

04-MED-08-0741  
BU# 0979-07  
04-MED-08-0741  
BU# 0979-08

STATE EMPLOYMENT  
RELATIONS BOARD  
2005 FEB 28 A 9 32

IN THE MATTER  
OF  
FACTFINDING  
BETWEEN THE  
CITY OF CINCINNATI, OHIO  
AND

QUEEN CITY LODGE NO. 69,  
FRATERNAL ORDER OF POLICE,  
Non-Supervisors & Supervisors

Issue: Factfinding  
Date of Hearing: January 13 and 14, 2005  
Location: City of Cincinnati Waterworks; Administrative Offices  
Case No: 04-MED-0741 (Non-Supervisors); and 0742 (Supervisors)  
Date of Award: February 25, 2005  
Finding: The findings are too numerous to list here. Each is specifically addressed below.

Union Representative: Stephen S. Lazarus  
Hardin, Lefton, Lazarus & Marks, LLC  
915 Cincinnati Club Building  
30 Garfield Place  
Cincinnati, Ohio 45202-4322

City Representatives: Jonathan J. Downes  
Benjamin S. Albrecht  
Downes, Hurst & Fishel  
400 S. Fifth Street, Suite 200  
Columbus, Ohio 43215-5492

**REPORT AND RECOMMENDATIONS**

Michael Paolucci  
Factfinder

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Administration

By letter dated November 3, 2004, from Dale A. Zimmer, the Administrator with the Bureau of Mediation at the State Employment Relations Board (SERB), the undersigned was informed of his designation to serve as Factfinder in a procedure mandated by R.C. 4117.01, et al., more specifically R.C. 4117.14(D)(1). On January 13 and 14, 2005, hearings went forward in which the Parties presented testimony and documentary evidence in support of positions taken. Although mediation was inquired into before the start of the factfinding hearing, it was determined that there was a high unlikelihood of success and therefore a hearing was started. The record was closed at the end of the hearing and the matter is now ready for a factfinding report with recommendations.

Resolved Issues

Prior to, and during the hearing, the Parties were able to reach agreement on numerous issues. These agreed to issues are incorporated herein, and made a part hereof by reference. The agreed to issues are not more specifically set forth herein, but are recommended to be made part of the Agreement as agreed to by the Parties. Further those portions of the Agreement not addressed either hereunder or through the tentative agreements are also recommended to remain as written.

Unresolved Issues Presented

The following fifteen (15) issues were presented for conciliation:

	<u>Article, Section</u>	<u>Title</u>	<u>Bargaining Unit</u>	<u>Number</u>
1.	Definitions -	Supervisors (Issue V)	Supervisors	City #1
2.	Article I -	Recognition	Both	Union#1/City #1
3.	Article III, Sts 3,6,12-	Grievance Procedure	Both	Union #2
4.	Article VII, Sect 1 -	Wages	Both	Union #4
5.	Article VII, Sect 5 -	Shift Differential	Both	Union #5

6.	Article VII, Sect 21 - Medical Insurance	Both	Union #10/City #9
7.	Article VII, Sect 32 - Assistant Chiefs	Supervisors	City #12
8.	Article VII, Sect 32 - OPOTA Certification	Patrol	Union #15
	Article VII, Sect 33 - OPOTA Certification	Supervisors	City #13
	Article VII, Sect 33 - Training Allowance	Patrol	Union #16
	Article VII, Sect 34 - Training Allowance	Supervisors	City #15
9.	Article VII - New - Swat Supplement	Both	Union #21
10.	Article VII - New - Sgt. Accrued Time	Supervisors	Union #22
11.	Article VII - New - Promotions	Both	Union #23
12.	Article XVI - Residency	Both	Union #28
13.	Article XVII- Duration/Terms of Agreement	Both	Union #29/City #18

\* \* \*

Section 4117-9-05 and RC 4117(G)(7) of SERB's administrative rules and the Ohio Statute, respectively, address the issues that a factfinder must consider when making recommendations. That section, in pertinent part, reads as follows:

\* \* \*

- (K) The fact-finding panel, in making recommendations, shall take into consideration the following factors pursuant to division (C)(4)(e) of section 4117.14 of the Revised Code:
- (1) Past collectively bargained agreements, if any, between the parties;
  - (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
  - (3) The interest 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;
  - (4) The lawful authority of the public employer;
  - (5) Any stipulations of the parties;
  - (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

The issues will be addressed giving consideration to all of the required factors.

### Factual Background

The employer is the City of Cincinnati, Ohio, a Ohio Municipal Corporation operating under a City Charter per the Home Rule Provisions of the Ohio Constitution, Article XVIII, Section 7. It has about 331,000 citizens. The City's non-supervisory and supervisory police officers are represented by the Union. Although the Union represents both, there are two (2) different bargaining units separated by rank into supervisors and non-supervisors. The authority of the undersigned extends to factfinding for both bargaining units.

The Parties have had a Collective Bargaining Agreement since 1976; and most of the Agreements have been two (2) year agreements. Both bargaining units have been recognized as "deemed certified" under the SERB rules. There are approximately one thousand twenty five (1025) employees in both bargaining units – two hundred fifty (250) in the supervisory unit, the remainder in the non-supervisory unit. The Parties engaged in extensive negotiations in October and November, 2004, and engaged in mediation with the State Appointed mediator in the middle of December, 2004.

During the bargaining process for the just expired Agreements, the Parties followed the statutory mandate and went through factfinding for both bargaining units and conciliation for the supervisors only. The undersigned acted as Conciliator in that process for the supervisors bargaining unit. Although tentative agreements were entered prior to going through the statutory mandated process for those Agreements, political problems arose that prevented the Parties from completing the tentative agreement with the supervisors. The non-supervisory police force was able to complete their Agreement short of Conciliation. The Supervisors were only able to enter an Agreement as a result of Conciliation.

Following Conciliation the Parties entered into the Agreements that have just expired. Those Agreements expired on December 18, 2004 and thereafter the undersigned was appointed as Factfinder for both bargaining units. Thus, the undersigned has acted as Conciliator in the preceding Supervisors Agreement, and is now Factfinder for both new Agreements.

During these negotiations, the City presented evidence through its Finance Director, William Moller, that it is suffering through economic difficulties. He testified that the City's CAFR (Comprehensive Annual Financial Report) shows that the City expects lower revenues, with increased expenses. Although in 2003 the City expected to have an increase in jobs; and although in 2003 the economy looked to be improving; the expectations were off and the job recovery now looks poor. Moller testified that it is not known exactly why the jobs have not increased, but that the City's finances are driven in large part by an income tax. Therefore, when jobs decrease, or do not increase, it is reasonable to expect the City's revenues to follow the same pattern. He testified that the larger employers are not increasing the number of jobs in the City, and that the forecast is for the City to lose jobs. It is not even a question of maintaining jobs already in place, it is the loss of jobs that is the current prediction of the City.

Moller provided an extensive explanation of the City's poor financial condition. Some of the highlights include the following:

- The City's General Fund, as the sole source of all Police Department expenditures, had a carryover of only \$2 million in 2004;
- Historically, the City has maintained a 10% budget carry-over, which should have translated into a \$31.6 million carry over;
- The City has cut \$16 million dollars to keep a balanced budget in 2004, and expects another \$6 million in cuts to maintain a balanced budget in 2005.
- the population is on a downward trend; from over 500,000 down to 330,000;
- the indicators show that the decrease in population, through the out-migration of the populace, will lead to a similar downward trend on job creation;
- logically following the loss of population and jobs will be a reduction in services;
- the City has reacted, through the Mayor's office, by reducing expenses to only "core services";

- Carryover balances have been decreasing for several years, and threatens to be reduced to \$24 million by the end of 2005;
- This amount is only 7% of annual revenue rather than the recommended 10% level that the City has historically maintained;
- The \$24 million, in the City's view, is dangerously close to the minimum reserve of 5% set by the Government Finance Officers Associations;
- Not only are revenues not increasing, they are exceeding expenditures;
- Revenues are currently "flat" and expect to begin a decline;
- Income tax collection, being tied directly to growth in income, will remain static - similar to income growth;
- the City concluded that its outlook is bad;

The Union criticizes the City's financial claims on several fronts. These are summarized as follows:

- It points out that each time the Real Estate Tax increases its revenues through the annual increase in property values, the City automatically reduces the millage collected;
- The reduction is voted on once per year when the City sets the millage rate, and a rollback has occurred every year in the recent past;
- The Union showed that if this rollback were not done, the City would not lose \$6.1-6.2 million;
- The Union discounts the City's reasoning for the rollback – that it motivates residents to either move to, or remain in the City - since it has consistently lost people notwithstanding the rollback;
- It claims that the City has actually budgeted a 2% increase in the budget even though it is offering 0% in this process.
- It cited the opinion of its expert who concluded that the City's finances were in acceptable condition, and that it could afford the Union's proposal. The Union expert criticized the City's priorities in spending.
- On cross-examination, Moller agreed that the City agreed to a 3% wage increases even though his opinion was that it did not have the money;
- Moller conceded that he stated then that the City would just "have to find the money" and that it did;
- Moller also confirmed that City Council received a 3% wage increase per the aforementioned Charter law;
- Moller also confirmed that City Council, after the Mayor had decided to reduce funding to Social Service endeavors, return \$2 million in funds to those services;
- Moller confirmed that the City Council planned on using money from a Traffic Camera, to be installed; and from money received from the demutualization of Anthem;
- Moller confirmed that the City received \$55 million from the demutualization of Anthem, and that the money has been spent;

- Some of the demutualization money was used for social services, some was used for a new Martin Luther King Drive exchange on to I-71, and the rest was spent on other non-personnel items.

The City had several responses, which include the fact that the rollback is a policy decision made by City Council in an effort to motivate more home ownership in the City. It argues that as a policy matter, it is not pertinent to the discussion of finances. Moreover, it contends that the policy is legitimate in that it likely improves the ability of the City to maintain the current number of homeowners, and also motivates new home ownership.

In addition, Moller conceded that 2% was budgeted for an increase in wages, but argued that such was for “personnel costs” which includes several other items than wages. Since personnel costs encompass everything including pensions, health care, new hires, and other items, then Moller contended it was not accurate to claim that the City planned on paying the bargaining units a 2% wage increase.

The City criticized the Union’s expert testimony in that the accountant who rendered the opinions was not proven to have any expertise in public financing; he did not have the benefit of the December 2004 forecast of the City; and that he appears to have made conclusions based on a cash accounting method – something the City, and the CAFR, can not do. The City admitted that it has a 2.1% income tax, but claims that such was increased in 1988 with the promise to the electorate that at least the .1% of 2.1% would be spent on capital expenditures. It criticized the Union expert for misstating how this amount must be spent, and contends that none of the references made by the expert can be spent on personnel costs.

The City cited past public-sector decisions, both factfinding and conciliation, for support of the fact that public financing is in poor shape. It asks that the current costs, projected costs, and the projected revenue stream be considered. It cites the state agencies as proof of the poor

condition and for the best comparables. On January 13 and 14, 2005, hearings went forward and thirteen (13) issues were submitted, as set forth in the following section.



administrative qualifications in the field of law enforcement and need not, at the time of appointment, be residents of the City or State. The Police Chief may be removed at any time by the City Manager. After the Police Chief has served six months, he or she shall be subject to removal only for cause including incompetency, inefficiency, dishonesty, insubordination, unsatisfactory performance, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or convictions of any felony. If removed for cause, the Police Chief may demand written charges and the right to be heard thereon before the City Manager. Pending completion of such hearing, the City Manager may suspend the Police Chief from office. The incumbent officers in the Police Chief and Assistant Police Chief positions at the effective date of this Charter provision, shall remain in the classified civil service until their position becomes vacant after which time their position shall be filled according to the terms of this section.

The above-cited provision thus makes Assistant Chief “at-will” employees, but gives the Chief express protection against such treatment.

The Amendment was placed on the November 6, 2001 ballot and was ultimately approved by voters by a 52%-48% margin. Although Issue 5 thus amended the City’s Charter, such was not automatically effective. Since Ohio law makes the Agreement superior to the City Charter, then the fact that the Amendment was made did not mean that the City could just begin enforcing the provisions. It still had to be successful at negotiations to make the Amendment enforceable against the Union. Indeed, when the City took certain actions following a vacancy in the position of Assistant Chief, the Union was successful in getting SERB to find probable cause of an Unfair Labor Practice and ordered a hearing.

During the previous negotiations, the Parties engaged in extensive negotiations and entered into a tentative agreement on December 4, 2002. The tentative agreement did not include a modification to the Assistant Chiefs’ position in concert with the terms of Issue 5. In sum, the Assistant Chiefs maintained their status as bargaining unit members with the full protection of the Agreement, including just cause protection. A large part of the reason that the Assistant Chiefs position was not changed was that the Union refused to bargain over any

changes that would result in removing their just cause protection. The City conceded that the issue over the Assistant Chiefs inclusion in the bargaining unit was not a mandatory subject of bargaining and thus the Union was within its right to refuse to bargain over the issue. It, however, contended that tenure rights and benefits are mandatory subjects of bargaining. It argued that the Union's position resulted in the City being unable to address modification of those benefits and tenure for Assistant Chiefs since the Union refused to bargain over any such changes.

On December 18, 2002, the City Council voted 7-2 against the tentative agreement. The Parties submitted videotapes of the debate. A synopsis of the City's position appears to be that since the voters approved Issue 5, and since Issue 5 required changes to the Assistant Chief's position, then the Tentative Agreement had to be rejected because it did not make the changes as mandated by the voters. The Parties then proceeded to the Factfinding process.

On March 11, 2003, a Factfinding decision was issued. The Factfinding report recommended that the Parties rely on their Tentative Agreement, hereinafter "TA," in entering a new Agreement. The City made many complaints about the Factfinding Report and same were submitted to the undersigned as the Conciliator in that process.

Following the issuance of the Factfinding report, the City Council rejected it on March 12, 2003, by the same vote as the rejection of the TA (7-2). Following the City's rejection of the Factfinding report the matter was processed through the SERB's procedure until it ultimately was appealed to the undersigned as Conciliator. The undersigned rejected the City's position and found for the Union in maintaining the *status quo* as it pertained to Assistant Chiefs.

The City now proposes the same changes to the Agreement that it made during the processing of the prior Agreement.

The Union proposes “Anti-Issue 5” – promotional provisions in separate parts throughout the Agreement. The proposals involve mandating that transfers be done (Article VII)

### Union Contentions

The Union argues that its proposals have been made at the suggestion of certain management representatives; that the mandated filling of vacancies is required to fully staff the police force; that the repercussions of Issue 5 have resulted in numerous Unfair Labor Practice charges; and that the Union needs the language to prevent the City from ignoring past Factfindings, Conciliations, and SERB rulings. It argues that the language simply mandates that the civil service rules be followed.

### City Contentions

The City argues that the change should be made because it is the will of the electorate; and because the Assistant Chiefs are managerial, executive positions that should be excluded from the bargaining unit. It cites the statutory authority for positions that are excluded from coverage as supervisory positions. The only reason, it claims, that the Assistant Chiefs have been exempt from the application of the law is due to the “deemed certified” status of the bargaining unit. It contends that no comparable Ohio City has supervisors in the bargaining unit; that no logic supports the exclusion of only two (2) positions in the entire police force from the bargaining unit; and that the situation creates divided loyalties and undue pressure.

The City contends that Issue 5 has been unfairly characterized as targeted solely at the Police. Instead, it contends that it applies City-wide and has been used to exempt positions from the Fire Department – although it concedes that the Fire Union agreed to the exemption. Since

the popular vote required the change; and since such makes it in the best interest of the City; then it argues that Issue 5 must be adopted to achieve the goals of the popular will in making the City employees more accountable for their actions.

The City criticizes the Union's proposals as lacking any logical support and characterizes them as being proposed solely to raise the stakes in the negotiations. Since during negotiations there was no basis given for these proposals, and due to the ongoing litigation with Issue 5, it argues that the Union's proposals should not be recommended.

### Recommendation

This issue has been discussed at length between the Parties and by the undersigned. There is little new offered that has not already been addressed, *albeit* in other decisions. Since prior statements and analysis by the undersigned did nothing to change the Parties positions or arguments, it is plain that nothing new would move them in a more positive direction. Therefore, a straightforward statement is felt to be all that is necessary.

Issue 5 was a bad idea from its inception. It was good that it was not included in the last Agreement. It continues to be best left out of the Agreement. It is not recommended. The Union's proposals are similarly not in the Parties best interest. In a different setting, the Union's proposals would be logical and reasonable. However, the pending Unfair Labor Practice charges appear to be directly on point and it is better to wait for those results before changing the Agreement. They are not recommended.

**2. Article I - Recognition Both Union#1/City #1**

Proposal(s)

The Union proposes a two (2) year agreement.

The City proposes a three (3) year agreement.

Union Contentions

The Union asserts that since the Parties have historically kept two (2) year Agreements, then there is a strong preference for that period. It contends that the City's reasoning for a three (3) year Agreement are not logical. Moreover, it contends that the City failed to provide this proposal in any of the early discussions between the Parties. It cites prior arguments of the City where it claimed that as the lead bargaining unit, the police should parallel the biennial budget. Because of this assertion, the City is the party that urged the two (2) year agreements that it now wants to be rid of. Finally, it contends that if the City is correct in its description of its financial condition, then the request for a three (3) year Agreement does not follow.

City Contentions

The City argues that when Parties achieve a more mature relationship, three (3) year Agreements are common. It contends that the length is necessary to allow time in which to work out how to apply language. In contrast, it asserts that two (2) years is insufficient to give the Parties an opportunity to work out issues. It describes the two (2) year period as being too short between when negotiations end and when they must begin anew; and argues that the extra time will allow the Parties to stop negotiating for a more reasonable period.

The City asserts that this is especially true for the new Grievance Procedure that is too new to determine its strengths and weaknesses. It contends that all major Ohio cities have a

three (3) year period – and it asserts such is reasonable in this case. It points out that the internal comparables justify the change; that this bargaining unit used to have three (3) year agreements; and that there is no reason for this bargaining unit to not parallel the biennial budget.

### Recommendation

It is recommended that the Parties enter a three (3) year Agreement with a wage and health care re-opener in the third year.

The sole reason for this recommendation is the perceived volatility of the Parties' relationship. The evidence was overwhelming in that every negotiation between the Parties receives extraordinary scrutiny. To help stabilize this relationship, and to provide some time to cure the problems, it is reasonable to believe that a three (3) year period is better than a two (2) year period. The experience of the undersigned across the State support this change. Moreover, the financial weakness of the City is addressed by leaving the only issues after the two (2) year period to be wages and health insurance. While these are often the most contentious of issues, the instability should be reduced by making them the only issues open for discussions.

### **3. Article III, Sts 3,6,12 - Grievance Procedure Both Union #2**

#### Proposal(s)

The City proposes changing the “Pre-arbitration thirty (30) day” discovery mandate from “within thirty (30) days following Step 5, to “thirty (30) days after confirmation of the hearing date.”

The City also proposes a no back pay provision if a grievance is rescheduled at the request of the Union.

The Union proposes numerous changes to the Grievance Procedure. These include deleting provisions that

- call for drawing the arbitrator by lot;
- require each Party to submit the name of twenty (20) arbitrators to American Arbitration Association, hereinafter “AAA,” 50% of which must maintain an address within sixty (60) miles of the City;
- call for the inclusion of only those arbitrators who appear on both lists;
- call for the comprising of all arbitrators on both lists if there are not nine (9) arbitrators that are mutually listed;
- that allow for the removal of an arbitrator once per year by each party;
- that calls for the replacement of arbitrators under a similar procedure as that above described;
- that mandates a pre-arbitration hearing discovery hearing; and,
- that prohibits evidence more than three (3) years old.

The Union also proposes language that would make appeals to the Hamilton County Common Pleas Court payable by the appellant if that appellant loses the appeal.

### Union Contentions

The Union cites the historical use of this procedure as proof of its need to change. The Union cites the fact that the City proposed significant changes to this section during the negotiations for the just expired Agreement. The Union complained that the City-cited reasons for the new process are not legitimate. It cited the City rationale – that it was losing all of the arbitrations and that the arbitrators that were being chosen were not local and were not subject to pressure from the local public – as evidence that the basis for the new process was invalid.

The Union argued that the City wants to put arbitrators through a “public flogging” in order to make them rule differently. It argued that the process, in having each party pick “their” arbitrators, created city-based arbitrators as well as union-based arbitrators. Moreover, it complained that while the City got the Union to agree to a three (3) year limitation, it refused to agree to the same restriction. It contended that it agreed to the process because it was part of a

“package” that the Union believed was in its best interest to agree to. While the total package was acceptable, the Union argued that certain components were terrible – including this portion.

The Union argued that the process is illogical and unfair for a number of reasons, including:

- the number of arbitrators picked by the City was more than those picked by the Union (based on coin flips);
- the location of an arbitrator should not be a factor;
- the manner of picking an arbitrator is not as good as that used by AAA;
- the arbitrators, because of the manner in which they are picked, are perceived as either “union” or “City” arbitrators;
- coin flips are an unfair manner in which to pick new arbitrators;
- the three (3) year limits is only applied to the Union, and not the City;
- the discovery provision effectively gives the City the advantage of using the Union attorney to advise it of the Union’s case at no cost to the City, and allows it to prove its case without having to first conduct a thorough investigation

The Union also pointed out that although the City agreed that the process was only meant to be used in non-disciplinary cases, this agreement was not included in the language.

The Union argued that its addition to the provision was simply to prevent either party from filing frivolous motions. It contends that although the City conceded that a problem existed with regard to the striking of arbitrators, it refused to provide a counterproposal that the Union requested.

The Union also cited the fact that the use of arbitration was something the City first proposed in 1995 to move away from Civil Service Appeals. Like in 2002 when the City proposed this current “terrible” system, the City complained that changes were needed because it was losing a disproportionate share of the disciplinary appeals. Each time the Union points out that it agreed to changes proposed by the City.

The Union derides the City’s complaints and points out that the City is the instigator of all discipline; that it has all the resources to investigate disciplinary issues; that the City decides

what the appropriate discipline should be; and that the Union has no ability to cross-examine witnesses that are interviewed by the City. Notwithstanding this control, the fact that the City loses so many arbitrations, it asserts, is a reflection of the City's poor decision making rather than an unlevel playing field in the Union's favor.

The Union complained that the process already favors the City; that the City does not need the advantage of discovery; that the City already pays outside counsel a considerable amount of money to add to its advantage; and that the unfair process is not justified, is not necessary, and needs to be changed. The Union went further and criticized the process; the City's position; and the City's rationale.

#### City Contentions

The City discounts every point of the Union as complaints without support. It argues that there are no "city" or "union" appointed arbitrators since the lists come from FMCS and/or AAA. It argues that the new system was awarded in factfinding and conciliation and therefore should be given an opportunity to work before being judged by the Union as wrong. It points out that the Union agreed to the process as part of package and now complains that it is not fair. It argues that every issue raised by the Union should be raised at the negotiating table, and should not be resolved at this step in the process.

The City contends that it paid dearly for the new arbitration process – it claims it was the basis for the 2% additional wage increase in the last Agreement. It contends that it should not now have to get rid of the new system without having first tried it. It argues that the preference for local arbitrators is logical, but still does not necessarily mean that the panel will be made up mostly of local arbitrators. It points out that there are currently fewer than 50% local arbitrators. It does not understand why the preference for local arbitrators is objectionable since judges are

local. It contends that a lot of time and effort was put into creating this process and it should not be abandoned without first seeing how or whether it works.

The City points out that the Union's proposal on the use of three (3) year old disciplines is not true. It cites Article 11 in support of the fact that an expungement of discipline occurs after three (3) years unless it is serious in which case it occurs after five (5) years. Both hold true unless there is intervening discipline. It contends that the Union's proposals simply ignore the fact that the Union has been able to avoid harsh discipline often and needs no assistance in the arbitration procedure.

### Recommendation

The *status quo* is recommended with one (1) minor changes. At the section where the remaining names are combined into one (1) list, it is recommended that the combined list only include those arbitrators, who were not mutually acceptable, but who were on both Parties' lists, to be included if and only if they are members of the National Academy of Arbitrators.

The City's position is correct in that the process has not yet been given an opportunity to work. While it appears to be a bit convoluted, such may be due to the unusual character rather than an actual weakness in the process. Moreover, the Union's objections as to arbitrators being either "union" or "city" is superseded by the fact that they must first be active in either FMCS or AAA panels before either side can choose them. Since panel members of both organizations must be neutral in order to be included, then the fact that they were first proposed by one party or the other is of no consequence. The experience of the undersigned informs that the method in which an arbitrator is chosen is rarely, if ever, disclosed. Thus, the fact that one party or the other was the sponsor will most likely never come up, and if it did it would be of no

consequence.

The recommendation that is made is also done in an effort to soften the effect of including arbitrators that were not otherwise mutually acceptable. In order to motivate both sides to nominate widely accepted arbitrators, then it is reasonable to only include those who were not mutually acceptable who are members of the National Academy. This group restricts membership based on experience and any claim that an arbitrator will be influenced because one side or the other was the sponsoring party will be softened by the experience of those chosen.

Also recommended is the inclusion of language that makes clear when the process is for disciplinary matters, and when it is not. It appeared that the Parties agreed to the limitation of its application to the different types of grievances and it is therefore fair to modify the provision to match the intent.

The remaining proposals are not necessary due to the lack of experience of the Parties, and because the lack of experience means that there are few identifiable problems that are certain to have occurred.

#### **4. Article VII – Section 1, Appendix A – Wages - Both Agreements Union #4**

##### Proposal(s)

The Union proposes a 6% wage increase in each year of a two (2) year Agreement.

The City proposes a 0%, 1.5%, and 1.5% wage increase in each year of a three (3) year Agreement.

## Background

The AFSCME unit received a 2% wage increase in 2004 and a 2% wage increase in 2005. Other bargaining units are unknown. Management, except City Council, received a 0% wage increase in 2005.

## City Contentions

The City relies on its, and the State's, poor financial condition. It cited the factfinding and conciliation reports issued to state-wide bargaining units. Those Agreements universally provide 0% wage increases, with minor adjustments in the current year and no wage increase until the third year. Moreover, it points out that the third year wage increases are timed to coincide with large increases in the employee contribution to the health care premium. Since many of the contributions come with no cap in the amount, then it argues that the net effect is a 0% wage increase for every year.

The City relies on the fact that public-sector employer are relying on attrition and layoffs to reduce its wage burdens. In contrast, it points out that it is actually attempting to hire more police. It contends that the police ratio to population is higher than in comparable cities; that police salaries are at the top of State and similarly sized cities; that the Police Department budget is the largest in the General Fund; that a raise in the Police wages will be twice the cost of any raises to the AFSCME Unit; that the Police budget has increases while the other general fund budgets have been cut or remain static; that only the safety forces have gone without reductions in force; that tentative plans exist to increase the size of the police force; that of the comparable cities (Dayton, Cleveland, Akron and Toledo), the City is the only one without a reduction in force; and that the Local Government Fund has been frozen for two (2) years and is in jeopardy of being eliminated.

It cited the above-referenced extensive testimony of Moller in further support. It argued that the current weak financial condition, together with the threat of worsening future financial issues, all support its wage increase.

### Union Contentions

The Union asserts that the historical wage increase has been three percent (3%) in each of the last six (6) years. It contends that the comparables support its proposal, and that the City's proposals were unreasonable.

The Union argues that the City's proposals were evidence of its bad faith bargaining, and it cited specific conduct of the City as the negotiations proceeded. Indeed, the City at first proposed no wages until the Union made its proposal; it then proposed no salaries for non-supervisors; and proposed a salary reduction for the remaining employees.

The Union complained that the City's actions have resulted in a loss of a large number of employees. It cited the seventy two (72) resignations (7%) within a three (3) year period as evidence of same. Since the majority of these employees resigned to work for other local police agencies, it contends that the normal retirement of officers is not the problem.

The Union discounts the City's claim of no money since it always makes the claim in negotiations. It contends that the problem is not revenue, or revenue growth, but spending. It cites interviews with Council members, as stated in local newspapers, as proof of spending being the underlying problem rather than revenues. It points out that the only department in public safety that generates revenues is the police – over \$3 million since 2002. It contends that the City, if it were to restrain its poor spending habits, has money to spend today, tomorrow and well into the future. It cites the accounting expert it hired in support of the claim that the City has

plenty of money. It also cited other cities, nationwide, with a similar population size, and other similar characteristics in support of the claim that this bargaining unit is underpaid and deserves a higher base wage.

Inside Ohio, it contends that the City pays less than Cleveland, Columbus, and Toledo. It cites SERB statistics in support of the claim that the average wage increase for all police in the State was 3.38% with the range being from 0% to 11%. It points out that the City's 0% wage increase is combined with a huge increase in health insurance premiums and follows its original position that a wage cut was in order.

The Union contends that the City has taken a position so low as to provide a reason for the undersigned to come between the Parties at a low figure that the City should have started at. It asks that the undersigned not fall for the ploy, and contends that the City's position is not realistic. Moreover, it argues that the City's proposal, combined with a worse health care program than that agreed to by the AFSCME unit, is simply unfair. It points out that the City's spending includes Council's decision to continue social service spending even though the Mayor has attempted to restrict spending to core services. It contends that the City's unreasonable spending includes:

- \$300,000 for purchase of County real estate;
- a new Community Planning Chief at the rate of \$92,300.00;
- Spending \$7 million on a Recreation Center and other set asides for unspecified projects;
- A Fire Department Consultant for \$185,000.00;
- \$1.2 million on Queen City Barrel (before it burned down);
- refusing to sell Blue Ash Airport;

The Union contends that the City's spending is reckless; that the City has refused to merge departments in a method that would save money; that it has failed to tax stock options; that it continues to roll back tax millage rates for property owners; and that it has abandoned the

concept of managed competition that would save it millions. It asserts that the decision to spend the \$55 million demutualization money on social services was irresponsible.

These factors, along with the difficult job of a police officer, it contends, prove that the City's offer is unreasonable. It contends that the jobs of these police officers is tough; that it requires fair pay; that, as the Mayor, the police force is the most scrutinized in the nation; that it is one of the best police forces in the country as proven by the fact that it was asked by the President to provide security during the inauguration; and that all these support a fair wage increase greater than that offered by the City. The Union cited extensive economic authority for the proposition that the City's General Fund balance is positive; is well above the percentage considered prudent (5%); and that it is healthy compared to the remaining funds.

### Recommendation

The recommendation on this issue is exceptionally tough. The City's evidence is compelling in proving that the City is facing hard economic facts. Its current financial condition is substantially weaker than in years past; its forecasts are reasonable and predict worsening budget problems; and the Mayor's conclusions that spending needs to be stopped are on point. If these were the only facts, the City's proposals would have force. Indeed, the testimony of Moller showed that he is a responsible financial authority with a competent administration alongside. He appreciates the nuances between what expenses should continue in a time of budgetary shortfalls, and those which have to continue for other reasons. His understanding of the inner-workings of the City's budget was not questioned.

These facts do not stand alone, however. Equally compelling is the evidence provided by the Union. While only touched on above, there is a problem with the City's decision making that

support a finding consistent with the Union's proposals. Indeed, several of the facts were difficult to understand for a City in crises. These include the spending of the demutualization money; the wage increase automatically made to City Council; and the continued use of the millage rollback. While each is understandable when economics are good, none are logical today.

Indeed, the use of the demutualization money is not a new issue. Every governmental entity in Ohio that used Anthem had to address how to spend the unexpected revenue. The City's use of it was unique and difficult to understand based on the financial conditions it faced. Instead of using it to stabilize the General Fund, the money was spent. This is a valid factor to consider in determining the appropriate wage rate. Moreover, it can not be ignored what City Council, essentially, paid itself. If the inability to change the City Charter were a mitigating factor, then the 3% wage increase would have less impact. However, the Union was able to show that objections have been raised before about the automatic nature of City Council's wage increases. Thus, they are directly relevant.

In evaluating what a fair wage increase should be, internal comparables are often the most compelling. It would be manifestly unfair to give a 0% wage increase to the police force in the same year that City Council received a 3% increase. If leadership begins at the top, then City Council's wage increase is fairly considered as the standard against which all other City employees wages should be judged.

Finally, the millage rollback is a questionable fact. While the City's motivations are good, it must be questioned whether the rationale is justified in light of the continued population loss. If the City's motive to maintain the populace was working, it would be expected that it would not continually lose people. Instead, the evidence shows that more people leave the City

every year. It is fair to conclude that the property millage is having no affect on individuals' decision making on where to reside. In times of financial distress, this decision making is reasonable to question.

These factors, among others, all reduce the otherwise strong case of the City. In reaching a determination on wages, the last factor given weight is the relief given to the City on the Health Care benefit. As discussed below, the City's need for more assistance on health care premiums is given, and such has pertinence to the level of wages recommended hereunder.

Based on all the foregoing, the following recommendation is made:

The wage increase should be 3% in the first year of the agreement. This should be split into two (2) increases of 1.5%.

The wage increase should be 2% in the second year of the agreement. This should also be split into two (2) increases of 1%.

The wage increase for the third year should be kept open in the third year of the Agreement.

**5. Article VII, Section 5 - Shift Differential Both Union #5**

Proposal(s)

The Union proposes changing the calculation for the Shift Differential from \$.70 cents to 3% of the top step of an officer hourly rate. This would eliminate the need to change the benefit each year and would simply keep it at 3%.

### Union Position

The Union contends that the first benefit was in 1982 at \$.35 per hour; that it has been raised modestly over the years; that before the most recent Agreement, it has not been raised since 1999; and that it is more rationale to rely on a percentage number that would automatically change. If such were done, it points out, there would be no need to continually renegotiate the benefit. It contends that even the City admits that the change to 3% would have no immediate impact; that its proposal is not an increase in shift differential pay; and that its intent is to be compensated based on future increases rather than asking for a current increase. Finally, the Union cites documented evidence of the negative impact of working the night shift, and the need to be compensated for these negative consequences.

### City Contentions

The City argues that there is no comparable that has a percentage based benefit; that the proposal would become an administrative nightmare; and that there is an increased costs associated with the administration of the percentage benefit.

### Recommendation

The proposal is not recommended. While the reasoning is good, the administrative costs outweigh the reasonable motive. Unless the percentage could be set at one point in the Agreement and remain unchanged for the life of the Agreement, the Union's proposal would be too difficult to administer.

**6. Article VII, Sect 21 -Medical Insurance Both Union #10/City #9**

Proposal(s)

The Union proposes changing the contribution by members from \$15 for single to \$35 for single and from \$30 for family to \$50 for family. These increase under the Union's proposal to \$50/\$75 for 2005. The Union's proposal would keep the current options for health care – either the Anthem Blue Access (PPO) or Anthem Blue Priority (HMO) Plan. It would also remove the co-payment provision that keeps the bargaining unit rate the same as the AFSCME unit.

For the Dental/Vision Plan, the Union proposes an increase to \$75 from the current contribution of \$54.00.

The City proposes language that would simply state that the Union is permitted to join the available health insurance plan that the City is offering and it would set the premium contribution of the bargaining unit at 10%. The language would give the City complete discretion in choosing a health plan and would have no cap on the amount that the bargaining unit would have to contribute.

Union Position

The Union contends that the City's proposal is too rapid a departure from the Parties history where the bargaining unit paid no monthly premium until the 2003 Agreement. It contends that the City's own representatives have informed the Union that its proposal would be an out-of-pocket expense, on average of \$984.00 per year; that it would result in a 4.5% decrease in monthly premiums; but would be a 170% increase in deductibles and co-pays in the 80/20 plan proposed by the City. Haas, the City's Health Care expert, told the Union it would amount to a 2% pay cut for bargaining unit members in the first year that the plan was put in place.

The Union points out that although the City claimed it was attempting to match bargaining units to the same health plan, AFSCME had a 5% contribution to monthly premiums, while the City's proposal was a 10% contribution. Moreover, the City continues to pay for AFSCME retirees, but refuses to negotiate over FOP retirees – an admitted permissive subject. Since the Union's proposal increases the contribution by its members dramatically; and since the Union's proposal actually provides a higher monthly contribution by FOP members than that paid by AFSCME bargaining unit members; then it asserts that it is more reasonable. It asserts that the City's savings will amount to \$180,000 in 2005 and \$456,000 in 2006 under the Union's plan

In contrast, it argues that the City's proposal will give a tremendous revenue enhancement to the City; that the City's proposal would increase revenues by \$984,000; that the 2005 increase to bargaining unit members would be 75% for the single plan and 43% for the family plan; that the 2006 increase will be 43% and 50% respectively; and that over the life of the Agreement, the increase will be 150% and 115%, respectively. It argues that the City proposal and the AFSCME plan are not equal; that the AFSCME plan covers retirees; that the retirees cost is \$34,000,000 per year.

The Union asserts that comparable jurisdictions are either lower or at the City's current health care premium.

### City Contentions

The City points out that the Union was given full access to its health insurance expert and was permitted to engage him on any subject. It contends that if something different is given for this group than the remaining employees, then the Plan itself will cost the City more because of fewer participants, and that it will leave this bargaining unit as the sole participant in the Union's

proposal.

The City cited significant costs factors that have continually taken more of its resources. Health Insurance premiums have doubled in five years; they have gone from less than 7% of personnel costs to 15%; that the City has no control over the costs; and that its plan will actually result in a cheaper benefit for many employees. It asserts that since only the most sick will pay more, then the new plan is actually more fair to all employees since they will pay based on the level of their illness.

The City cited extensive comparables showing that State employees are paying similar amounts; that comparable City's have similar health plans; and that these employees have benefited for a long time by receiving health insurance at lower costs than any other similarly situated public employee.

### Recommendation

This issue is often the most contentious. This case is no different and it is complicated by the fact that the City's proposal attempts to mirror that in the AFSCME Agreement, but actually changes significant portions. A review of the evidence shows that this bargaining unit has benefited by delaying what is inevitable – increased sharing of health insurance premiums. It is behind other similarly situated employees, and that benefit is going to end sooner rather than later.

In reviewing the AFSCME Agreement, other differences exist. In the City's proposal here, it simply gives the bargaining unit employees the ability to participate in whatever the City is offering. The AFSCME Agreement specifically references the benefits and attaches a copy of same. This must be done here so that the Parties know exactly what they are bargaining over.

Indeed, part of the problem in coming up with a recommendation is the complicated

nature of the differing benefits. However, from the evidence submitted, the premiums are reasonable at 5% (\$12.66/34.98 – Single/Family); the deductibles for network are reasonable (\$300/600); and the coinsurance is reasonable (20% to \$1200/20% to 2400). The prescription benefits appear to be in line with comparables, and some costs savings can actually be achieved by using a mail order. Finally, the plan provides benefits at no cost for “wellness visits.” These are all reasonable and comparable to other health insurance.

The main sticking point is the out-of-pocket maximums. This represents a large increase from the current benefit and is more reasonable at a lower rate. The dangerous nature of the police officer position makes it more likely that the police will reach the number faster than other City employees. Therefore, a lower number is justified for the out-of-pocket maximums. Based on the wage rate recommended, it is recommended that the City’s proposal only be reduced a minor amount. That is, because the recommendation include a wage increase that is high based on the City’s legitimate financial problems, a smaller than what otherwise might be justified decrease is recommended.

It is therefore recommended that the City proposal be made with the following adjustments:

- A 5% premium contribution;

- An attachment of the specific plan;

- Similar language to that of the AFSCME language that references the specific plan and benefits;

- A reduction of the out-of-pocket maximums to \$1,200.00/\$2,500 for Network Single/Family, and 2,500/5,500 for Non-Network; and,

- That the plan will not change for the first two (2) years of the Agreement. Only in the

third year may the issue be re-opened.

**7. Article 7, Sect 32 - Assistant Chiefs Supervisors City #12**

Addressed under number 1.

<b>8. Article VII, Sect 32 - OPOTA Certification</b>	<b>Patrol</b>	<b>Union #15</b>
<b>Article VII, Sect 33 - OPOTA Certification</b>	<b>Supervisors</b>	<b>City #13</b>
<b>Article VII, Sect 33 - Training Allowance</b>	<b>Patrol</b>	<b>Union #16</b>
<b>Article VII, Sect 34 - Training Allowance</b>	<b>Supervisors</b>	<b>City #15</b>

Proposal(s)

The Union proposes changing the percentage calculation from 4% of the “top step of a Police Officer” to 4% of the actual bi-weekly gross pay of the officer receiving the pay. It also proposes removing a reference to the non-applicability of the pay to FLSA. The benefit for the supervisors is already based on the actual bi-weekly gross pay of the officer. The proposal is for similar changes to be made to the Training Pay section.

The City proposes changing the Supervisors Agreement so that the calculation is returned back to the “top step” as in currently in the non-supervisors agreement.

Union Contentions

The Union argues that the change should be made so that both bargaining units are the same. It contends that the supervisors contract was changed through the conciliation process and asks that the non-supervisors be changed to match. It asserts that the increase to 4% was an agreed to method of “hiding” a total five percent (5%) wage increase. It contends that the intent

of the Parties in the prior agreement, to give a true 5% wage increase is only achieved if the Union's proposal is granted.

### City Contentions

The City agrees that the bargaining units should match, but claims it should be reduction in the Supervisors Agreement to match that contained in the non-supervisors. It points out that the change was only made, by the undersigned, in conciliation, because the Union's last best offer was closest to the Tentative Agreement. While it concedes the point, it argues that such resulted in a windfall for the Supervisors; that it is an administrative nightmare; and that it should be returned back to the original language.

### Recommendation

In light of the City's proven financial troubles, and since it is felt that the change to the supervisor's contract was only due to the "last best offer" nature of the past conciliation, then it is recommended that the supervisor's contract be changed back to the "top-step" language that is contained in the non-supervisors agreement.

It is true that the two (2) bargaining units should match; but it is truer that the supervisors have received a larger than reasonable raise through the change that was made. The logic for the awarding of the change during the past conciliation was *solely* due to the fact that it was closer to the Tentative Agreement that had been entered. Since it was not based on any other factor, and since this is factfinding, then it is recommended that the change be made back to the original top-step basis. Finally, the City is correct in its assertion that the administrative headache that the new language created was not justified and must be returned to its original.

**9. Article VII - New – Swat Supplement Both Union #21**

Proposal(s)

The Union proposes a new benefit of \$1,000/\$2,000 per year for members of the SWAT negotiation/tactical teams.

Union Contentions

The Union asserts that SWAT teams have been used numerous times (147 incidents in three (3) years, 191 in the last year); that most incidents require members to be called to return to duty from off-duty status; that they are on-call 24 hours per day, 7 days per week, 365 days per year; that they must complete a 40 hour training course; that they are required to keep and maintain tactical equipment; and they are required to keep in shape sufficient to pass a bi-annual physical fitness test. The Union asserts that the fire department has comparable position in hazmat and they receive extra compensation. Moreover, motorcycle officers receive extra compensation for performing normal duties with the only difference being their motorcycles.

It contends that in light of the extra work and duties, these officers should receive extra compensation. It argues that its proposal even recognizes that the tactical are different since they respond more and have the physical fitness requirement that the negotiation team does not.

City Contentions

The City contends that no other comparable bargaining unit in the entire state has the extra benefit proposed by the Union. The Chief testified that it is considered an honor and a privilege to be chosen for the special assignment; that officers seek the opportunity; and that the

recognition that comes with the position is usually considered enough compensation.

### Recommendation

The external comparables and the City's finances justify no change. The Union's proposal is not recommended.

## **10. Article VII, Section 41 - New - Sgt. Accrued Time Supervisors Union**

### Proposal(s)

The Union proposes a new benefit of four (4) hours compensatory time at 1 ½ times the regular rate, every two weeks for Sergeants.

### Union Position

The Union notified the City that its members are complaining about the added duty of first-line supervisors – Sergeants. The members have complained that without extra incentive, the number of applicants for the position will continue to decline. It points out that the Chief has admitted that Sergeants are the most critical position in the force; that many eligible Officers decline to take an exam because of the potential loss of pay; and that there is no overtime opportunity for the position. It asserts that the City has offered nothing to solve the problem, and its proposal is simply an attempt to address the concerns of its membership.

The Union contends that the workload has increased due to the mandates of the Department of Justice on the Sergeants; that they are being required to come early and stay late

with no overtime payments; that they must investigate any incidents of violence; and that they face disciplinary action if they do not conduct an adequate investigation.

The Union cites the average differential between Police Specialist and Police Sergeant in 2003 is only 3.5% (\$2,321.25). Moreover, it cites the declining number of applicants to take the Sergeant's exam; and the declining number of applicants who pass. In 1995 there were 178 competitors, and 94 who passed. By 2004 those numbers fell to 49 competitors and 13 pass.

#### City Contentions

The Chief conceded that the number of applicants has gone down, but counters the fact with the claim that in the past many officers took the exam without any real intention of becoming Sergeants. Since many officers just took the exam to see how they would do, then he contends that the reduction in the numbers is not a reflection of anything other than a reduced interest to those who are more qualified anyhow.

#### Recommendation

The City has a problem and as part of its management function, it can choose to address it or ignore it. The Union's proposal is not reasonable in a period of struggling economics. If the City does not believe this a priority, and the economics support no new benefits, then it must be recommended that the new benefit not be given.

**11. Article 7 - New - Promotions Both Union #23**  
Addressed under number 1.

**12. Article 16 - Residency Both Union #28**

Proposal(s)

The Union proposes expanding the residency requirement to the County and any adjoining Counties.

The City proposes the *status quo*.

Union Contentions

The Union asserts that the willingness of an officer to place their life on the line is not affected by their residency. It contends that as civil servants the police should not have to lose their freedom to choose where to live. It cites Columbus, Ohio, and Northern Kentucky as comparables where the residency requirement is expanded to contiguous counties, or where no requirement exists at all. Moreover, it points out that the majority of Hamilton County police departments do not have strict residency requirements at all. It contends that the removal of the residency requirement would assist in recruiting new officers.

City Contentions

The City contends that this is important to the City; that it has an important interest in not having officers who are not part of the public they protect; that the internal comparables all have the same residency restriction; and that the Union's proposal would make these employees the only City employees permitted to live outside Hamilton County.

Recommendation

It is recommended that the current language remain unchanged.

13. Article 17 -  
#29/City #18

Duration/Terms of Agreement Both

Union

Recommendation

A three (3) year term is recommended with wage and health care re-openers in the third year. Given the Parties' difficulty in negotiations and other labor relations area, it is reasonable to conclude that their two (2) year Agreements are not working. A respite between negotiations may be helpful in providing more stability. Moreover, the City's financial situation is addressed by leaving only wages and health care open for the third (3<sup>rd</sup>) year.

February 25, 2005  
Cincinnati, Ohio



Michael Paolucci