

STATE OF OHIO

STATE EMPLOYMENT
RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD

2003 FEB 13 A 10:45

IN THE MATTER OF
FACT-FINDING BETWEEN:

CLERMONT COUNTY COMMISSIONERS

CASE NO. 02-10-1058

AND

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

JERRY HETRICK
FACT-FINDER

FACT-FINDING REPORT
AND
RECOMMENDATIONS

APPEARANCES

FOR THE COUNTY

Paul Berninger, Attorney
Brenda Durham, DPSS Supv.
Beth Nevel, DPSS Director
Sandra Harvey, Personnel Administrator

FOR THE UNION

Barry Gray, Staff Representative
Michael J. Smith, FOP-ERT
Patty Schramm, FOP Associate

DATE OF ISSUANCE: FEBRUARY 11, 2003

BACKGROUND

This matter came up for hearing on January 29, 2003 before Jerry Hetrick, appointed as fact-finder pursuant to Ohio Rev. Code Section 4117.14. The hearing was conducted between the Clermont County Commissioners and the Fraternal Order of Police, Ohio Labor Council, Inc. (Telecommunications) at the Clermont County Administration building. The bargaining unit consists of fourteen (14) Emergency Resource Technicians working at the Clermont County 911 Center. There are five (5) vacancies. The bargaining unit dispatch Police, Fire, and Emergency Medical Services in response to emergency and non-emergency telephone calls from the general public.

The unresolved issues set forth in the respective briefs are as follows:

1. Article 33 Lead Workers
2. Article 13 Drug Testing
3. Article 22 Longevity

The fact-finder incorporates by reference into this report and recommendations all resolved and tentative agreements reached between the parties. In making the following recommendations, the fact-finder has reviewed the arguments and evidence presented by the parties both at hearing and in their position statements prior to hearing.

By mutual agreement, the parties requested the fact-finder proceed directly to fact-finding rather than efforts at mediation.

FACT-FINDING CRITERIA

In the determination of facts and recommendations, the fact-finder considered the applicable criteria required by Ohio Rev. Code Section 4117.14 (C) (4) (e) as listed in 4117.14(G)(7)(a)-(f) and Ohio Administrative Code Section 4117-9-05(K)(1)-(6) as follows:

- (1) Past collectively bargained agreements, if any, between the parties.
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classifications involved.
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effects of the adjustments on the normal standard of public service.
- (4) The lawful authority of the public employer.
- (5) Any stipulations of the parties.
- (6) 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.

FINDINGS OF FACT AND FINAL RECOMMENDATIONS

ISSUE NUMBER 1-LEAD WORKER

Articles 33 and 34 provides for the selection of bargaining unit members to function as temporary supervisors and Communications Training Officers. The purpose is to utilize experienced bargaining unit employees in the absence of management employees and to train new employees in the policies and procedures of the Communications Center. Employees assigned as temporary supervisors receive an additional two dollars (\$2.00) per hour worked as a temporary supervisor. Employees assigned as Communications

Training Officers receive an additional one-dollar (\$1.00) per hour worked in training a probationary employee.

The County proposes the elimination of Articles 33-34 and replacement with Lead Workers. In its pre-hearing statement the County's proposal would provide greater compensation than is currently provided but would also result in some more senior persons who desire to be a Lead Worker to share in the shift rotation. At the hearing the County indicated that it wished to change the shift selection process to have a more experienced distribution of seniority with the establishment of Lead Workers. The County says it has too many inexperienced off shift employees when needed. The County's proposal has as its intent the rotation of Lead Workers. In effect, the County's proposal would require employees to make a choice between their shift preference and functioning as a Lead Worker. In exchange for the flexibility of assignments, compensation would attach to all hours worked while classified as a Lead Worker.

The Union points out the proposal adversely affects the selection of shift preference of employees as Lead Workers with less seniority could be placed on shifts of the County's preference and displace more senior employees on shifts of their choice. The Union also notes that the most experienced management personnel are on one shift.

FINDING AND RECOMMENDATION

The fact-finder's function is to put the parties into the same position they would have occupied but for their inability to reach full agreement. This issue deals with management's direction and control of the work force in order to provide the supervision and training of communications control employees who implement policies and procedures of employees who communicate information to fire, police, and EMS

employees. The accurate and timely conveyance of directions is of paramount importance to the safety and welfare of Clermont County citizens. The commissioners have an obligation to provide the best possible training to employees placed in Emergency Response Technician positions. Balancing that responsibility is the seniority right of employees to exercise their seniority for their shift of preference. The County's proposal provides an opportunity to submit bids for the Lead Worker position indicating the order of shift preference for Lead Worker assignments. Employees have a choice quarterly to decide whether to bid for Lead Worker assignments with its additional compensation or remain on the shift of their preference. There is the potential for the County to place a less senior Lead Worker on a shift which a more senior employee has submitted a shift preference under Article 19. In the event this occurs, the interests of the public to insure that Emergency Response Technicians are properly supervised and probationary employees properly trained in departmental policies and procedures outweigh the seniority rights of Article 19. This is especially the case where the assignment is temporary in nature such as functioning as a temporary supervisor in the absence of a supervisor or training probationary employees and offers a quid pro quo, additional compensation. The fact-finder notes that the County's proposal would allow for retaining the less senior Lead Worker on the preferred shift of a more senior employee for at least two quarters when no other Lead Workers bid for the assignment. The fact-finder recommends that the Lead Worker return to his/her shift selected through Article 19 when the supervisor the Lead Worker replaced returns from that absence and/or when the probationary employee(s) are properly trained in the policies and procedures of the

Communications Center and the purpose behind the Lead Worker's assignment has been attained.

It is the final recommendation of the fact-finder that Article 33-34 of the collective bargaining agreement be replaced be replaced with Article 33 Lead Worker with the following language:

Section 33.1. Management may designate selected bargaining unit employees to be Lead Workers. Lead Workers shall act as temporary supervisors in the absence of a Supervisor and shall have the responsibility for training probationary employees in the policies and procedures of the Communications Center.

Section 33.2. Persons designated and assigned as Lead Workers shall receive as a Supplement to their hourly rate for all hours worked, the following amounts:

- A Shift--\$1.00
- B Shift--\$1.25
- C Shift--\$1.25

Section 33.3. Lead Worker assignments shall be bid every quarter each calendar year. A bid shall state the order of shift preference for the assignment. If there are more Employees designated as Lead Workers than there are assignments, then designated employees shall be eligible for assignments as follows:

- A. The initial assignments made after January 1, 2003 shall be made according to seniority whereby the most senior designated Lead Worker shall be assigned his/her preferred shift.
- B. No person shall be eligible to be assigned as a Lead Worker in two Consecutive quarters except when no other Lead Workers bid for the Assignment.
- C. No person shall be eligible to be assigned as Lead Worker in two consecutive quarters on the same shift except when no other Lead Workers bid for that shift.
- D. Lead Worker assignments shall be considered temporary. The Lead Worker shall be returned to the shift he/she occupied before the temporary assignment as a Lead Worker on the return of a supervisor or completion of the probationary employ(s) training in department policies and procedures.**

ISSUE NUMBER TWO-DRUG TESTING

Article 13 of the current contract provides that drug screening or testing may be conducted upon a finding of probable cause. The County proposes that Article 13, Section 13.1 provide that drug screening or testing may be conducted according to the procedures set forth in Title 49 CFR Part 40, Title 49 CFR 382, 305, and may also be conducted upon reasonable suspicion that an employee that an employee has violated county or departmental drug and alcohol policies. Reasonable suspicion means specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee or an abrupt and observable decline in employee performance as replacement language for “drug screening or testing may be conducted upon a finding of probable cause.

Section 13.3 would also be modified to provide for reference to controlled substances as defined in 21 CFR 1308 and or 49 CFR 40.85.

The County has proposed to expand its drug testing capabilities to include a random testing program identical to that now permitted to public employers who employ persons required to maintain Commercial Driver’s licenses. The County contends that a professionally managed testing program would act as a deterrent to employees who might consider reporting to work under the influence. Says the County, employees work in a safety sensitive position and should be held to a higher standard than mere reasonable suspicion. The county says because the employees work in a 24-hour critical response position the county must strengthen its deterrent efforts. Accordingly the County

proposes a system that mirrors the DOT requirement for Commercial Driver License holders.

The Union is not against providing a drug free environment as evidenced by the existence of the current provision on drug screening and testing. The Union additionally indicates a willingness to strengthen the existing provision. The Union recommends Section 13.1 be modified to provide that "Drug screening or testing may be conducted upon reasonable suspicion that an employee has violated county or departmental drug or alcohol policies. Reasonable suspicion means specific, contemporaneous, articulable observations concerning appearance, behavior, speech or body odors of the employee, or an abrupt and observable decline in employee performance. The Union position would result in the deletion of the current wording that "Drug screening or testing may be conducted upon the finding of probable cause from the current labor contract and the deletion of reference to 21 CFR 1308 and or 49 CFR 40.85 in Section 13.3 proposed by the County. The Union argues that it believes it had agreed with the County's proposal on January 10, 2003, which changed the threshold or lowered the burden of proof to a reasonable suspicion and indicated surprise when the drug screen or testing issue was placed before the fact-finder. The Union indicates that Highland County uses probable cause as the burden of proof in such instances. Finally the Union notes the county indicated there is no significant drug problem and points out that the one occurrence was handled by the current system.

FINDING AND RECOMMENDATION

The implementation or changes in drug screen or test provisions are not governed, in the fact-finder's opinion, by external comparisons. Instances of drug usage in one county, by itself does not establish drug use by another bargaining unit but take on significance

when there is an issue which must be addressed with this bargaining unit. Where an party proposes a change in contract language, it has the burden of showing that: the present language has given rise to conditions that require amendment: the proposed language may reasonably be expected to remedy the condition: that the change will not impose an unreasonable burden on the other party, or in this case, disturbs the balance between the public's interest in preventing drug usage by public employees and employee privacy issues. Here the County has the burden of proof.

Based on the facts and evidence presented at the hearing and pre-hearing materials, the County has not met that burden. The affected unit is neither an over the road trucking unit nor does it represent the physical threat to public safety as Police, Sheriff, and EMS units would. The County acknowledged no significant drug problem existed and did not challenge the Union statement that the one occurrence had been dealt with satisfactorily by current procedures. The County conditioned its final settlement offer on the parties reaching agreement without fact-finding. The Union position at the hearing would lower the County's burden of proof to reasonable suspicion. The Union position adopts language initially suggested by the County on January 10, 2003 and strengthens the public interest in deterring drug usage among public employees. The fact-finder recommends adoption of the Union position on Article 13 Drug Screening. Article 13 of the collective bargaining agreement shall be amended to include the following language:

Section 13.1. Drug screening or testing may be conducted upon reasonable suspicion that an employee has violated county or departmental drug or alcohol policies. Reasonable suspicion means specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee, or an abrupt and observable decline in employee performance. The testing shall be conducted solely for administrative purposes and the results obtained shall not be used in any criminal proceeding. Under no circumstances may the results of the drug screening or testing be released to a third party for the use in criminal prosecution

against the affected employee. The following procedures shall not preclude the employer from taking disciplinary action, but such actions shall not be based solely upon the test results.

Issue Number Three- Longevity

The Union has proposed a new provision providing for longevity pay. Specifically the union would add to the current contract that provides a ten-year wage schedule a longevity pay schedule based on a dollar amount. After ten years of service the employee would receive five hundred dollars (\$500). Each additional year of service would be increased by fifty dollars (\$50) with a maximum payment of thirty years and fifteen hundred dollars (\$1500). In support of its position the Union asserts that longevity pay is a widely accepted practice to reward employees for continuous service in both the private and public sectors. At the fact-finding hearing no supporting evidence was provided in support of its proposal.

The County makes no proposal for adding longevity pay to the labor agreement. In its opinion the current salary schedule recognizes growth in the job but sees no improved job performance resulting from the union's proposal. The county notes that longevity pay is not part of the compensation package of its non-bargaining units or the majority of its other bargaining units. Longevity pay is found only in the agreement with AFSME and the County has proposed the elimination of longevity pay and replacement by a pay for performance plan. The record shows that the Department of Human Services represented by AFSME obtained longevity pay by statute, rather than through collective bargaining, which has subsequently been repealed by the state. The county has proposed that pursuant to Article 38, discussions regarding a pay for performance plan. If the parties

reach agreement on a pay for performance plan by October 31, 2004, wages will be increased on January 1, 2005 by three (3) percent. If no agreement is reached, the tentative agreement provides for a wage re opener.

FINDING AND RECOMMENDATION

Changes in either pay structures or additional features should occur through bargaining or overwhelmingly be supported either by external or internal comparisons. Neither the external or internal comparisons dictate a finding in favor of including longevity as an element of compensation beyond the current structure. While there are vacant positions, it has not been demonstrated that a turnover problem exists. Adoption of the Union position would place the County in a position where it has added a longevity schedule while a proposal exists for its elimination with another bargaining unit. Adoption of the Union position adds additional costs in a climate where costs must be closely monitored.

The County's proposal for increasing compensation through a pay for performance plan offers an opportunity for increased compensation in exchange for improved performance which benefits both the public served by the county and the bargaining unit without increasing costs in proposed labor contract. Based on the evidence presented in pre-hearing position statement and the hearing, the fact-finder concludes that the Union has not presented sufficient evidence to warrant the recommendation of its proposed longevity schedule. The final recommendation contains no recommendation for the adoption of the Union' proposal for its longevity schedule.

Respectfully

 Fact-Finder