



**I. PROCEDURAL BACKGROUND**

This matter came on for hearing on February 8, 2007, before Jonathan I. Klein, appointed as fact-finder pursuant to Ohio Revised Code Section 4117.14, and Ohio Administrative Code Section 4117-9-05. The fact-finding hearing was conducted between the City of Orville (“Employer” or “City”), and the Ohio Patrolmen’s Benevolent Association (“Union”), at the Orville City Hall located at 207 North Main Street, Orville, Ohio. The bargaining unit represented by the Union is comprised of all full-time dispatchers, police officers and sergeants.

The eight (8) unresolved issues between the parties consist of scheduling, sick leave payout, wages, health insurance, uniform allowance, residency, shift bidding and secondary employment. The fact-finder incorporates by reference into the Report and Recommendations all tentative agreements between the parties relative to the current negotiations and any provisions of the current collective bargaining agreement, which agreements and provisions were not otherwise modified during fact-finding. In making the recommendations which follow, the fact-finder has reviewed the stenographic record of the arguments and evidence presented by both parties at hearing, together with their respective position statements.

**II. FACT-FINDING CRITERIA**

In the determination of the facts and recommendations contained herein, the fact-finder considered the applicable criteria required by Ohio Rev. Code Section 4117.14(C)(4)(e), as listed in 4117.14(G)(7)(a)-(f), and Ohio Admin. Code Section 4117-9-05(K)(1)-(6). These fact-finding criteria are enumerated in Ohio Admin. Code Section 4117-9-05(K), as follows:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

### **III. FINDINGS OF FACT AND FINAL RECOMMENDATIONS**

#### **Issue 1: Article 8 Hours**

##### *Position of the Union*

The Union submits that the City frequently changes employee schedules in order to avoid the payment of overtime. It reasons that the City has created this problem in the first place by permitting a decline in staffing levels to take place. To correct this problem, the Union proposed two new sections to follow section 1 of Article 8.

**Section 2:** Once established a schedule will not be changed solely to avoid payment of overtime.

**Section 3.** Employees shall not be required to work a schedule consisting of split days off or multiple shifts within a week. Employees may, however, bid for such schedules.

Joshua Hunt, a patrol officer, identified the City's month-by-month assignment schedule for the period of December 19, 2005, through January 14, 2007. (Union Ex. 1). The bid schedule is typed, and any changes are inserted by handwritten notations. For example, the schedule indicates that a patrol officer Kreakie bid a shift with a built in double back on January 1 and 2 – the bidder knew of the double back in the schedule at the time of his bid. The same is true for the double back on January 8 and 9. However, the Union's proposal seeks to address the change in Kreakie's schedule inserting another double back on January 13 and 14, 2006, so that the patrol officer worked six out of seven days – a schedule change clearly not part of the original job bid.

Another example proffered by the Union was the schedule of patrolman Zimmerman. For the week of January 9 -15, 2006, Zimmerman's schedule was changed so that he worked three different shifts during that one week period. In a four-week period, January 16, 2006 through February 12, 2006, Officer Kreakie did not work two weeks with the same shift schedule. Instead, his shifts began at 3:00 p.m., 7:00 a.m., 8:00 p.m. and 11:00 p.m. In another example, Officer Hunt, who bid an assignment with Sunday and Monday as his scheduled days off, worked two out of four Sundays, including one week with two consecutive double backs. During the

week of October 23-29, 2006, Officer Hunt worked a 3:00 p.m. shift, an 11:00 p.m. shift, a 5:00 p.m. shift and two 8:00 p.m. shifts.

With these examples, the Union reasoned that while management has a right to schedule employees, it appears a reduction in overtime costs takes precedent to an employee's regular work schedule. Once the schedule is posted, the City should not be able to alter it if the only reason to do so is the avoidance of overtime.

*Position of the City*

The City rejects the Union's proposed change in favor of current contract language. Chief Carozza testified that after the shifts are bid late in the calendar year based on seniority, the schedule is prepared. Dispatchers are required to work two out of the three shifts during each calendar year, and patrol officers and sergeants must work all three shifts during each calendar year. Bidding on shifts takes place in two-month blocks of time.

In his review of Union Ex. 1, Chief Carozza stated he was not aware that any of the scheduled changes were made for the sole purpose of avoiding payment of overtime. Rather, the changes were due to use of comp time, vacation, personal days, training, illness and FMLA leave. Indeed, the contract only requires forty-eight hours notice for an employee to take personal time. The chief noted instances where an employee was off on sick and comp time, while at the same time another employee was in training. (City Tab 2 at 4). He also testified to using a part-time officer to cover some of the time off. Further, split days off occurred in 2006 in two months, March and September, and they were due to factors involving FMLA and other time off. The police chief stated he needs to meet the department's self-imposed, minimum staffing

requirements of two officers on day shifts, three officers on afternoons and two on nights, except for Friday and Saturday nights when there are three officers scheduled.

With respect to payroll costs, the City's Safety-Service Director, Becky Jewell, identified the 2007 budget amount for the police department payroll at \$1,435,050. Combined with other expenses in the police department, the payroll adds up to 30 percent of the general fund expenditures, or 47 percent of total payroll expenses in the amount of \$3,187,000 in the general fund.

#### Final Recommendation

The fact-finder is well-aware of the competing interests which drive the parties respective positions on this issue. An employee who bids and is awarded a specific shift expects to work that schedule. In contrast, management of the police department is tasked with the duty to provide adequate coverage for the City's citizens taking into consideration periods of greater criminal activity, the needs of its employees for time off due to medical or reasons, and any time off based upon contractual requirements.

It is apparent to the fact-finder that numerous schedule changes have been implemented by the chief of police in the past. However, it is not so readily apparent that any of those changes have taken place "solely to avoid payment of overtime." The burden of demonstrating the sole factor in any schedule change was the avoidance of overtime is one that clearly rests with the Union under its proposal. The fact-finder holds the Union's proposal for a new Article 8, Section 2 is reasonable, and it is hereby recommended.

As to the Union's proposal to prohibit a work schedule of split days off unless an employee bids such schedules, the fact-finder is unpersuaded that such a provision is required by the evidence presented. Further, it is evident that such a prohibition would unduly impinge on the City's efforts to change schedules for reasons other than solely to avoid overtime, such as to accommodate training, special details and paid leave.

Finally, as to working multiple shifts within one week, the fact-finder holds that the number of shift changes which have been imposed on certain employees other than their bid schedule appears excessive. In some instances, an employee may have his scheduled changed to start at 3:00 p.m., 11:00 p.m. and then 7:00 a.m. in one week. Absent a posted position with such a schedule, the fact-finder has rarely observed so many shift changes within a one week period of time.

Specific shift bids which incorporate double back or changes in shift start times is one thing, but the number of involuntary changes of shift start times as evidenced in the duty assignment schedules of the City's police department are excessive. The fact that the referenced jurisdictions may not have similar contract language is not persuasive evidence that duty assignment schedule changes have been imposed in those jurisdictions with the frequency shown in this case. However, to facilitate scheduling the fact-finder recommends the City be permitted to require one shift change per week in excess of the employee's bid schedule. Accordingly, it is recommended that Article 8 be modified with the addition of Sections 2 and 3 which state, as follows:

Section 2. Once established a schedule will not be changed solely to avoid payment of overtime.

Section 3. No employee shall be required to work a schedule with more than one shift start time within a single work week in excess of their awarded shift schedule.

**Issue 2: Article 10 Pay Rates**

On wages, the City submitted a proposal for a two percent (2%) across-the-board increase in each year of the agreement. The Union has proposed a five percent (5%) increase across-the-board, coupled with shift differentials of \$.40/hour for the second shift, and \$.30/hour for the third shift.

*Position of the City*

At the time of the last contract negotiations, the City emphasized that it found itself in a precarious financial position, which resulted in a freeze in year one, and two percent and three percent annual increases in years two and three of the prior agreement. The 2004 wage freeze was imposed throughout City, including a freeze on employee step increases.

Dennis Forrer, the City's Personnel Manager, projected flat growth for the general fund for 2007. Three years earlier going into the last agreement the City cut five positions in its service department, and did not replace a police officer who left. Forrer identified data from Rittman, Wooster, Wadsworth, and the Wayne County Sheriff evidencing three percent increases in 2006, and a 3.5% increase for the Wayne County Sheriff in 2007. (City Exhibit 2).

The City reached agreement with the union representing other city workers such as utilities maintenance workers, water plant operators, electronic technicians and account clerks. The contract with the United City Workers (“UCW”) provides for three percent increases for 2007, 2008 and 2009. Forrer opined that there were too many open issues at that time to offer any more. Based upon SERB generated data of surrounding jurisdictions, Forrer acknowledged that the wage increases were mostly three percent.

Becky Jewell identified income tax receipt data showing the amount of gross income tax receipts, refunds issued, and the allocation split between the general and capital improvement funds. The evidence showed that the receipts for 2006 were slightly less than for 2005. In November 2006, an attempt to pass a quarter percent increase in the income tax to 1.25% failed. The general fund ending balance contained \$1,236,785. (*See also*, City Exhibit 3 - Income Tax Analysis).

Despite the less than optimistic projections, Jewell identified several manufacturing companies with smaller size work forces coming to the City. On cross-examination, Jewell agreed that none of the employers currently within the City had threatened to leave or go out of business. As part of the City’s more difficult financial past, the bargaining unit employees took a wage and step freeze in 2004.

When it comes to the Union’s shift differential proposal, the City counters that the UCW has had the shift differential built into their wage package for at least the last ten years. It also points to the fact that neither Rittman, Wooster, Wayne County Sheriff nor Wadsworth provide shift differentials to their employees. Further, the UCW contract costs are picked up by the

utilities which are rate supported. In addition, Medina and Brunswick have populations that are three and four times as large as the City, respectively.

*The Union's Position*

The Union contends that the City's patrolmen are paid five percent less than the average at the top pay for comparable jurisdictions, including Brunswick, Medina, Wadsworth, Wooster and Rittman. The percentage difference increases to more than ten percent below the average when other economic factors, including uniform allowance, annualized shift differential, longevity and other benefits are included. (Union Ex. 4). Further, keeping in mind the last agreement, including a wage freeze, the bargaining unit received only slightly more than a 1.5% average increase over the term of the last agreement. When compared with the state as a whole, the City has fallen well below the average annual wage settlement. (Union Ex. 6). In 2004 and 2005 alone, the bargaining unit lost four percentage points when compared with the state-wide average.

The Union also submits that the bargaining unit employees should receive a shift differential as a new benefit, but one that is the equivalent to what the other organized city workers currently enjoy. (Joint Exhibit 3). The difference, of course, is that the Union seeks the forty cents per hour shift differential, provided to the UCW in Article 4, Section 4c of their agreement for third shift work, to be paid to the Union's members working the second shift.

**Final Recommendation**

It is the fact-finder's recommendation that the pay rates incorporated through Article 10 should be adjusted across-the-board, as follows: effective January 1, 2007 – 3.5 percent; effective January 1, 2008 - 3 percent; and effective January 1, 2009: 3 percent. This recommendation takes into account and affords considerable weight to the bargaining unit's position relative to other comparable jurisdictions (excluding Brunswick); the City's financial well-being and future investment; the wage freeze during a year of the prior collective bargaining agreement between the parties, and the percentage increases received by the other internal bargaining unit.

As to the Union's proposal seeking a shift differential, the fact-finder notes that none of the most comparable jurisdictions currently provide a shift differential for bargaining unit employees performing comparable work. While the fact-finder recognizes the shift differential paid to other City workers, he also notes the greater percentage wage increase to be paid to the bargaining unit employees in accordance with the overall recommendations in this Report. Shift differential is not recommended for inclusion in the new agreement.

**Issue 3: Article 16 - Sick Leave**

Article 16, Section 7 currently states that any full time employee of the City eligible for retirement according to the applicable state statutes shall be paid the accumulated sick leave to his or her credit, not to exceed 960 hours, in a lump-sum amount upon his retirement. With the exception of the agreed upon changes to Article 16, the Union proposes current language. The

City, however, seeks two changes to this article of the collective bargaining agreement, which proposed changes remain at impasse.

Position of the City

The first part of the City's proposed change is to add language to the agreement providing that new hires would be paid for fifty percent of their accumulated sick leave up to a maximum of 480 hours upon retirement. Several retirements in 2006 required significant financial payments by the City, and it lays claim to an effort at achieving financial stability for the future. The City emphasizes that the UCW agreement was amended so that employees hired after January 1, 2007, will receive a maximum payment of eighty percent of their accumulated sick leave, subject to a 768 hour maximum. This modification, according to the City, is supported by the comparable jurisdictions of Rittman, Wadsworth, Wooster and the Wayne County Sheriff's Office. It was estimated that more often than not the employees retire with an accumulated sick leave balance of 960 hours.

The second prong of the City's proposal was for the purpose of encouraging attendance. This proposal would be directed at new hires after the contract's effective date, and would modify the payment of sick leave in the following manner. For the first forty hours of sick leave in a calendar year, an employee would receive one hundred percent of his or her straight time rate. This would be followed by payment at seventy percent of the employee's straight time rate for the next forty hours of sick leave used in the same calendar year. After eighty hours, however, the rate would jump back to one hundred percent to compensate for major or catastrophic illnesses. In an example put forth by the City, if an employee has already been off

work for five days and he or she knows that a sixth day of absence will be compensated at 70 percent of the employee's regular rate of pay, there is a disincentive to call off work for a minor illness. The City's present attendance policy is a no fault system.

Position of the Union

The Union stands firmly opposed to the creation of a two-tiered system of sick leave retirement benefits. Moreover, all the City's proposal accomplishes is to create an incentive for people to use sick leave, rather than lose it. As to the proposal that sick leave use in excess of forty hours in a calendar year would result in a reduction of pay for the next forty hours, the City's personnel manager agreed that no other employer except for the State of Ohio had a similar policy.

Final Recommendation

It is the fact-finder's recommendation that Article 16 should not include the City's proposals on sick leave. Clearly, there are costs associated with retirement which the City has managed, and which it carefully reviews to make certain it will be able to meet such obligations in the future. However, the fact-finder is well aware that the reduction in such pre-existing benefits are commonly the result of a negotiated *quid pro quo* in the absence of other compelling factors. No evidence of such consideration has been shown, and other compelling justification for such a reduction is absent.

Further, the City recognizes that among its own list of comparables the results are mixed. Its proposal is 288 hours less than what it agreed to with the UCW, and is less than all

comparables with the exception of the Wayne County Sheriff. The police officers in Wadsworth can receive up to a maximum 1280 hours of sick leave balance upon retirement – well in excess of the bargaining unit employees. With this record evidence, the fact-finder is unpersuaded that a sufficient justification has been offered to alter current contract language.

As to the second component of the City’s proposed changes to Article 16, the fact-finder must reject the proposed change. First, the general notion of a two-tiered sick leave benefit for bargaining unit employees is an anathema to harmonious labor relations. It is an earned benefit utilized by virtually every member of the bargaining unit at some point in time during the life of the agreement. With the proposed change in contract language, new hires will find their compensation for legitimate sick leave use cut for the second forty hours of sick leave they utilize.

Second, except for the fact that the State of Ohio may have similar contract language, none of the comparable jurisdictions have a two-tiered system. The fact that the UCW agreed to a similar provision is simply one factor to be considered, and standing alone carries little persuasive weight. Finally, there is no evidence that a financial disincentive of the kind posed by the City will have any affect on improper sick leave use – a matter best left to the fair and equitable administration of a standard sick leave policy.

**Issue 4: Article 22 - Health Insurance**

A number of issues were raised with respect to health insurance, including the City’s proposal that new employees pay 20 percent of the health care premium on a pre-tax basis.

Currently, there is no health insurance premium contribution from bargaining unit employees. As an initial issue, the City proposal to create a two-tiered premium contribution is rejected by the fact-finder. Health insurance is a problem for all employers and bargaining unit members across-the-board.<sup>1</sup> Further, as a general rule adjustments to health insurance should be proposed and implemented for all employees in the City. Uniformity in health insurance lends itself to increased bargaining power in negotiating rates, less administrative burdens with the City's partial self-funding of health insurance, and insures provision of an equitable benefit to all employees. There is no compelling reason to single out new hires alone for a 20 percent premium contribution.

The fact-finder also reviewed the cost figures for health insurance, and notes the remarkable job the City has performed in consultation with the Union and others in actually reducing such insurance costs since 2003. (Union Ex. 8). Again, there are no compelling reasons to alter the basic health insurance structure the City has in place at this time.

As to the prescription drug component of the standard and alternate plans, the fact-finder has carefully reviewed the data, and finds that the City's proposal to both maintain and increase the prescription drug co-payments from \$6 for generic, \$10 for formulary and \$15 for non-formulary to \$6, \$12 and \$24 respectively, is fully warranted and reasonable.

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1. There is no issue involving dental insurance.

Final Recommendation

Based upon the totality of the record presented, the fact-finder rejects the City's proposal and recommends no change in the health insurance provision with the exception of the above-noted increase in certain prescription drug co-payments.

**Issue 5: Article 23 - Uniform Allowance**

For the calendar year 2006, full-time uniformed officers received \$775 in uniform allowance. The Union proposes an increase of \$50 for each year of the new agreement, and the City proposal is for a \$50 increase in years 2 and 3 of the agreement, but employees must provide receipts twice each year to be reimbursed for uniform expenditures.

Final Recommendation

Aside from continuation of the \$50 annual increase, the Union has offered no other evidence of the necessity to increase the uniform allowance other than sweeping statements as to the inadequacy of the current allowance in meeting the officers uniform requirements. The City, recognizing that an increase of \$50 in the second and third year of the agreement would be warranted, proposes that all officers must provide receipts twice per year. It was suggested that the City has concerns employees are using the uniform allowance to make mortgage payments or to buy children's clothes. The City's position is equally lacking any compelling evidence that employees are misusing the uniform allowance, or that receipts are necessary for an allowance the Union maintains is taxable income to the bargaining unit employees.

In light of the record evidence, the fact-finder's sole recommendation on this issue is that the uniform allowance be increased by \$50 in each of the last two years of the collective bargaining agreement.

**Issue 6: Article 40 - Residency**

*Position of the Union*

Under the current contract language, all full-time employees covered by the agreement are required to maintain their residence within a six-mile radius of City Hall as a condition of employment. The Union proposed adoption of a version of the requirement contained in Ohio Rev. Code Section 9.481 that an employee must reside in Wayne or any adjacent county in the state.

*Position of the City*

The City seeks to maintain the status quo. It pointed to the need with a police force the size of its police department to have a residency requirement, and as a charter municipality this provision (and the ability of the police chief to enforce a six-mile zone) should be left in place. Examples provided of such a need included approximately four instances when members of the emergency response team were called to service. (Testimony of Chief Carozza).

**Final Recommendation**

Both parties agreed at hearing that the impact of Ohio Rev. Code Section 9.481 on a charter city is currently under litigation, *i.e.*, the issue before the courts is whether R.C. 9.481 is

constitutional and prevails over conflicting municipal charter residency requirements for municipal employees. The fact-finder is aware of several court decisions which have rejected the use of a mandamus action to address the issue, and have referred to the use of a declaratory judgment action and request for injunctive relief instead. *State ex. Rel. Beane v. Dayton*, 112 Ohio St. 3d 553, 207-Ohio-811 (March 14, 1997); *Cleveland Fire Fighters Assoc. Local 93 v. Jackson*, 2006-Ohio-800 (8<sup>th</sup> Dist. Ct. App.) (2006). No judicial review of the important constitutional merits of the statute as pertains to municipal charter residency requirements was provided to the fact-finder at hearing.

The fact-finder has no authority to circumvent statutory authority promulgated by the legislature of the State of Ohio. Rather, the fact-finder is of the opinion that while the statute “remains on the books,” whether it is currently the subject of careful judicial review or not, and in the absence of a stay of its enforcement, the statutory mandate controls and the fact-finder has no jurisdiction to make recommendations contrary to the statute. Consistent with the most restrictive language of the statute pertaining to police and fire fighters, among others, the language of Article 40 shall be modified to read, as follows:

Section 1. All full-time employees covered by this agreement are required, as a condition of employment, to reside within Wayne County or in any adjacent county. All new hires shall relocate within this residency zone no later than 18 months after his or her date of hire.

**Issue 7: Letter of Agreement - Shift Bidding**

*The Union's Position*

Coupled with the deletion of Section 6 concerning the duration of the Letter of Agreement (“LOA”), the Union proposes a reincorporation of the letter agreement into the collective bargaining agreement. The Union highlighted the fact, concurred in by the chief of police, that under the LOA the chief retained absolute discretion as to what shifts would be available for bid. (Tr. 208). The chief stated that in the absence of the current side agreement he would seek input from his supervisory staff.

*The City's Position*

The City rejects maintaining the shift bidding side agreement in the new contract. It references the lack of any such provision in Rittman and Wooster, but acknowledges shift bidding rights enjoyed by the UCW.

Final Recommendation

There is no evidence that the shift bidding language contained in the LOA has unduly impinged on management’s right to manage and operate the police department. The chief of police voiced his desired outcome that abolishment of the letter agreement would result in input from his subordinates in the shift scheduling process. However, it was clear that the chief currently receives that input, and he retains discretion to create the bid schedule with the potential of arbitral review should the change in schedule or bid procedure be challenged by the Union as unreasonable, arbitrary and/or capricious. A modified version of the old expression

might read, “if the bidding of shift preference is not broke, don’t fix it.” The letter agreement is recommended to remain in full force and effect for the duration of the new agreement.

**Issue 8: New Article - Extra Duty Details**

The Union has proposed an extra duty detail provision, which contains language it claims was tendered earlier in negotiations by the City. The City stands in opposition to such a proposal, noting that it places additional administrative burden on the chief of police. It also opposes the Union’s proposal based on potential workers’ compensation liability issues, and cites to an incident involving an off-duty police officer from another jurisdiction injured guarding a street construction project within the City limits.

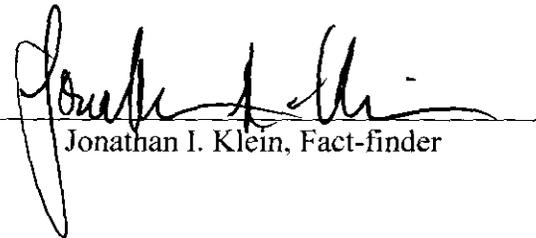
**Final Recommendation**

It is noted that the newly appointed chief of police had received no inquiries from members of the bargaining unit requesting to work an extra duty detail, or secondary job. The fact-finder finds the record of past practice with respect to outside work details to be scant, at best, and certainly non-existent with the current chief.

Language of the sort offered by the Union is not uncommon in police contracts, but its inclusion is most often the result of voluntary bargaining between the parties, and the exchange of some form of *quid pro quo* in order to secure the participation of police department management in the administration of the outside work details. Some departments prefer to be

involved in the outside work of its officers, while others elect a hands-off approach of the kind the City is taking in this fact-finding.

The fact-finder does not recommend the inclusion of the Union's proposal at this time. Instead, he recommends that the members of the bargaining unit approach the chief for approval to work such projects – he has never had the opportunity to review such requests in his current position. Further, it is recommended that the parties explore further ways to address the concerns the City has to insure that it is not subject to workers' compensation or other claims which might be generated from such outside employment.

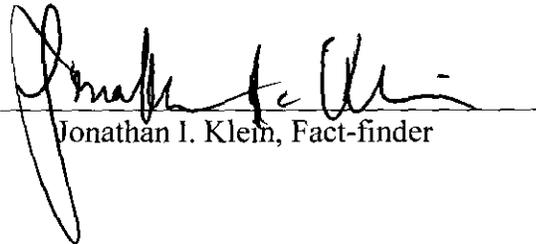


Jonathan I. Klein, Fact-finder

Dated: October 4, 2007

**CERTIFICATE OF SERVICE**

Originals of the Fact-finding Report and Recommendations were served upon Lisa A. Kainec, Esq., Kastner, Westman & Wilkins, LLC at 3480 West Market Street, Suite 300, Akron, Ohio 44333; Kevin Powers, Esq., Ohio Patrolmen's Benevolent Association, 10147 Royalton Road, Suite J, P.O. Box 338003, North Royalton, Ohio 44133; and upon Mary Laurent, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215-4213, each by express mail, sufficient postage prepaid, this 4<sup>th</sup> day of October 2007.



Jonathan I. Klein, Fact-finder