

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

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2005 JUN -3 A 11: 39

MIAMI TOWNSHIP, CLERMONT )  
COUNTY )  
and )  
FRATERNAL ORDER OF POLICE, )  
OHIO LABOR COUNCIL, INC. )  
)  
)

04-MED-09-0811  
04-MED-09-0812

**FACT FINDING REPORT**

Date of Award:  
June 1, 2005

**APPEARANCES:**

Mitchell B. Goldberg, Appointed Fact Finder

For the Public Employer:

Lawrence E. Barbieri, Esq., Attorney  
John W. Hust, Esq., Attorney  
R. Steven Bailey, Chief  
David D. Duckworth, Administrator

For the Union:

Thomas Fehr, FOP/OLCI Representative  
Sgt. Albert Fatute, Sergeant's Unit Representative  
Keith Bullock, Patrol Representative

## I. Introduction and Background.

SERB appointed the undersigned, Mitchell B. Goldberg, as the Fact Finder of this public employment contract dispute on November 30, 2004. The parties entered into an agreement extending the fact-finding period during their negotiations. They agreed on a hearing date of May 5, 2005. Evidence in the form of testimony and documentary exhibits was presented. They further agreed, at the conclusion of the hearing, that the Report is to be issued on June 1, 2005.

The parties submitted pre-hearing position statements in accordance with SERB rules and guidelines. Two bargaining units are involved in the negotiations, the patrol unit consisting of Patrol Officers, Specialists, a Corporal and P.F.C.; and, four sergeants in the Sergeants unit. There are approximately thirty members of both units. The units exclude the usual classifications of managers, professional, supervisory, confidential, part-time, seasonal, and administrative employees. The units were deemed certified on February 20, 1985.

The parties negotiated at various times from October through January. The last session occurred on January 21, 2005. The following articles were tentatively agreed upon: Article 1 – Agreement/Purpose; Article 8 – Grievance Procedure (except Sections 8.6, Step 1); Article 9 – Discipline; Article 14 – Hours of Work and Overtime; Article 15 – Wages and Compensation (only Section 15.9); Article 16 – Court Time/Call-Out Time/On Call; Article 18 – Vacations; Article 19 – Sick/Bereavement Leave; Article 22 –

Insurance; Article 23 – Equipment/Clothing; Article 35 – Tuition and Education Incentives (Sections 35.2 dealing with grades and 35.3 only; and , Article 40 – Duration.

The parties, through mediation, were able to resolve one issue involving changes to Article 35, Tuition Reimbursement. That agreement is incorporated herein for purposes of this Report. Seven issues were unresolved between the parties and were the subject of the hearing. The remaining articles that were unchanged in the expired agreement and the articles and issues tentatively agreed upon, and agreed upon through mediation at the hearing, are hereby adopted herein and incorporated into this report for purposes of the new agreement.

The unresolved issues are: (1) Step 1 of the Grievance Procedure; (2) Wages; (3) Shift Differential; (4) Tuition and Education Incentives; (5) Employee Rights – Polygraph Testing; (6) Drug Testing; and (7) Physical Fitness. The following recommendations take into consideration all of the criteria set forth in SERB Rule 4117-9-05 (J).

## II. Unresolved Issues.

### 1. Article 8 – Grievance Procedure.

The Employer proposes a language change in Step 1 that eliminates the requirement that employees must first attempt to settle a grievance issue by taking the matter up orally with their immediate supervisor. The change would provide that the oral discussion be first taken up with a lieutenant and provides for an oral answer within two

days of the discussion. Further, unresolved matters must be submitted in writing on a grievance form to the lieutenant within two days (instead of five days) of the lieutenant's oral answer. The lieutenant would provide a written response within three days after receiving the written grievance.

The Employer believes that the change is more efficient and practical because most grievances cannot be settled at the first step with a sergeant. The issues are usually beyond the scope of a sergeant's authority. Further, there is the appearance of a conflict of interest for sergeants who address grievances from the patrol unit at the first step. Both sergeants and patrol officers belong to the same union. The Employer has noticed that grievances are granted at the first level without consultation with lieutenants. If lieutenants were involved at the outset, these grievances would be contested.

The Union objects to any change. The present procedure is working to the satisfaction of both parties. The Employer did not present any specific problem or abuse with the present procedure. The Employer's proposal would eliminate the first line of supervision and remove many of the sergeant's existing supervisory responsibilities. Moreover, most grievances are already handled with lieutenant input at the first step. Half of the grievances are now processed through lieutenants directly and do not involve sergeants.

I find that the Employer concerns can easily be addressed with management directives and policies instead of a language change to the CBA. Sergeants must

understand that they must act as managers in the best interests of the Employer when they handle patrol grievances at the first level. The Employer may require as a matter of policy that sergeants consult with lieutenants on all grievances they receive before any answer is given. In each case, a lieutenant may direct the sergeant's response to the grievance, and overrule the sergeant's recommendation at the first level. The sergeants must understand that management is entitled to speak with one voice from the very beginning of the grievance process.

Recommendation. No change.

2. Article 15 – Wages and Compensation.

The parties are far apart on an agreement for across the board wage increases. The Union is proposing a three-year package of 9%, 6% and 5%. The Employer has countered with 1%, 1.5% and 1.75%. Through mediation, the parties were able to come together somewhat, but their respective proposals were tied into other proposals that were not acceptable.

The Employer's proposal is based upon its attempt to operate the township's finances on a conservative basis for the benefit of its citizens. Ninety per cent of the operations of the police department are funded through special tax levies. Five per cent comes from grants. No money comes from the general budget. Revenues equaled expenses in 2001, but in 2002 and thereafter, expenses have exceeded revenues. In 2003, expenses exceeded revenues for the police department by over \$500,000. In 2004,

revenues were \$4, 176, 419 and expenses were \$4, 466, 484. The total budget for safety services, which includes fire and EMS, has remained in line.

In terms of comparables, Miami is close to other similar townships and police forces in the area for salaries of sergeants and patrol officers. These include Colerain, Delhi, Green, Union (Clermont), Loveland, Milford, Clermont County, Hamilton County, and Warren County. The members of the bargaining units make considerable amounts over their base pay when other compensation and benefits are taken into account. Moreover, the officers and sergeants earn a considerable amount of overtime pay.

The Union proposal is considerably out of line when one considers the CPI and the small increases in the cost of living. Moreover, wage settlements for the police statewide, according to the SERB report, show wage increases averaging only 2.99% for 2004.

The Union has a different view. The Employer has the ability to pay for substantial wage increases – it has not claimed otherwise. The township has the highest growth rate, the highest household income, and the highest per capita income in Clermont County. The area has developed from a rural township into a wealthy suburban area with increased commercial and residential development. Population has grown from 23, 382 in 1970 to 36, 632 in 1990. By 2003, the population exceeded 40,000. Building permits and residential development have boomed. This has required more police services and

more specialized services. The township is in excellent financial condition. It has funded many capital improvements and enjoys an excellent bond rating.

The good financial condition has permitted the township to provide handsome pay increases for administrators with semi-annual pay increases. The recent fire contract provides for 4% annual increases, and 4% increases have been provided to non-bargaining unit employees.

In terms of comparables, Miami continues to fall below the rates for top patrol officers in the area. For 2005, the other townships exceed Miami's annual rate by over \$6,000 at the highest level (Union - Butler), and by \$2,000 at the lowest level (Union - Clermont). Green has recently received 3% annual increases, and Colerain received a 3.25% increase. Union - Butler received a 4% increase for 2005. The top sergeant's pay reflects a similar pattern. For 2005, the top sergeant's pay at Miami is approximately \$57,000 compared to Union-Butler at approximately \$64,000. Union-Clermont is at \$58,600.

The Union contends that substantial increases are needed to bring Miami in line with Union-Clermont, its next-door neighbor. Increases in past contracts have narrowed the gap, but the difference in pay remains substantial. Union operates with much more staff. Miami has chosen to operate with less staff, but pays substantial overtime. The officers deserve to be fairly compensated for the heavy workload.

After reviewing the abundance of economic evidence presented by the parties, I find that an increase similar to that provided in Union-Clermont is in order. There is nothing written in stone that requires Miami to equal Union-Clermont in all respects relative to compensation; however, Miami should not increase the disparity between the compensation paid to its police force members and the compensation paid by its neighbor for similar services. There is some indication that Union-Clermont provides for more intense services because of the dense population of its apartment residents in the Eastgate area. Miami's residents are more dispersed. Nevertheless, the present gap in compensation should not be increased when the township has the ability to pay for the increases. The fact that fire, the other component of the public safety budget, received increases of 4% is also a compelling reason for the police to receive something similar.

Recommendation.

I recommend a three-year contract retroactive to January 1, 2005 with annual across the board increases in both units of 4%, 4% and 4%.

3. Article 15, Section 15.10 -- Shift Differential.

The Union proposes additional compensation for those officers working the night shift (6:00 pm to 6:00 am). These officers are subject to substantial physical demands when their schedules are disrupted because of departmental training sessions that occur during the day shifts. They must attend court during the daytime. Their family life is severely limited because of their night duty. Finally, they are denied premium holiday pay for the first six hours of every holiday. For example the first six hours of work on

Christmas Eve, from 6:00 pm until 6:00 am are paid at straight time as part of their regular duties. The dayshift employees, however, who report at 6:00 am, receive 2 1/2 times their regular rate of pay.

The Employer offered a 3% shift differential in exchange for the Union agreeing to a language change giving the Chief the right to schedule all employees for any shift regardless of seniority. The Union rejected this proposal.

The evidence does not warrant the imposition of a shift differential without a negotiated agreement between the parties. Moreover, the Union should not have to forfeit its past bargained seniority rights to obtain this additional compensation.

Recommendation. No change.

#### 4. Article 35 – Tuition and Education Incentives.

The Union proposed increases of 1% in the incentive bonuses provided to Employees who receive advanced educational degrees. The Employer objects to the increases for economic reasons. The parties reached agreement on the language regarding the terms of entitlement. The coursework may now include degrees in public administration and the reimbursement payments are limited to the fees charged for Ohio residents at the University of Cincinnati (adjusted for differences between semester schools and schools like U.C. that operate on a quarter system).

Recommendation. The parties' agreement is adopted and incorporated into this Report. There shall be no change or increase in the reimbursement rates.

5. Article 36 – Employee Rights.

The Union wants new language permitting Union representation at all phases of an investigation of employee misconduct, including polygraph examinations. The Employer wants to prevent any other person being present during the examination if the polygraph examiner requires isolation. This is the subject of a ULP charge pending before SERB over a dispute in a particular case. The Union is alleging that the employee's Weingarten rights were violated when he was denied representation during the polygraph test.

Recommendation. There shall be no change in the existing language. The issue should be resolved by SERB, or through further litigation absent a settlement between the parties.

The Employer proposes language restricting the statement in Section 36.10 that it "agrees to treat all members in an equal and fair manner" to the purposes of Article 36, which is confined to the conducting of investigations of alleged employee misconduct. The Union has attempted to use the existing language as a basis for many types of grievances, not limited to matters of Employer investigations of misconduct. This language should not apply in matters involving the rights of the Employer to manage the workforce or to exercise its specific rights set forth in the CBA.

The Union believes that the removal of this general language in 36.10 and the Employer's proposed language of restricting its "fairness" to the investigative process give the Employer a license to discriminate.

I believe that the language in question is merely a shorthand attempt by the parties to insert a clause into the agreement reflecting the obligation of all employers to comply with federal and state laws prohibiting employment discrimination. The parties may want to negotiate more specific language in this regard, but the present language serves the intended purpose of requiring the Employer to comply with any external law in applying the terms of the CBA, or in managing the workforce. I see no reason for a change in the language at this time.

Recommendation. No Change.

#### 6. Article 38 – Drug Testing.

The Employer wants to add language that an employee who receives a positive test "may be subject to disciplinary action up to and including termination of employment." The Union believes that the existing language provides for "one free bite of the apple," meaning that the employee may avoid discipline for the first occasion of a positive test for drugs or alcohol.

Section 38.10 merely defers the application of discipline until after the employee completes a rehabilitation and detoxification program. If the program is successfully

completed, the employee returns to work after being off without pay, but with the use of any accumulated sick leave. I do not interpret this language as prohibiting the assessment of discipline for misconduct related to the use of drugs or alcohol in the workplace. The language appears to be limited to the case where an employee is tested because it is suspected that he or she is at work under the influence, but he or she has not engaged in any separate act of misconduct. The deferment of discipline under Article 38 for the first offense is only for the offense of testing under the influence of drugs or alcohol, but not for other related misconduct.

However, in cases where there is related misconduct, discipline is permitted under the standards set forth in Article 9. The employee's actions are scrutinized separate and apart from any drug or alcohol use. For example, an officer who kills a pedestrian while operating a cruiser under the influence of drugs or alcohol may be subject to discharge for the first offense and may not be returned to work after successful completion of the rehabilitation program. This is discipline for misconduct, not because the officer tested positive for drugs and alcohol. Article 38 should not be confused with Article 9 that provides for discipline for "drunkenness" and other offenses such as immoral conduct, neglect of duty, and other failure of good behavior. If the parties have a different interpretation of the Article 38 language, it is incumbent upon them to negotiate further language to make their intentions clearer.

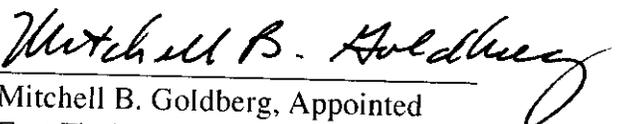
Recommendation. No change.

7. New Article – Physical Fitness.

The parties agreed to defer this issue while they continue to negotiate over the issues of acceptable physical fitness standards.

Recommendation. No change.

Date of Report: June 1, 2005

  
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Mitchell B. Goldberg, Appointed  
Fact Finder

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