# STATE OF OHIO
## STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD
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**IN THE MATTER OF:**

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| **THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS - UNIVERSITY OF TOLEDO CHAPTER;** | **CASE NO. 04-MED-03-0218 / 04-MED-03-0219 (Tenure/Tenure Track Bargaining Unit; Lecturers Bargaining Unit)** |
| **and** | |
| **COMMUNICATION WORKERS OF AMERICA, LOCAL CHAPTER 4530** | **CASE NO. 04-MED-03-0308** |
| **and** | |
| **UNIVERSITY OF TOLEDO POLICE ASSOCIATION** | **CASE NO. 04-MED-08-0734** |

**"Unions / Employee Organizations"**

**and**

**BOARD OF TRUSTEES, THE UNIVERSITY OF TOLEDO**

**" University / Employer"**

# REPORT OF FACT-FINDER AND RECOMMENDATIONS

**DATE OF REPORT AND DATE OF MAILING: NOVEMBER 7, 2005**

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## I. INTRODUCTION.

This matter comes before the Fact-Finder as a result of a referral on July 21, 2005 by the State Employment Relations Board ("SERB") pertaining to fact-finding protocol between two bargaining units of the American Association of University Professors - University of Toledo Chapter (Tenure/Tenure Track as one bargaining unit and Lecturers as a separate bargaining unit), the Communication Workers of America, Local Chapter 4530, and the University of Toledo Police Association (hereinafter collectively referred to as "Unions" or "Employee Organizations") and the Board of Trustees of the University of Toledo (hereinafter referred to as "University" or "Employer"). As noted on the face page of this Report, each of the bargaining units presented a separate case to SERB, and for fact-finding purposes, the four cases have been consolidated. Unless otherwise specifically indicated to the contrary, the Fact-Finder's findings and recommendations are deemed applicable equally to each of the bargaining units which are encompassed in this Report.

The fact-finding hearing for the taking of evidence, submission of issues and presentations of the parties' respective positions was initially scheduled for August 26, 2005. On August 19, 2005, the Fact-Finder was advised by legal counsel for the Unions that a "tentative agreement on the outstanding issues in their healthcare negotiations" had occurred and requested a canceling of the fact-finding hearing scheduled for August 26, 2005. For reasons which were neither explained nor elicited, the tentative agreement did not reach final resolution, and after further correspondence with the parties, fact-finding was requested to be resumed and rescheduled. Ultimately, the fact-finding was held on October 10, 2005 at the Transportation Center (Room 1500-E) on the University's Campus in Toledo, Ohio. No post-hearing briefs were submitted, and the hearing was considered closed as of October 10, 2005.

The Fact-Finder received and has taken into consideration numerous exhibits and material presented by both parties. 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).

The Fact-Finder has also taken into consideration the Fact-Finder's Report and Recommendation by Fact-Finder Stanley T. Dobry dated April 1, 2002 pertaining to the same parties as set forth in SERB Case Nos. 01-MED-10-0983, 01-MED-08-0704 and 01-MED-12-1107.

## II. BACKGROUND

The University of Toledo (established in 1872) and a member of the State University System as of 1967 is the fifth largest of Ohio's thirteen state universities. The University offers more than 140 programs of study in eight different colleges and has approximately 2,171 permanent full and part-time faculty and staff members who receive medical and prescription drug coverage under the University of Toledo's health insurance plan, the University being a self-insurer. The current plan provides medical, prescription, dental and vision coverage to eligible employees and their dependents. Of that total number, approximately 598 are tenure or tenure track faculty members represented by the University of Toledo Chapter of the American Association of University Professors (constituting one bargaining unit), approximately 84 full-time non-tenure track faculty members, known as "Lecturers" also represented by the Association of University Professors but as a separate bargaining unit. The Communication Workers of America, Local 4530 represents approximately 612 classified civil service staff employees performing various tasks generally classified as clerical, custodial, maintenance and technical. The University of Toledo Police

Association represents approximately 26 law enforcement officers in the University's Police Department.

The Collective Bargaining Agreement which the parties have been operating under originally covered the period April 8, 1998 though June 30, 2000 and, by agreement, has been extended and, except as noted in this Report, is not material in that the sole issue presented to the Fact-Finder and which is at impasse pertains to healthcare benefits. By extension, the University Professors Labor Agreement runs from July 1, 2004 through June 30, 2007, and the Communication Workers and Police Association Agreements run from June 1, 2005 to December 31, 2007. The parties historically have engaged in multi-unit bargaining on healthcare issues through a "Joint Benefits Committee" with the end product being each bargaining unit executing a separate memorandum on the agreed upon healthcare provisions. The Memorandum that is in effect extends through December 31, 2005, and it is the ensuing impasse which brings the healthcare issues to fact-finding.[1]

In addition to the representatives set forth on the face sheet of the Report, the following were in attendance and/or provided testimony:

| | |
|---|---|
| Dr. James King | Consultant for Unions |
| Andrew W. "Mick" Dier | University of Toledo Police Association, President |
| Maureen Conroy | American Association of University Professors, Benefits Negotiating Team |
| Harvey Wolff | American Association of University Professors, President |

[1]The healthcare benefits for the Association of University Professors (Tenure Unit) is generally encompassed in Article 13 of its Collective Bargaining Agreement, the Lecturers Bargaining Unit is set forth in its Article 12, the Communications Workers Unit is generally set forth as an Addendum to its Agreement, and the provisions regarding the Patrolmen's Association is generally encompassed in its Article 40.

| | |
|---|---|
| Wade Dockert | Communication Workers of America, Director, University of Toledo Unit |
| Ron Honse | Communication Workers of America, President, Local 4319 |
| Paul Csurgo | University of Toledo, Police Association |
| Kelle Repinski | American Association of University Professors, Professional Staff |
| Kevin West | University of Toledo, Division of Human Resources, Faculty Labor Relations |
| David Clark | University of Toledo, Division of Human Resources, Senior Analyst |
| Deithra Glaze | University of Toledo, Division of Human Resources, Benefits Director |
| Randy McElfresh | University of Toledo, Division of Human Resources, Director, Labor and Employee Relations |

As previously noted, the sole issue at impasse and which is before the Fact-Finder pertains to the general issue of healthcare benefits. In that regard, the Unions and the University have represented that some aspects pertaining to the health benefits issue have been resolved as summarized and set forth as follows:

1. The term of the health care addenda will be from July 1, 2005 through January 1, 2008 as set forth in the preamble and **Duration** provision of each memoranda.

2. The employee monthly premium contribution rate (which increases by 7% annually along with indexing the salary bands) as set forth in each memorandum under the **Medical Insurance** section. The University will also make available an additional option for employees to elect participation in the PPOM network. As a result, the Administration will modify the plan document as specified in the side letter under paragraph 1.c. Special Circumstances. See the side letter and Special Circumstances definition attached.

3. Certain OTC medicines will be added to the drug formulary list as set forth under the **Over-The-Counter Medications** provision of each Memorandum.

4. **Joint Benefits Committee** language under the UT-AAUP and CWA memoranda (language already contained in UTPPA 2005-2007 labor agreement attached).

5. The definition of **dependent** eligible for health care coverage as set forth in paragraph 1.a. of the side letter.

6. Administration of specialty drug prescriptions through an exclusive vendor (Drugsource, Inc.) as set forth in the **Specialty Drug** provision of each memorandum. However, the parties are in dispute over the specialty drug co-payment under this provision.

To the extent necessary, the Fact-Finder approves the above and incorporates them as part of this Report and Recommendations.

The issues which appear to be at impasse and the specific subject of this Report are referenced as follows: (1) deductibles; (2) specialty drugs; (3) prescription drug co-pay; (4) spousal coverage; (5) wellness committee; and (6) domestic partner benefit.

As previously noted, the University is a self-insurer of its health benefits program, and as an overview, the University indicated that there is a decline in student enrollment from the past several years, that healthcare costs represented 5.78% of the general budget fund in Fiscal Year 2001 (2000-2001) and that by Fiscal Year 2006 (2005-2006), it is 8.74%. Part of the decline in the University's funding can be attributable to the State of Ohio's contribution share which over the past five years has been cut by $14.4 million. Further, the University states that in 1977, the State covered approximately 63% of the cost of a college education and that by Fiscal Year 2006, the State will cover only 29.3% of the cost. Thus, the University contends that it is in a "financial squeeze" and one of the areas of concern and attention is the cost of healthcare benefits.

The Fact-Finder commends the representatives of both the Unions and the University for presenting their particular positions in a highly professional and articulate manner. In preparing this Report and Recommendation, 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.

### 1. Deductibles/Out of Pocket Maximums:

Under the present contract, if an employee obtains medical care, there is a "in-network" formula of 90/10, that is, the employee, as part of his deductible contribution, would pay 10% of the medical charge, whereas, if the medical service is obtained "out-of-network," there is a 70/30 formula. The deductible is subject, however, to a maximum of $500.00, with a family maximum of $1,500.00. Presently, whether the medical service is obtained in or out-of-network, the payments are accumulated in order to satisfy the annual deductible requirement. The University proposes that the deductibles and the out of pocket maximums be separated, resulting in a $500.00 maximum for network charges, a $500.00 maximum for out-of-network maximum, and a family maximum of $1,500.00 applicable for each category. The net effect of this proposal would be, potentially, to raise the deductible to $1,000.00 and the family maximum to $3,000.00. The University argues, in part, in its Position Statement, that "the current practice defeats the purpose of steering employees to in-network vendors which provide greater discounts and, therefore, reduce costs to employees and the University." However, during the fact-finding, the Unions had argued that in 2003, 24.02% usage

occurred for out-of-network which decreased to 10.61% for 2004 and 12.54% for 2005. Thus, the Unions' argument suggests that there is an overwhelming use of in-network.

The Fact-Finder well appreciates the economic impact that would obviously occur both to the employee and to the University if the deductibles and the maximums were separated when the usage was in-network or out-of-network. Although there is an obvious financial impact, on balance, the Fact-Finder is of the view that there is an underlying element of unfairness imposed on an employee who, through no choice of his own, might be required to utilize medical services out-of-network. One can only speculate at this point in time as to what the particular conditions and circumstances might be, however, the Fact-Finder does not believe it appropriate for him to second guess as to what circumstances might arise where an individual, of necessity or for reasons beyond his control, would have to resort to medical services out-of-network. In doing so, the employee is thereby subjecting himself to an "additional round" of deductible or maximum. On balance, whether an employee selects in-network or out-of-network, the employee should only be subjected to a single deductible/maximum. Accordingly, the Fact-Finder recommends that current contract language be retained in that there is a formula of 90/10 for in-network service and 70/30 for out-of-network, with a single $500.00 maximum applicable to both and a family maximum of $1,500.00. The underlying incentive for an employee to utilize in-network services versus out-of-network services is evident in the different percentage contributions. All things being equal, the Fact-Finder would be inclined to believe that an employee would tend to use in-network services knowing that his participation would be 10% versus 30%.

The Fact-Finder recommends the following contract language: "In-network and out-of-network deductibles and out-of-pocket maximums shall be cumulative, i.e., payment toward one is credited toward payment of the other."

## 2. Specialty Drugs:

At the present time, the prescription drug program provides a three tier benefit, each with its own deductible. Tier 1 covers generic and certain selected over-the-counter (OTC) medications, Tier 2 covers certain preferred brands, and Tier 3 covers non-preferred brands. The University has proposed adding a fourth tier formulary providing for a "specialty drug" classification which would provide for a co-pay of 20% of the claim to an annual out-of-pocket maximum of $4,000.00 per prescription. It was indicated that there are presently approximately 25 employees who need specialty drugs which are long-term medications for various conditions, such as multiple sclerosis. It was estimated that the cost of the specialty drugs is approximately $20-25,000.00. In the scheme of things, such amount may not be considered large but to provide for such a separate tier would indeed result in a cost savings to the University. The Unions propose to maintain the present three tier structure.

The Fact-Finder recommends that the present three tier structure be maintained and that specialty drugs not be treated as a fourth tier nor given a special classification. First, to create a fourth tier for specialty drugs would, in effect, amount to a specific penalty for those employees, and their dependents, who through no fault of their own are required to obtain medication for a particularly severe disability. There are undoubtedly significant and other hardships already placed on the employee or the dependent by virtue of the condition and to now impose an additional classification for those drugs resulting in a higher co-pay and a higher out-of-pocket dollar maximum only adds to that burden. This is not a burden that is shared equally by all other employees who are obtaining medications and, at the present time, it would be inappropriate, if not unfair, to single out those individuals requiring specialty drugs to now incur additional expenses not shared by other employees. Also, the Fact-Finder has concerns that the 20% co-pay and the $4,000.00 out-of-pocket

maximum is not a cumulative or collective figure applicable to all of the specialty drugs which the individual might need but, rather, it would apply per prescription. Thus, conceivably, the annual out-of-pocket maximum could reach amounts such as $8,000.00 or $12,000.00, as well as increasing the actual dollar outlay by virtue of the 20% co-pay.

In light of the above, the Fact-Finder recommends that the current contract be maintained with the three tier classification.

**3. Prescription Drug Co-Pay:**

Currently, covered employees have a co-pay obligation of $4.00 for generic and selected OTC medications (Tier 1), $8.00 for brand formulary (Tier 2), and $16.00 for non-formulary brands (Tier 3). Preliminarily, the Fact-Finder recommends that the following OTC medications be included under the prescription drug benefit as a Tier 1 (generic) classification: Prioles EC OTC, Claritin CL, Aritin-D, Alavert, "generic" Loratadine and Loratadine/Pseudoephredrine combination medicines.

The University has proposed, in collaboration with the Medical University of Ohio, participation in an on-campus prescription drug program by establishing an "on campus" pharmacy to be available for eligible employees.

The University has proposed a schedule of co-payments in two classifications, one being where the prescription is purchased "off campus" and another when purchased "on campus." Also, the University has proposed different co-payment schedules for different years. The co-payment format as suggested by the University is as follows:

| For Fall 2005 and Calendar Year 2006 | "Off Campus | On Campus |
|---|---|---|
| Off Campus - 30-day supply | | |
| Tier 1 (generic and selected OTC medicines) | $10.00 | $5.00 |
| Tier 2 (preferred brand) | $25.00 | $10.00 |
| Tier 3 (non-preferred brand) | $40.00 | $20.00 |
| On Campus - 90-day supply | | |
| Tier 1 (generic and selected OTC medicines) | | $15.00 |
| Tier 2 (preferred brand) | | $22.50 |
| Tier 3 (non-preferred brand) | | $45.00 |

| Effective January 1, 2007 | Off Campus | On Campus |
|---|---|---|
| Off Campus - 30-day supply | | |
| Tier 1 (generic and selected OTC medicines) | $11.00 | $6.00 |
| Tier 2 (preferred brand) | $28.00 | $12.00 |
| Tier 3 (non-preferred brand) | $45.00 | $24.00 |
| On Campus - 90-day supply | | |
| Tier 1 (generic and selected OTC medicines) | | $15.00 |
| Tier 2 (preferred brand) | | $22.50 |
| Tier 3 (non-preferred brand) | | $45.00 |

| Effective January 1, 2008 | Off Campus | On Campus |
|---|---|---|
| Off Campus - 30-day supply | | |
| Tier 1 (generic and selected OTC medicines) | $12.00 | $7.00 |
| Tier 2 (preferred brand) | $32.00 | $14.00 |
| Tier 3 (non-preferred brand) | $51.00 | $28.00 |
| On Campus - 90-day supply | | |
| Tier 1 (generic and selected OTC medicines) | | $15.00 |
| Tier 2 (preferred brand) | | $22.50 |
| Tier 3 (non-preferred brand) | | $45.00" |

The Unions have proposed, likewise, an "off campus" and an "on campus" co-payment formula to be effective November 1, 2005 but to be applicable throughout 2006, 2007 and 2008, as follows:

"EFFECTIVE NOVEMBER 1, 2005

| | |
|---|---|
| Off-Campus - 30-day supply | |
| Tier 1 (generic and selected OTC medicines) | $5.00 |
| Tier 2 (preferred brand) | $10.00 |
| Tier 3 (non-preferred brand) | $25.00 |
| | |
| On-Campus - 30-day supply | |
| Tier 1 (generic and selected OTC medicines) | $0.00 |
| Tier 2 (preferred brand) | $5.00 |
| Tier 3 (non-preferred brand) | $10.00 |
| | |
| On-Campus - 90-day supply | |
| Tier 1 (generic and selected OTC medicines) | $0.00 |
| Tier 2 (preferred brand) | $10.00 |
| Tier 3 (non-preferred brand) | $20.00 |

Likewise, the Unions have proposed that in the event the on campus pharmacy should cease to be available or otherwise eliminated, the employee's co-pay would be as follows:

30-Day Supply:

| | |
|---|---|
| Tier 1 (generic and selected OTC medicines) | $4.00 |
| Tier 2 (preferred brand) | $8.00 |
| Tier 3 (non-preferred brand) | $23.00 |

The Fact-Finder recognizes both the utilitarian and the economic advantages available to both the University and the Unions in utilizing the on campus pharmacy. Indeed, the on campus election would represent a significant savings to both the University, in its ability to secure rebates for the medications and to the employee in terms of his/her co-payment expenditure. At the fact-finding hearing, it was also represented that, currently, 43% of the prescriptions are generic and that 44% represents a general benchmark.

The major difference between the proposals of the University and the Unions is not in their acceptance or rejection of the utilization of an on campus pharmacy but, rather, the amount or extent of the co-payment. Although it is recognized that the use of a lower co-payment for on campus use

is indeed an incentive, both financially and geographically, however, the Fact-Finder believes, at the present time, that it would be unreasonable to place a zero co-pay for on campus use. This may indeed generate re-examination at the end of the current contract term but, for its inception, it is not unfair nor unrealistic for the University to seek some co-payment even when an on campus pharmacy is utilized. Accordingly, the Fact-Finder recommends the following co-payment program:

> "Prescription Drug Co-Pays - The retail and on-campus prescription drug co-payment will be effective with the implementation of the on-campus pharmacy in the Fall of 2005 and will continue to be in effect through January 1, 2008.

| For Fall 2005 and Calendar Year 2006 | Off Campus | On Campus |
|---|---|---|
| 30-day supply | | |
| Tier 1 (generic and selected OTC medicines) | $10.00 | $5.00 |
| Tier 2 (preferred brand) | $20.00 | $10.00 |
| Tier 3 (non-preferred brand) | $30.00 | $15.00 |
| On Campus - 90-day supply | | |
| Tier 1 (generic and selected OTC medicines) | | $15.00 |
| Tier 2 (preferred brand) | | $25.00 |
| Tier 3 (non-preferred brand) | | $35.00 |

| Effective January 1, 2007 | Off Campus | On Campus |
|---|---|---|
| 30-day supply | | |
| Tier 1 (generic and selected OTC medicines) | $11.00 | $6.00 |
| Tier 2 (preferred brand) | $22.00 | $12.00 |
| Tier 3 (non-preferred brand) | $33.00 | $18.00 |
| On Campus - 90-day supply | | |
| Tier 1 (generic and selected OTC medicines) | | $15.00 |
| Tier 2 (preferred brand) | | $25.00 |
| Tier 3 (non-preferred brand) | | $35.00 |

| Effective January 1, 2008 | Off Campus | On Campus |
|---|---|---|
| 30-day supply | | |
| Tier 1 (generic and selected OTC medicines) | $12.00 | $7.00 |
| Tier 2 (preferred brand) | $25.00 | $14.00 |
| Tier 3 (non-preferred brand) | $38.00 | $20.00 |
| On Campus - 90-day supply | | |
| Tier 1 (generic and selected OTC medicines) | | $15.00 |
| Tier 2 (preferred brand) | | $25.00 |
| Tier 3 (non-preferred brand) | | $35.00 |

The Employer shall determine the hours of operation for the on-campus pharmacy, but shall offer hours on at least six days each week."[2]

In the event the on-campus pharmacy of the prescription drug benefit ceases to be an option, the University will provide the Unions sixty (60) days advance notice. The parties will be obligated to negotiate over any change to the prescription benefit plan as a result of the loss of the on-campus option. A sixty (60) day negotiation period shall be established upon notification by the University to the respective bargaining units. This negotiation period shall be inclusive of mediation and fact-finding. In the event the parties are not able to reach agreement prior to fact-finding, the fact-finder's decision shall be final and binding on all parties."

**4. Spousal Coverage:**

Under Article 13, Section 13.1.4 of the University Professors Agreement (similar provisions in the other contracts), it is provided:

If a full-time employed spouse and/or dependent of a member declines similar (i.e., schedule of benefits, cost to the individual) hospitalization coverage from his/her employer because he/she elected a different benefit or cash payment, said spouse and/or dependent shall not be eligible for University coverage.

A spouse or eligible dependent enrolled in employer paid hospitalization insurance who loses such coverage, and who would otherwise be eligible for participation in a University plan, shall be permitted immediate enrollment (no waiting period) and

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[2]During fact-finding, the University indicated that initial hours might be from 7:30 a.m. to 6:00 p.m. Monday through Friday and 9:00 a.m. to 1:00 p.m. on Saturday with the view that if the need and demand should justify same, the University would consider expanding the weekday and/or Saturday hours.

shall not subject to medical underwriting or any pre-existing condition(s) clauses or waivers.

The University has proposed a modification of the above-mentioned section which provides, in essence, that spouses of any employee who was with the University prior to October 1, 2005 would be "grandfathered" under Section 13.1.4. However, any spouse of a new employee hired on or after October 1, 2005 would be required to enroll in a single medical, prescription, dental and/or vision plan offered by their place of employment if such a plan covers at least 50% of the monthly cost of the single health care coverage, provided that coverage is available and the spouse is eligible for such coverage. A spouse or a dependent who does not enroll for such available coverage or who accepts a different benefit or a cash incentive in lieu of the coverage through his/her place of employment would not be eligible for University of Toledo coverage. The plan would also provide for certain hardship exemptions as, for example, if the spouse's annual income is $10,000.00 or less or if the spouse pays 40% or more of the premium and the total household annual gross income is $106,090.00 or less.

The University presented as Exhibit E a survey of a number of public employers situated primarily in or around Lucas County but also covering other state universities. There is no unanimity, however, the Fact-Finder notes that the Medical University of Ohio has a provision that when a spouse or a dependent has an available comparably priced employer paid hospitalization policy, the spouse must enroll in that policy and, if the spouse declines or elects a cash payment, the spouse is not eligible for Medical University of Ohio coverage. The Medical University of Ohio language approximates what is already set forth in Section 13.1.4.

The Fact-Finder recognizes that the ultimate goal of the University is to avoid having to incur additional medical expenses when both its employee and the employee's spouse (or dependent) are

gainfully employed full-time. If the benefits and the cost to the spouse or dependent are substantially similar to that available under the University's plan, certainly, there should be no compelling reason why the employed spouse should be covered under the University's plan rather than being covered under that spouse's employer's plan. It is this Fact-Finder's view that Section 13.1.4 is reasonable in that it essentially places the full-time employed spouse's or dependent's hospitalization plan in equipoise with that of the University rather than using a percentage formula as suggested by the University. Thus, the present contract language should be retained.

5. **Wellness Committee:**

The Unions have proposed the establishment of a joint wellness committee which would also encompass a disease management program and an employee assistance program. The Unions, at the core of their proposal, request that the University be mandated to fund the wellness committee, seeking an allocation of $104,000.00 for 2006 and $108,000.00 for 2007. Further, funding for the disease management program is proposed at $364,000.00 for 2006 and $378,500.00 for 2007. The University counters that within its financial ability, it has budgeted for general wellness programs in the amount of $226,000.00 for the first half of 2006.

During the course of the fact-finding hearing, this was one issue in which both parties, conceptually, were in agreement. The major area of difference is that the Unions propose a mandated funding for these programs, whereas the University believes that such funding should be left to the discretion of the University's Trustees. The issue is, indeed, a narrow one but, on balance, this Fact-Finder is of the view that although the establishment and funding of a wellness committee addressing the issues of disease management and employee assistance are laudatory projects, ultimately, the funding for these projects must, in the first instance, be determined by the University's Trustees. If these programs are adequately funded, it is the University itself which will be the

primary recipient of the programs' effectiveness and, equally so, would be the first to suffer any potential negative consequences from a lack of funding.

In light of the above, the Fact-Finder recommends that the following be adopted:

> "The Wellness Committee shall be reconvened to begin discussions regarding wellness, disease management and employee assistance programs, design and implementation. The Committee will be responsible for the development and implementation of an RFI ("Request For Information") and/or RFP ("Request For Proposal"), review process and make recommendations to the Joint Benefits Committee and Administration."

**6. <u>Domestic Partner Benefits</u>:**

The Unions have proposed that the University extend healthcare benefits to domestic partners of its employees to the same extent and under the same definitional standards of "domestic partner" in effect as of January 1, 2005 at The Ohio State University. The Unions argue that the time has come for benefits for domestic partners to be recognized for inclusion.

The Fact-Finder notes that this issue was previously raised before Fact-Finder Stanley Dobry in his Report of April 1, 2002, recommending that the plan not be adopted, indicating that, in his view, the "time is not yet ripe" and that no public university in Ohio had yet granted it. The matter was one under continuing debate at that time. Obviously, since Fact-Finder Dobry's Report, The Ohio State University, the largest university in the State of Ohio, has granted domestic partner benefits.

The University has contended that in light of the Ohio constitutional amendment defining marriage in November 2004 that there should be a re-opener to discuss offering domestic partner benefits if it is determined that the University may lawfully do so.

On November 2, 2004, the voters of Ohio approved an amendment to Article XV, Section 11 of the Ohio Constitution which states:

> "Only a union between one man and one woman may be a marriage valid in or recognized by this State or its political subdivisions. This State and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

The State of Michigan apparently also has a substantially similar constitutional amendment which was litigated before the Circuit Court for Ingham County, Michigan in the case of *National Pride at Work, Inc., et al. v. Granholm*, Case No. 05-368-CZ (decided September 27, 2005). The Court's decision is that of a trial court and may very well be addressed by the Michigan appellate courts. However, comments made by the trial judge are pertinent to the issue presented here. At Page 7 of the Court's Slip Opinion, the Court stated, in pertinent part:

> "Healthcare benefits are not among the statutory rights or benefits of marriage. An individual does not receive healthcare benefits for his or her spouse as a matter of legal right upon getting married. If a spouse receive healthcare benefits, it is as a result of a contractual provision or policy directive of the employer. Likewise, healthcare benefits are not limited to those who are married. Within the confines of what the health insurance provider offers, an employer may choose to offer coverage to any person who bears an employer-defined relationship to the employee. Healthcare benefits for a spouse are benefits of employment, not benefits of marriage."

The Fact-Finder is not going to engage in a debate as to whether Section 11 of Article XV of the Ohio Constitution does or does not pass muster under the United States Constitution, and the Fact-Finder recognizes that there are some situations in which legal status is directly related to a relationship between one man and one woman, for example, the right to file a joint tax return, the right to receive spousal social security benefits and the right of dower. Entitlement to healthcare benefits, however, do not necessarily fit within that niche but, as suggested by the Michigan decision, may indeed be more akin to contractual or other benefits elected to be provided by the employer.

The Ohio State University, under its dependent eligibility criteria for health benefits, has a classification called "eligible dependents" which is broken down to four classifications or categories,

to wit: (1) a legal spouse of a covered employee, (2) a dependent child of a covered employee, (3) the same-sex domestic partner of a covered employee, and (4) a sponsored dependent of a covered employee. The particulars of the eligibility criteria used by Ohio State University are set forth at Pages 21-22 of this Report.

The Fact-Finder appreciates the University's position that this issue should "remain on the table" as a possible subject for re-opening. To do so only delays a certain inevitability in ultimately coming to grips with this issue and making a decision as to incorporating or not incorporating coverage for a domestic partner. In light of the action taken by the Ohio State University, this Fact-Finder is not prepared to say that it is too soon to address the issue or that the University should take the lead in being the first to establish such coverage.

Accordingly, the Fact-Finder recommends that domestic partner coverage be adopted consistent with the eligibility criteria set forth by the Ohio State University. Additionally, the Fact-Finder recommends that any individual classified as eligible by virtue of domestic partner status would be subject to the spousal/dependent coverage provisions set forth in Item 4 (Page 13) of this Report. Further, in the event that it is ultimately determined that the University may not lawfully provide this benefit as finally determinated by a state or federal court of competent jurisdiction, then such provision shall then and there be stricken as part of the contract for health benefits.[3]

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[3]In The Plain Dealer, October 30, 2005 edition, it was noted at Page A-22 that the Supreme Court of Alaska ruled that it was unconstitutional to deny benefits to same sex partners of public employees. The State Supreme Court ruled that barring benefits for state and city employees' same sex partners violated the equal protection clause of the Alaska constitution.

Executed at the City of Cleveland, Cuyahoga County, Ohio, this 7th day of November, 2005.

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, via FedEx, this 7th day of November, 2005, to the following:

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# Dependent Eligibility Criteria for University Medical, Dental, and Vision Plans

**Eligible Dependents**

- The **legal spouse** of a covered employee.
- A **dependent child** of a covered employee who meets all of the following criteria:
  1. is unmarried;
  2. has not reached the age limit of 23, or was permanently disabled at the attainment of age 23; and
     - covered by a university medical plan when he or she reached the limiting age; or
     - covered as a dependent under the medical plan of his or her parent's employer immediately prior to the parent's employment with the university;
  3. receives at least 50% of his or her financial support from the employee, or is the intended recipient of coverage that is court-ordered upon the employee; and
  4. fits into one of the following categories:
     - an employee's natural child;
     - an employee's adopted child;
     - an employee's step-child who also resides in the employee's household for at least half of the year;
     - a child of an employee's covered same-sex domestic partner who also resides in the employee's household for at least half of the year; or
     - a child for whom the employee has legal guardianship or an interlocutory order of adoption.
- The **same-sex domestic partner** of a covered employee who meets **all** of the following criteria:
  1. shares a permanent residence with the employee (unless residing in different cities, states or countries on a temporary basis);
  2. is the sole same-sex domestic partner of the employee, has been in a relationship with the employee for at least six (6) months, and intends to remain in the relationship indefinitely;
  3. is of the same sex as the employee and is not currently married to or legally separated from another person under either statutory or common law;
  4. shares responsibility with the employee for each other's common welfare;
  5. is at least eighteen (18) years of age and mentally competent to consent to contract;
  6. is not related to the employee by blood to a degree of closeness that would prohibit marriage in the state in which they legally reside; and
  7. is financially **interdependent** with the employee in accordance with the plan requirements outlined by Ohio State. Financial interdependency may be demonstrated by the existence of **three (3)** of the following:
     - joint ownership of real estate property or joint tenancy on a residential lease
     - joint ownership of an automobile
     - joint bank or credit account
     - joint liabilities (e.g. credit cards or loans)
     - a will designating the same-sex domestic partner as primary beneficiary
     - a retirement plan or life insurance policy beneficiary designation form designating the same-sex domestic partner as primary beneficiary
     - a durable power of attorney signed to the effect that the employee and the same-sex domestic partner have granted powers to one another

# Dependent Eligibility Criteria for University Medical, Dental, and Vision Plans

| | |
|---|---|
| **Eligible Dependents, continued** | • A **sponsored dependent** of a covered employee who meets **all** of the following criteria:<br>1. resides at the employee's residence and will continue to reside there during the period of coverage;<br>2. shares a relationship with the employee as defined by one of the following:<br>– parent, step-parent, parent-in-law or person who stood in loco parentis to the employee as a child<br>– grandparent or grandparent-in-law<br>– sibling or sibling-in-law<br>– aunt or uncle<br>– niece or nephew<br>– child-in-law<br>– grandchild or grandchild-in-law<br>– biological, adopted, step or foster child who is not otherwise eligible for coverage under the terms of the university's group health plans<br>– opposite-sex domestic partner who is unmarried, and with whom the employee is not related by blood to a degree of closeness which would prohibit marriage in the state in which they legally reside, and with whom the employee has been in a relationship for at least six (6) months and intends to remain so indefinitely;<br>3. is financially dependent upon the employee for more than 50% of his or her financial support, in accordance with the plan requirements outlined by Ohio State. Financial dependency is demonstrated by the sum of all of the following:<br>– rental value of housing;<br>– cost for clothing, education, recreation and transportation expenses;<br>– cost for medical, dental, and/or vision care; and<br>– cost for a proportionate share of other expenses necessary to support the sponsored dependent within the employee's household (such as food and utilities), but which cannot be directly attributed to that individual; and<br>4. is enrolled in Medicare if he or she is eligible for such coverage.<br>**Note:** A dependent who would otherwise be eligible for coverage, but who is on active duty in any military, naval, or air force of any country, is not eligible for university Health Plan coverage during the period of active duty. |
| Dependent child coverage beyond the age limit | An unmarried child who is covered as a dependent child under a university Medical, Dental, or Vision Plan, and is permanently disabled upon attainment of the age limit, may be eligible for continued coverage as a dependent child if:<br>• the child is incapable of self-sustaining employment by reason of mental retardation, or mental or physical disability, and is primarily dependent upon the employee for support and maintenance;<br>• the employee makes application for continuation of coverage to the university within 31 days after the child reaches the age limit, which includes providing satisfactory proof of the child's incapacity and dependence upon the employee; and<br>• the employee provides proof of the continuance of such incapacity and dependence upon request by the university. |