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April 18, 2007

Edward E. Turner
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STATE EMPLOYMENT RELATIONS BOARD
2007 APR 23 P 12: 05

Re: **City of New Philadelphia**
-and-
FOP/OLC

SERB Case No.: 06-MED-09-0932/0933/0934

Mary:

Enclosed find the Report & Recommendations in the fact-finding above.

Regards,

Greg Van Pelt

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
FACT FINDING PROCEEDINGS

REPORT & RECOMMENDATION OF THE FACTFINDER

GREGORY JAMES VAN PELT

AS ISSUED

March 18, 2007

IN THE MATTER OF:

City of New Philadelphia *(Employer)* *-and-* **Fraternal Order of Police, Ohio Labor Council** *(Union)*	SERB Case No.: 06-MED-09-0932/0933/0934

APPEARANCES:

On Behalf of the Employer:

Nicholas Codrea	Lead Negotiator
Greg Popham	Safety Director
Jeff Urban	Chief of Police

On Behalf of the Union:

Mark Drum	FOP/OLC Staff Representative
Dan Rievoger	Police Officer
Sheldon Demattio	Captain
Cindy Alesiano	Dispatcher
Rich Calderon	Police Officer

Gregory James Van Pelt

SUBMISSION

The Parties in the present negotiation have had an ongoing collective bargaining relationship culminating in an Agreement that obtained through December 31, 2005. Mutually agreeing to an extension of the statutory deadlines in which to engage in FMCS supervised Interest Based Bargaining, but were unsuccessful in reaching agreement. Accordingly, the Parties met in negotiations toward a successor contract on four occasions prior to reaching impasse on the issues enumerated below. Pursuant to the provisions of Ohio Revised Code 4117.14(C)(3), the undersigned was appointed Factfinder in the matter.

Having reached impasse, the Parties requested the Factfinder to attempt mediation of unresolved issues prior to holding an evidentiary hearing. Mediation session was attempted on March 16, 2007 at the New Philadelphia Police Department in New Philadelphia, Ohio. Mediation failed to resolve the issues at impasse, and the Parties were afforded an opportunity to present evidence and testimony supportive of their positions. The matter was submitted to the Factfinder for a Report & Recommendations, pursuant to ORC 41117.14, *et seq.* and was declared closed as of the date of hearing.

ISSUES AT IMPASSE

The Parties identified and presented the following issues as unresolved:

1. **Article 12 – Sick Leave**
2. **Article 26 – Hospitalization**
3. **Article 30 – Compensation**
4. **Article 39 – Midterm Dispute Resolution**

STATUTORY CONSIDERATIONS

In weighing the positions presented by the Parties, the Factfinder was guided by the considerations enumerated in OAC 4117-9-05(K), *et seq*, specifically:

4117-9-05(K)(1) Past Collectively bargained agreements, if any, between the parties;

4117-9-05(K)(2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

4117-9-05(K)(3) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

4117-9-05(K)(4) The lawful authority of the public employer;

4117-9-05(K)(5) Any stipulations of the parties;

4117-9-05(K)(6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

BACKGROUND AND STATUTORY CONSIDERATIONS

The City of New Philadelphia (City or Employer) is the county seat of Tuscarawas County. The FOP/OLC (Union or FOP) represents some 26 employees of the New Philadelphia Police Department (NPPD), working in three classifications: Patrol Officers, Ranking Officers, and Dispatchers.

The predecessor collective bargaining Agreement obtained through December 31, 2005. However, at the time of expiry the City was experiencing some financial difficulties and the terms of the Agreement were extended for an additional year. Following the expiration of the Agreement, the City placed on the ballot a measure providing for additional income taxes for police operations. That levy was successful.

In September and October of 2006, the Parties met in negotiations under the FMCS Interest Based Bargaining initiative. Unfortunately, the procedure did not result in a negotiated Agreement. The Parties continued bargaining for a successor contract and were successful in resolving a number of issues, included and recommended by reference in this Report. Following four negotiating sessions there remained four issues at impasse.

Those issues having been submitted to the Factfinder, and evidence and testimony having been taken and reviewed in consideration of the statutory mandates enumerated above, the undersigned Factfinder respectfully submits this Report & Recommendations.

FINDINGS AND RECOMMENDATIONS

1. Article 12 – Sick Leave

Union's Proposal:

The FOP proposes the addition of two Sections to Article 12's Sick Leave provisions.

The first of these, at Section 12.4, would define "unauthorized use" of sick leave under the City's policy, and would enumerate the corrective action to be taken. Section 12.5 of the FOP's proposal would establish a procedure for disciplinary action in cases of sick leave abuse.

The FOP/OLC argues that the City's sick leave policy provides for discipline on the basis of sick leave utilization, even when that usage is accompanied by a physician's excuse. Consequently, the Union questions the policy's compliance with ADA and FMLA regulations. Moreover, although it concedes that the sick leave policy is city-wide, it claims that the instant bargaining unit is the only one subject to disciplinary action.

The policy was unilaterally implemented by the Employer, and the Union at the time failed to file notice to negotiate. Indeed, it argues that one bargaining unit member was disciplined for utilizing sick leave to attend a terminally ill parent. Under the FOP/OLC's proposal, it argues, the City would be able to take action in cases of pattern or other abuse.

Employer's Position:

The City rejects the FOP's proposal. It argues that its current sick leave policy is in place, and functional. In fact, the Employer says, the policy has been tested in arbitration. Accordingly, it urges the Factfinder to recommend current contract language.

Findings & Recommendations:

The City's current, unilaterally enacted sick leave policy subjects bargaining unit members to discipline for the legitimate exercise of a contractual benefit. The Union's proposal accommodates the Employer's reasonable and understandable interest in controlling sick leave abuse, while at the same time providing for clear definitions of sick leave abuse. There was no assertion presented that the vast majority of NPPD employees abuse sick leave; nor is there reason to conclude that abusers would not be subject to disciplinary under § 12.5, as proposed by the FOP.

For these reasons, the Union's proposal regarding new §§12.4 and 12.5 is recommended, as submitted.

2. Article 26 – Hospitalization

Employer's Proposal:

The City proposes changes to existing health care provisions which would permit bargaining unit members to select between three health care options. Option 1 is derived from the predecessor 90/20 health care plan, and requires an employee contribution of 10% deducted twice monthly from employee's pay, as well as an increase in bargaining unit members' cost under the prescription drug plan. Option 2 provides 80/20 coverage, with no employee premium participation, and prescription drug coverage as in Option 1. The Employer's Option 3 proposal provides for City contributions to an Employee Health Savings Account.

The Employer argues that its health care proposal was recommended for the City's Firefighters by the Factfinder in their negotiations, and is the same plan implemented for all non-bargaining unit employees.

Union's Position:

The FOP/OLC proposes retention of the current health care benefit. All of the plan options proposed by the Employer entail increased employee contributions. While the Union concedes that costly changes have occurred in the health care industry, it argues that the dramatic increases sought by the City are too drastic for implementation in the first contract year, which the Union maintains will amount to over 110% of the current cost to bargaining unit members.

Additionally, the FOP contends that the Employer has unilaterally implemented

payroll deductions from bargaining unit members' paychecks, amounting to some forty additional dollars per month. Indeed, the Union has filed a ULP with the SERB regarding the incident. Accordingly, it urges the Factfinder to recommend no change to the provisions of Article 26 until such time as the Board issues its opinion in the matter.

Findings & Recommendations:

The problems faced by employers attempting to provide health insurance coverage to their employees seem increasingly difficult to address in a manner that meets the needs of all workers. In addition to the exponentially rising costs and the often diminishing coverages available, there is the difficulty of providing one policy that meets the needs of different groups of employees. As a result, in almost every case, all employees must be covered by the same policy, and internal parity becomes the essential consideration of a neutral in impasse resolution.

Here, the City's proposed plan is that offered to all of its non-represented personnel, as well as having been recommended by its firefighters. While it is unfortunate that some increased participation by bargaining unit members is necessary under the plan – particularly with regard to prescription drug co-pays – such is the reality of health coverage in contemporary life. In that regard, the City's proposed plan makes an attempt to offer employees some options, dependent on their individual circumstances.

Accordingly, the City's proposal for changes to Article 26, consistent with the coverage offered to non-bargaining unit and Fire Department personnel, are recommended as submitted.

While the FOP/OLC's ULP claim against the Employer for the unilateral imposition of terms and conditions of employment still in the process of negotiation is a matter for the Board's determination and beyond the jurisdiction of the neutral here, it is urged that the Union withdraw its claim, consistent with the Factfinder's recommendation above.

3. Article 30 – Compensation

Union's Proposal:

The FOP/OLC argues that during the last contract cycle bargaining unit members agreed to a one year extension of the Agreement under its existing terms, and consequently

received no wage increases for that year. Employees also agreed to support proposed city income tax increases. Those measures having successfully resolved the City's financial difficulties, the Union proposes that bargaining unit members be made whole for the losses they absorbed. The Union rejects the Employer's offer as failing to increase NPPD employees rates to parity with others doing comparable duties, either internally or within the regional labor market.

Accordingly, the FOP/OLC proposes increases of 5% of the base wage rate in each of the three years of the successor Agreement. The Union also proposes increases in the rank differential between officers and patrol officers to 10% from the current 8%. The FOP/OLC also proposes increases to proficiency and certification allowances, as well as additional stipends to detectives required to be "on-call" during their off-duty hours.

Employer's Position:

The City proposes increases of 3% per year in each of the Agreement's three years. This figure, it says, has been accepted by other of the Employer's bargaining units, and should be recommended by the Factfinder on the basis on internal parity.

Findings & Recommendations:

Members of this bargaining unit agreed to accept no wage increase and to operate under the terms of the predecessor Agreement for an additional year in order to assist the City in resolving financial difficulties. While there is evidence that those problems are resolved, the 5% annual wage increase sought by the bargaining unit is burdensome on the Employer. Moreover, the evidence adduced at hearing indicated that a 3% wage increase in each of the contract years had been established in the City's negotiations with its bargaining units, including the Firefighters. Accordingly, the Employer's proposal of wage increases of 3% in each of the respective years of the Agreement is recommended.

However, similarly, certain compensatory allowances and differentials in the Fire Agreement were eliminated and rolled back into the base wage rate. Consistent with the internal parity considered in the Factfinder's recommendation of 3% annual wage increases, it is reasonable that this bargaining unit should likewise benefit from inclusion of heretofore non-base bonuses and allowances. Accordingly, the following recommendation includes $0.28 rebased into the 2006 wage to cover elimination of all Article 14 Night Shift Bonuses. Further, $0.32 per hour is rebased into the 2007 wage for Police Officers acquiring

continuing professional training under Senate Bill 281. Non-probationary Dispatchers would receive $0.32 per hour for attaining and maintaining Jailor Certification under Ohio law.

Section 30.1 *Effective January 1, 2007, January 1, 2008 and January 1, 2009 Captains, Patrol Officers and Dispatcher/Jailers will be compensated on an hourly basis as follows:*

	2006 REBASED	***3% GWI 1/1/2007***	***2007 REBASED***	***3% GWI 1/1/2008***	***3% GWI 1/1/2009***
Captains					
Probation	*N/A*	***$20.55***	*N/A*	***$21.16***	***$21.80***
Captains	*N/A*	***$21.63***	*N/A*	***$22.64***	***$23.32***
Allows for a 9.0% Rank Differential Captain/Patrol Officer.					
Patrol Officers					
Starting	***$16.00***	***$16.48***	***$16.80***	***$17.30***	***$17.82***
90 Days - 1 Year	***$17.50***	***$18.03***	***$18.35***	***$18.90***	***$19.46***
Step 1	***$18.15***	***$18.69***	***$19.01***	***$19.58***	***$20.17***
Step 2	***$18.37***	***$18.92***	***$19.24***	***$19.82***	***$20.41***
Step 3	***$18.73***	***$19.29***	***$19.61***	***$20.20***	***$20.81***
Step 4	***$19.01***	***$19.58***	***$19.90***	***$20.50***	***$21.11***
Step 5	***$19.27***	***$19.85***	***$20.17***	***$20.77***	***$21.40***
Dispatcher/Jailers					
Starting	***$14.81***	***$15.25***	*N/A*	***$15.71***	***$16.18***
90 Days - 1 Year	***$15.32***	***$15.78***	*N/A*	***$16.25***	***$16.74***
Step 1	***$15.92***	***$16.40***	***$16.72***	***$17.22***	***$17.74***
Step 2	***$16.20***	***$16.69***	***$17.01***	***$17.52***	***$18.04***
Step 3	***$16.56***	***$17.06***	***$17.38***	***$17.90***	***$18.44***
Step 4	***$16.85***	***$17.36***	***$17.68***	***$18.21***	***$18.75***
Step 5	***$17.16***	***$17.67***	***$17.99***	***$18.53***	***$19.09***

Section 30.2 The rebased 2006 wage rates above allow $0.28 per hour to compensate Captains and Patrol Officers for the elimination of and payment under the previous Article 14 Shift Differential. The rebased 2006 wage rates above allow $0.28 per hour to compensate Dispatchers for the elimination of and payment under the previous Article 14 Shift Differential.

Section 30.3 The rebased 2007 wage rates above provide $0.32 per hour to all Patrol Officers in 2008 as compensation for acquiring Continuing Professional Training under Senate Bill 281. The rebased 2007 wage rates above provide $0.32 per hour to all non-probationary Dispatchers for attaining and maintaining Jailor Certification under the Ohio Revised Code.

Section 30.4 The Parties agree the wage rates above as stated in Sections 30.1, 30.2 and

30.3 allow for all professional proficiencies currently possessed by Bargaining Unit Members.

Section 30.5 *Effective with the execution of this Agreement, Patrol Officers and Dispatcher/Jailers shall be compensated according to the following "Step" scale:*

Contract Year	***Step 1***	***Step 2***	***Step 3***	***Step 4***	***Step 5***
2007-2009	***1+ to 2 years***	***2+ to 4 years***	***4+ to 8 years***	***8+ to 15 years***	***15 plus years***

4. Article 39 – Midterm Dispute Resolution

Union's Proposal:

The FOP proposes as Article 39 language establishing procedures for resolution of disputes occurring during the term of the Agreement.

Absent exigent circumstances or legislative mandate, public employers in Ohio may not unilaterally modify provisions regarding either permissive or mandatory subjects of bargaining, under the SERB's ruling in *SERB v. Toledo City Schools,* SERB 2001-05. This decision was upheld by the court in *SERB v. Toledo City School District*, 2002 WL 32345626 (Ohio Com. Pl.). In fact, the FOP argues, SERB recommended that parties adopt some type of mid-term dispute resolution procedure in *FOP Capital City Lodge 9 and Franklin County Sheriff,* SERB 90-012:

> Because there is no statutory remedy at hand and because of our concerns for good faith, on-going bargaining, the Board recommends for the parties the adoption of procedures especially designed to deal with mid-term disputes.

The City has unilaterally imposed modifications to existing contract provisions, as they did in implementing changes to the health care withholdings of bargaining unit members. "Without a mid-term resolution procedure to address such issues the parties can easily be in litigation for two to three years to ultimately resolve disputes."

Based on this rationale, the Union proposes language it states it has implemented in other collective bargaining agreements. The FOP's proposal would provide for mid-term negotiation of mandatory subjects not involving exigent circumstances or legislative mandate. The proposal progresses from good faith bargaining between the parties to mediation and culminates in interest arbitration based, generally, on the conciliation procedure for safety forces contained in ORC 4117 in lieu of the right to strike, and

containing similar guidelines. Under the Union's proposal, the City would then have thirty calendar days in which to implement the arbitrator's award or, alternatively or abandon its proposed changes and revert to the existing contract provisions.

Employer's Position:

The City rejects the FOP's proposal. During the course of negotiating this Agreement, the Parties had the unlimited right to submit proposals and counter-proposals for bargaining. As a result of this negotiation, any issues arising under the Agreement should be resolved, or if not, are subject to resolution under the contractually provided grievance procedures.

Moreover, the Employer's proposal constitutes a MADD under the terms of ORC 4117. Consequently it constitutes a permissive rather than a mandatory subject of bargaining, and is therefore not susceptible to the impasse resolution procedure of fact-finding.

Based on this position, the City argues that the Factfinder should not recommend implementation of the FOP's mid-term dispute resolution proposal.

Findings & Recommendations:

The Factfinder agrees with the City that a mid-term dispute resolution procedure is not strictly a term or condition of employment as contemplated by Ohio labor law, and as such is a permissive rather than mandatory subject of bargaining. Moreover, while it may certainly be implemented by mutual agreement of the Parties, any dispute resolution procedure alternative to the statutory provisions should not be imposed through arbitral fiat.

However, *Toledo* specifically addresses both mandatory and permissive subjects of bargaining. Moreover, the Factfinder's recommendations are subject to review and rejection by the Parties. They are not binding and enforceable except as agreed to by each Party, as would be a Conciliator's award. Particularly in safety units, the advisability of having a memorialized procedure for resolution of mid-term disputes – as recommended by SERB in *FOP Capital City Lodge 9 and Franklin County Sheriff supra* – offsets any reluctance on the part of the Factfinder to include such a procedure in his report.

Moreover, the FOP's proposal does not mitigate or prejudice any statutory or existing rights of the Employer. Under the *Toledo* decision, Employers may not unilaterally impose mid-term modifications to existing agreements, absent exigent circumstances or legislative

mandate. The Parties must bargain any changes not dictated by exigency or law. Unilateral implementation of changes results in challenge to the Employer's action in a ULP claim, reviewable by SERB on a case-by-case basis. In *Franklin County Sheriff,* the SERB discouraged such resolution as inefficient and contrary to good-will bargaining.

As proposed, Article 39 provides a reasonable alternative to the filing of ULP claims in mid-term disputes. The procedures provided do not restrict the City's right to unilaterally modify contract terms in exigencies. Nor does the provision obligate the City to implement the arbitrator's award; it may revert to the existing contract terms or it may unilaterally implement its provisions, subject to a finding by SERB that having done so constituted a ULP. Neither of these alternatives serves to mitigate or even alter existing rights of the Employer.

Therefore, the FOP's proposal is recommended as submitted.

SUMMARY

FINDINGS AND RECOMMENDATIONS

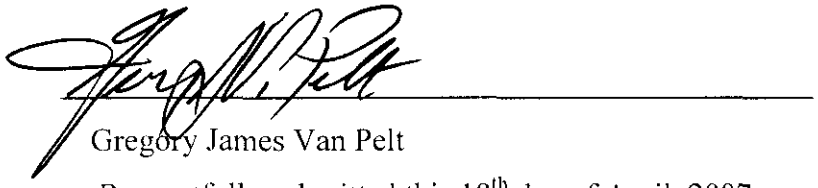
1. **Article 12 – Sick Leave**
   FOP/OLC's proposed addition of §§12.4 and 12.5 recommended.

2. **Article 26 – Hospitalization**
   City's health care proposal recommended as submitted.

3. **Article 30 – Compensation**
   3%-3%-3%; rebasing of wage scale to include differentials, allowances and bonuses.

4. **Article 39 – Mid-Term Dispute Resolution**
   FOP/OLC's proposal recommended as submitted.

Any and all other tentative agreements heretofore entered into between the Parties are recommended as submitted.



Gregory James Van Pelt

Respectfully submitted this 18th day of April, 2007
At Shaker Heights, Cuyahoga County, Ohio