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STATE EMPLOYMENT
RELATIONS BOARD

2004 JUN 28 A 10: 39

PURSUANT TO O.R.C. 4117.14(C)
UNDER THE AUSPICES OF THE
STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER BETWEEN)

CITY OF WICKLIFFE)

and)

FRATERNAL ORDER OF POLICE)
LODGE 116)

FACTFINDER'S REPORT

SERB CASE NOS.

03-MED-09-0996;

03-MED-09-0997

This Factfinding arises pursuant to Ohio Revised Code Section 4117.14(C). The parties, City of Wickliffe ("City") and Fraternal Order of Police Lodge 116 ("FOP"), selected Susan Grody Ruben to serve as sole, impartial Factfinder, whose Recommendations are issued below.

Hearing was held May 18, 2004 in Wickliffe, Ohio. The parties were afforded full opportunity for the presentation of positions and evidence. Pre-hearing submissions were received from both parties.

The parties requested the Factfinder to deliver her Report on June 11, 2004.

APPEARANCES:

for the City:

Tom Grabarczyk, Consultant, Labor Relations Management, Inc., 6800 W. Central, Suite L-2, Toledo, Ohio 43617.

for the FOP:

Robert M. Phillips, Faulkner, Muskovitz & Phillips, LLP, 820 West Superior Avenue, 9th Floor, Cleveland, OH 44113.

FACTFINDER'S RECOMMENDATIONS

Statutory Criteria

In reaching Recommendations on the seven open issues, the Factfinder has reviewed the parties' pre-hearing submissions and the evidence and positions presented at the Factfinding Hearing. The Factfinder has analyzed this information in the context of the statutory criteria found in Ohio Revised Code Section 4117.14(G)(7):

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- a) Past collectively bargained agreements ... between the parties;**
- b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;**
- c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;**
- d) The lawful authority of the public employer;**
- e) The stipulations of the parties; and**
- f) Such other factors, not confined to those listed ... which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.**

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Bargaining Unit

The bargaining unit consists of a Patrol Unit of approximately 30 patrol officers, and a Promoted Unit of approximately 12 supervisory police officers. The Chief of Police is excluded from the bargaining unit, as are part-time police officers.

Issues

At the end of the Factfinding Hearing, there remained seven open issues:

- 1) Wages**
- 2) Health Insurance**
- 3) Uniform Allowance**
- 4) Field Training Officer Premium**
- 5) Residency**
- 6) Physical Fitness**
- 7) Drug and Alcohol Testing**

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1. Wages

City's Proposal Regarding Wages

The City proposes the following wage increases:

2004 – 1% (retroactive to January 1, 2004)

2005 – 1.5% (effective January 1, 2005)

2006 – 1.5% (effective January 1, 2006)

The City presented its proposal against a background of continued deficit spending. According to the City's General Fund Summary, 2004 is projected to be the third consecutive year of deficit spending:

2002: (\$ 237,963)

2003: (\$1,349,350)

2004: (\$ 786,534) projected

The City's position is that without help in plan design and cost sharing in health care insurance, there is no money for wage increases. Moreover, the City points out that some of the 3.5% and 4% wage increases seen in comparator communities are from Year 3 of 3-year contracts; the City predicts the upcoming contracts in these

municipalities will have smaller wage increases, given the downturn in the national and local economies since these contracts were negotiated. The City also points out various layoffs at City-sited private companies, including Lubrizol Corporation's November 2003 announcement of 100 layoffs at its City site.

FOP's Proposal Regarding Wages

The FOP proposes the following wage increases:

2004 – 4% (retroactive to January 1, 2004)

2005 – 4% (effective January 1, 2005)

2006 – 4% (effective January 1, 2006)

The FOP presented its proposal against a background of a financially healthy municipality, especially as compared to its neighboring municipalities in Lake County. The City has had a significant ending general fund balance in each of the last three years which has easily enabled the City to avoid “deficit spending”:

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2001: \$10,455,740

2002: \$10,217,777

2003: \$ 8,868,437

The FOP's position is that police wages in the City are competitive, and should remain so. The FOP notes many other police bargaining units in Lake County municipalities have collective bargaining agreements that provide for wage increases of between 3.5% and 4%.

The FOP also notes the City's revenue and expense statement through Q1 2004, when compared with 2003, shows a budgeted wage expense increase of \$100,000 for 2004 basic police wages. According to the FOP, this \$100,000 translates to a budgeted 5% increase for 2004.

The FOP also notes the City has not alleged it has an "inability to fund" pursuant to R.C. § 4117.14. Regarding local layoffs affecting income tax revenue, the FOP notes that despite Lubrizol Corporation's November 2003 layoffs, other local employers' hiring has offset some of those income taxes lost due to the Lubrizol layoffs.

Factfinder's Recommendation Regarding Wages

First, it must be noted the FOP (and ultimately, the Factfinder) have helped the City with plan design and cost sharing in health care insurance (as discussed below). The solutions found thus make it more viable for the City to address appropriate wage increases.

Second, the City's carryover balance in 2004 of approximately \$8 million¹ is a healthy carryover balance that is not exempt from funding some wage increases. This is true especially given that: 1) the City has not stated it has an "inability to fund"; and 2) the City projects the 2004 Ending Fund Balance to be \$8,003,793, even with the City's projection of \$786,534 of expected "deficit spending" in 2004 taken into account. Thus, even if the extra \$100,000 apparently budgeted for 2004 police wage increases is used, and the City incurs \$800,000 in "deficit spending" (presumably funded by the carryover), the 2004 and 2003 ending fund balances will be virtually the same – approximately \$8 million.

¹The City-prepared "General Fund Highlights" states the 2003 ending fund balance was \$8,868,437. At the Factfinding Hearing, the 2004 carryover balance was referred to as being \$7,900,000. The difference in these two figures does not materially affect the Factfinder's Recommendation regarding wages.

According to the Finance Director of Mentor (the much larger municipality next door), “good practice” is for an ending fund balance to be “about 10 percent of your revenues.”² According to the City’s “Projected Fund Activity,” projected general fund revenue for 2004 is \$10,944,800. As stated above, the City’s projected ending general fund balance for 2004 (taking into account \$800,000 of projected “deficit spending”) is \$8,003,793. Thus, the City’s projected ending general fund balance for 2004 is 73% of revenues. Compared to the 10% benchmark, it appears the City’s current and projected general fund balance is way beyond adequate, and can be used as a source of police wage increases.³ Of course, any wage increases should be

²Jennifer Seward, “Mentor OKs ‘04 budget,” The News Herald, date illegible on copy placed in evidence, but presumed to be late 2003 or early 2004, given the content of the article; page number not indicated in copy placed in evidence.

³Cf., e.g., the 2004 carryover funds of Painesville, a larger Lake County municipality (with a larger budget) than the City. (Painesville has a 2004 budget of approximately \$63 million; the City has a 2004 budget of approximately \$22 million. Scott Heasley, “Painesville adjusts 2004 budget,” The News-Herald, April 21, 2004, p. A-2; Jenny May, “Wickliffe has big plans for 2004,” The News-Herald, January 7, 2004, page number not indicated on copy placed in evidence.) Painesville began 2004 with only \$1.2 million in carryover funds. Scott Heasley, “Painesville adjusts 2004 budget,” The News-Herald, April 21, 2004, p. A-2. Painesville projects 2004 revenue of \$52.7 million. Scott Heasley, “Painesville city loads year-end meeting with much legislation,” The News-Herald, December 17, 2003, page number not indicated on copy placed in evidence. Thus, Painesville’s 2004 carryover is approximately 2% of its projected revenues. Despite this dismal ratio, Painesville “recently” agreed to raise its police wages by 2%. Scott Heasley, “Painesville adjusts 2004 budget,” The News-Herald, April 21, 2004, p. A-2.

Cf., also, the City Council of Mentor-on-the-Lake’s characterization of its finances: According to that City Council’s Finance Committee Chair, there will be a projected \$152,073 balance going

prudent and consistent with the statutory criteria.

This is not to suggest general fund carryovers should be used infinitely into the future to fund wage increases. There certainly may come a time when it would not be prudent to draw down the general fund any further. Given that the 2004 balance is projected to be 73% of projected revenues, however, the City has not yet reached that time.

Third, it appears the City already has budgeted for a 5% wage increase in the 2004 budget. (Cf. total annual appropriation for Police Department wages listed in City accounting document dated 12/31/03 (\$1,672,000) with total annual appropriation for Police Department wages listed in City accounting document dated 3/31/04 (\$1,770,058.) This additional \$98,058 appropriated for Police Department wages translates roughly to a 5% wage increase in 2004.⁴ (The \$98,058

into 2005, against \$3.6 million in projected 2004 operational budget revenues, a ratio of 4%. Despite this dismally low carryover, the President of Mentor-on-the-Lake's City Council said, "Things are tough all over...But I don't believe we're having any great financial problems." Jennifer Seward, "M-L approves tight budget," The News-Herald, March 10, 2004, page number not legible in copy placed in evidence.

⁴According to the City, the cost of a 1% increase for police wages (including increased pension contributions) is \$19,992.96. $5 \times \$19,992.96 = \$99,964.80$. The FOP did not account for the \$1,906.80 difference between the \$98,058 in the 2004 budget, and the \$99,964.80 cost of a 5% increase. The Factfinder is unaware of the reason for the difference. In any event, the City appears to have built in an increase to police wages in the 2004 budget.

includes an increased pension contribution.)

While the Factfinder has no intention of “penalizing” the City for having acted responsibly in budgeting for a wage increase, this information shows that even with a 5% increase in 2004, the City ends up with approximately the same \$8 million ending fund balance in 2004 as it had in 2003. Thus, it is difficult, if not impossible, to conclude a 4% increase, as proposed by the FOP, would harm the City’s fiscal condition in 2004.

Fourth, the statute requires wages to be analyzed in comparison to similar municipalities’ wages. The parties generally agree the appropriate comparator municipalities are the smaller municipalities in Lake County – among them Willoughby, Willowick, Willoughby Hills, and Mentor-on-the-Lake. The City’s police employees’ salaries land roughly in the middle of the pack of smaller Lake County municipalities. To maintain this standing, which is a reasonable and appropriate goal, requires wage increases.⁵

⁵The City’s prediction that some of the comparator municipalities’ yet-to-be bargained collective bargaining agreements will have wage increases lower than the 3.5% and 4% increases currently in place may be accurate, but is too speculative for the Factfinder to rely on.

Fifth, while Lubrizol Corporation had significant layoffs in late 2003, leading to lost income tax revenue for the City in 2004, it appears the Lubrizol layoffs will be at least partially offset by new engineering jobs created by other local companies.⁶

Sixth, it should be noted the Consumer Price Index in 2003 rose 2.2% on average from 2002. U. S. Department of Labor, Bureau of Labor Statistics, February 20, 2004. Thus, if the CPI stays roughly the same in the next 2-1/2 years, the City's proposed wage increases would be less than increased cost-of-living expenses during the 2004-2006 collective bargaining agreement.

Seventh, the City calculated the cost of a 4%/4%/4% wage increase for police during the 2004-2006 contract (including additional pension contributions) would cost \$492,758.

Eighth, it is clear from the City's "General Fund Highlights" that, like so many other municipalities during the period 2000-2003, revenues decreased, while expenses increased.⁷ The City appears to

⁶See Clifford Anthony, "Lubrizol lays off 100 locally," The News-Herald, November 5, 2003, page not indicated on copy placed in evidence.

⁷E.g., income tax revenue fell approximately by \$900,000 during this period, while health insurance expense increased by approximately \$500,000.

have done a far superior job to managing this difficult situation than have many other municipalities. Unfortunately for all concerned, it does not appear that this undesirable imbalance will be reversed anytime soon. Accordingly, fiscal prudence is necessary when taking on additional expenses.

Ninth, the City's projected shortfall between revenues and expenses in 2004, though significantly shrunk from 2003, still remains a sizeable figure. (Operating deficit in 2003 was \$1,349,350; projected deficit for 2004 is \$786,534.) While the City has significant resources that to date have allowed the City to remain "in the black," it is fiscally responsible for the City to guard its resources.

Tenth, the parties' 2001-2003 collective bargaining agreement provided for 4%/3.5%/3.5% wage increases.

Taking into account all ten points discussed above, which are grounded in the relevant statutory criteria, the proposals made by the parties, as well as the evidence presented by the parties, the Factfinder recommends the following wage increases:

2004	<u>4%</u> (retroactive to January 1, 2004)
2005	<u>3.25%</u> (effective January 1, 2005)
2006	<u>3.25%</u> (effective January 1, 2006)

These increases allow the City to: 1) remain competitive in hiring and retention; and 2) maintain the fiscal health for which the City is renowned.

2. Health Insurance

City's Proposal Regarding Health Insurance

The City proposes switching from a self-funded health insurance plan⁸ to a carrier-provided health insurance plan.⁹ As part of this proposal, the City proposes a choice of benefit levels as offered by various carriers to whom the City put out bids. Among those carriers was Medical Mutual. The Medical Mutual bid contains an HMO plan and a PPO plan. With regard to the level of benefits found in the

⁸In this Factfinding Report, "self-funded" is synonymous with "self-insured."

⁹Though the 2001-2003 collective bargaining agreement gives the City the option of making such a switch during the life of that agreement, such a switch is a mandatory subject of bargaining with regard to the 2004-2006 agreement.

Medical Mutual plan, which includes a prescription drug benefit of \$3(generic)/\$5(brand name) co-pays,¹⁰ the City proposal includes modifying those benefits to the extent the City has discretion to go up to \$10/\$20 for prescription drug co-pays. (The 2001-2003 contract provides for “up to” \$3/\$10 for prescription drug co-pays.)¹¹

With regard to employee contributions to the cost of health insurance premiums, the City proposes a floating employee contribution of 12% of the collective total cost of health/prescription, dental, and eye monthly premiums as adjusted during the term of the 2004-2006 collective bargaining agreement.

The City presented its proposal against a background of rising health care insurance costs. The City points out its health insurance costs increased from \$849,915 in 2000 to \$1,349,274 in 2003. This is an increase of \$499,329 or 58.75%.

¹⁰During the mediation and factfinding of this matter, there was some confusion regarding the meaning of the term “co-pay.” In this Factfinding Report, “co-pay” shall mean “a fixed dollar amount insureds must pay each time they receive a particular covered service or product.”

¹¹At the Factfinding Hearing, the parties referred to current practice being \$5/\$10 for prescription drug co-pays. This appears to have been an agreed-upon modification to the 2001-2003 collective bargaining agreement, though it is not reflected in the exhibits placed in evidence.

The City has concluded it needs to stop self-funding health insurance. At the time of the Factfinding Hearing, the City's self-funded City-wide plan had 107 policies. In such a small group, the City points out, it takes only one large claim to significantly affect costs. The City has been experiencing a high level of large claims, as well as high usage of physician services and prescriptions.

The City notes it needs to have a floating 12% employee contribution toward premiums because generally, insurance contracts are for one year. It is likely that during Years 2 and 3 of the 2004-2006 contract, premium costs will increase. The City's position is that it should not have to bear by itself those rising premium costs. The floating 12% shares the burden of rising premium costs with employees, who are benefitting from the health care insurance.

Similarly, the City points out, its proposal to retain discretion to raise prescription co-pays up to \$10/\$20 is made to save money for both the City and employees. The discretion to raise the co-pay, if acted upon, would result in lower premiums. If the employees are responsible for 12% of premium costs, higher co-pays resulting in

lower premiums would save everyone money.

FOP's Proposal Regarding Health Insurance

The FOP accepts the City's switch from a self-funded plan to a carrier-provided plan. Of the carrier-provided plans the City offered to the FOP, the FOP chooses the level of benefits found in the Medical Mutual HMO and PPO plans. The City has accepted the FOP's choice of this level of benefits (as found in the Medical Mutual plans), with the exception of prescription co-pays (for which the City proposes "up to \$10/\$20).

With regard to prescription co-pays, the FOP proposes status quo – \$5/\$10.¹²

The FOP proposes employee contributions toward the cost of health insurance premiums be:

2004 – \$65/month effective upon contract execution

2005 – \$75/month

2006 – \$85/month

¹²See footnote 11.

The FOP presented its proposal against a background of acknowledging health care insurance costs are rising annually. Due to that national issue, the FOP accepts the City's switch to a carrier-provided plan. The FOP notes that some of the benefits found in the Medical Mutual PPO plan are not as good as were provided under the City's self-funded plan. The City's self-funded PPO plan was a "first dollar" plan; for example, employees paid nothing for office visits. The level of benefits found in the Medical Mutual PPO plan provides that an insured pays a \$10 co-pay for office visits. Thus, the FOP rejects any further erosion of the benefit levels found in the Medical Mutual plans.

With regard to prescription co-pays, the FOP points out the City's proposal to have discretion to raise the prescription co-pays up to \$10/\$20 is an erosion of benefit levels, which is unacceptable to the FOP.

The FOP also rejects a floating 12% employee contribution toward premiums, on the basis that it would put a disproportionate and uncertain burden on employees. In the 2001-2003 contract, the employee contribution was a fixed \$25/month for single coverage, and

\$50 for family coverage. The City has more resources than any individual employee; accordingly, rising health care insurance costs during the life of the 2004-2006 collective bargaining agreement should be borne by the City, according to the FOP.

Factfinder's Recommendation

Though the subject of health care insurance was vexatious during the parties' negotiations and during the mediation conducted by the Factfinder, by the time of the Factfinding Hearing, much had been sorted out. Accordingly, the open issues on health care insurance are:

1) The method and amount of employee contributions toward the cost of health care insurance premiums; and

2) Whether and what kind of modifications shall be made to the levels of benefits found in the Medical Mutual HMO and PPO plans.

1) Employee Contribution Toward Premiums

The Factfinder appreciates that both parties seek certainty with regard to premium costs. Such certainty makes it more possible to create accurate budgets, whether they be family budgets or City

budgets. Given the national reality of ever-increasing health insurance premium costs however, it is impossible for both parties to achieve this fiscal certainty.

The question thus becomes which party is the more appropriate party to absorb rising costs due to rising premiums during the life of the 2004-2004 collective bargaining agreement. Clearly, the City has more resources than any individual employee. Thus, it is reasonable for the City to bear the risk of rising premiums during the life of the 2004-2006 collective bargaining agreement. In negotiations for the next collective bargaining agreement, the City is free to make a proposal based on the rising premiums during the last contract. Accordingly, the Factfinder does not recommend the City's proposal to have employees pay a floating 12% share of health insurance premiums.

The question then becomes whether the FOP proposal of \$65/month (2004, effective upon execution of collective bargaining agreement); \$75/month (2005); and \$85/month (2006); is appropriate. Under the 2001-2003 contract, employees pay \$25/month for single

coverage and \$50/month for family coverage.

Given that some of the benefits found in the Medical Mutual plans are not as high as the benefits provided by the City's self-funded plan, the Factfinder recommends other changes should be minimized to the extent feasible. Accordingly, the Factfinder recommends that during this initial switch to a lesser plan, employee contributions to monthly premiums should not increase drastically. The Factfinder therefore recommends the FOP's proposal on employee contributions to the cost of health insurance premiums.¹³

2) Level of Benefits

The Factfinder appreciates how the City has attempted to replicate many of the health insurance benefits enjoyed by employees under the self-insured plan. Not surprisingly, though, as the self-insured plan was a "Cadillac plan," the cost of exactly replicating it would be exorbitant.

¹³The FOP's proposal on employee contributions to premiums does not differentiate among different sized policies; i.e., in 2005 under the FOP proposal, an employee would contribute \$75/month regardless of whether it is for single coverage, "employee plus one," or family coverage. The insurance industry quotes separate prices for each of these types of policies. The parties may want to address this issue.

The Factfinder sees this issue as closely related to the issue of appropriate employee contributions toward monthly premiums. Thus, she uses the same reasoning. During this initial switch from the Cadillac self-insured plan to a more common carrier-provided plan with lesser benefits, there should be as few other changes as possible. This is especially true with regard to employees' out-of-pocket costs. Accordingly, the Factfinder recommends the FOP's proposal of the \$5/\$10 co-pays for prescription drugs (status quo).¹⁴

3. Uniform Allowance

City's Proposal Regarding Uniform Allowance

The City proposes status quo; i.e., no increases in uniform allowance. The City's position is that the limited resources available should be earmarked for insurance costs and across-the-board increases.

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¹⁴The Factfinder also notes the parties have agreed to establish and participate in a City-wide health insurance advisory committee.

FOP's Proposal Regarding Uniform Allowance

The FOP proposes increases in uniform allowance as follows:

2004 – increase by \$50

2005 -- increase by \$50

2006 -- increase by \$50

The FOP considers this a modest proposal that is justified by what it describes as double-digit increases in uniform prices.

Factfinder's Recommendation Regarding Uniform Allowance

While the FOP's proposal indeed is not an expensive proposition when compared to wage increases and higher insurance costs, it still must be factually justified in the evidentiary record to receive serious consideration. The Factfinder finds this justification lacking and therefore recommends the City's proposal for status quo.

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4. Field Training Officer (“FTO”) Premium

City’s Proposal Regarding FTO Premium

The City proposes status quo; i.e., no premium for field training officers. The City’s position is that field training responsibilities are voluntarily taken on, and are part of the job for those who choose to participate.

FOP’s Proposal Regarding FTO Premium

The FOP proposes a 10% wage premium to Field Training Officers during those hours that they train rookies. The FOP’s position is that in order to continue to attract highly-qualified officers to take on the responsibility of training rookies, there should be a premium.

Factfinder’s Recommendation Regarding FTO Premium

The Factfinder believes that providing on-the-job training to rookies creates more work for those officers who choose to take on this responsibility. It is easier to do just your own job, as compared to providing on-the-job training to a rookie, as well as being largely

responsible for the rookie's actions.

The City is correct that officers voluntarily become FTO's, which suggests an FTO premium is unnecessary. It is important to note, however, that it is in the City's short-term and long-term interest to have its best officers take on FTO duties; i.e., the better the FTO, the better trained the rookie. As highly-qualified City officers get older and retire, surely the City wants and needs officers who were well-trained as rookies by these highly-qualified officers.

A 10% premium only for hours worked as an FTO would not unduly burden the City's finances. Given the: 1) relative modesty of the request; 2) the significant benefit received by the City when a highly-qualified officer works as an FTO; 3) the added responsibility placed on an officer while working as an FTO; and 4) the City's continuing need to have its most qualified officers volunteer to work as FTO's, the Factfinder recommends the FOP's proposal.

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5. Residency

City's Proposal Regarding Residency

The City proposes to modify Article 38 – Residency -- to extend the 15 “statute-mile” residency requirement to 20 miles. The City notes it is very important to have off-duty City police officers available to supplement on-duty officers during an emergency.

FOP's Proposal Regarding Residency

The FOP accepts the City's expansion of the residency requirement to 20 miles, but proposes a modification; i.e., that the Mayor have discretion to grant a waiver to the 20-mile residency requirement.

The FOP first notes that residency requirements are not necessary in this day and age, as neighboring communities' safety forces have mutual aid pacts with the City. Moreover, distances greater than 20 miles can be traveled quickly, given the multitude of highways in northeast Ohio. The FOP also notes that even an extension to a 20-mile residency rule still limits an officer's ability to

live where land is less expensive and more plentiful. Mayor discretion to grant a waiver is highly desirable in the case where an officer wants to purchase land or a home just over the 20-mile limit, or has some other compelling reason to seek a waiver.

Factfinder's Recommendation Regarding Residency

Discretionary waivers in a collective bargaining agreement invite trouble. Allowing a 20-mile rule to be stretched to 20.5 miles invites a waiver request for a stretch to 21 miles, and so on and so on. If the Red Cross requires a person to weigh a minimum of 110 pounds in order to give blood, should it permit a 109-pounder to give blood because she asked? Rules often have somewhat arbitrary cut-off points. Bright-line rules are needed for ease of administration. A rule subject to discretionary waivers can lead to divisiveness among employees and allegations of favoritism. Accordingly, the Factfinder recommends the City's proposal.

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6. Physical Fitness

City's Proposal Regarding Physical Fitness

The City proposes new contract language that requires employees to meet and maintain OPOTA (Ohio Peace Officer Training Academy) physical fitness standards. The City makes this proposal on the basis that it is extremely important for police officers to be fit for duty.

FOP's Proposal Regarding Physical Fitness

The FOP rejects the City's proposal because: 1) it is unfair to raise physical fitness standards after an individual has been hired; 2) OPOTA physical fitness standards are not age-normed, and therefore are not reasonable; and 3) status quo is sufficient; i.e.,

Article 41 – Fitness for Duty – provides:

In cases where the Employer feels an employee is unable to perform the essential elements of his position, an evaluation of the employee's condition shall be made by the physician designated and paid for by the Employer. Should the physician concur with the Employer, the employee may be placed on sick leave or extended unpaid leave.

Should there be a conflict between the employee's doctor and the doctor designated by the Employer over an opinion concerning the employee's ability to return to work, the Employer will obtain a second opinion.

If found unfit for duty and unable to return to regular duty within one (1) year, the employee may be separated from service.

Factfinder's Recommendation Regarding Physical Fitness

The Factfinder recommends status quo on the basis that existing contract language can be used to question an officer's fitness for duty.

7. Drug and Alcohol Testing

The parties have agreed on most aspects of an updating of and modifications to the current Article 36 – "Drug Testing" – policy. One issue remains – who pays for required tests other than initial drug/alcohol screening tests and confirmatory tests.

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City's Proposal Regarding Drug and Alcohol Testing

Updated Section 36.05, as proposed by the City, provides in pertinent part:

DRUG AND ALCOHOL TESTING

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...Except as otherwise provided herein, costs of all initial drug/alcohol screening tests and confirmatory tests shall be borne by the City. The cost of all other required tests shall be borne by the employee.

The City bases its updates and modifications to the policy as “reflect[ing] industry standards.”

FOP's Proposal Regarding Drug and Alcohol Testing

The FOP rejects the City's proposal to have employees pay for certain required tests. It is the FOP's position that if the City requires a test, it should pay for it. The FOP proposes the above excerpted language from updated Section 36.05 should read:

...Except as otherwise provided herein, costs of all drug/alcohol screening tests and confirmatory tests , and all other required tests, shall be borne by the City.

i.e., not just “initial” drug/alcohol screening tests and confirmatory tests should be paid for by the City; “all” required tests should be paid for by the City.

Factfinder’s Recommendation Regarding Drug and Alcohol Testing

Record evidence does not establish it is an “industry norm” for employees to pay for some required tests. Indeed, in the Factfinder’s experience, it is commonplace for an employer to pay for required tests. Accordingly, the Factfinder recommends Article 36.05 be modified as proposed by the FOP.

DATED: June 10, 2004


Susan Grody Ruben, Esq.
Factfinder