

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT
RELATIONS BOARD
2004 OCT 26 A 10:31

IN THE MATTER OF:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 57**

**CASE NOS. 03-MED-09-0966
(Patrol Officers and Detectives)
03-MED-09-0967
(Sergeants and Lieutenants)**

"Employee Organization"

and

CITY OF RICHMOND HEIGHTS

"Employer"

**REPORT OF FACT-FINDER
AND RECOMMENDATIONS**

DATE OF REPORT AND DATE OF MAILING: OCTOBER 25, 2004

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I. INTRODUCTION.

This matter comes before the Fact-Finder as a result of a referral on December 31, 2003 by the State Employment Relations Board ("SERB") pertaining to fact-finding protocol between the Fraternal Order of Police, Lodge No. 57 (hereinafter referred to as "Union" or "Employee Organization") and the City of Richmond Heights (hereinafter referred to as "City" or "Employer").

There are two cases presented to the Fact-Finder, one being Case No. 03-MED-09-0966 regarding full-time patrol officers and detectives and Case No. 03-MED-09-0967 regarding sergeants and lieutenants. The two cases present the same issues and have been consolidated, both for purposes of the fact-finding hearing and for purposes of the instant Report and Recommendations.¹

The fact-finding hearing was conducted for the taking of evidence, submission of issues and presentation of the parties' respective positions on July 23, 2004 and August 19, 2004, with the hearing being conducted at the Richmond Heights City Hall, Richmond Heights, Ohio. Post-hearing statements and arguments were submitted, and the hearing was considered closed as of October 15, 2004.

The Notice of Fact-Finding dated December 31, 2003 indicated, in part, that a hearing was to be held and the Fact-Finder was to serve the parties with a written Report and Recommendations no later than January 14, 2004, unless the parties mutually agreed to extend fact-finding pursuant to Ohio Administrative Code 4117-9-05(G). The parties have mutually agreed to extend fact-finding to the dates indicated above and, therefore, the Fact-Finder finds that the instant hearing, and this Report, are not in contravention of any orders or provisions of SERB and that the extension of fact-finding was in accordance with Ohio Administrative Code 4117-9-05(G). The Fact-Finder received

¹The two bargaining units are encompassed in the same collective bargaining agreement. See Article 2, Section 2.2.

and has taken into consideration exhibits and material presented by both parties. The Fact-Finder has also taken into consideration the Conciliator's Opinion and Award in the case of *Fraternal Order of Police, Lodge 58 and City of Richmond Heights*, SERB Case Nos. 00-MED-09-0986 and 00-MED-09-0987 and the Report and Recommendations of the Fact-Finder in the case of *International Association of Firefighters, Local 2009 and City of Richmond Heights*, SERB Case No. 03-MED-09-1034. In addition to the material presented and the arguments of the parties, the Fact-Finder has taken into consideration the statutory guidelines enunciated in Revised Code §4117.14(C)(4)(a) through (f), the guidelines set forth in Revised Code §4117.14(G)(7)(a) through (f), and SERB Regulations, Ohio Administrative Code 4117-9-05(J) and (K)(1) through (6).

II. BACKGROUND

The City of Richmond Heights is a suburb of the City of Cleveland situated in northeastern Cuyahoga County and has a population of approximately 10,000. The consolidated bargaining unit for purposes of this hearing consists of all patrol officers, detectives, sergeants and lieutenants. The City has indicated that at the present time, there are 21 full-time employees and one part-time employee. The Union is the present exclusive bargaining representative of the two bargaining units.

The Fact-Finder commends the representatives of both the Union and the City for presenting their particular positions in an articulate and highly professional manner. In preparing this Report and Recommendations, the Fact-Finder has attempted to summarize the salient aspects involved. However, any brevity should not be construed as an attempt to diminish the significance of the Report nor the nature of the issue and the material presented in support. Additionally, the Fact-Finder is cognizant of the caveat expressed by Justice Douglas in *Johnson v. University Hosp. of Cleveland* (1989), 44 Ohio St.3d 49, 58, wherein he stated: "Our occupational duty continuously requires us to balance rights and responsibilities of persons regardless of their color, sex, position

or station in life. We accomplish that balancing in this case while recognizing that our decision will be something less than universally accepted."

III. RECOMMENDATIONS.

Preliminarily, the Fact-Finder notes that the parties had previously executed a Collective Bargaining Agreement covering the period from January 1, 2001 through December 31, 2003. The 2001-2003 Collective Bargaining Agreement sets forth 34 different Articles. Unless and to the extent indicated otherwise in this Report and Recommendations, the Fact-Finder finds that the articles not otherwise changed by virtue of this Report or changed as mutually agreed between the parties shall be deemed to remain unchanged.

Article 15 - Salary Schedule (Section 15.1 - Wages)

The Union proposed a wage increase of 13-1/2% allocated 4% effective January 1, 2004, 4-1/2% effective January 1, 2005 and 5% effective January 1, 2006. The City has proposed an 11% wage increase allocated 4% effective January 1, 2004, 4% effective January 1, 2005 and 3% effective January 1, 2006. The Fact-Finder notes that in the Fact-Finder's Report regarding the collective bargaining agreement with the firefighters, he recommended an 11% wage increase based on the same three year allocation as proposed by the City. The Fact-Finder is aware that the City has rejected the Fact-Finder's Report and the status of that collective bargaining unit may well be the subject of conciliation. However, the Fact-Finder's Report nevertheless provides some guidance to this Fact-Finder.

Based on the positions presented, the Fact-Finder recommends that the City's proposal be adopted. Accordingly, the Fact-Finder recommends that Article 15, Section 15.1 be amended and recomputed on the basis of a 4% wage increase effective January 1, 2004, 4% wage increase effective January 1, 2005 and a 3% wage increase effective January 1, 2006. The Arbitrator notes

that by an agreement executed by the parties dated November 17, 2003, any wage increase granted during the year 2004 would be made retroactive to January 1, 2004. That agreement, in pertinent part, states: "The parties have agreed that the current Collective Bargaining Agreement effective January 1, 2001, until December 31, 2003, shall be extended indefinitely, pending the completion of negotiations. Further, the City agrees that the first year wage increase, and benefits, if any, shall be retroactive to January 1, 2004, unless agreed otherwise."

Article 15 - Salary Schedule (Section 15.7 - Physical Proficiency Allowance)

The current contract, as an incentive for police officers to maintain operational efficiency, requires that they be in good physical condition. In this regard, the current contract provided for an immediate payment of \$500.00 plus an additional \$500.00 for 2001 regardless of their physical proficiency score in the Cooper Fitness Protocol. For 2002, employees who performed at the 30th percentile received an additional \$500.00, and for 2003, employees who performed at the 50th percentile were to receive an additional \$500.00. The Union has proposed an annual physical proficiency allowance of \$1,000.00 plus an additional \$500.00 to those unit employees achieving the 50th percentile in the Cooper Fitness Protocol. The City has essentially argued that the employees are satisfactorily compensated and the additional proficiency pay should not be included.

Based on the arguments and discussions that occurred, and in light of the fact that a physical proficiency allowance presently exists, the Fact-Finder recommends that the Union's proposal be adopted. The Fact-Finder therefore recommends that Section 15.7 read as follows:

"Section 15.7 - Proficiency Allowance. The City shall provide a proficiency allowance for members of the bargaining unit as follows:

- a. Employees shall receive an automatic annual \$1,000 payment as a proficiency allowance for participation in the Cooper Fitness Protocol, satisfactory annual firearms certification required in accordance with R.C. 109.081, and maintaining AED certification is required.

- b. Employees may receive an additional \$500 annual allowance by achieving the 50th percentile in the Cooper Fitness Protocol, specifically, the "Single Standard General Population Norms." Such test shall consist of the following six (6) events:

1.5 mile run	Sit and Reach
Push-ups	Leg Press
Sit-ups	Bench Press

The highest score on five (5) events will be used to compile an average final score. The physical test shall be given twice (2x) per year with a minimum of three (3) events offered.

- c. Payment of the proficiency allowance shall be made on the following dates:
1. March 1 of each contract year for the automatic allowance.
 2. October 1 of each contract year for those who have earned the allowance."

Article 16 - Holidays

Section 16.1 provides for eleven (11) paid holidays including, not only the more traditional and statutorily designated holidays, but also adds Good Friday, Christmas Eve Day, New's Eve Day and the employee's birthday. The Union has proposed one additional personal day to commence in the third year of the contract, i.e., 2006. The City has advocated no change from the current contract language on the basis, essentially, that no city personnel or other collective bargaining unit in the City have a twelfth (12th) holiday.

The Arbitrator recommends that the current contract language be retained essentially on the basis that current contract language is consistent with what is applied in the other collective bargaining units in the City.

Article 17 - Sick Leave

Section 17.11 of the present agreement provides, in essence, that upon retirement or separation from employment after 15 years of service, a unit member is entitled to receive a credit and payment for one-third (1/3) of the employee's accrued unused sick leave with the maximum number of hours qualifying for such payment being 690 hours. The Union has proposed to increase the maximum number of hours to 960, whereas the City has proposed retention of current contract language. The Fact-Finder recognizes that there is no absolute fixed figure for this benefit, and although it certainly represents a potential financial obligation by the City, it also serves as an incentive for an employee to continue his employment with the City, at least for 15 years. Also, any increase in the number of hours would obligate the City to only a 1/3 actual payment. Thus, increasing the maximum number of hours from 690 hours to 960 hours represents an increase of 270 hours which would actually represent 90 additional hours of pay, assuming that the unit employee accumulates the maximum.

The Arbitrator, therefore, recommends that Section 17.11 be amended to read: "The maximum number of hours qualifying for such payment shall not exceed 960 hours." All other language in Section 17.11 shall remain as in current contract.

Article 20 - Overtime Rates/Call-In Pay (Compensatory Time)

Section 20.4 allows a unit member to accumulate a maximum of 300 hours compensatory time to be paid upon the employee's retirement. The Union has proposed increasing the compensatory time from 300 to 480 hours in order to restore that compensatory time figure which was permitted in the contract prior to 2001. The City advocates retention of current contract language. The Fact-Finder notes that this issue was, in fact, one of the issues presented to the

Conciliator in the prior SERB Case Nos. 00-MED-09-0986 and 00-MED-09-0987. The Conciliator there held, in part:

"However, Lodge 57 members presently enjoy great freedom to utilize compensatory and other discretionary time with little advance notice. It is reasonable to conclude that if the Arbitrator were to direct the provision sought by the Union, the Employer would have little choice but to prohibit the very freedom in requesting time off Union members presently enjoy."

The Conciliator ultimately held for a maximum accumulation of 300 hours.

The Fact-Finder in the instant matter concurs with the views expressed by the conciliator in the cited cases and does not believe that the evidence advanced by the Union warrants an increase in compensatory time. Accordingly, the Fact-Finder recommends that the present contract language of Section 20.4 be retained.

The Fact-Finder notes that as part of the prior agreement, but not set forth within any particular Article, was a "Letter of Understanding" dated January 1, 2001 from the City's Mayor to the Union's legal counsel which stated:

"Any employee who, as of the date of ratification of this agreement, has more than three hundred (300) hours of compensable time shall not be eligible to bank any additional compensatory time. Consequently, such employee shall be "red-circled" and may maintain whatever balance they have over three hundred (300) hours for the duration of their employment or may use such time as they deem fit in accordance with departmental practices."

For purposes of clarification, the Fact-Finder is recommending that the January 1, 2001 "Letter of Understanding" be carried over into the proposed new three year contract for the period January 1, 2004 through December 31, 2006.

Article 20 - Overtime Rate/Call-In Pay (Work Day Definition)

The Union has proposed the following language to be inserted in Section 20.1:

"For purposes of this Agreement, a work day shall consist of eight (8) regularly scheduled, consecutive days during a twenty-four (24) hour period of time

with the exception of shift changeover or pre-scheduled overlapping in part or in whole shifts. The twenty-four (24) hour period commences at the beginning of the regularly scheduled shift. The normal work week for a full-time officer shall consist of forty (40) regularly scheduled hours."

The proposal is actually a modification of what is presently set forth in Section 20.2 of the Collective Bargaining Agreement which states: "Overtime pay for any scheduled duty shall be at time and one-half (1-1/2) the regular hourly rate based upon an eight (8) hour day work period for any work performed after eight (8) hours."

The underlying problem which apparently raises the concern and desire for a definition of a work day is not for a situation, for example, where an officer starts at 8:00 a.m. and works until 8:00 p.m. Obviously, the hours worked past the eight (8) hour shift would be compensated at time and one-half (1-1/2). The problem arises, however, in a situation where an officer is working from 8:00 a.m. to 4:00 p.m. on one day and then is scheduled to work from Midnight to 8:00 a.m. on the second day. Thus, the police officer would be working more than eight (8) hours in a consecutive twenty-four (24) hour period and neither work period would constitute overtime. The realities of such scheduling and the impact on morale, work efficiency and the like are readily apparent. The City counters, however, that it tries to avoid such scheduling but admits that such a scheduling dilemma does periodically arise, particularly when necessary to cover when other officers are on vacation, compensatory time, sick leave, emergencies and the like. The City further contends that because of its relatively small department, although it would like to accommodate every police officer, it is still necessary that the Police Department be appropriately staffed 24/7, 365 days a year.

The Fact-Finder is not unsympathetic to the proposed definition and the obvious necessity for a rescheduling of personnel if the proposed language were adopted. However, in overall perspective, the Fact-Finder believes that the underlying issue is more appropriately encompassed

within the scope of the management rights provision under Article 3 of the Collective Bargaining Agreement which, in pertinent part, states as follows:

"Section 3.1. It is agreed that the Employer reserves all of the customary rights, privileges or authority of management, except as modified by the terms of this Agreement including, but not limited to, the following:

* * *

(C) Maintain and improve the efficiency and effectiveness of governmental operations;

(D) Determine the overall methods, process, means or personnel by which governmental operations are to be conducted;

* * *

(F) Determine the adequacy of the workforce;

* * *

(H) Effectively manage the workforce."

Additionally, although the issue may not be susceptible to a mutually satisfactory conclusion, in light of the fact that it was submitted to the Fact-Finder for review, nevertheless, the Fact-Finder would suggest that this is an issue that might be considered by the Labor/Management Committee established under Article 8 of the Collective Bargaining Agreement.

Accordingly, the Fact-Finder recommends that the current contract language remain unchanged.

Article 21 - Uniform Allowance

Section 21.1 provides for a uniform allowance upon the request of the Chief of Police and approved by the Director of Public Safety. The uniform allowance for 2001 was \$800.00, \$850.00 for 2002 and \$900.00 for 2003, with an additional \$300.00 per year to members of the SWAT Team. The Union has proposed an increase of \$50.00 and an additional \$25.00 for the SWAT Team in each

year of the contract. The City had initially proposed \$25.00 per year plus \$25.00 for the SWAT Team but has somewhat modified its position and is not strongly disagreeing with the Union's proposal in light of other dispositions set forth herein.

Accordingly, the Fact-Finder recommends that Section 21.1 be deleted, and in lieu thereof, the following be substituted:

"Section 21.1. The uniform requirements of each member of the Division of Police, including detectives, shall be provided by the City. Upon the request of the Chief of Police and approved by the Director of Public Safety, each employee shall be provided a uniform allowance of \$850.00 per officer for 2004, \$900.00 per officer for 2005 and \$950.00 per officer for 2006. The City shall pay an additional \$325.00 per year to members of the SWAT Team for the duration of the contract. The uniform allowance shall be paid to the employee in two (2) equal cash payments on January 1 and July 1 of each year."

Article 22 - Insurance

Section 22.1 (Paragraph D) provides for a prescription drug co-pay by the unit bargaining member of \$3.00 for a generic drug and \$5.00 for a named brand drug. The City has proposed to increase the co-pay to \$8.00 for a generic drug and \$15.00 for a named brand drug. The Union has proposed that the current contract language be retained.

Not surprisingly, the City has contended that its total health insurance costs for all City employees has substantially increased from a current cost of approximately \$367,000.00 to a potential estimate of \$474,000.00. Although the drug benefit only represents a portion of that, by increasing the deductible, the City would accomplish some savings. The City's health plan is through "QualChoice" operated by the University Hospital Health System of Cleveland. It was projected, for example, that even going from a \$3.00/\$5.00 co-pay to a \$5.00/\$10.00 co-pay would bring about a savings of approximately \$25,000.00. The Union contends that an increase in the co-pay would work a hardship on some of the unit members and also diminishes any benefits that might

otherwise be gained by a salary increase. While the arguments presented by both sides have elements of merit, one aspect of overriding influence in the Fact-Finder's recommendation is the representation by the City that its healthcare program under QualChoice is applicable uniformly to all employees of the City, union and non-union. Additionally, the Fact-Finder in Case No. 03-MED-09-1034 in the matter between the City and the firefighters also recommended an increase in the deductible for generic drugs from \$3.00 to \$8.00 and an increase in the deductible for brand named prescriptions from \$5.00 to \$15.00. The Fact-Finder does not believe that there is an overriding justification to depart from the protocol that appears to be city-wide to this particular bargaining unit.

The Union has made a suggestion that the City implement a health reimbursement arrangement under Internal Revenue Code §105, §106 and §125. (26 U.S.C. §105, §106 and §125) See, also, Internal Revenue Ruling 2002-41. Indeed, the Union presented evidence that another municipality in Cuyahoga County has implemented such a health reimbursement arrangement. While such a proposal is not without reason and certainly is an item to be considered and explored, the Fact-Finder does not believe that the issue has been either fully developed nor presently appropriate to be included within the present recommendations in light of the recommendation which he has proposed. This also might be a subject matter for review by the Labor Management Committee under Article 8 but, most likely, if it were pursued, it might very well be a program applicable to all employees.

For the reasons set forth above, the Fact-Finder therefore recommends that Subparagraph D in Section 22.1 be amended to read: "Prescription Drug - \$8.00 deductible generic; \$15.00 deductible brand."

* * * * *

Executed at the City of Cleveland, Cuyahoga County, Ohio, this 25th day of October, 2004.

Respectfully submitted,



DONALD N. JAFFE
Fact-Finder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Report of Fact-Finder and Recommendations has been forwarded to the Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213, Robert M. Phillips, Esq., at Faulkner, Muskovitz & Phillips, LLP, 820 West Superior Avenue, Ninth Floor, Cleveland, Ohio 44113-1800, and Marc J. Bloch, Esq., at Duvin, Kahn & Hutton, L.P.A., Erievue Tower, 20th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114, via FedEx, this 25th day of October, 2004.


DONALD N. JAFFE
Fact-Finder