

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

IN THE MATTER OF:

CASE NO. 03-MED-09-0983

FRATERNAL ORDER OF POLICE,
LODGE NO. 3

"Employee Organization"

and

CITY OF LORAIN

"Employer"

STATE EMPLOYMENT
RELATIONS BOARD
2005 DEC - 7 A 10:34

**REPORT OF FACT-FINDER
AND RECOMMENDATIONS**

DATE OF REPORT AND DATE OF MAILING: December 6, 2005

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I. INTRODUCTION.

This matter comes before the Fact-Finder as a result of a referral on February 24, 2004 by the State Employment Relations Board ("SERB") pertaining to fact-finding protocol between the Fraternal Order of Police, Lodge No. 3 ("FOP") as the collective bargaining representative for approximately 102 police officers from the rank of patrol officer through captain, but excluding one captain designated as an Administrative Captain, and the City of Lorain.

At the time of the Fact-Finder's initial appointment, he was instructed to conduct a hearing and issue a report by March 9, 2004 unless the parties mutually agreed to an extension of fact-finding as provided under Administrative Code 4117-9-05(G). By correspondence dated March 3, 2004, the Fact-Finder was advised that the parties had mutually agreed to an extension of time and requested an indefinite period of extension. Thereafter, the Fact-Finder was advised that the parties had not reached a final resolution and fact-finding was thereupon scheduled to commence on November 17, 2004.

The fact-finding commenced, as scheduled, on November 17, 2004, and during the course of the hearing, it was represented to the Fact-Finder that the Lorain City Council had enacted legislation seeking an income tax levy of 1/4 of 1% to be voted upon at a special election on February 8, 2005. Whether that tax levy passed or failed, it was apparent that the outcome of the levy would have an impact upon the economic issues asserted in the parties' position statements. Likewise, the Fact-Finder was concerned that should he proceed to issue a full report with recommendations, particularly as to the economic issues, such report might be construed as having a certain influence, positive or negative, in any potential publicity regarding the income tax levy. Accordingly, on November 23, 2004, the Fact-Finder issued a Procedural Order staying further fact-finding pending certification of the vote pertaining to the income tax levy with fact-finding to be rescheduled thereafter. Notwithstanding the stay, the Fact-Finder further indicated in his Order of

November 23, 2004 that such Order did not preclude the parties from undertaking any negotiations to resolve any of the issues set forth in their various position statements.

The issue submitted to the voters of the City of Lorain was to provide an additional 1/4 of 1% income tax levy effective March 1, 2005 through December 31, 2009 for the purpose of providing general operating funds and equipment to the City of Lorain. On February 24, 2005, the Board of Elections of Lorain County certified that there was a total vote on that issue of 7,930 with 5,465 voting "yes" and 2,465 voting "no." (Joint Exhibit 1) Thus, the issue passed.

While the instant case was stayed pending the outcome of the income tax levy election, the Union filed an unfair labor practice charge against the City under Case No. 04-ULP-10-0548 regarding an alleged unilateral change by the City regarding use of donated sick leave. That issue was only tangentially involved in the instant fact-finding, however, consideration of the ULP by SERB required further postponement of the fact-finding. Eventually, the unfair labor practice charge was settled between the parties, which allowed fact-finding to proceed and was then scheduled for October 3, 2005. On that date, and again on October 6, 2005, the Fact-Finder served as a mediator in an attempt to resolve the issues or to narrow them in terms of the presentation of any evidence. Ultimately, a full fact-finding hearing was held on November 10 and November 17, 2005. All of the hearings were held at the Lorain City Hall, 200 West Erie Avenue, Lorain, Ohio, except for the initial hearing on November 17, 2004 which, although initially scheduled to be held at the Lorain City Hall was moved to a conference room at the Spitzer Hotel located across the street from City Hall.

The Fact-Finder received and has taken into consideration numerous exhibits and materials presented by both parties, including three joint exhibits, FOP Exhibits 1 through 17, and City exhibits measuring approximately 3-1/2 inches referenced as Exhibits A-1 through A-21, B-1

through B-9, C-1 through C-11, and D through JJ. In addition, the Fact-Finder has reviewed and taken into consideration Fact-Finder James M. Mancini's Report and Recommendations in the matter of the *City of Lorain and United Steel Workers of America*, Local 6621, SERB Case No. 02-MED-09-0808, Fact-Finder John S. Weisheit's Report dated February 23, 2004 in the matter of *United Steel Workers of America and the City of Lorain*, SERB Case No. 02-MED-09-0808 (Mr. Wisheit serving as Conciliator), Fact-Finder Gregory J. VanPelt's Report and Recommendations in the matter of the *City of Lorain and OPBA*, SERB Case No. 03-MED-10-1252, Conciliator James M. Mancini's Conciliation Award in the matter of the *City of Lorain and Ohio Police Benevolent Association*, SERB Case No. 03-MED-10-1252, and Fact-Finder Marc A. Winter's Report and Recommendations in the matter of the *City of Lorain and International Association of Fire Fighters, Local 267*, dated November 10, 2005, SERB Case No. 05-MED-05-0657.

In addition to the material presented, testimony of the witnesses and the arguments of the parties, the Fact-Finder has also 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).

The Fact-Finder commends the representatives of both the Union and the City for presenting their particular positions in a highly professional and articulate manner, as is evident not only by the length and breadth of the documentary material presented but in light of a rather elongated fact-finding protocol. In preparing this Report and Recommendation, the Fact-Finder has attempted to summarize and address 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 issues 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."

II. BACKGROUND.

The Fact-Finder could spend an inordinate amount of time and text to set forth the entire background of the City of Lorain and to put in perspective the current unresolved issues between the FOP and the City. To do so, however, would gain nothing as even a novice in government administration would be immediately aware of the distressed financial condition of the City. As the State Auditor stated in his analysis on October 17, 2002 (City Exhibit A-6):

"Based on the examination of the financial forecast of the General Fund of the City of Lorain, the Auditor of State does hereby certify a deficit in the General Fund of \$2,400,000 for the year ending December 31, 2002. On the basis of this certified deficit, a fiscal watch exists at the City of Lorain as defined by Section 118.022(A)(4) of the Ohio Revised Code."

Revised Code Section 118.022(A)(2) defines a fiscal watch condition as:

"The existence of a condition in which the aggregate of deficit amounts of all deficit funds at the end of its preceding fiscal year, less the total of any year-end balance in the general fund and in any special fund that may be transferred as provided in Section 5705.14 of the Revised Code to meet such deficit, exceeded 1/12 of the total of the general fund budget for that year and the receipts to those deficit funds during that year other than from transfers from the General Fund."

At Page 8, the State Auditor stated:

"The financial forecast of the General Fund for the year ending December 31, 2002 indicates that a fiscal watch exists under Section 118.022(A)(4) of the Revised Code. The forecasted deficit of \$2,400,000 exceeds 1/12 of the General Fund revenue from the prior year by \$425,000."

On January 15, 2004, the State Auditor conducted a performance audit of the City noting that the City remained under a fiscal watch (City Exhibit A-3). As summarized by the Auditor at Page 1-3:

"The City of Lorain is located in Lorain County in Northeastern Ohio and has a population of 68,652. The City's economic climate is marked by relatively high unemployment rates. The City's unemployment rate was 10.2% for 2002 as reported by the U.S. Department of Labor, Bureau of Labor Statistics. According to the 2000 Census, Lorain's median income was \$33,917 which is 17% less than the state average of \$40,956. The City's industrial base consists primarily of manufacturing and trade enterprises."

On June 24, 2005, the City's independent auditors issued a report as of December 31, 2004 (City Exhibit A-5). In part, the auditor's stated at Page 3 of their report:

"Key financial highlights for fiscal year 2004 are:

The City's deficit cash balance in the General Fund as of December 31, 2004 is \$2,340,819. This is an increase of \$668,816 over 2003. Of this amount, \$483,877 was due to making a fifth payment to the Police and Fire Pension (in the year 2000, the City only made three payments—this fifth payment brings us back in line with our pension payments). This remainder of the increase in the deficit occurred in spite of wage freezes by city employees and cost containment measures instituted by the City.

Total assets decreased by \$7,167,821 from 2003 to 2004, or 2.27%.

Total liabilities increased by \$499,510 from 2003 to 2004, or .52%.

Total net assets decreased \$7,667,331 from 2003 to 2004, or 3.49%."

Arguably, one might think that the financial picture for Lorain might be somewhat brighter with the passage of the 1/4 of 1% income tax increase in February 2005, which would generate approximately \$2 million a year. Such optimism, however, was quickly dashed when, on October 13, 2005, the Ford Motor Company wrote to the Mayor of the City of Lorain stating, in pertinent part (City Exhibit A-8):

"This communication is to advise you that plant consolidation actions may constitute a 'mass layoff' as defined by the Act [Worker Adjustment and Retraining

Notification Act] at Lorain Assembly Plant located at 5401 Baumhart Road, Lorain, OH 44053 and at Ohio Assembly Plant located at 650 Miller Road, Avon Lake, OH 44012.

It is anticipated that approximately 767 hourly employees will be affected by the Lorain and Ohio Assembly plant consolidation action. The number of employees by classification as outlined in this letter may be less due to the impact of potential attrition, e.g., voluntary quits, retirements, etc., between now and the effective date of this action. The reductions were to be indefinite with non-skilled employees being laid off effective December 16, 2005 and skilled trades to be reduced by the end of January 2006."¹

This consolidation of the Ford Avon Lake and Lorain Plants, leaving Avon Lake as the survivor, obviously places a financial hardship on the City of Lorain and, suggestively, wipes out any gain that might have been realized by the passage of the 1/4 of 1% income tax increase. The Lorain City Treasurer, in a Memorandum dated September 27, 2005 (City Exhibit A-9) stated: "During the year of 2004, Ford Motor paid \$2,464,317.81 in withholding. This amount was based on a total payroll of \$141,577,531.47." Additionally, Federated Stores, which operates a credit facility within the City of Lorain, recently announced layoffs, and the City Treasurer, in a letter dated October 26, 2005 (City Exhibit A-11), stated: "Due to the recent announcement by Federated Stores, operating as May Credit locally, we estimate the loss of revenue to be approximately \$50,000."

The reader is also referred to the 2003 study prepared by the Joint Center for Policy Research of the Public Services Institute, Lorain County Community College, entitled, "Our People, Education, and Economy: Changing Nature of Lorain County" (City Exhibit D). Among the major items noted in the study were, by referencing titles: "(1) Persons Age 45-64 Fastest Growing Over Last Decade, Pattern to Continue; (2) Married Couple Families Continue to Decline; (3) African-

¹Although not considered as evidence in this matter, the reader is referred to the newspaper series entitled "Ford Leaves Lorain" appearing in The Plain Dealer, December 4, 11 and 17, 2005 editions.

American Families Almost Three Times as Likely, and Hispanic Families Nearly Twice as Likely, To Be Single-Headed Than Are White Families; (4) Average Size of Household Continues to Decrease."

The report also noted at Page 7 that "Lorain City has a per capita income of only \$16,340. On average, City of Lorain residents make \$4,714 less per person than county residents overall." The City Auditor, Ronald Mantini, testified regarding his estimates for the next several years and the financial forecast. See, generally, City Exhibit A-2, and City Exhibit DD. Without going into a line by line detail, suffice to note that a projected deficit at the end of 2005 of approximately \$2,391,000 goes to a projected deficit in 2006 of \$3,389,000, a projected deficit in 2007 of \$4,688,000, and a projected deficit in 2008 of \$6,304,000. The Auditor's computations (City Exhibit DD) also make a projection as to the dollar amount for fiscal watch threshold and also the threshold dollar amount at which the City would be in a fiscal emergency status. It was obvious that the City would be in a fiscal watch during all of the next four to five years and would probably reach fiscal emergency threshold sometime in 2007 and thereafter.

Throughout the fact-finding, it was readily apparent that both the Union and the City are cognizant of the City's present and projected financial situation, particularly with the projected closing of the Ford Motor Lorain Plant. However, these circumstances are neither new nor novel to cities located throughout Ohio and many of the other midwestern "rust belt" areas. The Fact-Finder does not doubt that it will take cooperation by all sectors to achieve workable, if not harmonious, collective bargaining relations. The City cannot be blind to an underlying necessity of providing and sustaining adequate safety forces. The Union can take a "hard line" which probably would do nothing but exacerbate the financial picture of the City and, likewise, the City could take a "hard line" which would do nothing but disrupt morale and reduce the ability of the City to hire

new police officers by reason of resignation and/or retirement. There must, inevitably, be an area of mutual accommodation so that the City can survive financially and that its employees will be retained in order to provide essential governmental services to the citizens of the City of Lorain.

It is in light of the above abbreviated background that the Fact-Finder submits his recommendations as hereinafter set forth.

III. RECOMMENDATIONS.

Miscellaneous.

The "current" contract that the parties have been operating under was for the period January 1, 2001 through December 31, 2003. Essentially, the parties have been operating under that contract for the last two years, although there have been a series of negotiations ongoing between the parties during that period of time. There are a few provisions, substantially procedural in nature, which the Fact-Finder perceived to be acceptable by the parties, although there was no formal "signing off." In that regard, the Fact-Finder thus considers it necessary to identify these preliminary matters upon which he believes that the parties are in mutual agreement.

Article VI - Union Representation.

Section 6.1 is amended to read as follows: "The Employer will recognize five (5) employees selected by the FOP to act as Lodge Officers or Grievance Representatives (intended to include two (2) elected officers and three grievance members) for the purpose of processing grievances and attending meeting in accordance with the provisions of this Agreement. No Employee shall be recognized by the Employer as a Lodge Officer or Grievance Representative until the FOP has presented the Employer with written certification of that person's selection."

The last sentence in §6.2 is amended to read: "However, Employee shall not be compensated for attendance at such hearings and/or meetings during non-duty hours."

A new §6.4 to read as follows: "Members of the FOP Executive Board shall be granted forty (40) hours of paid time off for FOP matters including negotiations, per year, subject to approval of the Chief of Police, which approval will not be unreasonably withheld or denied."

Article IX - Grievance Procedure.

In §9.7, Step 1, the second to the last sentence in Step 1 is amended to read as follows: "If no meeting was deemed necessary by the Division Commander, he shall investigate and respond to the grievance within ten (10) business days following the aggrieved employee's written submission of the grievance to the Division Commander."

In §9.7, Step 2, the second to the last sentence is amended to read as follows: "If no meeting was deemed necessary by the Police Chief, he shall investigate and respond to the grievance within ten (10) business days following the aggrieved employee's written submission of the grievance to the Police Chief."

In §9.7, Step 3, the second to the last sentence is amended to read as follows: "The Director of Public Safety shall investigate and respond in writing and state the reasons for the response to the grievance within fifteen (15) business days following the meeting date. If no meeting was deemed necessary by the Director of Public Safety, he shall investigate and respond in writing and state the reasons for the response to the grievance within fifteen (15) business days following the aggrieved employee's written submission of the grievance to the Director of Public Safety."

In §9.7, Step 4, the last sentence of the first paragraph pertaining to arbitration is amended to read: "The right of the Union to arbitrate a grievance is limited to a period of thirty-one (31) calendar days from the date a written answer to the grievance, with the reasons state therein, was provided by the Safety Director in Step 3 of the grievance procedure, and any grievance not

submitted in such period shall be deemed settled on the basis of the last answer given by the Employer."

Article XIV - Hours of Work and Overtime Compensation.

Overtime Compensation.

Section 14.2 of the Collective Bargaining Agreement provides in essence that when an employee is required to work more than 160 hours in any 28 consecutive day work period, that employee is entitled to overtime compensation at the rate of 1-1/2 times his/her regular base rate of pay for all hours worked in excess of 8 hours in a work day. The Union has proposed that in instances of "forced overtime," they should be paid at twice their hourly rate of pay. The Union emphasized that they were not suggesting double time for work extending beyond their 8 hour shift because of investigative or similar matters in process or a continuation of the work activity in which they were involved during their regular shift. However, the Union suggests that because of an argued manpower shortage, officers are often required to work an extended shift beyond their regular shift, and in situations such as these, they should be compensated at double time. The City rejects that contention and essentially argues that officers are reasonably compensated at the time and a half rate.

The Fact-Finder recommends that the current contract language be retained for two major reasons. First, the Fact-Finder cannot overlook or disregard the potential financial impact and, at this present time, he is reluctant to recommend double time although, if the City makes an abusive use of "forced overtime," such requirement may result in deteriorating morale and difficulties in recruitment. Secondly, because the Fact-Finder is recommending only an extension of the present contract for one year through December 31, 2006, the issue of "forced overtime" may yet become a further topic of negotiations in connection with a potential contract for the years subsequent to 2006.

Compensatory Time

Section 14.3 of the Collective Bargaining Agreement provides in part: "Accumulated compensatory time shall be taken off within a reasonable period of time after it is earned and shall in no event necessitate an overtime situation nor create an undue hardship in scheduling on [sic.] maintaining operations." The contract further provides that if compensatory time cannot be taken within a reasonable period of time after it is earned, the employee may elect to either be paid in overtime compensation or be allowed to carryover accumulated compensatory time not to exceed a maximum of 480 hours.

On June 11, 2003, Captain Robert Davey, the Department's Administrative Captain, issued a memorandum to patrol supervisors dealing with the approval of compensatory time for telecommunicators and correction officers. Although not specifically addressed to uniformed officers or the FOP, the essence of the memorandum appears to be applied. In part, Captain Davey stated: "The use of time coming by telecommunicators and corrections officers will not be approved unless the required position can be filled by another qualified on-duty employee in the same bargaining unit, or by a qualified employee of the same bargaining unit on overtime status." (FOP Exhibit 13) The memorandum of June 11, 2003 was amended by Captain Davey on July 8, 2003 wherein he added, in part: "Permission allowing overtime to cover an employee on time coming will only be granted to no more than one employee from each bargaining unit per shift, regardless of the length of time coming granted." (FOP Exhibit 12) The City objects to any increase in compensatory time that could be converted to cash because of the City's financial condition. Further, the City suggests that it must be able to control the use of the compensatory time so that there is no "undue hardship" in maintaining its operations.

The Fact-Finder recognizes that maintaining operations of a police department is, in the first instance, a right of management. However, the contract under which the parties have been operating became effective January 1, 2001 and, although expiring on December 31, 2003, has been continued by the parties. Subsequent to that contract, the U.S. Court of Appeals for the Sixth Circuit decided the case of *Beck v. City of Cleveland*, 390 F.3d 912 (decided Nov. 12, 2004). That decision dealt directly with the issue of use of compensatory leave by police officers as it relates to the Fair Labor Standards Act. The police officers had contended that even under the undue disruption rule under §207(o)(5) of the Fair Labor Standards Act, a municipality cannot refuse to honor a police officer's timely leave request solely in order to avoid payment of overtime to substitute police officers.

The Sixth Circuit cited an August 19, 1994 opinion of the Department of Labor, Wage and Hour Section which stated:

"It is our position, notwithstanding [a collective bargaining agreement to the contrary], that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide service of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive."

The Court of Appeals, in essence, held that financial reasons, by itself, was an insufficient basis to satisfy the undue disruption provision. As the Court further noted in its decision:

"First, to grant the City the unlimited discretion to deny compensatory leave requests relieves the City of establishing the undue disruption requirement imposed by Congress. Second, the undue disruption clause is ambiguous and the Secretary's regulation that a city cannot deny compensatory leave merely to avoid payment of overtime to a substitute officer should obtain here. To comply with the Act and its legislative history, the City should be required to make a factual showing of undue disruption, financial or otherwise."

Concluding, the Court stated:

"In our view, invalidation of the police officer's statutory rights under §207(o)(5) requires a clear showing of the City's entitlement to the undue disruption exception to awards of accumulated compensatory leave. The police officer's compensatory leave request must be granted absent 'clear and affirmative evidence' of an undue disruption of the City's provision of police services for its citizens that is the controlling consideration under the 'unduly disrupt' standard in §207(o)(5)."

In the opinion of the Fact-Finder, the recent decision of *Beck v. City of Cleveland* thus overrides the conflicting language in §14.3 of the instant Collective Bargaining Agreement. Accordingly, within the parameters set forth by the U.S. Court of Appeals in *Beck v. City of Cleveland*, the Fact-Finder recommends that the sentence "Accumulated compensatory time shall be taken off within a reasonable period of time after it is earned and shall in no event necessitate an overtime situation nor create an undue hardship in scheduling on maintaining operations" be stricken.

Separately, the Fact-Finder finds that the parties are in substantial agreement to add a new §14.9 to provide as follows: "When a shift vacancy arises and the Department needs to fill said vacancy, when all factors are equal, but subject to the operational needs of the Police Department as determined by management, such vacancy shall be based upon an officer's seniority. Seniority for this purpose shall be classification, i.e., rank, seniority."

Article XIX - Longevity

Section 19.1 of the contract provides longevity pay of ½ of 1% of a Class A patrolman's annual base rate of pay for each year of service up to a maximum of 20 years. The City proposes that the longevity formula set forth under §19.1 be eliminated and substituted with a flat amount of \$90 per year of service. The City asserts that this adjustment is, once again, necessitated for reasons of financial difficulties and the fact that the City is in a fiscal watch.

The Fact-Finder recommends that current contract language be retained, again for the reason that he is addressing a one year contract and not a two or three year contract. The issue of an adjustment to longevity is a further matter to be explored in the next round of negotiations which, presumably, will be for a longer contract term.

Article XXII - Insurance Coverage

The City noted that the group health insurance is employer provided and the City is a self-insurer with Medical Mutual of Ohio as plan administrator. There is no deductible, no co-insurance and no monthly premium contributions by the employees although they pay a \$10.00 co-pay for an office visit and a co-pay of \$2.00/\$5.00 on prescription drugs for generic or name brand. Effective June 1, 2004, the United Steel Workers of America, Local 6621, which represents the City's largest bargaining unit, agreed to implement certain cost sharing aspects pertaining to the group health insurance, including a payroll deduction toward premiums. The Fact-Finder discusses at Page 17, *post*, a \$2,400 wage adjustment² granted by the City to the firefighters as a "*quid pro quo*" for the firefighters to agree to participate in the same healthcare program as applied to the steelworkers' agreement. The City indicated that the plan would provide for a 5% monthly premium contribution by the unit employee with a deductible of \$100/\$200 for single/family coverage and a 10% co-insurance with a maximum out-of-pocket cost to the employee of \$1,000/\$2,000 for single/family coverage. Also, dental coverage would be eliminated as presently no other employee unit has dental coverage with the City.

The City noted in its position statement (Page 4):

²A bonus of \$800 per year for 2001, 2002 and 2003. The bonus was added to the firefighters' wage base.

"The cost of health insurance and prescription coverage has more than doubled since 1995. The employees do not contribute to their group health insurance, and have not shared in these rising costs. Instead, the City and its taxpayers have absorbed 100% of the healthcare costs. These healthcare costs have adversely and directly contributed to the dire financial straits of the City. It is imperative that the City obtain some relief in the form of cost-sharing and plan changes for group health insurance. Such changes would enable the City to significantly reduce its General Fund deficit and allow the City to properly fund its health care reserves."

It cannot be gainsaid that the issue of health insurance coverage is a most complicated and involved issue. The Fact-Finder is not unaware of the City's financial situation yet, at the same time, the City is proposing that the police officers accept a wage freeze and, at the same time, make a premium contribution for their healthcare which, arguably, thus reduces the net effect of a non-wage increase. Even the offer of the three year/\$800.00 per year wage adjustment must have been considered as an incentive to the firefighters to accept a steelworkers' health plan. One can only speculate as to whether the firefighters would have accepted or rejected the plan if that \$2,400 "carrot" had not been offered.

In overall perspective, if the instant contract were one for a three year period, the Fact-Finder would be inclined to recommend that the police officers convert to the same health plan now being utilized by the City applicable to all other employees. However, again recognizing that his recommendations herein are only applicable for a one year period, i.e., 2006, the Fact-Finder is reluctant to suggest such a significant change. Accordingly, the Fact-Finder recommends that current contract language be retained although, anticipating that new contract negotiations may very well get underway shortly, this is an issue which needs to be strongly evaluated by the parties.

Article XXVI - Sick Leave

The City has proposed replacing the current sick leave policy set forth under the Collective Bargaining Agreement with a sick leave proposal substantially similar to that used by the State of

Ohio for its employees. The Fact-Finder recommends that current contract language be retained as he considers that it is an inappropriate time, for a one year contract, to address significant issues dealing with the modification of the sick leave policy.

Article XXX - Shift Differential

The present contract provides for three shifts in the Police Department—the first shift designated as a day shift, a second shift designated as the "afternoon shift," and a third shift designated as the "night shift." Under §30.2, members of the bargaining unit who work on the second shift receive a shift differential of 35¢ per hour and bargaining unit members who work on the third shift receive a 40¢ per hour shift differential, all being in addition to his/her regular hourly rate of pay. The Union proposes that the second shift differential be increased to 70¢ per hour and that the third shift differential be increased to 80¢ per hour.

Without belaboring the issue, even though the dollar amount may not be substantial in relationship to other costs, the Fact-Finder recommends that current contract language be retained, particularly, once again, since the recommendation is applicable for a one year period, i.e., Calendar Year 2006.

A new §30.3 is to provide as follows: "Each officer shall be permitted to select his assigned shift, by the date of rank, annually. This Article shall be in force for every officer, regardless of rank, where they are assigned to like duties and there is more than one shift available, but subject to the operational needs of the Department as determined by management."

Article XXXI - Wages.

In its Position Statement, the FOP has proposed a 1.5% increase in base wages as of October 1, 2005 and a 3% increase effective the first pay period of January 2006. During the fact-finding hearing, the Union modified its position by indicating that it would accept whatever wage

increase was granted to the firefighters. The City countered by stating in its Position Statement: "Due to the dire financial straits of the City of Lorain, the City is proposing a wage freeze for 2005 and 2006." This issue is much more complex than may initially appear.

Briefly stated, the FOP accepted a wage freeze in 2003 which was to have been a 3.5% wage increase. The FOP received a 3.5% wage increase in 2004 which was its 2003 wage increase and did not receive an additional wage increase for 2004. Thus, there was suggestively a 2 year wage freeze.

The City has suggested (City Exhibit FF) that a 1% wage increase would cost the City an additional \$221,587, a 2% wage increase would cost an additional \$443,175, and a 3% wage increase would cost an additional \$664,762.

In 2001, 2002 and 2003, the City negotiated with the firefighters an annual "bonus" of \$800 for each of those three years added to the wage base which was given as a "*quid pro quo*" to the firefighters in exchange for their acceptance of participating in the City's self-insured general medical/hospitalization health program rather than maintaining their separate plan. The police have their own separate health plan under which the City is a self-insurer also. (FOP Exhibit 7) The Union contends that the average pay for a police officer is \$41,643.14 and the average pay for a firefighter is \$41,923.23 (FOP Exhibits 9 and 10).

While the instant fact-finding was proceeding, the City was also proceeding with fact-finding regarding the firefighters in SERB Case No. 05-MED-05-0657. On November 10, 2005, the Fact-Finder issued his Recommendation for a wage increase of 3.5% for one year effective January 1, 2006. (Joint Exhibit 3) On November 15, 2005, the Lorain City Council rejected the fact-finding report. The City advised the Fact-Finder in the instant matter that a request for the appointment of a Conciliator had been submitted to SERB, and it is thus readily apparent that some of the same

issues facing both the firefighters and the police officers will be addressed in conciliation as to Case No. 05-MED-05-0657 sooner than the instant case.

In 1995, the FOP settled a lawsuit which it had filed against the City in the Lorain County Common Pleas Court, Case No. 93-CV-110792. The settlement, in part, established a "benchmark" number of ninety policemen whose salaries and benefits were to be paid from the General Fund. Any police personnel or equipment above the benchmark were paid out of a special and separate "Police Levy Fund," funded by a 1/4 of 1% income tax. As noted in Paragraph 2 of the Settlement (City Exhibit A-20):

"The benchmark number of police personnel shall be set at ninety (90) policemen, whose salaries, benefits and other operating costs shall be borne by the general fund. All police personnel above the benchmark shall be paid from the Police Levy Fund all in accord with Lorain Ordinance No. 39-92."

The benchmark provision of 90 police officers was modified for the period November 24, 2001 through December 31, 2002 when the benchmark was reduced to 83 police officers. (FOP Exhibit 4)

Further, under Lorain Ordinance 22-92, passed February 17, 1992, it was provided that no less than 24% of the General Fund had to be allocated to the City's Police Department. (City Exhibit A-20)

The Fact-Finder candidly concedes that he is somewhat on the horns of a dilemma in addressing this particular issue. On the one hand, he is cognizant that if he recommends a wage increase anywhere near the wage increase recommended by the Fact-Finder in the firefighters' case, the City will most likely reject that recommendation also. This would then force the instant case into conciliation, similar to that being pursued as to the firefighters. On the other hand, if the Fact-Finder were to recommend a freeze for the year 2006, such decision might significantly hinder or be unjust

as to the police officers, particularly if a wage increase is granted through conciliation as to the firefighters. Although the Fact-Finder is reluctant to suggest that the firefighters and the police officers are merely mirror images of each other or constitute the two sides of the same coin, there is nevertheless a certain aspect of commonality, primarily arising as a result of their both being safety forces.

In light of the present circumstances and this Fact-Finder's recommendation that any wage increase that might be granted would only be applicable for the calendar year 2006, the Fact-Finder considers it more prudent to, in effect, take a step backward and to recommend that the wage issue be held in abeyance until the Conciliator's decision in Case No. 05-MED-05-0657 and that the same wage increase granted to the firefighters by the Conciliator in that case likewise be deemed applicable to the police officers in the instant case.

Article XXXIV - Present Benefits and Past Practices

Section 34.1 of the present contract states: "All present benefits and past practices in effect prior to this Agreement and not covered by, in conflict with, or superseded by this Agreement shall remain in full force and effect, unless and until changed in writing by mutual agreement of the parties." The City proposes to eliminate that clause on the basis that it is "very general, very broad and purports to adopt any and all past practices." The City proposes that any alleged practice or benefits not made a part of the new contract be considered "null, void and unenforceable." (City Position Statement, Page 5) The Fact-Finder has some sympathy with the City in terms of the broad language in §34.1. Obviously, a reference to a past practice without specifically identifying it in the Collective Bargaining Contract raises a question as to whether the matter is or is not a past practice. Indeed, the Supreme Court has recently addressed the issue regarding utilization of past practices as being binding on the parties in the case of *Assn. of Cleveland Firefighters, Local 93 of the Internatl.*

Assn. of Firefighters v. Cleveland, 99 Ohio St.3d 476, 2003-Ohio-4278, wherein the Court noted at ¶16: "The predominant definition, and the one used by both the arbitrator and the Union, requires that to be binding on parties to a collective bargaining agreement, a past practice must be (1) unequivocal, (2) clearly enunciated, and (3) followed for a reasonable period of time as a fixed and established practice accepted by both parties. We think this is a sound and logical test, and hereby adopt it."

The Fact-Finder concedes that §34.1 probably needs to be re-examined, if not re-written, however, again, because he is addressing his Recommendations solely for a one year period ending December 31, 2006, it is recommended that current contract language be retained.

Article XXXIX - Physical Fitness Program

Section 39.1 sets forth a voluntary physical fitness program, and under §39.2, one who successfully completes the physical fitness test is entitled to the option of three hours of compensatory time or three hours paid time for each week in the respective quarter in which the individual qualified. The City proposes to modify the physical fitness program by eliminating the present language of §39.2 and providing for a benefit of \$200 paid semi-annually upon completion of a semi-annual physical fitness test. The City notes at Page 5 of its Position Statement: "The current provided is extremely generous, providing the successful candidate with three hours of compensatory time per week. (156 hours per year or approximately four (4) weeks pay totaling approximately \$3,500.)" Obviously, the City suggests that if the physical fitness program costs \$3,500 per officer, multiplying that amount by say 90 police officers, results in a rather significant sum. The Fact-Finder appreciates that the proposal is "money driven," however, Article XXXIX is in the present contract which covered 2001 through 2003 and is still in operation. Although adjustment to Article XXXIX might be necessitated because of the City's financial conditions, the

City was facing financial hardship at the time it executed the current contract although perhaps not as severe as it is now. Notwithstanding this situation, however, the Fact-Finder considers the compensation for the physical fitness program is but part of the larger financial package and, again, since the Fact-Finder's Report and Recommendations deal only with 2006, it is recommended that the current contract language be retained.

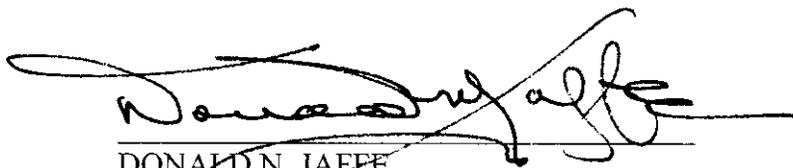
Take Home Car Program

The Union noted that some individuals in the Police Department are permitted to "take home" a car. In that context, the Union proposes that any officer who is not assigned a take home car be paid \$1,000 per year, such payment, in essence, equalizing the usage right afforded to police officers who do have an assigned take home car. Again, in light of the limited time period being recommended by the Fact-Finder for the duration of the contract, the Fact-Finder recommends that the current policy be maintained and that the issue of the assignment of a take home car is a management prerogative. The Fact-Finder recognizes a certain psychology of safety and public perception when they observe more police cars in or around the city streets, and that this may be a deterrent to crime, however, that is a matter that will have to be left at the present time to the discretion of the City. If there are negative consequences in terms of public safety arising from the restricted assignments of a take home car, those are consequences that will have to be faced and addressed by the City.

* * * * *

Executed at the City of Cleveland, Cuyahoga County, Ohio, this 6th day of
December, 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald N. Jaffe", written over a horizontal line.

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; Jack L. Petronelli, Esq., Johnson & Colaluca, LLC, 1700 North Point Tower, 1001 Lakeside Avenue, Cleveland, Ohio 44114; and Michael J. Scherach, Esq., Operations Deputy, and Craig Miller, Safety/Service Director, Lorain City Hall, 200 West Erie Avenue, Lorain, Ohio 44052, via FedEx, this 6th day of December, 2005.


DONALD N. JAFFE
Fact-Finder