear to apply, regardless of whether the bargaining unit is comprised of rank and file employees or supervisors.

Most important, however, is that the current Agreement contains a fair share provision. Because of the tremendous value such a provision has to the Association, its elimination could only be contemplated in return for a very significant quid pro quo. Since the Employer has not offered such concessions, the fair share provision should remain in the existing Agreement.

## RECOMMENDATION

The fact finder does not recommend any changes in this provision.

## ARTICLE 6, NON-DISCRIMINATION

### POSITIONS OF THE PARTIES

In the current Agreement, the “Employer and the Association agree not to discriminate against any bargaining unit employee with respect to compensation, terms and conditions of employment because of such individual’s race, color, religion, sex, age, national origin, disability, ancestry of any person, or Association membership or non-membership.” The Employer proposed adding the word “unlawfully” prior to the word “discriminate” in the first line of this Article.

The Employer argued that some forms of discrimination are legal, such as assigning an individual of a particular sex to a certain job, if sex constituted a bona fide occupational qualification for that job.

The Association argued that this provision has never presented a problem to the parties. It added that the current language protects employees against discrimination, even if it is not unlawful, and that it sees no reason to give up that language.

#### FINDING OF FACT

Because the existing Agreement does not contain the change proposed by the Employer, and because no problems appear to have been caused by the absence of such language, no change appears warranted.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

#### ARTICLE 7, GRIEVANCE PROCEDURE

#### POSITIONS OF THE PARTIES

The Employer proposed two changes to the existing Agreement: that at least five days prior to an arbitration, the parties be required to exchange lists of the witnesses and documents they intend to exchange at the hearing; and that the losing party pay the arbitrator's fee, or share the fee equally in the case of a "split" decision. The Employer conceded that the initial impetus for this proposal was to bring it into conformity with the contract in effect for the Corrections Officers. In addition, they argued, it would aid the settlement of grievances prior to arbitration, if more information was shared prior to the hearing. Finally, the Employer maintained that loser pays arbitration is a way of reducing the number of grievances that lack merit that proceed to arbitration.

The Association argued that the Employer has access to all documents, so there is no reason to require the exchange of documents prior to the hearing. In addition, the Association argued that a mechanism to reduce the number of grievances advancing to arbitration is unnecessary in a bargaining unit that rarely has an arbitration. Finally, the Association said that because the bargaining unit is relatively small, they do not have the resources to proceed to arbitration with grievances that lack merit.

#### FINDING OF FACT

There is some merit to the Employer argument that the exchange of information prior to an arbitration hearing could facilitate the settlement of the grievance prior to the hearing. However, since grievances in this unit rarely proceed to arbitration, there is no compelling reason for a change.

The Employer proposal for loser pays arbitration, and equally sharing the cost of an arbitrator in the case of a "split" decision, adds confusion to the arbitration process.

Although loser pays grievance arbitration is becoming more common, it remains the exception. In addition, the fact finder believes that an arbitrator should decide a grievance solely on its merits. With the language proposed by the Employer, the decision of the arbitrator could be inappropriately influenced by his/her recognition of the cost implications of their decision.

Because loser pays, or splitting the cost of arbitration are not the norm, and because the current Agreement does not contain such a provision, there is no compelling reason to change the existing Contract.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

#### ARTICLE 8, DISCIPLINE

##### POSITIONS OF THE PARTIES

The only issue that remains in dispute on this matter is in Section 8.6. Under the current Agreement, an employee accused of a felony is placed on leave until the matter is resolved. At present, if the employee is found innocent, or if the charge is reduced to a misdemeanor, he or she is paid for the leave. The Employer proposed that if an employee pleads guilty to a misdemeanor charge, they not be paid for their period of leave. Pleading guilty to a misdemeanor charge, the Employer argued, is still evidence of inappropriate behavior and should not be rewarded by a paid leave.

The Association argued that many misdemeanors involve relatively minor offenses, and should not expose an employee to a loss of wages. In addition, they said, regardless of the disposition of the legal charges, the employee remains subject to disciplinary action on the job if the offense is serious in nature.

##### FINDING OF FACT

It was clear from the testimony at the hearing, that the reason this change was proposed by the Employer was to achieve consistency with the Contract covering Corrections Officers. Discipline is not a problem with the employees in this unit, and the proposal advanced by the Employer is not intended to resolve an existing problem. Because the current Agreement does not contain the language sought by the Employer, and because no significant disciplinary problems exist in this unit, no changes are warranted at this time.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

## ARTICLE 9, PERSONNEL FILES

### POSITIONS OF THE PARTIES

After considerable discussion, the parties reached agreement on Sections 9.1 and 9.2. Although the parties reached substantive agreement regarding the matters addressed in Section 9.3, they did not agree on the language to reflect that agreement. The Employer was concerned that if a Level 4 Warning was followed by a lesser infraction, the current language could be construed to reduce the time period the Level 4 Warning would have force and effect. The Association believes that the language proposed by the Employer would have the effect of unintentionally lengthening the time period a Level 4 Warning would have force and effect.

The parties agreed that it would be acceptable to adopt the schedule of how long discipline should remain in effect that was adopted in recent negotiations with Corrections Officers.

The Employer proposed minor changes in language in Sections 9.4 and 9.5. The Association, in part, accepted the proposed changes, but wanted to retain existing language in other parts of these sections. Neither party considered these changes of great significance.

### FINDING OF FACT

As indicated, the parties reached substantive agreement on changes they wished to incorporate in this section. They could not agree on language to express that agreement. Because the fact finder is not as familiar with the disciplinary policy as the parties, he doubts he could recommend language that would be better than that fashioned by the parties. He will therefore recommend that the language incorporated in the contract with the Corrections Officers serve as the basis for this provision.

Because no compelling reasons were advanced by the Employer to support their recommended changes in Sections 9.4 and 9.5, he believes that unless the Association agreed to the change, current contract language should remain in effect.

### RECOMMENDATION

This Article should read:

Section 9.1 Each employee may inspect his/her personnel file maintained by the Employer. Inspection of the individual's personnel file shall be by scheduled appointment requested in writing or by phone call to the Employer or designee.

Appointments shall be during the regular scheduled work hours of the administrative staff of the Employer and during the non-work hours of the employee. An employee shall be

entitled to have a representative of his/her choice accompany him/her during such review. An employee may copy documents in his/her official personnel file.

Section 9.2. If an unfavorable statement or notation is in the employee's official personnel file, the employee may place a statement of rebuttal or explanation in the file. No anonymous material of any type shall be included in the employee's official personnel file.

Section 9.3. Records of Level 1 Warnings shall cease to have force and effect one (1) year after the date of issuance, provided no intervening discipline has occurred. Records of Level 2 and Level 3 Warnings shall cease to have force and effect two (2) years from the date of issuance, provided no intervening discipline has occurred. Records of Level 4 Warnings shall cease to have force and effect five (5) years from the date of issuance, provided no intervening discipline has occurred. In the event of intervening discipline, these records of discipline shall cease to have force and effect five (5) years or two (2) years from the date of the most recent issuance of discipline, as appropriate to the schedule in this section.

Section 9.4. The Employer will not disclose items from an employee's official personnel file that are prohibited from disclosure under current law.

Section 9.5. Within fifteen (15) calendar days of certification of the results of any promotional examination, a bargaining unit employee may review his/her examination paper. Such review shall be granted upon receipt of a written request through the chain of command, and shall not exceed sixty (60) minutes.

An applicant who reviews his/her examination pursuant to the provisions of this Section shall be precluded from eligibility to take the same exam within six (6) months of the review date, unless an alternate form of the exam is given.

The provisions of this Section apply only to examinations prepared by the Ohio Department of Administrative Services or the Employer. Review of the result of exams obtained from any other source shall not be permitted.

## **ARTICLE 10, PROBATIONARY PERIOD**

### **POSITIONS OF THE PARTIES**

The Association proposed that the probationary period for Lieutenant's be reduced from one year to six months. It wants to make the probationary period for Lieutenant consistent with the Captain's probationary period, which is six months. The Association conceded that a one year probationary period is appropriate for Sergeants, because they have not yet served in a supervisory capacity. Because Lieutenants have already demonstrated their ability to be supervisors, the Association argued, a six month probationary period is adequate to judge their performance. Finally, the Association

pointed out that no problems with newly promoted Lieutenants have ever been shown to exist.

The Employer wishes to retain the one year probationary period for Lieutenants. If the Association believes that a consistent probationary period is desirable, the employer argued, it make more sense to extend the probationary period for Captains to one year. Six months, the Employer said, is simply not adequate time to judge the performance of Lieutenants.

#### FINDING OF FACT

Because the current Agreement provides for a one year probation for Lieutenants, and because no compelling reasons were advanced to justify a change, the current provision should remain in effect.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

#### ARTICLE 11, SENIORITY

#### POSITIONS OF THE PARTIES

The Association proposed that shifts be selected on the basis of seniority. They provided documentation indicating that in Stark, Montgomery, Cuyahoga, Butler, and Greene counties, shift selection is based on seniority. They argued that employees who have invested years of service with the Employer should be afforded the privilege of selecting a shift that is least disruptive to their lives.

In addition, the Association said that they are disadvantaged by the fact that they are not contractually required to receive adequate warning prior to a change in their schedule. It is hard to plan your life, they said, when you never know when your schedule will change.

The Employer proposes that current contract language be retained. They argue that the Employer needs to retain the ability to assign staff in a manner that best fits the organization's needs and to rotate bargaining unit members in a manner that will broaden their skill base. Because of high turnover of Corrections Officers, the Employer contends, it must retain considerable discretion in the assignment of supervisory personnel.

#### FINDING OF FACT

The Association raises two salient, but fundamentally separate points, with respect to this article; the assignment of bargaining unit members to shifts based on seniority, and the

desire of employees to be able to able to reduce the number of disruptions in their life that occur at the last moment.

Although it is not unheard of for Corrections Supervisors to have shift assignments governed by seniority, it is not the norm. In this case, based on the relatively small number of supervisors, their differing levels of experience, and the need to staff more than one facility, the fact finder believes it would be unduly restrictive on the Employer to require that shift assignments be governed by seniority.

The Association, however, has an understandable concern that there is minimal contractual protection regarding the ability of the Employer to change shifts. Because this concern is not directly related to seniority it will be addressed in the consideration of Article 18 in this report.

## RECOMMENDATION

No changes are recommended in this Article.

## ARTICLE 12, VACANCIES AND PROMOTIONS

### POSITIONS OF THE PARTIES

The Association proposed language that ensures that rank structure be followed in the promotional process; that is, bargaining unit members could only be considered for promotion if they are currently employed in the next lowest rank. The Association argued that as a paramilitary organization, it is important that rank structure be followed. All other divisions in the Sheriff's Office, the Association argued, restrict candidates for promotion to those in the next lower rank.

The Employer argued that the Association was simply trying to reduce the discretion of the Sheriff. The current Agreement, the Employer said, permits the greatest number of qualified candidates be considered for promotion, so it should be retained. Finally, the Employer said that unit members should not be permitted to criticize the current promotional system, because it was responsible for their promotion.

### FINDING OF FACT

The Employer's argument that bargaining unit members cannot criticize the existing promotional system because it was responsible for their promotion, has no merit. If the Association believes the current system is flawed, they have every right to suggest that it be modified. Clearly, not all bargaining unit members benefited from the current system. During the hearing, it was stated that several years ago, a Sergeant was promoted to Captain. The top rated Lieutenant who was denied the promotion in that instance did not benefit by this system.

The Association is correct when it argues that in most paramilitary organizations strict rank structure is followed. Historically, however, this practice has not prevailed in this bargaining unit. Since no quid pro quo was offered to achieve this change, no change is appropriate.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

#### ARTICLE 18, HOURS OF WORK AND OVERTIME

##### POSITIONS OF THE PARTIES

The Association proposed that employees be given at least seven days notice of a non-emergency change in work schedule, rather than the current three day requirement. As discussed previously with regard to Article 11, the Association believes the current language is potentially extremely disruptive of the personal lives of bargaining unit members. The Association also proposed that the Contract specify the shifts to be worked, and the calculation of overtime payments based on a seven day time period, rather than the present 28 day period. They also proposed overtime payments for hours worked in excess of eight on any given day.

The Employer proposed that the Contract not stipulate the shifts to be worked, or the way that overtime payments are calculated. It also did not want to change the time required prior to a change in schedule from three to seven days.

The Employer proposed that sick days no longer be counted as hours worked when calculating the payment of overtime.

##### FINDING OF FACT

Contractually mandating the shift to be worked for supervisory personnel is an unnecessary limitation on the ability of the Employer to manage its work force. The manner in which overtime is presently calculated is normal for safety forces, and no compelling arguments were advanced to change this practice.

Similarly, abuse of sick leave is not a problem in this unit, and the suggested change proposed by the Employer of not counting sick days when calculating the payment of overtime, is unwarranted.

The Association request that seven days notice be required prior to a shift change is reasonable, so long as it is not required in emergency situations.

#### RECOMMENDATION

Article 18.1 of the new Agreement should read:

Article 18.1 The work schedule of each bargaining unit employee shall be determined by the Employer. Bargaining unit employees shall be given one hundred and sixty eight (168) hours notice of any non-emergency work schedule changes unless such advance notice is impractical.

## ARTICLE 19, WAGES

### POSITIONS OF THE PARTIES

The Employer proposed that for the three years of the new Agreement wages be increased 0% for the first year, 2% for the second year, and 2% for the third year. For the first year of the new Agreement, the Employer proposed the following lump sum payments that would not be added to the base salary: \$850 for Sergeants, \$1,000 for Lieutenants, and \$1,150 for Captains. The Association proposed a wage increase of 16% for the year 2003, 4% for the year 2004, and 4% for the year 2005.

The Employer made six major arguments in support of its position. First, it said that the wages of bargaining unit members are "far above the state averages for similar positions". Second, it said that as the result of the last negotiations, the historical differential of 16% between the pay of Corrections Officers and Sergeants had increased to 19.5%. The offer of a first year bonus rather than an increase in the base salary, the Employer said, was an attempt to re-establish the historical wage differential. Next, the Sheriff said, that the real wages of bargaining unit member had increased in recent years. Between 1996 and 2002 the salary increase for bargaining unit members was 5.4% higher than the corresponding increase in the rate of inflation, bringing about the increase in real wages.

Fourth, the Employer said the size of the Association increase was based on an attempt to achieve parity with people in the Patrol unit, a comparison the Sheriff considers inappropriate. Fifth, the Sheriff said that the first year pay increase it recently granted Corrections really amounted to less than the contractual amount of 3.5% because the implementation of their previous increase was delayed. Finally, the Sheriff argued that its salary offer is appropriate considering the difficult financial times the County is experiencing.

The Association said its wage proposal is justified in light of the recent salary increases granted to non-union employees of the County. In addition, it said that very significant wage increases are necessary to offset the increases in employee contributions for their medical insurance, which have ranged from 377% to 566% over the last four years. The Association said that its proposal is an attempt to reduce the wage differential that exists between bargaining unit members and the other uniformed supervisors that work for the Sheriff.

The Association argued that the jobs of bargaining unit members have become more difficult. With an annual turnover rate of 19%, and a reduction in the minimum age for Corrections Officers to 18, said the Association, the job of a supervisor has become more difficult. Adding to the difficulty of the job, the Association argued, are the increased number of attacks on officers. The Association suggested that if the County did not fund numerous projects the Association considers unnecessary, it could easily afford their wage proposal.

The Association said that it is not appropriate to look at the salary differential between Sergeants and the highest paid Corrections Officer. They said that while Corrections Officers recently received substantial pay increases, most of those increases were directed at employees below the top step in the salary scale. Supervisors should not suffer, the Association argued, as a result of how these pay increases for Corrections Officers were apportioned.

Finally, the Association compared the wages of bargaining unit members with those of comparable employees in the ten largest counties in Ohio. Although Hamilton County is the third largest county in the State of Ohio, it currently has the lowest wages for Corrections Supervisors. The Association argued that a 19.73% increase would be needed in 2003 to bring the wages of Sergeants to the average wage for the ten largest counties in the State, and a 13.75% increase would be necessary to bring their wage to the average for OPOTA certified counties.

#### FINDING OF FACT

Although both sides spoke of the financial resources available to the County, the Employer is not arguing an inability to pay.

Based on the evidence provided by the Employer, and not refuted by the Association, the wages of bargaining unit members have increased more than the rate of inflation in recent years, resulting in an increase in real wages.

Although the Association is correct when it argues that the wages of bargaining unit members are significantly below those of other uniformed supervisors employed by the Sheriff, this is not an appropriate comparison. The jobs of Corrections Supervisors are not comparable to the jobs of Patrol Supervisors.

When considering appropriate wage increases, fact finders mainly rely on two factors; considerations of internal equity and of external equity. Internal equity compares the pay of bargaining unit members to other employees of the same employer; external equity compares their pay with those of comparable employees working in other jurisdictions

In this case, questions of internal equity are extremely important. The Employer argues that no increase in base pay is appropriate for 2003 in order to re-establish the historical differential between Corrections Officers and Sergeants at 16%. In most situations the fact finder is familiar with where supervisors are unionized, the contract for the supervisors

closely mirrors that of the employees they supervise. The same union typically represents both bargaining units, the contracts typically expire at the same time, joint contract negotiations often occur, and on most issues the contracts are identical. This typical relationship does not exist in this situation. On some issues in this case, the Employer argued that the Supervisors contract should treat an issue in an identical fashion as the contract for Corrections Officers; on other issues the Association made this argument. Both sides clearly do not consistently believe that the Agreement for Supervisors needs to closely mirror that of the Corrections Officers.

In addition, the fact finder believes that the acceptance of consistent differentials in pay between ranks is predicated on the assumption that rank structure is respected. If rank structure is not followed with respect to promotions, the fact finder does not believe it needs to be respected in terms of salary differentials. In sum, because the Supervisors Agreement does not closely parallel that of Corrections Officers in many respects, the fact finder does not believe that this internal comparison should be controlling with respect to wages.

The parties disagreed on the facts necessary to determine an appropriate wage based on concerns for external equity. Although the Employer asserted that bargaining unit employees receive a wage that is "far above the state averages for similar positions", it provided no documentation to support this claim. The Association, however, provided considerable evidence not refuted by the Employer, that the wages of bargaining unit members are significantly below those of comparable employees in the State of Ohio. Based on the most appropriate comparison, the wages of Sergeants are 13.75% below those of other non-OPOTA Corrections Supervisors in the ten most populous Ohio counties.

In sum, two considerations appear most significant; neither side appears to believe that the Agreement for Corrections Supervisors needs to be closely based on the Contract covering Corrections Officers, and based on appropriate external comparisons, bargaining unit members are relatively underpaid.

## RECOMMENDATION

Sections 19.1, 19.2, and 19.3 should read as follows:

Section 19.1. Effective the beginning of the pay period which includes January 1, 2003 the annualized pay levels for all bargaining unit employees shall be as follows:

Corrections Sergeant	\$42, 921
Corrections Lieutenant	\$49,789
Corrections Captain	\$57, 755

Section 19.2 Effective the beginning of the pay period which includes January 1, 2004 the annualized pay levels for all bargaining unit members shall be as follows:

Corrections Sergeant	\$44, 209
Corrections Lieutenant	\$51, 283
Corrections Captain	\$59, 488

Section 19.3 Effective the beginning of the pay period which includes January 1, 2005 the annualized pay levels for all bargaining unit employees shall be as follows:

Corrections Sergeant	\$45, 535
Corrections Lieutenant	\$52, 821
Corrections Captain	\$61, 273

## ARTICLE 21, INSURANCE

### POSITIONS OF THE PARTIES

The Association proposed language that would permit one bargaining unit employee be permitted to participate on any committee that is established to seek employee input for employee insurance benefits. At present such a committee does not exist. The Association believes such participation is necessary because of the rapidly increasing cost of health insurance in recent years. In addition, the Association said, such a provision is appropriate because it is present in contracts the Sheriff has with other bargaining units.

The Employer argues that there is no need to discuss the composition of a committee that does not exist.

### FINDING OF FACT

This is clearly not an issue of great significance. At present such a committee does not exist and one is not contemplated by the Sheriff/County. However, if such a committee was established it makes sense to include a representative of this bargaining unit, since other bargaining units are guaranteed representation. It would not be appropriate to have an employee on such a committee "represent" employees who are not in their bargaining unit.

### RECOMMENDATION

A new section should be added to the Agreement, and should read:

If the Hamilton County Personnel Department determines that it is desirable to establish any committee or procedure for the purpose of seeking employee input on any insurance benefit provided to bargaining unit employees, such committee or procedure shall include the participation of one (1) bargaining unit employee. The bargaining unit employee who participates in such committee or procedure shall be selected by the Association. The formulation of any committee or procedure as described in this Section shall be at the sole discretion of the Director of the Hamilton County Personnel Department or the Director's designee.

## ARTICLE 22, HOLIDAYS

### POSITIONS OF THE PARTIES

The Employer proposed current language, plus the addition of a new clause, stating; "The Employer shall determine who is and is not scheduled to work a holiday." In arguing for the addition of this clause to the Agreement, the Employer says that it wants to make clear that bargaining unit members should not be allowed to schedule themselves off for holidays. This change, they add, only applies to a few employees who make out the schedules.

The Association says that with the addition of the Employer proposed language, employees could be forced to take a holiday off, denying them the opportunity to earn holiday pay. Holidays are bargained for, the Association says, and it should be the employees right to work if they want.

The Association also proposed the addition of language mirroring that in the Patrol Officer's contract; including increased any for holidays and an additional holiday for the Friday after Thanksgiving. This additional holiday, they said, is enjoyed by non-bargaining employees. Finally, the Association proposed that bargaining unit members be paid for the balance of their compensatory time at the end of the year.

The Employer rejected the idea of a "holiday bank". It said the cost of this item would be equal to a two percent pay increase. Finally, the Employer argued, the holiday bank is a unique aspect of the Patrol contracts, and presumed that they bargained something for it. No employees outside the Sheriff's unit has a holiday bank, the Employer said, and not all Sheriff's units have this provision.

### FINDING OF FACT

The fact finder views the addition of one holiday and the creation of a holiday bank in purely economic terms. The Association did not dispute the Employer contention that just the creation of the holiday bank would cost the equivalent of a two percent pay increase. This is a very significant increase, with nothing offered by the Association in return. Considering the recommendation the fact finder made with respect to wages, he does not believe a cost item of this magnitude is warranted at this time.

The Association states that “Holidays are bargained for and it should be the employee’s right to work if they want.” The fact finder does not understand the logic of this position. An hourly wage is also bargained for, yet employees do not have the right to work as many hours as they choose. Subject to contractual restrictions, it is the usual practice that employers retain the right to determine if employees should work on a particular day.

Because the change proposed impacts only a few employees who are in the unique position of determining schedules, it should be implemented.

## RECOMMENDATION

The following section should be added to the Agreement:

Section 22.5 The Employer shall determine who is and is not scheduled to work a holiday.

## ARTICLE 24, SICK LEAVE

### POSITIONS OF THE PARTIES

The Employer proposed numerous changes in this article which would reduce the number of days of sick leave, and to make it more difficult to take such leave. The Employer conceded that abuse of sick leave is not a major problem in this unit, but said it wanted language to deal with potential abuse as a way of setting an example for Corrections Officers.

The Association argued that an attempt to deal with sick leave abuse makes little sense in a unit in which such abuse is not a problem. The Association proposed a change in the language of Section 24.6, permitting employees to cash in unused sick days when they “separate from service”, rather than just when they “retire”. This change in language is partly to deal with the special circumstances of bargaining unit members who are not eligible to retire from the County, because they were initially employed by the City, prior to the County takeover in 1981. The change would also benefit the majority of employees in the unit, who separate from service without retiring.

The Association also asked for one additional personal day per year for not calling in sick. This incentive, the Association argues would serve to eliminate differential treatment with Corrections Officers, and would serve as an additional incentive to avoid excessive use of sick days.

### FINDING OF FACT

The drastic changes in language proposed by the Employer are unwarranted in a unit in which sick leave abuse is not a significant issue. If the Employer has a problem with abuse of sick leave by Corrections Officers it should address that problem directly.

Although the Association stressed the need to change the language in Section 24.6, to eliminate an inadvertent injustice against employees who were initially employed by the City, their proposed change is considerably more inclusive. The change in language proposed by the Association would benefit most bargaining unit members since most separate from service without retiring. A change should be made to correct the unintentional discrimination against the former City employees; it should not apply to other employees in the bargaining unit.

Finally, the addition of an additional personal day to serve as an incentive against sick leave abuse was not really opposed by the Employer.

## RECOMMENDATION

Article 24.6 should read:

Article 24.6 An employee with ten (10) or more years service with the Employer or ten (10) or more years of public service with political subdivisions of the State of Ohio who retires from active service with the Employer, shall be paid for fifty percent (50%) of the value of his/her accrued but unused sick leave up to a maximum payment of eight hundred (800) hours. Payment shall be based upon the employee's rate of pay at the time of retirement. Members of this bargaining unit are entitled to this benefit, regardless of which pension plan covers them, if they meet all of the other requirements of this article.

What was formerly Section 24.8, should read:

An employee who does not use any of his/her sick leave in any period consisting of three (3) consecutive months shall be granted one (1) day (personal day) of extra time off for each three (3) month period. Each three (3) month period begins with the first day following the last incident of sick leave usage and ends ninety (90) consecutive calendar days later. Personal days must be used within one (1) year of the date of earning, otherwise they shall be paid. Employees must be in pay status to receive credit toward earning of personal days. Periods of injury leave, leaves of absence, layoff, disciplinary suspension, etc. shall not be counted.

Per a stipulation by the parties, Section 24.7 should be removed from the Agreement.

## ARTICLE 26, DONATED TIME

## POSITIONS OF THE PARTIES

The Employer proposed changing the rate at which donated time is calculated. It proposes to use hour for hour donation of time, rather than cash conversion, but only within the bargaining unit. The Association would be agreeable to a change in how donated time is calculated, if it would include donating or receiving time from employees outside the bargaining unit. The Association expressed the desire to continue the past practice of allowing its members to help those in need, or for others to help Corrections Supervisors in need. The Employer opposed allowing Corrections Officers being able to donate "cheap" hours to much more highly paid people.

#### FINDING OF FACT

At present, the practice is to allow Corrections Supervisors to donate time to Corrections Officers and for Corrections Officers to be able to donate time to Corrections Supervisors. The fact finder is unwilling to contractually mandate a change in a past practice that also has a direct impact on a past practice in a different bargaining unit.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

#### ARTICLE 27, UNIFORMS AND EQUIPMENT

##### POSITIONS OF THE PARTIES

The Association proposed three changes; that the uniform allowance be increased to \$800, that uniform hats be replaced every eighteen months instead of every five years, and employees be provided free parking at all locations.

The Association argued that their current uniform allowance of \$400 is inadequate. It said that other bargaining unit employees receive an allowance of \$600. It said that five years is a long time period to go without a new hat, and indicated that they become shabby looking after a few years. The Association argued that it is very expensive for bargaining unit members to park in downtown Cincinnati, stating that the least expensive parking costs \$720 per year. It said that free parking is provided for almost all non-union employees.

The Employer proposed a continuation of the language in the current Agreement. It said the Association is requesting a uniform allowance that is \$200 higher than that received by other employees of the Sheriff. They said that hats are expensive, and are only worn to and from work and on special duty assignments. The special duty assignments, the Employer said, only benefit the employee and not the Employer, so the Employer should not be obligated to pay for a hat worn out during such assignments. Finally, the Employer said free parking for employees is cost prohibitive, and has never been awarded by a neutral.

## FINDING OF FACT

Since other employees of the Sheriff receive a uniform allowance of \$600 per year, it is appropriate that bargaining unit members receive the same amount. Because the current Agreement provides for the replacement of hats every five years, and because most of the wear appears to come from income producing special duty assignments, no change is necessary in this area.

Clearly, downtown parking is expensive. However, because it is not currently provided, because the uniform allowance was increased by \$200, and because of the wage recommendations made by the fact finder, it is not recommended at this time.

## RECOMMENDATION

Section 27.8 should read as follows:

Section 27.8. On the first regularly scheduled payday following February 1, 2003 and each subsequent year, all bargaining unit employees shall receive a uniform allowance of six hundred dollars (\$600).

## ARTICLE 29, TRAINING

### POSITIONS OF THE PARTIES

The Association proposed language that would allow bargaining unit members to participate in the tuition reimbursement program available other County employees. They also proposed language that would allow bargaining unit members to have the option to select another off day when training is scheduled on an employee's regularly scheduled off day. The Association stated that allowing employees to continue their education is in the best interest of both the Employer and the Employees. It cited a Florida study that concluded that better educated workers had considerably fewer disciplinary actions than less well educated employees. They argued that training sessions on scheduled off days can result in bargaining unit members working extended periods of time with few off days.

The Employer did not oppose the Association proposal to participate in the County tuition reimbursement plan. However, it argued that because of scheduling problems it could not accommodate the Association request with respect to time off resulting from training.

## FINDING OF FACT

Because the Association proposal on tuition reimbursement was not opposed by the Employer, it should be adopted. However, the Employer should not be obligated to give bargaining unit members the option of selecting another off day in lieu of compensatory

time. This is a relatively small unit, with supervisory functions that need to be performed twenty four hours a day. The Association proposal could unduly restrict the flexibility of the Employer to provide required coverage.

#### RECOMMENDATION

A new provision, Section 29.4 should be included in the new Agreement and should read:

Section 29.4. All bargaining unit employees shall be eligible to participate in the Hamilton County Tuition Reimbursement Program under the same terms and conditions, and with the same benefits, applicable to the other employees of the County.

#### ARTICLE 30, LEAVE OF ABSENCE

##### POSITIONS OF THE PARTIES

The Association proposed allowing employees to take unpaid FMLA leave first, and then taking paid leave later. The Employer proposed a continuation of the current policy of placing employees on FMLA after taking three sick days. The Association says that the Employer often places employees on FMLA status against their wishes. The Employer that their current policy is legal, is the standard policy for other County employees, and is especially needed in a relatively small unit, such as the Corrections Supervisors. The Employer also proposed a change in the military leave provision that it characterized as a "housekeeping" change.

##### FINDING OF FACT

The current practice is legal, it is the way employees in other County bargaining units are treated, and it is even more important in smaller units. There is no justification to change the current practice at this time.

#### RECOMMENDATION

No changes are recommended in this provision.

#### ARTICLE 34, RESIDENCY

##### POSITIONS OF THE PARTIES

The Employer proposes to retain the current policy, which requires that all bargaining unit members live in Hamilton County. The Association proposed that employees be permitted to live in an arching radius, beginning at the Justice Center and extending to the farthest point in Hamilton County.

The Association argued that the residency requirement should be changed because it has been eliminated for all County employees outside the Sheriff's Department. Such a requirement, the Association said, prohibits employees from living in a rural setting and forces them to pay the higher real estate prices that prevail within Hamilton County. Response time would not suffer, the Association said, because employees would not be permitted to live any farther from the Justice Center than is currently permitted. They argued that their presence within the County cannot serve as a crime deterrent, because they are not OPOTA certified to carry a weapon.

The Employer argued that no other employees of the Sheriff are permitted to live outside the County. They said it serves to deter crime in the County if other residents are aware there is a "police" presence in the area. If they wear their uniforms when commuting to work, the Sheriff said, it also serves as a crime deterrent.

#### FINDING OF FACT

This is a change of considerable value to the Association, a change that without the involvement of a fact finder, would almost certainly require a significant quid pro quo. Since the Association has not offered any concessions in return for this proposal, no change is appropriate.

#### RECOMMENDATION

The fact finder does not recommend any changes in this provision.

#### ARTICLE 35, DURATION

#### POSITIONS OF THE PARTIES

The only issue in dispute is Section 35.4. The Employer proposed adding a section that would make clear that employees in this unit are not entitled to both the protection of a labor agreement and any civil service laws that cover the same subject matter. The Employer argued that such a provision would remove potential legal ambiguity, and are present in other contracts

The Association does not want to add this new section to the Agreement. They say the potential conflict identified by the Employer is not a real fear for this unit. They also believe the current contractual silence on this matters offers the Association potential legal protection.

#### FINDING OF FACT

This issue addresses a potential, not a current problem. Because the inclusion of such provisions is not presently the norm, and because such a provision is not included in the

current Agreement, there is no justification at this time to recommend its inclusion in the new Agreement.

#### RECOMMENDATION

The new Agreement should not contain Section 35.4 proposed by the Employer.

#### ARTICLE 36, PERFORMANCE EVALUATION

##### POSITIONS OF THE PARTIES

During the course of negotiations, the Employer developed a new performance evaluation system. The Association believes that this new system addresses most of the concerns they have with respect to performance evaluations. However, the Association believes that the performance evaluation system needs to be referenced in the Agreement, and that employees be granted the right to grieve performance ratings. In addition, the Association believes that performance evaluations should not be altered unless a written explanation is given for the change. The Employer opposed the Association proposal, arguing that it would allow all evaluations to proceed to arbitration.

##### FINDING OF FACT

The policy developed by the Employer to do performance evaluations goes a long way toward establishing a rational policy for doing such evaluations. The Association proposal with regard to altering performance evaluations is reasonable. They grant the Employer the right to make any changes in performance evaluations it deems appropriate, as long as they offer an explanation for such changes. This does not impose an undue burden on the Employer, and should lead to greater consistency in the evaluation process.

The Employer has a legitimate concern, when it argues that it is inappropriate to open up the possibility that any performance evaluation could be challenged in arbitration. By their very nature, performance evaluations involve judgment calls. Management must be given a considerable amount of discretion in doing such evaluations, without having to worry about potential review by an arbitrator.

#### RECOMMENDATION

Article 36, Performance evaluations, should read:

Section 36.1 All performance evaluation policies and procedures as established by the Employer shall be applied to bargaining unit employees in a consistent and equitable manner.

Section 36.2 When an employee has worked under the direction of more than one (1) primary supervisor during any evaluation period, the input of each primary supervisor shall

be considered in preparation of the performance evaluation. An evaluation shall not be altered after the employee has initially received his/her evaluation, unless the employee is offered a detailed explanation for the alteration.

Section 36.2 The results of any performance evaluation shall not be subject to the grievance procedure provided for in this Agreement.

## ARTICLE 37, PHYSICAL FITNESS/WEIGHT STANDARDS

### POSITIONS OF THE PARTIES

In its position statement, the Association proposed that rather than having to comply with both the weight and physical fitness standards, bargaining unit members would avoid disciplinary action if they were in compliance with either of these standards. At the hearing, the Association modified its position to state that employees would be in compliance if they met the physical fitness standard; they would no longer have to meet the weight standard.

The Association argued that as their members age it becomes increasingly difficult to meet the weight standard, even if they stay in excellent physical condition. The BFOQ for the job, the Association indicated, is being in good physical shape, regardless of weight. In fact, the Association argued, size is an advantage rather than a disadvantage when dealing with an inmate population.

The Association also proposed that in the section requiring the Employer to make a reasonable accommodation for Employees unable to meet the physical fitness/weight standards, the Employer consider placement in a physically less demanding job as a potential accommodation.

The Employer proposed that employees continue to be required to meet both the physical fitness and the weight standards. Respect from inmates the Employer said, depends on appearance; inmates are unlikely to respect someone who is significantly overweight.

The Employer also proposed language stating that waivers of the physical fitness and weight requirements would initially be granted for a period of sixty days, with extensions possible in increments of thirty days. The Association said that the need to return to a physician every thirty days to qualify for the exemption imposes a cost burden on the Employee.

### FINDING OF FACT

There is considerable merit to the Association argument that the ability of bargaining unit members to adequately perform their job is predominantly a function of physical fitness, rather than weight. It is also true that the Sheriff considers the appearance of being physically fit to be extremely important, and that at present a weight standard must be met. Because employees are currently required to meet a weight standard, and because the Association has not offered a significant quid pro quo to remove this requirement, the fact finder does not believe a change is appropriate at this time.

Although not a major issue, the possibility that an employee has to go to a physician to get re-certified for a waiver of the physical fitness/weight requirement every thirty days, does impose a modest cost burden on the Employee. An extension of this time period to sixty days is appropriate.

Finally, the fact finder does not believe it is necessary to specify placing an employee in a physically less demanding job as a possible reasonable accommodation. If this is a reasonable accommodation, it would have to be considered by the Employer.

## RECOMMENDATION

Article 37, Physical Fitness/Weight Standards, should read as follows:

Section 37.1. Any employee failing to meet physical fitness standards due to valid medical reasons, including a temporary disability or handicap, shall be reasonably accommodated by the Employer, to the extent such an accommodation is possible within the Department. Reasonable accommodation shall include, but shall not necessarily be limited to, placement on disability leave under the terms of this Agreement. Placement on disability leave shall be grievable up through and including arbitration. It is the employee's responsibility to request a waiver due to medical reasons, and to submit sufficient evidence to support the request.

Section 37.2. If an employee obtains a letter from a licensed medical practitioner stating that participation by the employee in any portion of the physical fitness or weight standards policy would be detrimental to his/her health, the Employer may, at the sole discretion of the Employer, require that the employee be examined by a licensed medical practitioner selected by and at the expense of the Employer. Failure of the Employer to exercise such option shall result in an exemption from that portion of the policy which the letter specifically addresses. The Employer may periodically require that the employee so exempted be reexamined and that a new letter be furnished. The Employer will not unreasonably request this reexamination. In the event of conflicting medical opinions the parties agree to be bound by the opinion of a third licensed doctor to be selected by the Academy of Medicine of Cincinnati.

Section 37.3 Any employee who has not been granted a medical exemption or waiver shall, prior to suffering lost pay discipline for failure to meet physical fitness standards, be provided a "Notice of Pending Discipline", stating the reasons for the discipline and the

nature of the discipline to be served. If a grievance is filed contesting the proposed discipline, the imposition of discipline shall be stayed pending resolution of the grievance. Arbitration of such grievances shall be expedited. This section does not apply to disciplinary action for reasons other than failure to meet physical fitness standards.

Section 37.4 The accommodation and waivers under Sections 37.1 and 37.2 are automatically granted for a period of sixty (60) calendar days upon initial request and may be extended in sixty (60) calendar day increments at the discretion of the Employer, but the total time of such accommodation and waivers will not exceed one year in the aggregate.

#### FINAL RECOMMENDATION

In addition, the fact finder recommend that all other provisions that were tentatively agreed to, be incorporated in the new Agreement.

*Michael Marmo*

Michael Marmo  
Fact Finder

Cincinnati, Ohio  
February 5, 2003

#### PROOF OF SERVICE

This is to certify proof of service on February 5, 2003 by US Mail, overnight delivery, to Stephen S. Lazarus, Hardin, Lefton, Lazarus & Marks, LLC, 915 Cincinnati Club Building, 30 Garfield Place, Cincinnati, Ohio 45202; and Mark Lucas, Clemans, Nelson & Associates, 5100 Parkcenter Avenue, Suite 120, Dublin, Ohio 43017; and by certified US Mail, return receipt requested to Dale Zimmer, SERB, 65 East State Street, Columbus, Ohio 43215-4213.

*Michael Marmo*

Michael Marmo  
Fact Finder