

Introduction

In negotiations for a three-year successor agreement to begin December 2005, the parties held four meetings between November 2005 and May 2006, including a December session with a federal mediator. As a result of a budget deficit, the city proposed a wage freeze. The parties agreed to delay negotiations until after conclusion of negotiation with the patrol officers union in March 2006. The city granted a 3% increase to the patrol officers, and following passage of an income tax increase granted a retroactive 3% increases to unrepresented employees. The city and command officers did not finalize agreement on any issues, The FOP identified eleven unresolved issues for fact-finding on August 9, 2006. The parties agreed to extend the Fact-Finder's report to September 1, 2006 and waived any statutory claim that the Conciliator's final offer settlement award may not be effective until the following fiscal year.

The bargaining unit currently includes sixteen full time Command Officers -- 10 sergeants and 6 lieutenants -- employed to supervise 61 Kettering Police Officers represented by the FOP. The Employer and FOP/OLCI Command Officers have been parties to collective bargaining contracts since 1996; in the 1990s the command officers were unrepresented for several years following representation by a different bargaining agent. There are approximately 400 full time Kettering employees including unrepresented personnel and represented fire fighters, dispatchers, and clerical workers serving a city population of over 57,000.

The parties exchanged and submitted pre-hearing position statements that summarized their proposals, and they prepared supporting documents for presentation at the hearing to address the criteria established by the Ohio Public Employees Bargaining Statute in Rule 4117-9-05:

- 1) Past collectively bargained agreements, between the parties
- 2) Comparison of 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, and 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; and,
- 6) Such other actors, 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."

Meditation and Hearing: August 9, 2006 Kettering City Government Center

The parties accepted the fact-finder's offer to mediate and were then able to resolve eight of the eleven issues prior to the start of a hearing convened at 1:25 pm to address four remaining issues

1. Article 7 – Section 1 – Wages and – Section 4 – Wages (Command Officer Pay)
2. Article 10 – Section 14(a) – Health Care and Section 14(c) – Health Savings Account
3. Article 19 – Mid-Term Dispute Resolution Procedure
4. Retroactivity

One day after the hearing, the Fact Finder received via email from Kettering representative Daniel Rosenthal an attached letter from Kettering Human Relations Director Richard Strader withdrawing the proposed change to Article 10 Section 14(a) on health insurance. As a result, the fact-finder has only addressed the issues of wages, mid-term dispute resolution and retroactivity in this report.

Agreements

Prior to the hearing, the parties agreed to the following new contract language effective as soon as practicable following execution of the agreement:

Article 7 –

Section 5 – Uniform Allowance Beginning with the quarterly payment for the 4th Quarter of 2006, Command Officers will be paid a uniform allowance of ~~\$800.00~~ **\$1,000** per year. This allowance will be paid to each Command Officer in four equal payments at the beginning of each quarter.

Section 10. Normal Work Day. Except in the case of necessary appearances in court and emergency special duty assignments, the normal day for a Command Officer will be eight hours. **A Command Officer who is scheduled to work on a holiday will be paid time and one-half his regular rate and Command officer who is scheduled to be off work on a holiday and is then required to work on that holiday will be paid at double his regular rate.** Command Officers assigned to a watch will be required to report for roll call fifteen minutes prior to their scheduled shift. Those Command Officers will continue to receive a lunch period at a time during the shift as approved by the supervising officer. If, due to an emergency, no lunch period can be scheduled, fifteen minutes of overtime pay will be granted.

7...Article 9 – Section 1 – Vacation Accrual

Section 1. Vacation leave will be accumulated for uninterrupted employment on the following basis:

<u>Length of Service</u>	<u>Rate of Accumulation</u> <u>(Days per Month)</u>
Less than 5 years	5/6 .83
Over 5 and up to 10 years	1.08 1.17
Over 10 and up to 15 years	1-1/3 1.50
Over 15 and up to 20 years	1-2/3 1.75
Over 20 years and up to 25 years	1.92
Over 25 years	2.08

Retroactivity and Article 7 Wages

FOP/OLCI Position:

In December 2005, as a condition for delaying contract talks until after conclusion of the patrol officers agreement, the FOP/OLCI agreed that it would not propose a pay increase based on a differential, with the understanding that the union could propose a higher percentage increase than the patrol officers received. At the time negotiations were postponed in December, the city had proposed a wage freeze. The union contends that its proposals for annual percentage increases are fully consistent with the December 2005 agreement to postpone negotiations, and that in accord with standard practice increases should be made retroactive to the expiration of the prior contract. In June 2006, Kettering granted all unrepresented employees wage increases retroactive to December 2005.

Based on the 3% annual increases granted to patrol officers in March 2006, the union proposed that sergeants receive wage increases of 4% each year for three years and that lieutenants receive annual increases of 5%. The additional 1% and 2% each year was proposed as "Command Officer Pay" in order to increase the differential in compensation between sergeants and patrol officers as well as the differential between lieutenants and sergeants. In a letter responding to the employer's pre-hearing statement and at the hearing, the union

representative clarified that the draft contract language it had proposed had never been intended to result in second and third year increases higher than 4% for sergeants and 5% for lieutenants. The union submitted data from comparable jurisdictions illustrating a range of wage increases that exceeded 3%. Its representative noted that members would not enjoy the full increase because Kettering had increased the income tax by 0.5%.

The union argued that after years of disregard, wage compression must be rectified. The issue has been its top priority in every negotiation. In 1980 the IACP recommended that Kettering maintain the industry standard, a 15% wage differential between the ranks. Instead the differential between lieutenants and sergeants has remained at 7.5% and the differential between sergeants and patrol officers declined from 14% in 1980 to 11.3% in 2005. The union submitted fact-finding reports illustrating contract provisions with increases based on a specified % wage differential in fourteen other Ohio communities. Data from comparable jurisdictions, whether those selected by Kettering (based on regional proximity and size) or by the union (the state's most highly paid police departments), all illustrate considerably greater wage differentials than the compressed Kettering pay structure.

The proposed additional annual increases of 1% and 2% would ultimately create a separation between the patrol officers and sergeants of just over 14% and would establish a rank differential between sergeants and lieutenants of 13.5%. The union argued that the city had recognized the compression problem and had sought to rectify the issue in 2003 by offering patrol officers a lower annual increase than the command officers received. A fact finder recommended that patrol officers receive equal pay raises, and that union also was granted one more vacation day than command officers. As a result, in 2002 only three of the fifty patrol officers eligible for promotion took the exam, and only three of the nine sergeants eligible for promotion sought the rank of lieutenant. Unless Kettering follows the industry standard for compensation differential, the union argues that the city will not have an adequate recruitment pool for command officers.

Kettering employs an elite police force based on top wages in the state. While the city's patrol officers ranked fourth statewide in compensation, compensation for the city's sergeants and lieutenants will decline to 12th and 23rd unless wage compression is reduced. The proposed differential wage increases would only partially restore the city's lost ranking.

City Position:

Kettering insisted that the union's attempt to increase the wage differential violated the condition to postpone bargaining made in an unwritten agreement that its representative had summarized in a letter to the FOP/OLCI dated December 27, 2005. The patrol officers completed negotiations within two weeks after their prior agreement expired, a prompt settlement that justified minimal retroactive pay. The city argues that because the command officers violated the terms for delaying negotiations that their increases should only take effect after a successor agreement is concluded.

At the hearing, Kettering increased its offer from 2.5% to 3% annual increases for three years. All other bargaining units and unrepresented employees were granted the same increase. The city had warned the FOP/OLCI that any increase above 3% would need to be matched by cost saving in health insurance for the command officers. Although Kettering voters had approved a 0.5% increase in the income tax to 2.25%, the city anticipated significant tax revenue losses resulting from layoffs and prospective closures of major employers and had major concerns about growing health care costs based on recent annual increases of 18% and 20%.

The city offered wage data from 17 jurisdictions within a ten-mile radius and from 16 cities statewide in the 40,000 to 80,000 population range. In both the local and statewide comparison, Kettering paid the highest base wage salaries for Sergeants with 18 years of service, the city average. In the statewide comparison of lieutenants with 25 years of service, the Kettering average, the city ranked second behind Hamilton. In the local comparison of jurisdictions providing overtime for lieutenants, Kettering's maximum base wage was second; two jurisdictions without overtime also had higher maximum base wages.

The city offered extensive internal comparisons based on employees' gross compensation that included an average of \$8,000 per year in additional overtime pay to command officers in 2005. The average gross compensation for lieutenants equaled the total remuneration for more highly ranked captains and exceeded the compensation of six department heads. Fire captains, police lieutenants and sergeants are the only Kettering city managers who receive overtime compensation. As a result, the most highly compensated police sergeant and lieutenant earned \$10,000 and \$12,000 more than the highest paid police captain and also earned more than thirteen of the city's fourteen department heads.

The city argues that command officers are exempt under the FLSA, with no statutory entitlement to overtime pay. Granting the extraordinary increases proposed by the union would further compress the differential between lieutenants and unrepresented captains. With due respect to taxpayer concerns and over 400 public employees, Kettering can not grant disproportionate salary increases to a small bargaining unit of sixteen highly paid command officer who already enjoy extraordinary overtime pay.

Finally, the city submitted the 2003 Fact Finding report that rejected the union's prior attempt to create a wage differential.

Discussion: Retroactivity

In the absence of a written agreement to postpone negotiations, the Fact Finder carefully reviewed the Kettering representative's letter of December 27, 2005 which stated in part: "... the Union agreed not to seek a wage differential . . . The union remains free to propose a higher percentage increase than the patrol officers receive. . . the City remains free to propose a lower one." The Fact Finder notes that in the 2002-2003 negotiations the union proposed that command officers wages be based on a percentage differentials of 15% and 12% to separate sergeants from patrol officers and lieutenants from sergeants. Wage differential contract provisions in other jurisdictions similarly tie command officer wage increases to salaries in the patrol, units rather than providing for a percentage increase of the current base.

The Fact Finder concludes that the union made a good faith proposal in accord with the December agreement by proposing a higher percentage increase than patrol officers received. As forecast in its December letter, the city then responded by offering less than 3%. Although the union's proposed draft language for wage increases was not sufficiently clear about the 4% and 5% annual percentages, the FOP/OLCI clearly did not ask for a percentage wage differential of the type proposed in prior negotiations.

The proposal for a higher percentage increase does not become a wage differential provision simply because the union based its calculations on a level that would produce the desired separation in ranks. In accord with general practice in Ohio public employee labor negotiations and a reasonable construction of the negotiating history of this agreement, the Fact Finder concludes that the wage increases should be retroactive to December 2005.

The parties agreed at the hearing that their new agreement would be effective through December 21, 2008. The Fact Finder has reluctantly recommended that date for Article 20 – Duration. Regrettably, during mediation, it was not recognized that the parties might find it mutually advantageous for subsequent negotiations to conclude their agreement following the expiration of the Patrol Officer’s contract on March 1, 2009.

Discussion: Wage Increases and Differential.

In evaluating the external comparables, the Fact Finder considered the jurisdictions selected by the city based on proximity, (the local labor market) and population the most appropriate basis for applying the statutory criteria for resolving the wage issue: “the ability of the public employer to finance and administer the issues proposed.” The city data shows that its command officers earned top pay in the local labor market; the union’s data for the same local jurisdictions demonstrated that Kettering has a significantly lower wage differential separating Sergeants and Lieutenants.

In evaluating the internal comparables the Fact Finder considered the averages of actual gross income for 2005 provided by the city a less appropriate measure than the median, because the extraordinary overtime earned by one sergeant and one lieutenant seriously distorted the two averages. The union calculated wage differentials by comparing the top step of compensation at each rank, showing differentials of 11.3% and 7.5% without including actual income earned from overtime used in the computation below.

2005 Median Gross Earnings, (Includes overtime, holiday pay, uniform allowance)

	<u>\$ Total</u>	<u>Differential</u>
Chief of Police	101,124	16.8%
Captain (2)	86,575	2.2%
Lieutenant (6)	84,700	4.1%
Sergeant (10)	81,400	14.9%
Patrol Officer (61)	70,867	

Nearly all of the fact-finding reports on fourteen other police contracts submitted by the union involved disputes over how to adjust an existing wage differential. Only one of the cases, Parma, clearly offers a fact finder’s rationale for recommending the establishment of a wage differential formula opposed by the employer. The Kettering union no longer proposes a wage differential formula of that type, but the rationale of the Parma recommendation supports its proposal that command officers should receive a higher percentage increase in order to increase separation between the ranks.

This Fact Finder disagrees with the reasoning in the Parma report and finds other grounds for distinguishing it as precedent. The union in Parma included captains as well as lieutenants and sergeants making possible a comprehensive differential remedy unattainable in Kettering. Parma’s salaries are lower than Kettering’s for officers at all ranks. The Parma Fact Finder concluded without justification that an agreed formula linking command officers’ salaries to the patrol officers’ base would simplify subsequent wage negotiations. Even if that were true in contracts using a wage differential formula, that benefit would not be realized by the Kettering command officers who proposed an annual per centage increase.

Most critically the Parma report concluded that wage differentials were essential to assure an adequate recruitment pool of applicants for a growing number of command officer positions.

This Fact Finder also regards wage differentials as a means to an end, rather than a primary objective. The top priority is to recruit and retain superior sergeants and lieutenants. Wage differentials provide an incentive for lower ranking officers to apply for promotion. Despite the city's failure to achieve the "industry standard" for differentials since 1980, Kettering appears to have done remarkably well in maintaining an elite group of command officers. Retention rates in Kettering appear very high – sergeants have on average eighteen years of service and lieutenants twenty-five years.

There may have been relatively few applicants for internal promotion, but the union offered no evidence that there were too few. Even if no current employees applied for promotion, Kettering pays top salaries in the local market and presumably would have no difficulty finding well qualified outside applicants to fill any vacancies that developed. At this time, the union has forecast a problem and may or may not arise, and has surmised without supporting evidence that a slight increase in separation between the ranks would remedy that hypothetical problem.

In 2003, a fact finder rejected the Kettering command officer's proposal for a wage differential formula based on some of the same reasoning offered in this report challenging the new proposal for supplemental command officer pay. That precedent appears more relevant and applicable than the Parma report.

Even if wage differentials were viewed as a valued end without demonstrable benefit, the employer might reasonably conclude that other values take priority when there is no way to satisfy all employee groups with a perfect compensation policy. The employer convincingly argued that granting lieutenants higher compensation in order to create greater separation from sergeants would trigger resentment among unrepresented top managers who would no longer enjoy the highest pay rates. At a time of vast and growing wage disparities between top U.S. executives and their hourly workers, the Fact Finder questions the union's support for higher pay at the top in order to create appropriate differentials for their highly paid members. In any event, the Fact Finder has no authority to address FOP/OLC proposals that the city should limit raises for the patrol officers and increase pay for captains in order to enhance separation for sergeants and lieutenants.

The union's persistent commitment to increasing wage differentials is clearly genuine, as evidenced by its proposal that lieutenants, a minority of its membership, receive higher pay increases than sergeants. The city also appeared genuinely concerned about wage compression between sergeants and captains. The Fact Finder could not fashion any recommendation for a contractual remedy to address those concerns, but believes the parties have some opportunity to address gross wage compression by limiting overtime. If captains approve command officers overtime that is not a contractual entitlement, then supervisors could preserve a differential in gross compensation with their subordinates by setting upper limits on their overtime. Similarly, the union could agree to an upper limit of sergeants' overtime in order to increase the gross wage differential with lieutenants. Although the Fact Finder is not convinced that greater separation between sergeants and lieutenants is needed, the union might be able to devise an acceptable way of doing so at no additional cost to the city. In order to achieve that result in the current negotiations, the Fact Finder could have recommended increases of less than 3% for sergeants and more than 3% for the lieutenants.

Instead the Fact Finder recommends a 3% increase for both ranks based on his conclusion that the sergeants should receive no less than the raise awarded to all other Kettering employees

and that the union failed to make a case that increasing the differential warranted additional compensation for the command officers unit. The city provided limited documentation on its ability to pay no more than 3% to all its employees, and the union representative offered only minimal testimony claiming that Kettering could afford to fund the FOP/OLC proposals. In addition to the recommended 3% increase, the command officers will also receive time and a half when scheduled to work on a holiday, a \$200 increase in the uniform allowance three years after the prior \$200 increase, and an increase of one vacation day. Under the prior agreement, patrol officers promoted to sergeant lost a vacation day and this agreement restores parity.

RECOMMENDED CONTRACT LANGUAGE

ARTICLE 7 – WAGES
STEP RATES

Section 1. Basic rates of pay shall be increased by 3.0% retroactive to December 26, 2005, and subsequently on December 25, 2006 and December 24, 2007.

<u>Pay Grade</u>	<u>Basis</u>	<u>A</u>	<u>B</u>
<u>Rates Effective December 26, 2005</u>			
Sergeants 504	Hour	\$33.71	\$34.55
	Year	70,121	71,856
Lieutenants 505	Hour	\$36.27	\$37.15
	Year	75,434	77,276
<u>Pay Grade</u>	<u>Basis</u>	<u>A</u>	<u>B</u>
<u>Rates Effective December 25, 2006</u>			
Sergeants 504	Hour	\$34.72	\$35.58
	Year	72,224	74,012
Lieutenants 505	Hour	\$37.35	\$38.27
	Year	77,697	79,595
<u>Pay Grade</u>	<u>Basis</u>	<u>A</u>	<u>B</u>
<u>Rates Effective December 24, 2007</u>			
Sergeants 504	Hour	\$35.76	\$36.65
	Year	74,391	76,232
Lieutenants 505	Hour	\$38.47	\$39.41
	Year	80,028	81,982

Article 10 Health Insurance

The union initially proposed that the city match pre-tax contributions by the command officers to a health savings account, and the city investigated whether the feasibility of permitting the members to make their own contributions to the proposed vendor. If the city did so, it appears that establishing a comprehensive health savings plan for all its employees would be jeopardized. It appears the parties have a common interest in establishing a workable plan and will continue discussions.

Proposed Article 19 Mid-Term Dispute Resolution

The union submitted a pre-hearing statement under the above heading with draft contract language that applied to arbitration of disputes over a successor agreement. At the hearing the union introduced two alternative dispute resolution drafts for consideration. The FOP/Ohio Labor Council has prepared draft contract articles based on a 2001 SERB holding related to unfair labor practice determinations in the absence of agreed upon midterm bargaining procedures. The city strongly objected to any new contract language.

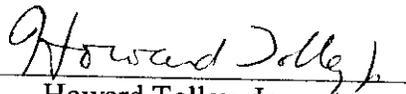
The Fact Finder stated at the hearing that it would be inappropriate to consider the alternate proposals that had not been submitted in advance, and concludes that insufficient justification was presented to recommend adoption of the draft contract language incorporated in the pre-hearing statement that has not been incorporated in other police contracts.

Conclusion:

The fact finder has attempted to resolve the issues with a thorough review of interrelated contract provisions and with careful attention to all the evidence and argument presented. If the parties find any substantive error in this report needing correction, a conference call should be arranged to discuss the concern, and a request may be filed with SERB for authorization to adjust the report [O.A.C Rule 4117-9-05(L)]. The Fact Finder appreciates the courtesy extended by all individuals involved in the process.

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Fact Finding Report has been served via electronic mail and BY REGULAR MAIL to Mr. Richard Strader, City of Kettering, 3600 Shroyer Rd, Kettering, OH 45429-2799 and to Mark Drum, FOP/OLCI, 222 East Town St., Columbus, OH 45215-4611 and by e-mail to Daniel G. Rosenthal, 425 Walnut St., Suite 2300 Cincinnati, OH 45202 on this 17th day of August, 2006.


Howard Tolley, Jr.