

STATE EMPLOYMENT
RELATIONS BOARD

Factfinding Report and Recommendations

2007 JAN -5 P 12: 06

in the matter of Factfinding between

City of Cincinnati

and

Fraternal Order of Police – Queen City Lodge No. 69

SERB Case No. 06-MED-08-0835

06-MED-08-0836

Marcus Hart Sandver, PhD

Factfinder

Hearing Date: December 13, 2006

Report Issued: January 3, 2007

Representing the City:

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Representing the FOP:

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I. Introduction

This case arises out of a dispute between the City of Cincinnati (the Employer) and FOP Queen City Lodge No. 69 to negotiate a successor agreement to a Collective Bargaining Agreement which expired on December 2, 2006. The parties met for a total of ten negotiating sessions in September, October, and November of 2005 to negotiate the agreement. Although tentative agreement was reached on many issues, some issues remained unresolved. Under the provisions of O.R.C. 4117.01 et. al. Marcus Hart Sandver was chosen by mutual agreement of the parties as the Factfinder to the dispute. Pre-hearing materials were received in a timely manner by the Factfinder.

II. The Hearing

A. Attendees.

The hearing was convened by the Factfinder at 9:00 AM on December 13, 2006 in the conference room of the Vernon Manor Hotel. In attendance at the hearing for the City of Cincinnati were:

1. Cassandra Washington Senior Management Analyst
2. Dan Campbell Senior Administrative Specialist
3. Nicholas Sunyak Senior Human Resources Analyst
4. Chuck Haas Risk Manager, Department of Finance
5. Ellie Topham Supervising Accountant Police Department
6. Scott Stiles Assistant City Manager
7. Joe Gray City of Cincinnati Finance Department
8. Kathy Creager City of Cincinnati Finance Department
9. Hilary Bohannon City Director of Human Resources

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| 10. | Ursula McDonald | Labor Relations/EEO Manager |
| 11. | Don Crain | Special Counsel to the City, Chief Spokesperson |
| 12. | Lea Carroll | Budget Director City of Cincinnati |
| 13. | Joe Scholler | Assistant Special Counsel to the City |

In attendance at the hearing for the FOP were:

- | | | |
|-----|-----------------|----------------------------------|
| 1. | Steve Lazarus | FOP Attorney, Chief Spokesperson |
| 2. | Kathy Harrell | FOP Queen City Lodge President |
| 3. | Michael Bolte | FOP Representative |
| 4. | Bryan Hawkins | FOP Attorney |
| 5. | Roper Wolf | FOP Member |
| 6. | George Pille | FOP Member |
| 7. | Hank Ward | FOP Member |
| 8. | Randy Rengening | FOP Member |
| 9. | Len LaBrecque | FOP Member |
| 10. | Terry Peirand | FOP Vice President |
| 11. | Thomas Haas | FOP Building Fund |
| 12. | Keith Fangman | FOP Member |
| 13. | Ed Schindler | FOP Member |

B. Exhibits.

Numerous exhibits were introduced into the record; too numerous to identify individually. For the employer, there were 48 exhibits bundled in a

multi-tabbed binder along with appendices A-H. The FOP exhibits were in 5 multi-tabbed binders identified as FOP Exhibits A-CCC (53 exhibits).

C. Opening Statements.

1. FOP Opening.

In his opening statement, Mr. Lazarus pointed out to the Factfinder that the parties have met in negotiations frequently over the past four months to negotiate the agreement. Several of the sessions were facilitated by a mediator from the State Employment Relations Board. More than 30 issues were resolved in negotiations but some items remain to be resolved. Mr. Lazarus noted to the Factfinder that many issues involved in the negotiations were rooted in historical and legal contexts including a public referendum in 2001 (known as Issue 5), to a string of litigation involving the FOP and the City from past fact-finding's, conciliations, and disciplinary actions taken by the City Police Department. Mr. Lazarus stated his opinion that the City is doing well financially and voiced optimism for the resolution of the dispute in Factfinding.

2. City Opening.

In his opening statement, Mr. Crain also emphasized to the Factfinder that much has been accomplished in the negotiations leading up to the Factfinding. Mr. Crain explained to the Factfinder that the most recent negotiations between the parties went to Factfinding and Conciliation in 2005. Mr. Crain noted to the Factfinder that part of the

Conciliation award was challenged by the Union in the Court of Common Pleas. The Union was successful in its challenge and the Employer appealed the decision of the Court of Common Pleas and to the Court of Appeals of the First Appellate District of Ohio. The judgment of the Court of Common Pleas was affirmed by the Appeals Court on September 8, 2006. The City has appealed this decision to the Ohio Supreme Court. In short, the 2004-2006 Collective Bargaining Agreement has still not been finalized as Factfinding begins for a new labor agreement.

As part of his opening statement, Mr. Crain requested that a statement of the City's financial condition be made by Budget Director Lea Carroll. No objection was raised by the Union. The witness was sworn in by the Factfinder.

Mr. Carroll began her presentation by distributing a publication entitled City of Cincinnati Budget Facts (City Exhibit # 44) specially prepared for the fact-finding. Ms. Carroll directed the Factfinder's attention to pages 2 and 3 of the document and pointed out that projections for the 2007 budget are that both police and fire expenses will rise from 2006-2007. Public safety expenses in 2007 will comprise 64% of the total budget, up from 62% in 2006. Based on a June 2006 projection, the carryover budget is expected to decline from a \$15 million surplus in 2006 to a zero balance in 2007 to a projected \$28 million deficit in 2008. A recalculation in November of 2006 however showed a small (\$2-3 million) surplus in 2007 and 2008. If present expenditure levels continue,

expenditures would exceed revenues in 2007 without reductions in other areas of the overall budget. Numerous examples of budget cuts in 2006 in areas such as recreation, health, finance, transportation and engineering, and public services were cited in the presentation. Proposed service cuts were identified that will be necessary to balance the budget in 2007 including the elimination of 507 positions in the ranks of City employees.

On cross examination, Mr. Lazarus asked Ms. Carroll to describe the City's actions taken in 2006 and earlier years to "roll back" property taxes. Ms. Carroll testified that City Council in 2006 decided to "roll back" property tax revenues that could have been collected due to increased valuation of property in the City. Ms. Carroll estimated that for a \$100,000 home this "roll back" would have amounted to a saving for the taxpayer of \$8. Mr. Lazarus asked Ms. Carroll to discuss the \$55 million the City received from the Anthem Insurance Company Demutualization settlement. Ms. Carroll testified that the vast majority of the Anthem funds (\$53 million of the \$55 million) had been placed into the City Capital Fund and thus was not available to enhance the general fund from which wages and benefits must be paid.

Mr. Lazarus asked Ms. Carroll to discuss wage increase projections for other bargaining units that have been factored into the 2007 budget. Ms. Carroll testified that the 2007 budget projections include a projected 4% increase for members of the CODE bargaining unit (2% across the board and 2% merit), a projected 5.7% increase in the building

trades unit (2.7% across the board and 3% merit) and a 3% increase for firefighters.

On redirect examination, Mr. Crain asked Ms. Carroll what wage increase projections she had made for the non-union City employees in the 2007 budget. Ms. Carroll testified that she had projected 0% increase for the non-union personnel in the City for 2007. there were no further questions and the witness was dismissed.

III. The Issues.

The parties were asked to present the unresolved issues to the Factfinder. The Factfinder reminded the parties that he would be guided by the criteria included in O.R.C. 4117.14(G)(7) in formulating his recommendations. These are essentially:

- (a). Past collective bargaining agreements between the parties.
- (b). Comparability to other private and public employees doing comparable work.
- (c). The interests and welfare of the public. The ability of the public employer to finance and administer the issues proposed.
- (d). The lawful authority of the employer.
- (e). The stipulations of the parties.
- (f). Other factors which are normally taken into consideration in the determination of the issues related to public or private service employment.

A. First Issue – Wages. (City Issue # 20, FOP Issue # 2)

1. FOP Position.

The FOP position on this issue is to request a six percent (6%) increase for 2007 and a six percent (6%) increase in 2008. In support of its position, the Union introduced Book 4 of 5 FOP Exhibits 10 (A)-(YY) into the record. Mr. Lazarus asked the Factfinder to take note of a recent memorandum from City Manager Milton Dohoney to the Mayor and members of City Council dated November 22, 2006 (FOP Exhibit 10(PP), Book 4). In this memorandum, the City Manager announced that general fund revenues were up \$16.2 million (5.8%) over October 2005, but added that the final budgeted increase would probably be closer to \$10 million accounting for timing differences and refunds. The memorandum went on to explain that this increase would be used to restore the General Fund reserve to 10%; its minimum reserve level. The memorandum identified increases in property tax revenues 15.3% ahead of those in 2005. The memorandum identified increases over 2005 budgets in Income Tax (+5.9%), Admission Tax (+24.2%), Licenses and Permits (+12.1%), Fines, Forfeits and Permits (+13.0%), Investment Income (+54.1%), Public Safety Revenues (+30.5%) and Building and Inspections (+11.5%).

Mr. Lazarus directed the Factfinder's attention to FOP Exhibit 1-(F) Book 4. This exhibit is a comparison of top step police officers salaries for 2006 or 2007 for 6 large Ohio cities; Akron, Cleveland, Columbus, Dayton and Cincinnati. According to the FOP calculations, the total compensation rate for the top step police officers in these cities would be as follows:

Akron	\$51,017.00 (2006)
Cleveland	\$57,268.32 (2006)
Columbus	\$67,637.00 (2007)
Dayton	\$55,208.10 (2006)
Toledo	\$60,466.68 (2007)
Cincinnati	\$57,924.44 (2006)

Mr. Lazarus asked the Factfinder to consult the FOP Exhibit 10KK and 10LL (Book 4) for additional information relevant to the cities financial health and bond ratings.

2. City Position.

The City position on this issue is to propose a zero percent increase in 2007, a 2 percent in 2008, and a 2 ½ percent increase in 2009. Mr. Crain asked the Factfinder to consider the wages increases given to the police officers in 2005 and 2006. The increases were 3 percent in 2005 and 3 percent in 2006 with an increase in the OPOTA pay of 2% and training pay of 2% (Employer Prehearing Brief p.23). Mr. Crain carefully explained to the Factfinder that the 2% on OPOTA pay and 2% training pay was in exchange for a change in the grievance and arbitration procedure which was negotiated with the Union in 2002 but later “lost” in a conciliation decision in 2005. (ibid). Mr. Crain in his prehearing statement was very clear in stating his view that there were reductions in personnel and reductions in City services as a result of the wage increases negotiated with the FOP between 2003 and 2006 (Op. Cit. p.24)

In City Exhibit 15, the City calculates comparability wage data for police officers in 9 cities in the region with a population of 150,000 or greater, the City comparability data differ from in FOP's in that the city comparables include data for Indianapolis, Pittsburgh, and Louisville. According to the City calculations, the average top step police officer in the 9 cities it used as comparables was \$54,197.24. According to the City comparability wage data, even with no wage increase in 2007 (City Proposal), Cincinnati would be second only to Columbus in wage rates for the top step police officer in 2007. If the FOP proposal were to be adapted (a 6% increase), Cincinnati would exceed Columbus' top step by almost \$500.

3. Discussion.

As is often the case in Factfinding and Conciliation, there is disagreement between the parties both as to the financial health of the employer and to wages paid to employees in other jurisdictions. The first issue has to do with the financial health of the employer. I agree with the City that it has gone through some troubled financial times in recent years and that 2003-2006 resulted in the elimination of some positions in the City and the reduction of some City services. At the same time, the City Manager's recent memo to City Council should give the City some reason for optimism for the future. Certainly, the City would not claim an inability to fund wages for the upcoming years. In fact, there are plans to expand the police force by 40-60 persons in 2007 and 2008.

The issue of wage comparability is somewhat problematic. The data in City Exhibit 15 differ from the data in FOP Exhibit 10(F) Book 4 for every city except Akron. Sometimes the City data have the top step base wage identified as being lower than the FOP data (Columbus, Toledo and Cleveland) and sometimes the City data shows the top step base wage rate as being higher than the FOP data (Dayton). The choice of comparable cities is also problematic. The City would like to include data from Indianapolis, Pittsburgh and Louisville (all outside of Ohio) all of which have lower officer salaries than Cincinnati. The FOP did not emphasize it in the hearing, but the Factfinder could not ignore FOP Exhibit 10(E) Book 4 which includes wage data from other Hamilton County Municipal Police Departments, some of which (e.g. Blue Ash, Forest Park City, Montgomery City, Norwood, Sharonville and Springdale) pay higher wage rates than Cincinnati. The issue of total compensation which includes items such as pension pickup, longevity pay, uniform allowance, OPOTA pay, training allowance and so forth, further complicate the matter. To cloud the matter further is the issue of co-pay of health benefit premiums and the issue of overtime pay.

I find that the City has the resources to fund a reasonable wage increase. At the same time, the City doesn't have unlimited funds to spend and must use its resources wisely.

4. Recommendation.

My recommendation is for the following wage increases retroactive to December 6, 2006.

2007 – 3%

2008 – 3%

B. Second Issue – Insurance (City Issue # 14, FOP Issue # 10)

1. City Position.

The City position on this issue is for the members of the Cincinnati Police Department pay 10 percent of the premium of their health insurance (both single and family coverage) for the 80-20 City health plan. The City proposal guarantees the level of benefits and co-payments until December 31, 2009. The City proposal to change the health plan premium share is found in City Exhibit # 21 and # 22.

In support of its position, the City provides the Factfinder with extensive documentation of increasing health care costs (Exhibits 23-29), and the Conciliation Order issued by Robert Stein involving the State of Ohio and AFSCME in 2003 (City Exhibit # 31). The City also asks the Factfinder to take into consideration the developments arising from the FOP's appeal of the Conciliators Award issued in June of 2005 regarding health insurance. In the 2005 Conciliation Award, the Conciliator awarded the City position which would be to raise the share of the premium paid by the employee to 5 percent of the monthly premium; up from a fixed dollar amount in the previous agreement (\$20 per month for single employees and \$35 per month for family coverage). In addition, the

City proposal would be to pay \$54.00 per member per month into a fund maintained by the FOP to provide dental and vision insurance to the members of the FOP bargaining unit. The FOP proposal in Conciliation was to provide for a 5% premium share capped at \$35 single and \$75 family for the Blue Access plan or Blue Priority plan with deductibles and co-payments as outlined in Appendix C and to increase the dental and vision benefit provided by the City to \$67.50 per month.

The Conciliator awarded the City's final offer on health insurance in her Conciliation Award. Due to the fact, however, that the City's final offer was missing a page, the Conciliator made an assumption or an inference about the City's final offer which wasn't exactly what was presented at the Conciliation hearing. As a result of this inference, the FOP appealed the Conciliator's Award to court. The Common Pleas Court and the Appeals Court both overturned the Conciliator's Award regarding health insurance and awarded the issue to the FOP. The issue has now been appealed to the Ohio Supreme Court and is awaiting a final determination. In the City pre-hearing brief, the savings to the FOP members as a result of the Court invalidation of the Conciliator's decision is labeled as an \$892,236 "windfall" (City prehearing brief p.39). In support of its position of a 10% premium share, the City in its pre-hearing brief states the view that "It permits the Factfinder to return to the City what it unfairly lost when the FOP took advantage of a technicality to unfairly favor its members". (Op. Cit. p.36).

2. FOP Position

The FOP position is for a 5 percent premium share capped at \$35 single and \$75 family for the Blue Access or Blue Priority Plan with co-payments and deductibles shown in Appendix C. Under the FOP proposal, the City would pay \$67.50 into the FOP administered Dental and Vision plan per month.

The FOP interpretation of what has transpired since the invalidation of the Conciliator's Award in 2005 is slightly different than that of the City. In its exhibit on health insurance Book 5 Tab 12 p.9, the FOP states that on July 1, 2005 the City implemented their 80-20 health insurance plan and began deducting a 5 percent premium share from the member's paychecks. The City requested a stay from the Appeals Court ruling invalidating the Conciliator's Award, but no stay was ever granted. In addition, the Union contends that the City continues to contribute \$54 per month to the FOP Dental and Vision plan, not the \$67.50 that would have been paid had the Conciliator's ruling truly been invalidated as of July of 2005. The FOP cites calculations made by Mr. Joe Gray that the City saved \$790,000 in 2005 and \$869,360 in 2006 by moving to the 80-20 plan. This was calculated by the FOP to be an effective 2 percent pay cut for the members of the bargaining unit (Op. Cit. p.11) mostly from the increased deductibles and out of pocket expenses associated with the City 80-20 plan.

3. Discussion.

To someone coming to this issue “cold” with no prior knowledge of the invalidation of the Conciliators Award and the tangle of litigation involving decisions, appeals, motions to vacate, motions to stay, and so forth, it is quite an effort to sort out the heart of the issue here. Fortunately, despite all the court actions and the bitterness over this issue, the positions of the parties are really quite close. The litigation will run its course and whether there is a “windfall” or not will ultimately be decided by the courts; so be it.

The task at hand is to find a resolution to this issue that both parties can live with. The City wants to provide the members of the FOP bargaining unit health insurance as close as possible in plan design and premium share as it provides other City employees, although with the FOP administered Dental and Vision plan it will never be identical. The FOP members want reliable, affordable health care for themselves and their families that cost them roughly what it costs other city employees and that provides comparable benefits.

4. Recommendation.

1. Effective January 1, 2007, the City provide members of the FOP bargaining unit with coverage under its Blue Access 80-20 plan that covers all other city employees.
2. The premium share shall be 5% of premium costs capped at \$35 single and \$75 family.

3. The monthly contribution to the FOP Vision and Dental fund shall be \$67.50 per member per month.

C. Third Issue – Employee Rights. (Police Officer rights in disciplinary investigations in current agreement).

1. FOP Position.

The FOP position on this issue is to add three sentences to Article X of the current agreement.

Employees will be treated with courtesy and respect.

Employees shall be treated in a fair and equitable manner.

No employee shall be denied due process in any administrative manner.

In support of its position, the Union cites data from the “Linder report” which was a survey of the members of the Cincinnati Police Department in 2006. The data shows that “only 28.1% of these officers surveyed think that discipline in the Cincinnati Police Department is fair and uniform” and that “only 23.7% say that in the eyes of Department, officers are innocent until proven guilty.” (FOP Book 5 Tab 17 (A)). The FOP exhibit on this topic also contains data from a Rand Corporation attitude survey of Cincinnati Police Officers released in September of 2006. In the Rand study, the data show that 76 percent of the officers surveyed either disagreed or strongly disagreed with the statement “CPD protects its officers from unreasonable lawsuits and accusations (Op. Cit. Tab B).

The FOP evidence in Book 5 also includes contract language from police agreements in Akron, Dayton, Cleveland, Columbus, and Toledo. All of the contract language included in Exhibit Book 5 Tab 17 (c, d, e, f, g) pertains to internal investigative procedures.

2. City Position.

The City position on this issue is to include the sentence “employees will be treated with courtesy and respect” but to oppose the inclusion of the sentences “employees shall be treated in a fair and equitable manner” and the sentence “no employee shall be denied due process in any administrative manner”. In support of its position, the City submits into evidence The Manual of Rules and Regulations and Disciplinary Process for the Cincinnati Police Department, Revised 11/14/06 (Exhibit 42). In its prehearing brief (Op. Cit. p.62-63) and in testimony from Chief Streicher, the City states its view that the inclusion of the FOP language in Article X would be “unworkable” and an “open invitation to chaos”. The City points out that similar language regarding internal investigations was presented by the FOP in negotiations in 1999-2000, 2001-2002, 2003-2004 and 2005-2006. The Factfinding recommendation of Mr. Paolucci in July of 2003 was to reject the Unions rather extensive proposal to add a new Article 17 “Police Officer Bill of Rights” to the contract. The issue was not discussed in the Conciliation Award of Dr. Goulet in June of 2005.

The City contends that the Union proposal is unnecessary because of the rights already given police officers under the Ohio and United States Constitutions and the City's extensive administrative regulations. The City notes that none of the post arbitration cases currently in litigation involve discipline in the Department. Also, never has an Arbitrator found that the City failed to give due process to an officer that had been disciplined.

3. Discussion.

I have looked over the contract provisions regarding disciplinary investigation for the 5 large Ohio cities provided in the FOP Book 5. I am quite familiar with the language in the City of Columbus contract in that I mediated the 1994 negotiations that created the language found in the contract today. I am also very understanding of the reservations expressed by the Chief in his testimony at the Factfinding hearing. Although the additions to Article X proposed by the Union are short and sweet, they could be the source of conflict over the meaning of the simple sounding terms like "due process in any administrative matter". The City representative stated at the hearing that the City would have no problem with the sentence "employees shall be treated with courtesy and respect." Interestingly, I don't find this language in any of the other contracts provided by the FOP so perhaps Cincinnati can take some provide in having a Disciplinary Investigation article which includes this guarantee.

4. Recommendation.

Article X of the current agreement – Police Officer Rights in Disciplinary Investigation shall be amended to include the sentence “employees shall be treated with dignity and respect”.

D. Issue 4 – Arbitrators Selection and Authority. Issue 5 – Arbitration Discovery and Evidence.

1. City Position.

The City is proposing wide ranging changes in the Arbitration process in the labor agreement. The first change would be to create a panel of 9 arbitrators who would serve as an arbitration panel during the term of the labor agreement. The names of potential panel members, 42, would be provided by the Arbitration and Mediation Service of Cincinnati. The Arbitrators would be drawn from a group who maintained business addresses within 100 miles of Cincinnati (including Columbus, Indianapolis, Louisville and Lexington). A panel such as that proposed by the City was used in the 2003-2004 agreement although the names of panel members were provided by the American Arbitration Association at that time.

The city also proposes language that would establish a system of pre-hearing discovery in discipline cases. The discovery process would limit the grievant from presenting into evidence at the arbitration hearing any documents or testimony related to the case that is more than 3 years old.

2. FOP Position.

The FOP position is to maintain current contract language. Current contract language is found in Article III of the past CBA. In Article III, Section 3, Arbitration is discussed under step six of the grievance procedure. Arbitrators are selected on a case by case basis from a list of names provided by the American Arbitration Association. There is no discovery language in Article III of the most recently expired CBA.

3. Discussion.

The intensity of debate concerning this article is quite extraordinary, Union Exhibit BBB is a 20 page condemnation of a grievance procedure and arbitration process that it labels as “clearly flawed” (p.7). In the 2005 Factfinding, the FOP labeled the grievance procedure and arbitration process that was adopted in 2002 as a “terrible system”. (FOP Book 2 Tab 7 p.17). In looking over the mass of material presented by both parties on this issue, I am inclined to believe that the system was “broken” by this unusual system of arbitrator selection and pre-hearing discovery and needs to be restored to its previous state (the procedure used in the agreements negotiated in 1995-2001).

One of the advantages of the previous system was its simplicity. The parties contact AAA for a list of qualified arbitrators. The parties strike names from the list alternatively and choose an arbitrator that is the least objectionable to each side. In cases where no name is acceptable to each side, a new list can be requested. The parties can stipulate to AAA that they want the names of arbitrators who have addresses within a

certain regional area. The arbitrator can subpoena witnesses at the parties' request. The arbitrator can rule on objections to evidence using the standards of admissibility that he or she has developed of the course of his or her career. I really don't see any advantage to either side of the convoluted system of "nominating" potential panel members from each side. The discovery process does seem a bit "slanted" to the employer's advantage. The employer argument that AAA should not be used any more because they no longer maintain a Cincinnati office seems a little weak to me. With e-mail and fax communication, it makes little difference where the regional office is located. There has never been an AAA office in Columbus, but this doesn't mean that Columbus based unions and employers don't use this Association's services.

There is a principle in social science theory labeled "Occam's Razor" which basically states that the simplest solution to a problem is probably the best one. I think the changes to the language in Section 6 of Article III that were brought about in 2002 have violated this principle and weakened the arbitration system in the Cincinnati Police Department.

4. Recommendation.

That the language in Article III Section 6 be changed to reflect the language found in agreements negotiated in 1995-2001.

E. Issue Six - Assist and Chiefs.

1. City Position.

The City position on this issue is to add language to the beginning of Article III which would exempt Assistant Chiefs who were hired or appointed on or after January 1, 2005 from utilizing the grievance procedure. The City proposal would also add language to the end of Article III Section 1 which would designate Assistant Chiefs as “at will” unclassified employees who would not be eligible to utilize the grievance arbitration procedure contained in the labor agreement.

In support of its position, the City cites the results of a November 6, 2001 ballot initiative in which the voters of the City of Cincinnati by a 52-48 percent margin approved Issue 5. By approving Issue 5, Article V Section 5 of the Cincinnati City Charter now contains a provision that designates the Police Chief and Assistant Police Chiefs as unclassified civil service employees of the City. The City directs the Factfinder’s attention to Tab 38 of its Exhibit 1 which contains a memorandum from Robert Johnstone Jr., Deputy City Solicitor to Mayor Charlie Luken dated December 14, 2002. In this memorandum, Mr. Johnstone attempts to explain to Mayor Luken the implications that the approval of Issue 5 would have for the status of the Assistant Chiefs under the labor agreement. Mr. Johnstone advises the Mayor that “the terms for the unclassified appointments to Assistant Chief are as a matter of law subject to and limited by the provision of the FOP agreement” (Exhibit 38 bottom of 3rd page).

2. FOP Position

The FOP representative directed the Factfinders attention to Tab A in FOP Book 2. In fact all exhibits in Book 2 relate to the status of the Assistant Chiefs under the labor agreement. The FOP position is that the Assistant Chiefs are part of the bargaining unit and are accorded the protections provided all other members of the bargaining unit. The FOP position is that it wants to maintain current language and provide the Assistant Chiefs the same access to the grievance procedure and arbitration that all bargaining unit members enjoy.

3. Discussion.

In a way, I am in debt to the FOP and to the City of Cincinnati for contributing greatly to my education in the field of Ohio Public Sector Labor Law. Following the issue from the Johnstone memo of 2002 to the letter of Roshani DeSoya Hardin in early 2003 to SERB, to the memo to City Council from Valerie Lemmsee in 2004, the Demasi case of 2005, the Arbitration Decision of Mollie Bowers in April of 2006, the motion to vacate filed by the City in July 2006, the motion to affirm filed by the FOP in July of 2006, the application for restraining order filed in August 2006, the SERB decision of 2005, the Common Pleas Magistrate's decision of 2006, and the Affirmation of the Magistrate's decision by Judge Cooper in August of 2006. I learned much more about Cincinnati's "Issue 5" than I ever thought I would before this Factfinding. I also came to the conclusion that this question will not be settled by the legal system for some time to come. Until the legal status of the Assistant Chiefs as being

members of the bargaining unit or not is finally resolved, I do not think that a Factfinding recommendation other than to maintain the status quo is justified. I have no desire to add to the controversy that already exists over this matter.

4. Recommendation.

Maintain current contract language in Article III.

F. Issue Seven – Promotions.

1. FOP Position.

The FOP position on this issue is to add a new Section 36 to the non-supervisor agreement and a new Section 37 to the supervisor's agreement which would incorporate existing civil service regulations regarding promotions into the labor agreement.

In support of this position, the FOP cites the long history of litigation involving "Issue 5" and the selection of Assistant Chiefs. The FOP believes that by incorporating these new sections into the labor agreement, the Civil Service rules which are currently followed for promotions would be memorialized in the labor agreement and would be protected from unilateral management initiative or from a vote of the citizens.

2. City Position

The City position on this issue is not to incorporate the new sections into the labor agreement. The City representative directed the Factfinders attention to City Exhibit 15 page 20. This exhibit shows that

for the 6 large cities in Ohio, promotion is by civil service rule, not the collective bargaining agreement. Secondly, Exhibit 15 page 20 shows that for the cities of Columbus, Cleveland and Akron, the “rule of 3” applies. In Cincinnati and in Dayton, the “rule of 1” applies. The City representatives characterized the “rule of 3” as the better method of promotion than the “rule of 1”.

3. Discussion.

Using Civil Service rules seems to be the established method for police officer promotions in most large municipalities in Ohio. It seems to have worked in Cincinnati well for the past 25 years or so. If the City wants to move to a “rule of 3” system, they should have made a proposal on this issue at the Factfinding or better yet at negotiations. This is a complex issue and very important to the City and to the FOP. This is a matter that will affect the careers of every police officer in Cincinnati and a matter that needs to be negotiated between the parties.

4. Recommendation.

That proposed Article 36 in the non-supervisor contract and 37 in the supervisor contract not be adopted.

G. Issue Eight – Residency Article XVI.

1. FOP Position.

The FOP position on this issue is to widen the geographic scope of the residency requirement in the labor agreement. The FOP proposal is to allow bargaining unit members to reside anywhere within a 22 mile area

as measured from Fountain Square in downtown Cincinnati; to the farthest point in Hamilton County, bounded by the State of Indiana on the west and the State of Kentucky on the south. In the event that the Court of Final Appeal does not rule in favor of the City in Case # A0604513, members shall be permitted to reside anywhere in the State of Ohio. In the event that the Court of Final Appeals does agree with the City then residency shall be limited by the City to Hamilton County or any adjacent county in the State of Ohio (Hamilton, Butler, Warren or Clermont Counties) as outlined in state law.

The FOP reasoning behind its proposal is that expanding the residency requirement would aid in the recruiting and retention of police officers in the Department. The FOP exhibit on this issue Book 5 Tab 18 p.6 points out that the members of the largest police department in the State (Columbus) have the right to reside in any contiguous county to Franklin County. Covington Kentucky police officers have no residency requirements and may reside anywhere they wish including Ohio. The majority of Police Departments in Hamilton County do not have residency requirements. Many of the members of the bargaining units that negotiate with the Hamilton County Sheriff are permitted to reside outside Hamilton County.

2. City Position

The City position on this issue is to maintain the current contract language requiring residency within Hamilton County. The City

representative pointed out to the Factfinder that at one time the City required members of the Department to reside within the City limits of Cincinnati. The residency requirements were broadened to allow officers to reside anywhere in Hamilton County in the 1993-94 labor agreement.

In support of its position, the City representative emphasized to the Factfinder that the residency requirement was a very controversial issue with City Council. There is a concern among members of Council that if the residency requirement is relaxed, that there will be an outflow of officers to adjoining counties; especially Butler and Warren Counties (City Pre-hearing brief p.66). The City representative further reminded the Factfinder that the whole issue of residency requirements for municipal employees is currently in litigation resulting from an act of the Ohio Legislature in the Summer of 2006 that the issue is being appealed by a number of cities in Ohio.

3. Discussion.

I can see how this would be an issue of some controversy between the City and its officers. The City wants the officers to reside as close as practicable to the City due to issues such as timely response to deal with emergencies. There is also undoubtedly a feeling among members of City Council, and the electorate, that the officers will take more pride in their work and will more closely relate to the concerns of the citizens of Cincinnati if they reside among them. Undoubtedly there is also a feeling

among some members of the business community that they would like to see money earned in Hamilton County stay in Hamilton County.

On the other hand, members of the bargaining unit want to have the freedom to reside wherever they choose, with some reasonable limits. Some officers may want to reside in a more rural setting than that found within the confines of Hamilton County or may feel that they could obtain a bigger or better residence if they were allowed to reside outside the County. These are valid concerns, and the action of the State Legislative Assembly this last summer seems to address these concerns. I think a compromise can be fashioned.

4. Recommendation.

If the Court of Final Appeal does not rule in favor of the City in Case # A0604513 members shall be permitted to reside in Hamilton, Butler, Warren or Clermont Counties in the State of Ohio.

If the Court of Final Appeals does rule in favor of the City, current contract language (e.g. residence in Hamilton County) remains.

H. Issue Nine – Duration.

1. City Position.

The City position on this issue is to propose a three year agreement beginning at 12:01 am on the 3rd day of December 2006 and shall remain in effect until midnight on the 12th of December 2009. That is an agreement of 3 years and 9 days.

In support of its position, the City representative directed the Factfinders attention to City Exhibit # 15 p.24. The data in this exhibit show that 5 of the 6 big cities in Ohio negotiate agreements of 3 years duration (Akron, Cleveland, Columbus, Dayton, and Toledo). Cincinnati is the only city to negotiate an agreement of 2 years. The City points out that negotiations are time consuming and expensive and that by reducing their frequency tax payers dollars would be saved.

2. FOP Position

The FOP position on this issue is to propose a 2 year agreement, actually a 52 pay period agreement that would begin on December 3, 2006 and expire on November 28, 2008.

The FOP position on this issue is based on a number of considerations. The first is past practice. Since 1993, the City and the FOP have negotiated 2 year agreements. The City in the past has put forth vigorous arguments for a 2 year contract (FOP Exhibit Book 5 Tab 19 A & B). In addition, the FOP points out to the Factfinder that elections for its executive board are held every two years on the odd year. These elected officers chosen in November 2005 would have their term of office expire in November 2007. Preparation for contract negotiations being midway through the even year. That is, preparations for the contract that expires in December of 2006 begins in June of 2006. The executive board elected in November of 2005 negotiates the 2006 contract. If the contract expired in December of 2009, the executive board elected in November of

2009 may be different than the executive board that began the negotiations in June of 2009. The election of City Council Members likewise occurs in “odd” years with those elected in 2005 negotiating the expiring 2006 contract beginning in June of 2006.

3. Discussion.

The City pre-hearing brief states “the external comparisons on this issue could not be more compelling” (p.60). I certainly agree with that statement. In my “heart of hearts”, I really feel that one of the problems facing negotiations for the City and the FOP is the 2 year agreement. Litigation concerning the Conciliation of 2005 has not even run its full course and here we are again at the bargaining table at Factfinding. The almost constant cycle of negotiations, factfinding, conciliation, litigation, negotiations must be exhaustive; not to mention damaging to the labor management relationship.

Nevertheless, the FOP evidence is quite compelling. A continuous string of 2 year agreements going back to 1993 certainly constitutes a pattern. The 2 year agreements negotiated by the IAFF and the City in 2001, 2003, and 2005 are pretty strong evidence of internal comparables. The timing of the election of the FOP executive board and city council for the “odd” years and the negotiation by the board and council of the “even” year agreement beginning in June is compelling. I don’t think that in over 21 years as a neutral I have ever recommended a 2 year agreement over a 3 year agreement but in this instance, I think a 3 year agreement would not

serve the best interests of either party or the public. The recommendation does accommodate one interest of the employer in that it includes one more pay period than does the Union proposal.

4. Recommendation.

This agreement shall be effective as of 12:01 AM on the 3rd day of December 2006 and shall remain in full force and effect until midnight on the 12th day of December 2008.

I. Issue Ten – Pension Pick Up, Article VII

1. FOP Position.

The FOP position on this issue is that the bargaining unit member pays nine percent (9%) to the Ohio Police and Fire Pension Fund and that the City “pick up” the remainder of the contributions as well as pay the City’s required contribution.

In support of its position the FOP evidence shows that in the City of Cleveland all 10% of the members contribution is “picked up”. In Columbus, the “pick up” is 7.5% with the member paying 2.5%. In Toledo by the end of their labor agreement, all 10% of the member’s contribution would be “picked up”. (FOP Book 5 Tab 15 A-E).

2. City Position

The City position on this issue is to refuse to “pick up” any of the member’s contribution to the Ohio Police and Fire Pension Fund.

In support of its position, the City makes three points. First, under ORC 4117.10(A) pension “pick up” is a permissive item of bargaining and

thus not properly a matter to be discussed in Factfinding or Conciliation. Second, the pension “pick up” is a new unjustified benefit. Finally, the pension “pick up” has significant potential to cost millions of dollars annually. (Employer pre-hearing brief p.50).

3. Discussion.

I find the employer’s arguments quite persuasive here. Although the Union is not asking for much in this proposal now, (the member pays 9%, the City pays 1% plus its own contributions), the costs are projected to rise. Looking at the City Exhibit # 34, employee costs are scheduled to increase gradually to 12% beginning in 2007 and employer costs are projected to go to 24 percent (up from 19.5% paid currently). The compound effect of “picking-up” 3% of the employee contribution (up from nothing now) and the projected rise of employer share from 19.5 to 24% could amount to a very sizable bill for the City. I know that pension “pick up” is relatively common for both police and firefighters across Ohio. But I agree with the employer that this is a permissive subject and one that is not within my jurisdiction as a neutral to grant.

4. Recommendation.

That the addition to Article VII, pension “pick up” not be included in the Collective Bargaining Agreement.

J. Issue Eleven – OPOTA Pay, Article VII, Section 33 (Supervisors) and Section 32 (Non-supervisors).

1. City Position.

There was not a great deal of discussion about this issue at the hearing. The City position on this issue is to eliminate the OPOTA (Ohio Peace Officers Training Academy) pay provision from the agreement for both supervisors and non-supervisors.

In support of its position, the City representative briefed the Factfinder on the history of the OPOTA pay provision. In the view of the City representative, the OPOTA pay provision was part of a package the City offered the FOP in the negotiations concerning the past 2003-04 labor agreement. In the City's view, the OPOTA pay was offered to the FOP as an incentive for the Union to agree to the employer initiated changes in the grievance and arbitration procedure. In negotiations, the FOP agreed to the changes proposed by the City to Title III, Section 6. When the contract went to Factfinding, Michael Paolucci (the Factfinder) recommended the City's proposed changes to the Arbitration and Grievance Procedure. When the matter went to Conciliation, the Conciliator (Dr. Goulet) did not choose the City's proposed final offer to change the arbitration and grievance procedure; rather she chose the FOP's position which was to go back to the way the arbitration and grievance procedure was worded in previous agreements.

When it came to the OPOTA issue (Article 32 in the non-supervisors agreement and Article 33 supervisors contract), Dr. Goulet writes "there is no dispute that the OPOTA allowance is to be four percent (4%) and the Training allowance to be two percent (2%)." (City Exhibit

Appendix F p.18) The remainder of the Conciliator's discussion of this issue concerned the method of computing the 4% and 2% (more on that below). Thus the OPOTA and Training allowances stayed in the contract even though the City's changes to the arbitration and grievance procedure were not implemented.

2. FOP Position.

As might be expected, the recollection of the FOP representative regarding OPOTA pay and the 2002 negotiations over the 2003-2004 contract differ somewhat from those of the City representative. The FOP representative stated to the Factfinder that in his view the increase in the OPOTA pay in the 2003-2004 contract was a way of "hiding" an additional pay raise to the officers and supervisors. The FOP agreed that the OPOTA increase be calculated on base pay. When the issue went to Conciliation, the FOP proposed that the OPOTA pay for the non-supervisors be calculated as 4% of the top step pay for the member's current rank or grade. For the supervisors, the FOP proposal was that the 4% be computed on the basis of the member's bi-weekly gross pay. The FOP final offer was awarded in Conciliation.

3. Discussion.

Interestingly, while the City pre-hearing brief proposes the elimination of the OPOTA pay, most of the City's discussion of this issue concerns how the pay is calculated. If my notes are correct, the City representative at one point in the discussion of this issue said "we will

give anything to get out of this gross salary deal". Meaning, presumptively, the method by which the OPOTA pay and the Training pay are calculated for supervisors. I agree that at the very least, the base for calculating the OPOTA and Training pay should be the same for the supervisors and non-supervisors. I am also persuaded that the calculation of the OPOTA pay and Training pay based on the bi-weekly gross pay of the officer presents something of a "moving target" as the gross pay for the officers may vary from pay period to pay period and thus requires a separate computation for each officer each pay period.

I am recommending to retain the OPOTA pay and Training pay. These have been in effect for sometime now, and the issue of whether OPOTA was a "buy out" for the changes in Article III as the City contends, or a hidden pay raise (hidden from whom one might ask?) as the FOP contends doesn't matter at this point. This is water over the dam. The real issue is how to administer this component of the pay package.

4. Recommendation.

OPOTA Certification Pay – Article VII, Section 32 (Non-supervisors).

Effective December 3, 2006, all sworn members shall receive an additional Ohio Peace Officer Training Academy Certification allowance annually in the amount equal to four percent (4%) of the top step of the annual salary rate of a police officer; to be paid bi-weekly throughout the year. (Current contract language to remain in effect.).

OPOTA Certification Pay – Article VII, Section 33 (Supervisors).

Effective December 3, 2006 all sworn members shall receive an additional Ohio Police Officer Training Academy Certification allowance equal to four percent (4%) of the top step of the annual rank or grade in which the officer is classified; sergeant, lieutenant, captain, and lieutenant colonel's/Assistant Police Chiefs with the exception of the sole Lieutenant Colonel/Assistant Police Chief designated to act in the absence of the Chief and authorized to exercise the authority and perform the duties of the Chief.

K. Issue Twelve – Training Allowance. Article VII, Section 35 Supervisors Agreement; Article VII, Section 34 Non-Supervisors Agreement.

1. City Position.

The City position on this issue would be to renumber and rename Section 35 of the supervisor's agreement to Section 34 and to renumber and rename Section 34 of the non-supervisors agreement. The new section would be 34 in the supervisor's agreement and 33 in the non-supervisors agreement and in both instances the new section would be renamed Training and Certification allowance.

2. FOP Position.

See discussion of OPOTA pay above.

3. Discussion.

See discussion of OPOTA pay above.

4. Recommendation.

Article VII, Section 35 (Supervisors)

Effective December 3, 2006 all members shall receive an additional Cincinnati Police Training Allowance in the amount equal to two percent (2%) of the top step of the annual salary rate of the rank or grade in which the officer is classified; sergeant, lieutenant, captain, and lieutenant colonels/Assistant Police Chief with the exception of the sole Lieutenant Colonel/Assistant Police Chief designated to act in the absence of the Chief and authorized to exercise the authority and perform the duties of the Chief (remaining language of this section to remain the same as in the current contract).

Article VII, Section 34 (Non-supervisors).

Effective December 3, 2006 all sworn members shall receive an additional Cincinnati Police Training Allowance in the amount equal to two percent (2%) of the top step of the annual salary rate of a police officer; to be paid bi-weekly throughout the year (remaining language of this section to remain the same as in the current contract).

IV. Certification.

This Factfinding Report and Recommendation was developed by me based on O.R.C. 4117.01 et. al. and evidence and testimony presented to me at a factfinding hearing conducted on December 13, 2006 in Cincinnati, Ohio. It is the intention of this recommendation that all other issues agreed to by the parties both before and during the hearing be included in the final recommendation.

Marcus Hart Sandver, Ph.D.
Factfinder
January 3, 2007