



## **Introduction**

The Ohio Patrolmen's Benevolent Association (OPBA or "Union") represents the bargaining unit at issue in this case. The unit is comprised of sixteen employees of the Athens County Sheriff ("Employer" or "Sheriff"). Fourteen members of the bargaining unit are deputy sheriffs, two members of the unit are transport officers. The unit is located in Athens County. The parties' previous collective bargaining agreement (hereinafter "Agreement") expired on December 31, 2006. Long but productive negotiations resulted in tentative agreements on many issues. The parties requested fact-finding and participated first in a mediation and then in a fact-finding hearing on April 18, 2007 at the Athens County Sheriff's office in Athens, Ohio. During mediation, the parties were able to resolve issues related to Article 9, Grievance Procedure, Article 10.1 and part of 10.7, Discipline, Article 27, Wages, but only regarding the increase in pay for a deputy sheriff serving as an officer-in-charge, and Article 35, Duration. The parties submitted the remaining issues, identified below, for fact-finding.

## **Criteria**

Fact-finders must consider the criteria articulated in Ohio Revised Code § 4117.14(C)(4)(e) and Ohio Administrative Code § 4117-9-05(K) when making a decision.

Criteria to be considered are:

- (a) past collectively bargained agreements, if any, between the parties;
- (b) comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (c) 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;

- (d) the lawful authority of the public employer;
- (e) the stipulation of the parties;
- (f) such other facts, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution proceedings in the public service or private employment.

### **Discussion**

The parties were at impasse on several issues: Discipline, Article 10. 4, 10.6 and part of 10.7; Filling of Positions, Article 12; and Wages, Article 27.1-27.3 and 27.9. Each issue will be discussed separately.

#### **Article 27: Wages and Officer-in-Charge Selection**

The parties disagree about two parts of Article 27 – what the wage increase for the next three years should be and who decides whether a particular deputy sheriff may serve as the officer-in-charge for a shift. The wage increase will be discussed first, the officer-in-charge issue second.

#### **Wages**

OPBA proposes a 4% increase in each year of the 3 year successor agreement. In other words, salaries for deputy sheriffs would increase 4% in 2007, 4% in 2008, and 4% in 2009. The Employer countered with a proposal that salaries increase 2% for each of those three years.

#### **Union Position**

The OPBA asserted that the County's compensation should be increased by 4% for each

year of the successor agreement. In support of their contention, the OPBA presented comparable information regarding current wage increases for the Hocking, Meigs, Morgan, Perry, Vinton and Washington County sheriff's offices (as well as some others). (U-4) The OPBA emphasized that in those counties, during similar time frames, wage increases ranged from 3% per year (Morgan, Meigs (1 year only), Perry, Washington (3% for 2005 and 2006, and 3% over two periods in 2007) to Hocking County where the increase was 3% for 2004 and then 5% in 2005 and 2006. (U-4) Pay ranges in these counties were both similar and different from Athens County. The pay range for Hocking County was much lower (between \$26,000 and \$30,285) than what is in place in Athens County (\$30,726 to \$37,388). However, Washington County, which is similar in population to Athens (both have approximately 62,000 residents), has a very similar pay structure (\$30,347 to \$42,141, effective 1/1/07). Washington County borders Athens County to the Northeast. In addition, the Union introduced Union Exhibit #6, the SERB Annual Wage Settlement Report (1997-2006). This exhibit demonstrated that for Southeast Ohio, which contains many of the poorest counties in Ohio, the average wage increase in 2006 was 3.17%. By county, the wage increase was 3.03% and for Police, the wage increase was 3.23%. While the Employer noted that Athens County is counted in this wage settlement breakdown, if anything, the Athens County numbers pulled these numbers down since the wage increases in the last contract were 3% for each year of the contract. The Union also emphasized the rosy economic picture for the County with a newspaper article and a copy of the Athens County budget. The OPBA noted that both the article and budget support the theory that there are ample funds available for a 3% increase for each of the years.

### **Employer Position**

The Employer provided evidence from a 2007 SERB Benchmark Report identifying pay scales from comparable counties to support its contention that a 2% raise in each of the years of the successor agreement was appropriate. Selecting counties that maintain a population similar to Athens County, the Employer emphasized that with a 2% wage increase, Athens County employees would remain near the average for starting and top level salaries. Examining wage comparables for contiguous counties, the Employer noted that, with a 2% wage increase, Athens County employees are paid approximately \$6,200 more than the average at the entry level and approximately \$7,700 more than the average at the top level. The Employer also presented evidence of wage comparables from regional counties and emphasized that, with a 2% wage increase, Athens County employees are paid approximately \$2,000 more than the average at the entry level and approximately \$100 more than the average at top level.

### **Recommendation**

After reviewing the testimonial and documentary evidence both sides presented, I conclude that a 3% wage increase, for each of the successor agreement's years, is appropriate. While the Employer pointed out that a 2% wage increase will place Athens County employees near the average for the State of Ohio, that conclusion would be equally correct if the employees received a 3% increase. The difference between the 2% and 3% increase is at the entry level is only about \$300 and only approximately \$374 at the highest level. A 3% increase places the Athens County entry level employees slightly above the state average for similarly sized counties, while the 2% raise would place them slightly below. The Employer's other evidence, with respect to contiguous and regional counties does not persuade the factfinder. As the OPBA

noted at the hearing, many of the counties surrounding Athens County, with the exception of Washington County, are the poorest counties in the state. Athens County, by contrast, is fortunate to be the home of Ohio University. Thus, it is likely that the budget for Athens County is larger than the budget for contiguous counties. Even if that is not the case, the OPBA demonstrated at the hearing that the budget picture for Athens County is quite positive.

The per capita income numbers the Employer provided are not especially helpful. It would seem probable that the per capita income of citizens in Athens County would be artificially depressed because many Athens county citizens are college students who are not likely to report high incomes. As a result, the per capita income comparables as well as the per capita income in Athens County do not provide much assistance in determining wage increases. Moreover, the regional county information the Employer provided seems rather limited – it provides information from only 4 other counties. Thus, it is not particularly convincing. The Union’s state average information is more persuasive. This evidence shows that, on average, police units, by county, are receiving greater than 3% raises. In addition, the Union demonstrates that deputy sheriffs in Washington County, which borders Athens County and has the same population, enjoyed a 3% raise in 2005, 2006 and 2007. Washington County deputy sheriffs also earn salaries comparable to Athens County deputies, even after the Athens County 3% raise is considered. Moreover, the Union evidence shows that, even in the Southeast region, average wage increases are slightly more than 3%. Thus, I conclude that a 3% wage increase, retroactive to January 1, 2007 is appropriate.

#### **Officer-in-Charge**

The Union proposed an addition to Article 27.9, which would prohibit a deputy sheriff

from serving as the officer-in-charge (OIC) of a shift if he or she has received a disciplinary suspension in the preceding six months, but that if the discipline is overturned in an arbitration, the deputy sheriff should be compensated for each opportunity lost to act as OIC as a result of the unjust discipline. Moreover, before removing a deputy sheriff from OIC eligibility, the Union proposes that the sheriff be able to show good cause. The deputy sheriff would be permitted to appeal the Sheriff's decision through the grievance and arbitration procedure.

### **Union Position**

The Union presented evidence that, prior to 2005, the senior deputy sheriff on a shift had always acted as OIC. In addition, the Union contended that this practice continues on 2 of the current 3 shifts. The Union emphasized the importance of recognizing that deputy sheriffs with greater experience, even after they have been subject to discipline, are in a better position to act as OIC than deputy sheriffs with fewer years in service.

### **Employer Position**

The Employer objects to this new provision, asserting that the Employer has a management right to determine who should be the OIC on any given shift. Moreover, the Employer is concerned that adding the "good cause" language to Article 27.9 will increase the number of grievances the union files. The Employer did not contest the Union's assertion that prior to 2005, the senior deputy had always served as OIC on a shift (if a sergeant or lieutenant was unavailable). The Employer agreed that the new practice of choosing an OIC without regard to seniority is isolated to a single shift.

### **Recommendation**

The Employer's current practice on two of three shifts is to assign the senior officer on

duty to act as OIC for the shift. On the third of these shifts, however, the sheriff designates who shall serve as OIC based on his judgment about who can best perform the job rather than on who has the greatest seniority. The OPBA objects to this practice because it ignores the seniority and experience of the senior officers. The sheriff emphasizes that he needs discretion to assign the OIC to ensure that whoever acts as OIC exercises the good judgment necessary to act as OIC.

Past (and current) practices suggest that, in general, the Employer believes that it benefits the sheriff's office to designate the senior officer as OIC. By following this past practice, and continuing the practice on 2 out of 3 shifts, the Employer tacitly agrees to the practice and, as a result, has effectively waived the right to claim that assigning the OIC is a management right. At the same time, if a deputy has received a disciplinary suspension within the last six months, the Employer should have the discretion not to permit that officer to serve as OIC. Such a decision is in the public interest because it protects the public from officers who have exercised poor judgment. Thus, I conclude that seniority on a shift should determine who serves as OIC. However, if an officer is suspended or disciplined, he or she is not eligible to serve as OIC for a six month period. Due to the administrative difficulties of determining how many opportunities to serve as an OIC an officer under discipline loses during the six month period he is on suspension or termination (if his discipline or discharge is ultimately overturned), I find that the Union's proposal to compensate the deputy for each opportunity lost to act as OIC as a result of the unjust discipline is unworkable.

The final question is whether an Employer must show good cause if it wishes to deny an officer the ability to act as OIC when he or she has the seniority to be the OIC. The Union suggests that the Employer show good cause to remove an officer from eligibility to serve as OIC

and that the sheriff's decision may be appealed through the grievance and arbitration procedure. Under Article 10, Discipline, the Agreement states "No employee shall be reduced in pay or position, suspended, discharged, or removed except for just cause." When an employee serves as OIC, his or her compensatory time is increased. Moreover, the accepted past practice, and current practice on 2 out of 3 shifts, is to designate the senior officer as OIC. These two principles, taken together, convince the fact-finder that removing a senior officer from eligibility for work as OIC is an adverse employment action of the type described in Article 10 because it involves a reduction in a type of pay and a violation of past practice. Thus, removal of an officer from OIC eligibility should only be done for just cause. Once removed from eligibility, an employee may appeal the employer's decision through the grievance and arbitration procedure. The fact finder recommends that the OPBA's proposed language be adopted but that the Agreement replace the word "good" with the word "just" to make the language consistent with other provisions of the Agreement. Thus, Section 27.9 should read:

**In the absence of a road patrol shift sergeant the senior road patrol deputy on duty shall assume the duties of an Officer-in-Charge ("OIC") to act in the place of the sergeant. Any deputy acting in said capacity shall receive one-quarter (1/4) hour of compensatory time for every four (4) hours worked. No deputy shall be the OIC who has received a disciplinary suspension in the preceding six (6) months. The Sheriff shall have the authority to remove a deputy from OIC eligibility for just cause shown. The affected deputy may appeal the Sheriff's decision through the grievance and arbitration procedure.**

#### **Article 12: Filling of Positions**

The OPBA suggests several changes to Article 12. With respect to job postings, the OPBA would like the Employer to post any job vacancy (whether the Employer wishes to fill it or not), post eligibility requirements for the job, post the job within 30 days of the vacancy, and

keep it posted for seven calendar days. The OPBA suggests changes to 12.2 and 12.5 to make them consistent with its proposal in 12.1. In addition, the Union proposes changing the process for evaluating the qualifications of employees seeking promotion. The Union proposes adopting a promotional testing process that will be conducted by an outside assessment center and “must consist of at least two (2) testing components one (1) of which must be a written examination.” (Union Position Statement).

### **Union Position**

The OPBA believes the changes to Article 12 are necessary to ensure that all vacated positions are filled, rather than, at the sheriff’s discretion, eliminated. Posting of the eligibility requirements, contends the Union, will help prospective candidates understand whether they are eligible for the position. The OPBA also believes it is necessary to post a job within 30 days of the vacancy and that it should remain posted for 7 days.

With respect to Article 12.3, the OPBA is concerned that the evaluation process the Employer currently uses to determine who should be promoted leaves too much discretion to the Employer. The OPBA believes that outside testing would provide an objective element to the promotion process that would make the process both appear fairer to its members and actually be more fair. The OPBA noted that the last promotion process resulted in two upset candidates, one of whom filed a claim with the Ohio Civil Rights Commission and received a letter saying that he had probable cause to believe that discrimination occurred during the promotion process.

### **Employer Position**

The Employer wishes to retain the discretion to eliminate jobs as they become vacant and claims that the Employer has a management right to eliminate positions. Moreover, the

Employer believes that thirty days for job posting and seven days for leaving the posting up are too much. The Employer is in favor of adopting some type of objective component to assist in the promotion process but believes the sheriff should retain some discretion in promotions. Moreover, the Employer is concerned that the OPBA's proposal is not sufficiently specific yet – it contains no information about testing costs and does not fully spell out what the testing is going to look like.

### **Recommendation**

I agree with the Employer that it should retain the ability to eliminate a job once it is vacated. In these economically troubling times, it would be irresponsible to tie the Employer's hands by requiring them to fill every position that is vacated. The Employer should have the discretion to eliminate a job if it believes that the job is no longer necessary or because the City cannot afford to maintain the position. When the Employer wants to fill a position, the OPBA's suggestion that the job be posted within thirty days of the vacancy, and remain posted for seven days, seems to be a reasonable one. It also is reasonable to provide the OPBA membership with information about the job's eligibility requirements in the posting. Thus, I recommend that the current language of section 12.1 be retained but that the Union's proposed language related to eligibility requirements and "within thirty (30) days of the vacancy occurring and shall remain posted" be added. Section 12.2 should retain current language. Section 12.5 should retain its current language because neither side addressed this issue in the factfinding hearing.

Section 12.3, the proposed promotional testing procedure, is a more difficult issue. I believe that both sides have great incentive to adopt a new testing procedure – the Employer, sued twice over the last promotion process, is genuinely interested in adopting a new plan for

promotions. In fact, I would surmise that after the last disastrous promotions period, it is incumbent upon the Employer to bring greater objectivity and openness to the promotions process. However, I am loathe to make specific recommendations regarding an appropriate testing mechanism without evidence about the cost of outside testing or what a written test in this context should evaluate. Thus, I reject the Union's changes to 12.3, and strongly recommend that both sides send this issue to their Labor-Management Committee in an effort to determine a fairer promotions process for all concerned.

### **Discipline**

The Union proposes adding language to article 10.6 that would require the Employer to notify an employee 24 hours before a conference to discuss suspension or termination of that employee for disciplinary reasons of the specific rules, policies, and/or procedures the employee allegedly violated. The Union also proposes to include language in Article 10.7 as follows: "Any employee who has been disciplined by suspension or discharge will be given a written statement describing the reason or reasons for which he or she has been suspended or discharged including the identification of the specific rules/policies/procedures violated." The Employer proposes to add language to 10.4 which would allow the Employer to use an employee's prior disciplinary history to impeach the employee's testimony that he or she has a clean work record.

### **Union Position**

The OPBA wants to require the Employer to provide notice of specific charges against an employee so that the employee and his representative will be able to prepare a defense to those charges. The OPBA contends that if the Employer knows what policies are violated, it should include that information in the notice informing the employee that a disciplinary conference is

going to take place.

### **Employer Position**

The Employer does not want to adopt the proposed changes to 10.6 and 10.7 because it believes that it already provides the Union with adequate notice that the employee has done something wrong when it notifies the employee that a disciplinary conference is going to be held.

The Employer is concerned that with four potentially applicable statutes, it would have a very difficult time identifying specific rules, policies, and/or procedures to include in a notice and that, as a result, its ability to discipline if the new language were in place would be unduly limited.

Moreover, the Employer claims that an outline of the charges provides sufficient notice to the employee to satisfy constitutional due process. The Employer contends that additional language is necessary in Article 10.4 so that it may rebut an employee's assertion that he or she has a clean work record with evidence that the work record is not clean, even though the disciplinary information used for the rebuttal may have ceased to have "force and effect" under the terms of the Agreement. Adding the language, claims the Employer, will clarify that the force and effect provision was not intended to preclude the Employer from impeaching an employee who testifies that he or she has a clean work record.

### **Recommendation**

Due process requires that employers treat employees fairly during the disciplinary process. More specifically, arbitrators hold that due process in the disciplinary context requires that an employer provide an employee with a "precise statement of the charges" against him. Norman Brand, ed., *Discipline and Discharge in Arbitration* at 39 (BNA 1998). If an employer intends to rely on a reason to support discharge or discipline, it must say so in writing, unless good reasons exist to excuse the employer's failure. Adequate information about the reasons for

discipline is necessary so that the union and employee may prepare properly for an investigatory interview or grievance hearing. Lack of adequate notice identifying the charges against the employee may prejudice the union and employee in preparing for these events.

Here, the Employer contends that it is difficult to be precise in the notice it provides to the employee that there will be a conference to allow the employee an opportunity to offer an explanation of his alleged misconduct. While this may be true, in contemplating suspension or discharge, an employer should take time to consider which rules the employee may have violated before making a decision. Thus, identifying specific rules, policies and/or procedures before the hearing should not be a major hardship. In light of the Employer's assertion that it is difficult to include every allegedly violated rule, policy or procedure, I recommend the inclusion of "if possible" language in sections 10.6 and 10.7, to allow the Employer to satisfy the contract language by making a reasonable effort to identify the rules the employee's misconduct allegedly violated. Thus, I recommend the adoption of the following language:

**10.6 (Beginning with the second paragraph) Not less than twenty-four (24) hours prior to the scheduled starting time of the conference, the Employer will provide to the employee a written outlines (sic) of the charges that may form the basis for the action. If possible, this notice will include identification of the specific rules, policies and/or procedures alleged to have been violated, together with written notification of the date, time and place of the hearing. . . .**

**10.7 Any employee who has been disciplined by suspension or discharge will be given a written statement describing the reason or reasons for which he or she has been suspended or discharged including, if possible, the identification of the specific rules, policies and/or procedures violated.**

In addition, I recommend the adoption of the Employer's proposed language in section 10.4. While the OPBA noted that an arbitrator has discretion to admit rebuttal evidence, the

Employer presented convincing evidence that it is necessary for the Employer to be able to rebut an employee's contention that the employee has a clean work record. This rebuttal evidence may only be used after the employee asserts that he has a clean record. As the Employer states, adding the language will clarify that the force and effect provision was not intended to preclude the Employer from impeaching an employee who testifies that he or she has a clean work record. Thus, I recommend the adoption of the following language to the end of Article 10.4:

**However, if the evidence or testimony is introduced representing that the employee has had a clean work record during his employment, the employer may raise the employee's prior disciplinary history to refute such evidence or testimony.**

This concludes the Fact Finder's Report and Recommendations.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Sarah Rudolph Cole", written over a horizontal line.

Sarah Rudolph Cole, Fact Finder

Columbus, Ohio  
May 2, 2007

### **Certificate of Service**

This is to certify that a copy of the foregoing was mailed this 2<sup>nd</sup> day of May, 2007, by U.S. Mail, DHL Overnight Express Mail to Edward S. Kim, Downes, Hurst & Fishel, 400 S. Fifth Street, Suite 200, Columbus, OH 43215 and Matthew B. Baker, Ohio Patrolmen's Benevolent Association, 92 Northwoods Blvd, Suite B2, Columbus, OH 43235. A copy was also sent by regular U.S. Mail to Administrator, Bureau of Mediation, 65 East State Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215-4213.

  
Sarah Rudolph Cole