

STATE EMPLOYMENT  
RELATIONS BOARD

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STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In Regard To The Matter Of The Fact-Finding Between:

THE CITY OF AKRON, OH ) CASE NO: 06-MED-10-1217  
 )  
-AND- )  
 )  
FRATERNAL ORDER OF POLICE )  
AKRON LODGE NO. 7 )

APPEARANCES:

For The City:

Tammy L. Kalail, Esq.,	Assistant Director of Law
Elaine B. Davidson, Esq.,	Assistant Director of Law
Joshua S. Horacek	Law Clerk
James J. Masturzo	Deputy Mayor. Labor Relations
Dianne L. Miller Dawson	Director of Finance
Mark A. McLeod	Employee Benefits Manager

For The Union:

Susannah Muskovitz, Esq.,	Attorney
Carla McNeill, Esq.,	Attorney
Paul Hlynsky	President
Pat McMillan	First Vice President
Dan Gump	Second Vice President
Clayton Cozart	Recording Secretary
Michael Leslie	Benefits Officer
Mark Duncan	Negotiation Team Member
Darletta Rubin	Negotiation Team Member
Gary Cole	Negotiation Team Member
Tim Givens	Negotiation Team Member
Vince Felber	Negotiation Team Member
Charles Rosenbaum	CPA Consultant

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BEFORE ALAN MILES RUBEN, FACT-FINDER  
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**BACKGROUND:**

The Employer, The City of Akron, exercises statutory and charter authority and responsibility, inter alia, for the provision of law enforcement services for its some 210,000 residents.

The City's Police Department's 457 sworn Officers, including some 364 Patrolmen, 61 Sergeants, 21 Lieutenants and 11 Captains form a Bargaining Unit exclusively represented by the Fraternal Order of Police, Akron Lodge No. 7.

The City and the F.O.P. are parties to a Collective Bargaining Agreement entered into as of January 12, 2004 for an initial term which expired December 31, 2006.

Timely notices were given of the Union's intent to modify or amend the Agreement, and negotiations looking towards the execution of a successor Agreement began on October 18, 2006 and continued on October 24<sup>th</sup>, November 1<sup>st</sup> and November 10<sup>th</sup>. On November 10, 2006, the City declared impasse, and the undersigned was appointed Fact-Finder by the State Employment Relations Board on December 8, 2006.

At the direction of the parties, an evidentiary hearing was begun on January 25, 2007 and concluded on February 6, 2007.

Timely in advance of the evidentiary hearing, the parties provided the Fact-Finder with the statements required by Ohio Administrative Code 4117-9-05(F) and the Ohio Revised Code Section 4117.14(C)(3)(a).

By the date of the Fact-Finding proceeding the parties had tentatively agreed to carry forward and incorporate into the new Agreement, mutatis mutandis, all Articles and Sections of Articles from the 2004 Contract except those set forth below.

Substantive changes were tentatively agreed upon with respect to the "time bank" addendum to the Contract. A "side agreement" directed the parties to meet within ninety-days after execution of the Labor Agreement to negotiate a "transitional work program". Also added was a requirement that Bargaining Unit members have "direct deposit" of their weekly paychecks.

The parties further tentatively agreed that the new Contract would be effective as of January 1, 2007 for an initial term of three-years.

The parties entered into a "Retroactivity Agreement" waiving the restrictions contained in O.R.C. Section 4117.14(G)(11), so that "increases in rates of compensation and other matters with cost implications may be retroactive

to and/or effective on January 1, 2007." [sic December 30, 2006].

The Fact-Finder finds appropriate and recommends the adoption of all of these tentative agreements.

Remaining unresolved were proposals submitted by the parties for amendments to the following Articles and Sections of Articles of the 2004 Agreement:

Article XV - "Risk Management";  
Article XVI - "Overtime";  
Article XXIV - "Wages" -  
                  "Pension Pick-up Plan"  
                  "Shift Differential";  
Supplementary Letter Agreement Dated 3/8/04 -  
                  "Health Maintenance"  
Appendix (Ordinance No. 799-2003) -  
                  "Health Insurance";  
Ordinance No. 799-2000) -  
                  "Prescription Drug Coverage".

Consequently, all Articles and Sections of Articles, Letters of Agreement and other operative conditions of employment appended to the 2004 Agreement which have not been specifically referred to above, and which are not discussed below, are to be carried forward and incorporated without substantive change in the new Agreement, and all proposals for Contractual amendments and the addition of Sections or Articles that are not so referred to or discussed are to be deemed as having been abandoned.

At the Fact-Finding hearing the City introduced fifty-three exhibits including copies of Contracts covering other

Bargaining Units in the City; Contracts with the Police Departments in comparable cities; the Akron City Charter; a time series comparing the City's income tax returns with those of comparable communities; the City's income tax rate and those of comparable cities; the tax credits available in Akron and in other Ohio cities; a time series showing the City's annual Police Department budgets and the Department's actual expenditures; Moody's and Standard & Poor's bond rating reports discussing the City's financial position; health care cost data for the City and comparable communities; Akron Police Department's turnover rates; salaries of Police Departments in comparable communities; cost analyses of the Union's and the City's wage proposals; a time series of the City's percentage wage increases since 1985 for Police and all other Bargaining Units; disciplinary actions taken because of Officers' failure to pass physical fitness tests; the City's Manual of Rules and Regulations; the Police Department's physical fitness test; a policy respecting physical fitness testing waivers; O.R.C. Section 2744.01 - 2744.10; a time series showing per capita revenue and per capita expenditures for Akron and comparable cities; a State Employment Relations Board Clearinghouse Wage Increase Report; the announcement of the

examination for Police recruits, and the "Final Validation Report of the Akron Police Department's Physical Ability Test" submitted by ARA Human Factors.

Testifying concerning these exhibits were the City's Director of Finance, Ms. Diane L. Miller Dawson, its Employee Benefits Manager, Mr. Clark A. McLeod and its Deputy Mayor for Labor Relations, James J. Masturzo.

The Union offered some twenty-four exhibits including a study of comparable cities' populations, Department sizes, number of citizens per Officer, and the number of calls for service and calls per Officer in 2005; a table of wages paid in comparable communities for 2006 and estimates for 2007 and 2008 based upon the City's proposal and the Union's proposal; a time series of wages paid by Akron and comparable communities; excerpts from the collective bargaining agreements from the City of Cleveland and Toledo and their Police Department Unions, the shift differentials paid to Police Officers in comparable communities; a report on a proposed health insurance program; a comparison of the Akron health care program with those of Police Departments in comparable communities; data with respect to the content and administration of the City's physical fitness program; a decision of the State Employment Relations Board finding the City of Cleveland guilty of an unfair labor practice on

account of "surface bargaining" instead of bargaining in "good faith"; articles on wellness programs and, finally, an analysis of Akron's financial condition and its ability to pay the Union's wage proposals by Rosenbaum and Associates, a Certified Public Accounting firm.

Offering testimony in support of the Union's position on the unresolved issues were Charles Rosenbaum, CPA and a number of members of the Bargaining Unit including President Paul Hlynsky, First Vice President Pat McMillan, Second Vice President Dan Gump, Recording Secretary Clayton Cozart and Benefits Officer Michael Leslie.

In making his recommendations upon all of the unresolved issues, the Fact-Finder has been guided by the factors set forth in O.R.C. Section 4117.14(C)(4)(e) and Ohio Administrative Code 4117-9-05(K) namely:

"(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."

In consideration of the Fact-Finder's docket, the parties graciously agreed to extend the time within which he might issue his Report of Findings and Recommendation.

**CONTRACT PROVISIONS AT ISSUE:**

**I. Article XV - "Risk Management"**

**A. The 2004 Contract:**

Article XV of the expired Contract entitled "Risk Management" creates a fund for the defense of Police Officers subject to civil actions and monetary judgments arising out of their conduct within the scope of their employment. It provides:

"Pursuant to Ordinance No. 101-1978, the City of Akron has created a fund known as 'Risk Management Fund' hereinafter referred to as the Fund.

"As the Fund pertains to Akron City Police Officers, the purpose of the Fund is to provide protection against monetary judgments as a result of a cause of action arising out of and during the scope of said officer's employment.

"Defense of a civil action against a police officer for a cause of action arising out of and during the course of his

employment will be by the City of Akron Department of Law under the direction of the Law Director. Only in cases of a conflict of representation of both the police officer and the City of Akron by the Department of Law will an officer be permitted to retain his own representation and still be able to participate in the Fund.

"The Fund shall be financed by the twenty-five thousand dollar (\$25,000) allocation in 1978 and an additional twenty-five thousand dollar (\$25,000) allocation on April 1, 1979. The balance of the Fund shall be maintained at fifty thousand dollars (\$50,000) on each April 1, thereafter. The yearly allocation, however, shall not exceed twenty-five thousand dollars (\$25,000).

"Any expenditure from the Fund must be authorized by the Director of Law, subject to the approval of Akron City Council.

"In the event of disagreement between the police officer and the Law Director regarding the services of another attorney, an ad hoc tripartite panel consisting of one (1) member appointed by the Law Director, one (1) member appointed by the FOP and the President of the Akron Bar Association shall be established to resolve the dispute. It is understood that this panel may not bind the Akron City Council."

#### **B. The City's Proposal:**

The City proposes to delete Article XV in its entirety because O.R.C. Section 2744.07 as amended in 2003, provides the relief contemplated in the pre-existing Ordinance.

Section 2744.07 states:

"Section 2744.07. Defense and indemnification of employees; authority to settle.

"(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property

caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. ....

"(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities. ....

"(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, upon the motion of the political subdivision, the court shall conduct a hearing regarding the political subdivision's duty to defend the employee in that civil action. The political subdivision shall file the motion within thirty-days of the close of discovery in the action. After the motion is filed, the employee shall have not less than thirty-days to respond to the motion. ...."

The City argues that the statutory procedure provides for administrative efficiency and conservation of the City's resources since the same tribunal before which a civil case against a Police Officer has been brought will also decide any question about whether the City is relieved of the duty to defend the Officer.

The Union's proposal to have the City "recognize all of its obligations pursuant to Chapter 2744 of the Ohio

Revised Code" is not only unnecessarily and unjustifiably broad, but makes the duty to defend subject to the Contractual grievance and arbitration procedure, as well as to the judicial process, and thereby creates an expensive, redundant procedure.

In fact, the "two procedure" path had already been followed in one case where the City refused to provide a defense for an Officer against whom a civil action was brought. In addition to responding to the City's Motion, filed in the court proceedings pursuant to O.R.C. Section 2704.07(C), the Union filed a grievance under Article XV to compel the City to arbitrate the issue. The matter is still pending.

**C. The Union's Proposal:**

The Union initially proposed the following substitute language for the text of Article XV:

"The City recognizes its obligations pursuant to Chapter 2744 of the Ohio Revised Code."

According to the Union, the City without first consulting with the Officer or the Union, arbitrarily decides whether the conduct of an Officer, against whom a civil action has been brought, was within the scope of the Officer's employment. The consequence is that Officers

have had to retain private counsel to mandate the City to undertake representation in the civil action.

However, following discussion at the Fact-Finding hearing, the Union, in its post-hearing submission, offered a compromise on the issue and proposed the following substitute language for Article XV:

"The City will contact and meet with the Union and the officer prior to making any decision about whether or not to represent the officer as obligated by Chapter 2744 of the Ohio Revised Code."

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

Making the issue of whether the City has recognized its obligations under Chapter 2744 Ohio Revised Code amenable to arbitral determination is problematic. In the first place, it remains to be determined whether the statutory provision, dealing with the City's duty to defend an employee subject to liability in a civil action, is exclusive and preempts any Contractual remedy.

Even if R.C. 2744.07 were not held to be preemptive, the question arises whether a prior court finding would be preclusive in a subsequent arbitral proceeding, or, conversely, whether a prior arbitral judgment would be considered dispositive in a subsequent judicial proceeding.

In the absence of any preclusive effect, if the award of the arbitrator were to be inconsistent with the judgment of the court, it is doubtful that the arbitral decision would be enforceable.

Unlike a Contract where statutory standards are incorporated into its provisions and are subject to interpretation by an arbitrator as in normal course, the Union's request is that the arbitrator determine whether the City has complied with a statutory duty, not a Contractual obligation. While deference is due to arbitral determination with respect to the meaning of Contractual provisions developed by the parties, no such deference need be accorded to an arbitrator's determination as to the construction of a statute.

Because of the uncertainties which would be created by having arbitrators determine whether the City has "recognized its obligations pursuant to Chapter 2744," the Fact-Finder does not find appropriate, and does not recommend, adoption of the Union's initial proposal.

As to the Union's "compromise" offer of a substitute provision, the Fact-Finder believes it has merit.

If an Officer, named a party defendant in a civil action on account of alleged conduct within the scope of his official responsibilities, wishes to communicate with

representatives of the City, either alone with his Union representative, before the City decides whether to undertake his defense, there does not appear to be any significant objection to permitting him to do so. Of course, statements made by the Officer to City personnel may be subject to discovery by the plaintiff in the civil action or used by the City in support of its motion to be relieved of the responsibility to defend the Officer. But, those are risks which the Officer may wish to assume.

Accordingly, the Fact-Finder finds appropriate and recommends that Article XV of the Contract be amended to read as follows, and, as so amended, be incorporated into the successor Agreement:

"Article XV - Representation of Officers subject to civil actions.

"When the City is notified that an Officer has been made a party defendant in a civil action seeking damages against the Officer based upon allegations that the Officer violated the rights of the plaintiff while acting in the scope of his employment with the City, the City shall contact the Union and the Officer and, at the Officer's request, meet with a representative of the Union, the Officer or both, as the Officer shall elect, prior to making any decision whether to represent the Officer in accordance with O.R.C. Section 27244.07."

## **II. Article XVI - "Overtime"**

### **A. The 2004 Contract:**

Article XVI of the expired Contract - "Overtime" - provides in Section D that Court appearances or training undertaken during off-duty hours earn "compensatory time" at the overtime time and one-half rate. The text reads as follows:

"D. Compensatory time earned through court appearances or training ordered by the Chief of Police during off-duty hours shall be calculated as follows:

"1. Compensatory time shall be earned at the rate of one and one-half (1½) times the actual time spent in court or training.

"2. Calculation of earned time shall be to the nearest one-tenth (1/10) of an hour.

"3. Minimum time earned for any one occurrence shall be four (4) hours.

"4. Maximum time earned for any one occurrence shall be eight (8) hours, except in cases where a police officer must appear in hearings outside the City of Akron.

"5. Additional training time required at the Weapons Range by reason of failure to qualify under normal procedures shall not qualify for compensatory time."

**B. The Union's Proposal:**

The Union proposes to delete Clause 4 of Section D, in its entirety. The Union argues that this provision violates the Fair Labor Standards Act in that Officers who work more than eight hours on an off-duty assignment are limited to eight hours of compensatory time. Further, when Officers attend an eight hour training session, they

receive slightly more than five overtime hours, equivalent to eight hours of straight time pay, while their instructors are paid for eight overtime hours.

**B. The City's Proposal:**

The City seeks to maintain the current text of Article XVI, Section D, Clause 4. It insists that the language complies with the requirements of the Fair Labor Standards Act in that compensatory time in lieu of overtime compensation may be provided pursuant to the provisions of the Collective Bargaining Agreement under 29 U.S.C. Section 207(o).

As Section D is administered, Officers making two court appearances on the same day are credited with eight hours of earned time, regardless of whether the actual time spent in court is less.

Similarly, Officers making a single court appearance which has been interrupted by a lunch break are also credited with eight hours of earned time.

The City is concerned that the deletion of Section D, Clause 4 would permit Officers to be paid for an unlimited number of hours per day by scheduling multiple court appearances. Thus, without the eight-hour limitation, an Officer who is scheduled for three or more court appearances in a single day, would earn a minimum of four

hours for each appearance. If there were four such appearances the Officer would be entitled to sixteen hours of compensatory time, even though the courts are not open for more than half that time, and the total amount of time spent in responding to each of those appearances could be considerably less than the full eight hours.

If the Union believes the City is administering the compensatory time provision improperly, so the City suggests, the Union's remedy lies in the grievance procedure, and not in changing a provision of the Contract which has been in effect for many years.

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

Whether the current and long standing overtime provisions of Article XVI violate the Fair Labor Standards Act is a matter better addressed to the Department of Labor and its Wage and Hour Division.

The Fact-Finder is confined to considering whether equity dictates elimination of the eight-hour maximum on compensation paid to Police Officers who appear as witnesses in court or who attend training sessions outside of their regular shifts, or whether the City's concern over the potential increased cost renders the proposal fiscally improvident.

The Union's focus is on the unfairness of limiting time earned for attendance at a training session on an off-duty day. The City's attention is fixed upon the ultimate economic impact of removing the eight-hour cap on court appearances which would ultimately translate into increased overtime utilization.

Both positions have merit, and the Fact-Finder believes that they can be accommodated by amending the text of Section D to differentiate between the two types of off-duty assignment - limiting the maximum time for court appearances on any one day, but allowing Officers attending training sessions while off-duty to earn compensatory time at the overtime rate for all hours in attendance.

Accordingly, the Fact-Finder finds appropriate and recommends that Section D of Article XVI be amended to read as follows, and, as so amended, be incorporated into the successor Collective Bargaining Agreement:

"D. Compensatory time earned through court appearances or training ordered by the Chief of Police during off-duty hours shall be calculated as follows:

"1. Compensatory time shall be earned at the rate of one and one-half ( $1\frac{1}{2}$ ) times the actual time spend in court or training.

"2. Calculation of earned time shall be to the nearest one-tenth ( $1/10$ ) of an hour.

"3. Minimum time earned for any one court appearance or attendance at a training session shall be four (4) hours.

"4. Maximum time earned for court appearances on any one day shall be eight (8) hours, except in cases where a Police Officer must appear in hearings outside the City of Akron.

"5. Additional training time required at the Weapons Range by reason of failure to qualify under normal procedures shall not qualify for compensatory time."

**III. Physical Fitness Requirement - Letter Of Agreement Of March 8, 2004; Rule 700.09 of the Department's Manual of Rules and Regulations and the Physical Fitness Policy of May 5, 2003:**

**A. The 2004 Contract:**

Rule 700.09 of the Department's Manual of Rules and Regulations entitled "Physical Fitness", referred to in the expired Contract, provided in pertinent part:

"Physical Fitness: All officers/employees of the Police Division shall maintain good physical condition so that they will be able to carry out the strenuous physical contacts often required of law enforcement officers.

"a. It shall be the responsibility of each commanding officer to observe and note any signs of physical unfitness in the police officers under his command. ...

"b. The following steps shall be taken by the commanding officer who notes signs of physical unfitness in any member of his command:

"1. As soon as is practical, he shall discuss the situation privately with the police officer to determine the cause or causes of the problem.

...

"6. In the event the police officer fails to comply with his [the commanding officer's] suggestions, the commanding

officer shall, after a reasonable length of time, serve the officer with a written warning to take immediate action, and he shall forward a copy of the written warning to his subdivision commander.

...

"d. Once an officer has received a written warning about his physical condition from his commanding officer, failure to take corrective action within a reasonable length of time shall be considered unfit for duty [sic] and shall be the subject of charges.

"e. Officers who have signed the Health Maintenance Requirements Agreement as a condition of employment shall comply with the terms of that agreement.

"f. A violation of Sections 700.09(d) or (e) is a major offense of the third degree."

The Department's Physical Fitness Policy incorporates Rule 700.09 and sets forth a three-tiered set of physical fitness standards as follows:

"Physical Fitness Standards:

"A. Officers hired prior to 1984 - Officers hired prior to 1984 are required to maintain a level of fitness pursuant to Rules and Regulations 700.09 [except that Section "e" is not applicable].

...

"B. Officers hired between 9-10-84 to and including 12-26-94 - Officers hired between 9-10-84 to and including 12-26-94 are subject to Rules and Regulation 700.09 and must comply with the Health Maintenance Requirements Agreement. Officers hired under the Health Maintenance Requirements Agreement who fall under mandatory intervention must do one of the following within 18 months from the effective date of this procedure:

"1. Maintain a level of fitness whereby the officer falls within the guidelines as specified in the Health Maintenance Requirements Agreement or;

"2. Complete the Criterion Task Test (CTT) within the time limits specified by ARA Human Factors Incorporated.

"Any officer who fails to fall within the guidelines of the Health Maintenance Requirements Agreement or complete the Criterion Task Test within the 18 month period will be in failure status and will be suspended without pay for a period of 5 working days. In lieu of a 5 working day suspension, officers may elect to forfeit 40 hours of accumulated time and will relinquish all rights of appeal. Officers in failure status will be required to undergo a physical assessment (each component) and counseling within 30 days by a Fitness Coordinator and be required to participate in a physical fitness program under the direction of a Fitness Coordinator.

"Six months after being declared in failure status, the officer will be required to either fall within the guidelines of the Health Maintenance Requirements Agreement or complete the Criterion Task Test. An officer who fails to do either during this 6 month period will be suspended for 10 working days. The officer will also be required to continue a physical fitness program.

"The officer will be given another 6 months to either abide by the Health Maintenance Requirements Agreement or complete a Criterion Task Test. An officer who fails to do either after a second 6 month period will be suspended without pay indefinitely. An officer who is suspended without pay indefinitely will be returned to full duty status once he/she has successfully completed the CTT or falls within the guidelines of the Health Maintenance Requirements Agreement.

"After the 18 month implementation period, any officer who was previously in compliance with the Health Maintenance Requirements Agreement and who falls into mandatory intervention will be given 6 months to either abide by the Health Maintenance Requirements Agreement or complete the CTT in the time specified. Officers who fail to abide by the Health Maintenance Requirements Agreement or complete the Criterion Task Test will be subject to the same discipline as applies above.

"C. Officers hired on or after 8-28-95 - Officers hired on or after 8-28-95 are subject to Rules and Regulations 700.09 and are required to successfully complete a Criterion Task Test within the time limits specified by ARA Human Factors Incorporated on an annual basis.

"II. Procedure for Testing:

....

"B. Failure to meet the department physical performance standard.

"1. Officers who are required to complete the Criterion Task Test as outlined in Section I-C who fail to meet the minimum physical performance standard within the time limits specified by ARA Human Factors Incorporated will be declared in failure status. Officers in failure status will be required to undergo a physical fitness assessment (each component) and counseling within 30 days by a Fitness Coordinator and be required to participate in a physical fitness program under the direction of a Fitness Coordinator. Compliance with the mandatory fitness training program will be supervised by the Officer's subdivision commander.

....

"A third CTT will be scheduled 6 months from the date of the second failed CTT. Failure to meet the required performance standard on the third attempt will result in a 5 working day suspension. In lieu of a 5 working day suspension, officers may elect to forfeit 40 hours of accumulated time and will relinquish all rights of appeal. Officers will be scheduled for another CTT 6 months from the failed third attempt.

"Officer who fail to complete the CTT on a fourth try will be suspended for ten working days. Six months from the failed fourth try, officers will be scheduled for a fifth CTT. Officers who fail to complete the CTT on the fifth try will be suspended without pay indefinitely. Officers suspended without pay indefinitely will be returned to full duty status once they successfully complete the CTT.

"C. This policy applies to all department officers, unless exempted for medical reasons. Medical exemptions will be granted based on recommendations from a City physician or a physician designated by the City."

A Supplemental Agreement between the parties entered into as of March 8, 2004 amended the Physical Fitness Policy as follows:

"A. Effective January 1, 2004, bargaining unit members hired between 9/10/84 to and including 12/26/94, must do one of the following:

"1. Maintain a level of fitness whereby the officer falls within the guidelines as specified in the Health Maintenance Requirements Agreement signed by the bargaining unit member or;

"2. Complete the Criterion Task Test (CTT) within the time limits specified by ARA Human Factors Incorporated. However, officers will be given the option to climb the wooden barrier that is presently part of the Criterion Task Test, or a six (6) foot chain-link fence.

"B. Officers hired on or after 8/29/95 will be required to successfully complete, on an annual basis, one of the following tests:

"1. Complete the Criterion Task Test (CTT) within the time limits specified by ARA Human Factors Incorporated.

"2. Complete the Criterion Task Test (CTT) within the time limits specified by ARA Human Factors Incorporated. However, officers will be given the option to climb the wooden barrier that is presently part of the Criterion Task Test, or a six (6) foot chain-link fence.

...."

**B. The Union's Proposal:**

The Union proposes to eliminate the March 8, 2004 Agreement amending the Physical Fitness Policy, and substitute in its place the following text which makes completion of the Criterion Task Test optional, rather than compulsory for Officers hired after December 26, 1994. Thus, the Union would allow these Officers the choice of passing the Criterion Task Test, complying with the Health Maintenance Requirement Agreement or participating in the FITSCAN assessment.<sup>1</sup>

The Union's proposal provides in pertinent part as follows:

"All officers hired on or after September 10, 1984 are required to participate in an annual physical fitness assessment. Participation in the assessment for those Officers shall be considered a duty assignment. Officers hired prior to September 10, 1984 may participate in the annual fitness assessment. Each officer participating in the assessments shall choose one of the following three available options for completing the assessment:

"1<sup>st</sup> option: Maintain a level of fitness whereby the officer falls within the guidelines as specified in the Health Maintenance Requirements agreement (heights/weight, blood pressure, cholesterol testing).

"2<sup>nd</sup> option: Complete the Criterion Task Test (also referred to as the Physical Ability Test) within the time

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<sup>1</sup> FITSCAN is general physical fitness assessment which provides officer with an appraisal of their health risks. All Officers must take the FITSCAN Test prior to undertaking the Criterion Task Test. The City provides for Fitness Coordinators to work with Officers to develop specific programs for improvements as their test results suggest are needed.

limits specified by ARA Human Factors Incorporated. Officers will be given the option of climbing either a six-foot wooden barrier or a six-foot chain-link fence.

"3<sup>rd</sup> option: Participate in the Fit Scan [physical fitness] assessment (as administered in 2005 through 2006).

"Each of the three fitness assessment options shall be provided a minimum of four times each calendar year. Each Officer who chooses and successfully completes the CTT, or participates in the Fit Scan assessment (as administered in 2005 through 2006), shall receive an additional \$300 payment as an incentive to maintain or improve their current personal fitness level. Officers may receive only one of these additional payments per calendar year. Training time shall be allowed for those Officers required to participate in the program if they participate outside their normal working shift or hours.

"An Officer who attempts, but does not successfully complete, one of the three options shall be permitted to attempt either, or both, remaining options in order to be considered in compliance with the program. Any Officer required to participate in the program who attempts, but does not successfully complete, at least one of the three options during any calendar year shall be considered in failure status. Officers in failure status are required to consult with their choice of either a fitness coordinator or personal physician for the purpose of improving their fitness level. Officers in failure status are not subject to the disciplinary process and may attempt any of the options as often as the assessment is offered. Officers in failure status who later successfully complete any of the three options shall be deemed in compliance."

The Union believes that the present system is punitive in that Officers who fail to complete the required test are subject to discipline including suspensions and forfeiture of forty-hours of accumulated time according to Rule 700.09 of the Manual of Rules and Regulations. The Union seeks to

abandon this kind of system and substitute for it a physical fitness plan that is "incentive based".

The Union cites the physical fitness programs of the cities of Cuyahoga Falls, Tallmadge, Twinsburg, Columbus and Dayton as exemplars of the kind of plans it has in mind. Those who pass the evaluations in those Cities may receive a monetary bonus, a membership in a fitness center, an opportunity for extra vacation days or a recognition award. Most of these programs are voluntary, not compulsory.

While physical fitness is certainly job related, the Union points-out that if an Officer is not sufficiently physically fit to do his or her job, the City may proceed to impose discipline under Rule 700.09.

**C. The City's Proposal:**

The City proposes to maintain the provisions of the May 5, 2003 Physical Fitness Policy as amended by the March 8, 2004 Agreement, and Rule 700.09 without change.

Officers hired after June, 1984 are required to sign an acknowledgement recognizing, and agreeing to abide by, the terms of the "Health Maintenance Requirements for Police Officers in the City of Akron, Ohio" as a condition of their employment. The "Health Maintenance Requirements" mandate Officers to have their blood pressure, serum

cholesterol and body weight tested, but does not relate directly to the Officers fitness to perform job duties. Physical ability to perform police functions such as giving chase to fleeing criminal suspects is evaluated pursuant to a test developed by a consultant, ARA Human Factors, Inc. The test requires Officers to perform certain exercises within a defined period of time such as surmounting a six-foot wall or chain-link fence, running a zigzag course for a distance of one-quarter mile, leaping over a five-foot culvert, dragging a 170 pound dummy for a distance of fifty-feet and pulling the trigger of a sidearm twenty-one times in rapid succession with the dominant hand, and then six times with the weaker hand, without altering the level of the barrel. The City insists the test is a valid indicator of whether Officers can adequately perform standard job duties and was so recognized in United States vs. City of Wichita Falls, Texas, 704 F.Supp. 709, footnote 1 (1988).

The Akron version of the test was developed after a survey to which 311 members (62%) of the Department responded. The survey asked the Officers to rate the frequency with which they were called upon to perform certain tasks. The answers given by the officers were used

to develop the specific features of the test, which then went into effect on March 15, 1997.

The "wall surmounting test" was formulated after receiving responses from 83% of Officers participating in the survey that acknowledged that they were frequently required to get over a wall or similar obstacle approximately six-feet high.

Nevertheless, the "wall surmounting test" proved to be a source of concern to the Bargaining Unit, in part because the Officers are trained not to climb over a solid wall in pursuit of suspects without being able to see what is on the other side. As a result, the parties agreed during the negotiations for the 2004 expired Agreement that officers could choose between surmounting the six-foot solid wall or a six-foot high chain-link fence.<sup>2</sup>

Officers suffering from a medical condition that affects their ability to undertake and successfully

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<sup>2</sup> The parties also agreed to establish a joint Physical Fitness Committee charged with studying the current fitness policy within the Police Department and making recommendations to the Police Chief regarding modifications to this policy.

However, the membership on the Committee was never constituted and no meetings were held during the term of the expired Contract.

complete the Physical Fitness Policy requirements may obtain a waiver from the testing procedure.

The parties agreed in the expired Contract to meet to discuss implementing the medical waiver provision. Although meetings were held and proposals exchanged, no agreement was reached.

Since 2000 a total of thirty-two officers have been disciplined for failure to pass this fitness program. Most of those cases occurred during the first four years of the program and only five Officers were disciplined during the two-year period 2005-2006. In 2000, an Officer was discharged for inability to meet the fitness standards.

In 2003, the disciplinary procedure was altered to provide an alternative penalty for Officers who had failed to meet the required performance standard after a third attempt. In lieu of a five working day suspension, the Officers might elect to donate forty-hours of accumulated time to the Union's time bank and relinquish all rights of appeal.

The progressive discipline process starts over for Officers who were once in "failure status", but who subsequently came into compliance. They are subject only to the first step of the discipline process should they again fail to satisfy the physical fitness test.

Taking issue with the Union's contention that comparable Departments do not require physical fitness testing, the City states that beginning with Officers hired in 2006, Dayton requires Officers to meet mandatory fitness requirements and "continue to maintain prescribed fitness standards for the duration of employment and as a condition of employment."

So also, Canton's Police Department requires officers hired after June 30, 2004 to comply with fitness guidelines as an ongoing condition of employment.

The City points-out that since the 2000 Contract, Officers receive an annual allowance of \$300.00 for the purpose of "maintaining a high level of physical fitness". Officers may use the allowance to purchase physical fitness equipment for home use, or for health club membership. The fitness allowance was granted, in part, because the gymnasium in the Police Department is too small to accommodate all officers. Nonetheless, the gym is furnished with new equipment each year and officers who choose to use the gym after 6:00 p.m. can park free of charge both on the street and in nearby parking garages.

In conclusion, the City maintains that having physically fit officers results in health cost savings and

also assures that officers are able to perform the arduous work required by their jobs.

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

As the City's witnesses maintained, the duties of Patrol Officers do not change based upon their age. Thus, all Officers ought to maintain a degree of physical fitness which allows them to deal successfully with the hazards of their job, including giving chase to, capturing and physically controlling suspects.

The present three-tier physical testing system which only requires Officers on or after August 28, 1995 to successfully complete the Criterion Task Test is therefore an anomaly.

Its existence can be explained on the basis of the fact that physical fitness was not a job requirement for Officers hired prior to September 10, 1984, and therefore these Officers are "grandfathered". So too, although Officers hired between September 10, 1984 up to and including December 26, 1994 are required to comply with the terms of the "Health Maintenance Requirements for Police Officers in the City of Akron, Ohio", they are not required to take the Criterion Task Test a physical abilities test which was not put in place until 1996, and made applicable

by agreement only to Officers hired on and after August 28, 1995.

None of the exercises required by Criterion Task Test appear to be unrelated to a Police Officer's duties, nor do they appear to be excessively onerous and unnecessary for the effective carrying out of the responsibilities of Police Officers. The fact of the matter is that the specific tests were developed only after considering the responses of Officers to a questionnaire on the subject. Indeed, the "wall or fence climbing test" appears to have been adopted only after the overwhelming majority of Officers responding to the survey mentioned climbing over six-foot barriers as a normal and common challenge they face in pursuing suspects.

The City has already granted a \$300.00 a year allowance to Officers for the purpose of helping to defray the cost of health club membership or the purchase of fitness equipment for home use. The Fact-Finder does not see where allowing an additional \$300.00 a year as an "incentive" is likely to reduce the rate of Criterion Task Test failures, nor does providing Officers the alternative to simply pass a health examination that would measure their vital signs and other health indicators assure that Officers, in fact, possess the physical ability necessary

to capture and subdue suspects in the course of physical encounters.

Accordingly, the Fact-Finder finds appropriate and recommends the continuation of Rule 700.09 of the Manual of Rules and Regulations of the Police Department, the Physical Fitness Policy of May 5, 2003 as amended by the Letter of Agreement of March 8, 2004, without change as proposed by the City.

That, however, does not end his Recommendations.

Of the 457 members of the City's Police Force, some 349 are age thirty-five or over. Another 144 Officers are between the age of forty to fifty.

Obviously, the normal, physically fit forty-five year old cannot perform at the level expected from a physically fit twenty-five year old. But, what older Officers may lose in agility they more than make-up in experience and judgment. It seems to the Fact-Finder that some age related adjustment to the fitness standards should be made.

The issue has not become acute as yet because of the fact that there are only Officers hired after August 29, 1995 are required to successfully complete the Criterion Task Test. The record before the Fact-Finder does not permit a recommendation as to how this may be accomplished,

but further discussions between the parties over this issue are likely to be production of practical suggestions.

The Fact-Finder notes that although the parties had agreed to establish a joint physical fitness committee, the committee was never formed. He therefore also finds appropriate and recommends that the parties adopt the following Letter of Understanding to be appended to the successor Agreement:

"The parties agree that not later than sixty days after the execution of the Collective Bargaining Agreement of June 1, 2002 they will each nominate three members to serve as members of a Joint Physical Fitness Review Committee charged with the responsibility of analyzing and making recommendations to improve the programs and policies relating to the maintenance of good health and physical fitness of Officers. The Committee shall convene and meet not later than thirty days after the parties exchange their list of members."

**IV. Ordinance No. 799-2000 Prescription Drug Coverage:**

**A. The 2004 Contract:**

Ordinance No. 799-2000 appended to the 2004 Contract, provides a schedule of deductible payments to be made by Bargaining Unit members who purchase prescriptions. The relevant text Section 1, Subsection F reads as follows:

"F. A prescription plan with a \$2.00 deductible feature.

"1. Effective January 1, 2001, the deductible shall be increased as follows:

- "(A) Brand name prescriptions - \$8.00
- "(B) Generic Prescriptions - \$4.00

"2. For those drugs purchased through mail order, the deductible shall be increased as follows:

- "(A) Brand name prescriptions - \$4.00
- "(B) Generic prescriptions - \$2.00

**B. The City's Proposal:**

The City proposes to amend the provisions of Ordinance No. 799-2000, Section 1(F) so as to increase the deductible for "non-formulary" prescription drugs and require refills for all maintenance drugs to be purchased through a mail order pharmacy service:

"Effective July 1, 2007, the following changes are hereby effective:

"A. Retail:

"Generic prescription - \$4.00 per prescription. Formulary (preferred drug) brand name prescription - \$8.00 per prescription. Non-formulary (non-preferred drug) brand name prescription \$25.00 per prescription.

"Mail Order:

"Generic prescription - \$2.00 per prescription. Formulary (preferred drug) brand name prescription - \$4.00 per prescription. Non-formulary (non-preferred drug) brand name prescription - \$20.00 per prescription.

"B. The prescription plan will require a mandatory mail order refill restriction for all maintenance drugs, whereby maintenance drugs must be filled by mail order after three (3) retail refills.

"C. The prescription plan will be modified to cover over-the-counter prescriptions for proton pump inhibitors and non-sedating antihistamines at the retail generic co-payment amount (\$4.00 per prescription)."

The City states that the cost of the prescription drug program has increased markedly in each year.

Under the current policy Officers need not purchase maintenance drugs through the mail order provider, "Caremark". Requiring utilization of the mail order program to purchase prescription drugs taken on a regular basis to treat chronic conditions would result in significant cost savings to the City because the drugs can be obtained at a overall lower cost. The requirement would also be advantageous to Officers because mail order purchase co-payments are lower than those obtaining for drugs purchased at retail establishments, and Officers receive a ninety-day supply rather than the thirty-day supply available from a local pharmacy.

The City also proposes to change the prescription plan from a two-tier to a three-tier formulary structure. The proposed three-tier plan would increase the required co-payment for what are termed "non-formulary brand name" prescriptions. These drugs tend to be significantly more expensive than available alternatives, and the higher co-payment would tend to encourage choice of a generic or preferred "formulary" medication thereby reducing the overall cost of the program.

"Formulary" drugs are those that Caremark has determined are "primary/preferred" because they are deemed clinically appropriate for treatment purposes and are cost-effective. All other non-generic medications, not considered by Caremark as "primary/preferred" drugs are deemed "non-formulary".

The final portion of the City's proposal involves the addition of two "over-the-counter" drug classes (proton pump inhibitors and non-sedating antihistamines), to the prescription plan.

The "proton pump inhibitors" are prescribed for gastrointestinal problems related to ulcers, gastric reflux disease, heartburn and indigestion. Among the brands are Nexium, Prilosec and Prevacid.

Non-sedating antihistamines are prescribed for allergic rhinitis. Brands include Clariton, Zyrtec and Allegra. Although these medications are available without a prescription, the retail price is generally higher than the prescription co-pay amount.

The three Bargaining Units with which the City has concluded negotiations have accepted the City's proposal, and the City's survey of sixteen public employers found that 75% utilize a three-tier plan.

**C. The Union's Proposal:**

The Union opposes any increase in the amount Officers pay for prescription drugs. It does not oppose the City's proposal to provide coverage for over-the-counter proton pump inhibitors and non-sedating antihistamines.

The Union suggests that the increased cost experienced by the City in making prescription drugs available to Officers is a direct result of the City's obstinate "failure to invest in finding a new, more affordable health care plan."

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

As the cost of prescription drugs has continued to escalate, employers have developed measures to control the cost of their prescription drug programs.

One such measure, introduced by most public and private employer plans, requires utilization of a mail order program for medicines which are required to be taken on a regular basis for an indefinite period of time to treat a chronic or recurrent medical problem. Mail order providers, such as Caremark, offer a ninety-day supply, rather than the thirty-day supply customarily dispensed by retail pharmacies. And, the prices charged under such mail order plans tend to be significant less than those charged at retail drug stores.

When Officers are required to take a particular medication on a long-term or indefinite basis, there is little inconvenience in having prescriptions refilled every ninety-days through a toll-free telephone call, e-mail or facsimile order. Nor is there any difficulty in having a prescribing physician provide two prescriptions, one for thirty-days which can be taken immediately to a retail pharmacy, and a second for multiple refills over the course of a year which can be mailed to Caremark.

The Fact-Finder therefore finds no substantial reason to object to the requirement that, after the third refill of a prescription at a local pharmacy, all remaining refills must be directed to the mail order provider, Caremark.

The Union, of course, has no objection to adding proton pump inhibitors and non-sedating antihistamines to the list of drugs available at the co-payment rate which is typically lower than the retail price.

The introduction of a "third-tier" of drugs - the so-called "non-formulary" medications - does represent an increase in Officer's co-payment responsibility of \$16.00 per order over that which is charged at present. However, the purpose of the increase is to encourage utilization of equivalent brand name and generic medications which are

significantly less costly than those in the non-formulary category. There will, of course, be a few cases where the prescribing physician does not believe that there is an effective substitute for a non-formulary medication, but overall, providing an incentive to use a lower cost alternative, reduces not only the City's health care bill, but mitigates the City's need to increase employees' contributions. The Fact-Finder notes that three of the Bargaining Units with which Contracts have been negotiated have already accepted the City's proposal, and the Fact-Finder believes that efficient administration of health care programs and the avoidance of cost shifting among units because of over-utilization by a favored Unit, also militates in favor of adopting the City's position.

Accordingly, the Fact-Finder finds appropriate and recommends that the City's proposal be adopted and that Section 1, Subsection F of the text of Ordinance No. 799-2000, as appended to the 2004 Agreement, be amended to read as follows:

""Effective July 1, 2007, the following changes are hereby effective:

"A. Retail:

"Generic prescription - \$4.00 per prescription. Formulary (preferred drug) brand name prescription - \$8.00 per prescription. Non-formulary (non-preferred drug) brand name prescription \$25.00 per prescription.

"Mail Order:

"Generic prescription - \$2.00 per prescription. Formulary (preferred drug) brand name prescription - \$4.00 per prescription. Non-formulary (non-preferred drug) brand name prescription - \$20.00 per prescription.

"B. The prescription plan will require a mandatory mail order refill restriction for all maintenance drugs, whereby maintenance drugs must be filled by mail order after three (3) retail refills.

"C. The prescription plan will be modified to cover over-the-counter prescriptions for proton pump inhibitors and non-sedating antihistamines at the retail generic co-payment amount (\$4.00 per prescription)."

**V. New Article - Employee Contribution and Health Care Costs:**

**A. The 2004 Contract:**

Ordinance No. 799-2000 as set forth in the 2004 Contract does not require employees to contribute to the cost of health insurance.

**B. The City's Proposal:**

The City proposes to require all Officers to contribute towards the premiums charged for health insurance as follows:

"Effective January 1, 2009, bargaining unit members will be required to pay each month the following towards health care coverage:

"Single coverage - fifty-dollars (\$50.00) per month.

"Family coverage - one-hundred dollars (\$100.00) per month."

In support of its proposal the City maintains that it has experienced a significant escalation in the cost of providing health care benefits to its employees, and that over the life of the expired 2004 Bargaining Agreement, medical benefit costs increased from \$20.7 million to \$23.91 million.

A consultant hired by the City anticipates the cost to continue to rise by 10-12% per year. [The average of cost of health insurance for the country as a whole increased by slightly less than 8% in 2006, and the forecast is for a comparable increase in 2007].

The City does not presently require employees to contribute to the cost of insurance, but, according to the 2005 Annual Report On The Cost of Health Insurance In The Public Sector", compiled by the State Employment Relations Board, 71.9% of Ohio Cities require their employees to contribute to the premium cost for single coverage, and 75% require their employees to contribute to the premium cost for family coverage.

The City of Akron's more limited survey of sixteen cities deemed comparable to Akron revealed that 87.5% require employee contributions. Of the six largest cities in Ohio, only Akron and Toledo do not mandate employees to

contribute towards the cost of health care coverage. In Summit County, Cuyahoga Falls is the only City, other than Akron, that does not deduct a monthly health care charge from the wages of its employees.

The City's proposal would defer deductions for health care coverage until 2009. The cost of insurance in that year is estimated to amount to \$13,939.00 per employee, and the proposed contribution of \$50.00 for single coverage and \$100.00 for family coverage, would require an annual average contribution of \$1,101.00 per Bargaining Unit member. This amount represents approximately 8% of the total anticipated cost of health care, and less than the average that 73% percent Ohio's public employees currently contribute towards the charge for family coverage.

**C. The Union's Proposal:**

The Union opposes requiring any employee subvention towards the cost of health care, at least so long as the City insists upon maintaining what the Union describes as an obsolete and costly program.

At the Fact-Finding hearing the Union provided the testimony of Mr. Glenn Szana, an expert in health care insurance. Mr. Szana testified that substantive features of the City's present health care plan have not been in use since the mid-1980's. Indeed, the structure of the City's

present health care plan is so out-of-date, that the plan is not capable of being bid to potential insurers. In his view, consideration of the currently available standard health care plans such as Medical Mutual "Super Med Plus", would present the City with opportunities to lower health care costs significantly.

After meeting with all five of the Unions representing City employees and with the Mayor, Mr. Szana made a proposal which, outlined acceptable and cheaper alternatives to the City's current health care plan. The City never offered a response.

As a result of the City's failure to investigate new health care options, the Union therefore opposes the City's attempt to transfer its burgeoning health care cost onto members of the Bargaining Unit.

Moreover, the City's proposed schedule of monthly contributions is excessive and out of line with the amounts charged employees in comparable jurisdictions. The only public employers whose premium charges are "remotely near Akron's proposal of \$100.00 a month for family coverage are the City of Columbus whose Officers (paid \$73,000.00 a year more than those of the Akron Department) pay \$71.40 a month and Summit County whose Sheriff Deputies are charged \$89.25

a month." The City's proposal thus represents an unwarranted, excessive burden upon Bargaining Unit members.

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

The Fact-Finder recognizes that the City of Akron is among a small and rapidly diminishing group of employers which do not require their personnel to contribute towards the cost of health insurance.

The Fact-Finder also recognizes that the escalating cost of health care insurance imposes a significant drain upon the City's finances, and that the burden is likely to increase rather than grow smaller during the term of the successor Contract.

Nonetheless, he does not find it appropriate to spread the cost to the City's employees without consideration of adoption of the most cost effective program of health insurance.

The Fact-Finder credits the Union consultant's testimony that the current health care program administered by the City is obsolete and inefficient. In his opinion, seeking bids on a standard plan offered by health insurers operating in Ohio would result in a marked decrease in the City's health care costs. Until due consideration is given to adoption of a more cost efficient program, the Fact-

Finder does not find it appropriate or recommend that it is appropriate to require employee participation in health care cost.

Indeed, the monthly health care contributions for both single and family coverages proposed by the City are out-of-line with the amounts charged by other public employers in Ohio.

Consequently, the Fact-Finder finds appropriate and recommends the Union's proposal to continue the present contribution free policy.

The Fact-Finder also finds appropriate and recommends that the parties adopt the following Memorandum of Understanding as a supplement to the successor Contract:

"The parties agree that within sixty-days after the execution of this Agreement, each party will appoint up to three members of a Health Insurance Improvement Committee charged with the responsibility to examine into and recommend more cost efficient health insurance program alternatives. Representatives of each of the other Unions representing City personnel shall be invited to join the Committee. The Committee shall meet within thirty-days after it has been constituted to discuss and formulate plans for the accomplishment of its task. Consultants retained by the parties may participate in the Committee meetings."

## **VI. Article XXIV - "Wages"**

### **A. The 2004 Contract:**

Article XXIV of the expired Contract provided a 2% wage increase commencing on January 4, 2004, an additional

2% effective on January 2, 2005 and a further 2% increase effective January 1, 2006.

**B. The City's Proposal:**

The City proposes to increase wages of Bargaining Unit members by 1% on December 31, 2006, by an additional 1% effective December 30, 2007 and a further 2.5% effective January 4, 2009.

The City maintains that it is fiscally unable to provide greater compensation to Bargaining Unit members.

The City's total General Fund allocated revenues of \$148.8 million in 2006 had increased by \$2.1 million over the \$146.7 million generated in 2005, although the principal source of General Fund revenues, the City income tax, had declined by some 2.4% from 2005. (\$109,138.00 vs. \$111,924.00). However, income tax revenues have grown an average of 2.8% over the last five-years.<sup>3</sup>

Inheritance tax earnings, which are inherently unstable, amounted to \$2.76 million in 2006. The estimate for 2007 is \$3 million.

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<sup>3</sup> Pursuant to Section 86d, of the City's Charter, only 73% of income tax revenues can be allocated to operational expenses, 27% is dedicated to the capital budget.

Investment earnings, also volatile, ranged from a high of \$4 million in 2001 to a low of \$623,000.00 in 2006. The estimate for 2007 is \$950,000.00.

Property tax revenues, on the other hand, have increased in each year since 2003, from \$16,586,000.00 in that year to \$23,377,000.00 in 2006.

Receipts from "curb service/recycling" have also increased steadily from \$9,467,000.00 in the year 2003 to \$12,773,000.00 in 2006.

The payments from a sixth revenue source, the Local Government Fund, have remained stable at approximately \$14,400,000.00 over the past four years.

Overall, the City projects a 2% revenue growth in 2007.

However, the City's expenditures have exceeded revenues in each of the last three years with the result that the cash balance in the general fund has been reduced from \$6,252,000.00 in 2003 to \$5,998,000.00 in 2006. [The City did not refer to the "unrestricted fund balance".]

In order to maintain its present favorable credit ratings from Moody's Investors Service and Standard and Poor's Service, the City was warned that "careful budgeting and maintenance of adequate reserves is imperative", and that while presently reserve levels are "adequate", they

"must be maintained in order to ensure a sufficient cushion, given the City's reliance on slowly growing income tax revenue."

To reduce costs, the City failed to fill some two hundred positions over the last four years. In 2002 the City's workforce was 2,452; as of the end of 2006 there were only 2,242 employees on the City's payroll.

In a nutshell, the City maintains that it simply cannot afford a higher increase.

Since 1985 the City has engaged in "pattern bargaining" "to insure equity among all City employees. In this way, the City has leveled the playing fields for the Unions who may not ... have as much bargaining strength such as the ANA [Akron Nurses Association] with its small membership. It also establishes a level playing field for the Unions who may not have the funds to have an attorney or professional negotiator represent them during negotiations. ... The City's proposal is fair in that the City's non-bargaining unit employees are all treated the same."

The City's 2007 three-year wage proposal has been negotiated with, and agreed to, by AFSCME, Local 1360, while two other Unions, the Civil Service Personnel Association and the Akron Nurses Association, have agreed

to the 1% increases for 2007 and 2008, but have not negotiated Agreements for 2009.

Further, it should be noted that over the past ten years the membership of F.O.P., Lodge No. 7 ratified every Contract the Union negotiated with the City, and the Union never proceeded to Fact-Finding and Conciliation.

The three Labor Contracts negotiated with the other Unions have "me-too" clauses which provide that their members will receive an amount equal to any increase beyond those agreed upon in their Contracts. However, the me-too provisions do not kick-in if the wage increases "are awarded to another bargaining unit by a third party."

The City does not face an attrition problem with its Police Officers because they are underpaid. Although in 2006, eleven officers left the Akron Police Department other than through retirement, its attrition rate is not significantly different from that of Dayton, the Ohio City closest in population and Police Department size. The 2000 census rated Akron's population at 217,074 and Dayton's at 166,179. The Bargaining Unit in Akron consists of 457 officers through the rank of Captain as of January 1, 2007, while Dayton's counterpart consisted of 405 Officers.

In 2006, seven Dayton Officers and one Sergeant left, but in the previous year some eighteen Officers and one

Sergeant had left, while in Akron only thirteen Bargaining Unit members had resigned over the past three-years.

The City's non-retirement turnover rate for 2006 was 2.43% which the City regards as "low and consistent with historical trends". A non-retirement turnover rate over the past ten-years averaged, at most, only 2.5%.

The Union's reliance upon the larger Cities in Ohio and the other Cities in Summit County to support its larger wage proposal is misleading. Of the six largest Ohio Cities, only Columbus and Cleveland have as low an un-earmarked income tax rate as Akron's 2%. Furthermore, Cleveland's 2006 estimated revenue growth is some 4%, while Columbus's actual 2006 revenue growth was 6.62%.

Even comparing Akron with Ohio's six largest Cities, a review of the starting or minimum pay rate for Patrol Officers during the ten-year period 1996 to 2006 discloses that Akron has never been either the highest paid nor the lowest paid. On the contrary, the City generally falls in the middle of the array.

Over the ten-year period in 1996 through 2006, Akron's minimum wage rate for Patrol Officers ranked as fourth highest among the big six, and its maximum wage rate has ranked either the fifth or sixth.

As to the Summit County Communities cited by the Union, none are comparable to Akron. Akron's population is 217,074 according to the 2000 census whereas Cuyahoga Falls, the next largest community in Summit County, reported a population of only 49,374.

The City suggests that the Cities of Youngstown and Canton are more comparable because they are often linked "geographically and economically". The State Employment Relations Board groups Akron and Canton together as the "Akron/Canton Region" in its reports. Akron Patrol Officers' annual wages range from \$42,390.00 to \$49,504.00. Canton top wage rate is only \$36,059.00, while Youngstown's wages range from \$35,153.00 to \$49,154.00.

The evidence establishes that the wage ranking of Akron's Patrol Officers vis a vis their counterparts in other Ohio cities has remained relatively stable.

Furthermore, the Union's focus on Patrol Officer compensation overlooks the fact that there are sixty-one Sergeants, twenty-one Lieutenants and eleven Captains who are members of the Bargaining Unit. All of these Officers enjoy a 16% differential over the rank immediately below, a differential mandated by Section 70a of the Akron City Charter. Their compensation is competitive with that of their peers in other communities.

The Union has gotten what it bargained for over the years, and cannot be heard to argue that its members are now underpaid compared to other Departments.

**C. The Union's Proposal:**

The Union proposes that Article XXIV be amended to read as follows:

"A. Effective January 1, 2007, all bargaining unit members shall receive a wage increase of four percent (4%).

"A(1). Also effective January 1, 2007, all bargaining unit members shall have a 'pension pick up plan' under which the City shall pick up 2% of the contribution of the covered employees to the Police and Fire Pension Fund ('OP&F').

"A(2). The pick-up plan is intended to comply with the requirements of Section 414(h)(2) of the Internal Revenue Code of 1986, as amended.

"A(3). The aforementioned pick-up is mandatory and no covered employee shall have the option of choosing to receive the contributed amounts directly instead of having them paid by the City to OP&F.

"A(4). The City specifically acknowledges that the contributions, although designated as employee contributions for purposes of OP&F, are to be paid by the City in lieu of contributions by its covered employees.

"A(5). The City shall pay to OP&F the contributions designated as employee contributions from the same source of funds as used in paying salaries.

"A(6). The pick-up by the City, as provided for in this section shall apply to the employees covered in this Agreement.

"A(7). The administration is hereby directed to implement all procedures necessary in the administration of the pay of all covered employees in this contract to effect the pick-up of a portion of the statutorily required contributions to OP&F so as to enable the covered employees

to obtain the resulting Federal and Ohio tax deferments and other attendant benefits.

"A(8). The pension pick-up plan, as set forth in this Article, may be amended from time-to-time by the City, but only for the limited purpose of satisfying any additional requirement(s) arisen from any future admendment(s) to Section 14(h)(2) of the Code.

"B. Effective January 1, 2008, all bargaining unit members shall receive a wage increase of four percent (4%).

"B(1). Also effective January 1, 2008, all bargaining unit members shall have a `pension pick-up plan' under which the City shall pick-up 2% of the contribution of the covered employees to OP&F. In addition, all provisions of Sections A(1)-(8) above shall also apply.

"C. Effective January 1, 2009, all bargaining unit members shall receive a wage increase of four percent (4%).

"C(1). Also effective January 1, 2008, all bargaining unit members shall have a `pension pick-up plan' under which the City shall pick up 2% of the contribution of the covered employees to OP&F. In addition, all provisions of Sections A(1)-(8) shall also apply."

In sum, the Union's proposal, including consideration of the compounding effect, represents a 19.10% increase in base wages for the three-years of the Contract.

Disputing the City's analysis, the Union maintains that Patrol Officers have the lowest wages of any of the major Cities in Ohio, and are well below the average wages paid by communities in Summit County. In order to increase their compensation to the average, Patrol Officers would need an 11.51% wage increase in the first year of the Contract.

The City's wage increase proposal would result in widening the wage gap, and place the Akron Patrol Officers some 17.4% below the average of their counterparts in other communities. Adoption of the Union's proposal, on the other hand, would result in narrowing the gap to 6% below the average wage in 2008, and less than 1% below the average wage in 2009.

The comparably low wages awarded to Akron Officers is not related to the quantity or quality of the work performed. Akron has fewer Police Officers per capita than any of the comparable communities.

Although the Department is authorized to have 526 Officers, it is considerably understaffed with only 457 Officers.

Nevertheless, the Department has managed to help lower Akron's crime and homicide rate so as to keep Akron ranked as "Ohio's safest large City".

The City enjoys a relatively healthy and stable financial position. The Union's CPA Report noted that Akron's "overall financial health ... has been relatively constant over the past several years", and the City has the financial capacity to meet the Union's wage proposal.<sup>4</sup>

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<sup>4</sup>The Union's Accountant presented a report attempting to demonstrate that the City was able to afford the Union's

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

The City has offered 1% increases in the first two-years of the successor 2007 Contract and 2.5% in the final year. The Union counters with a demand for 6% increases in each of those years comprised of a 4% raise in the base wage rate and a 2% pick-up of the Officers' share of the employee pension contribution.

The City claims that it lacks the financial capacity to pay more than it has proposed, and that as a result of the "me too" provisions in Contracts already reached with three other Unions, it would face a financially unsupportable burden.

For the past twenty-years, "pattern bargaining" has been in effect, and the same wage increases have been offered and accepted by all City employees, specifically including the Police Unit. That practice, the City insists, should not be broken.

Aside from its "ability-to-pay" and "pattern bargaining" contentions, the City denies that its Patrol Officers are significantly underpaid. Here, the City

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proposed wage increases. That report is flawed because it does not "roll-up" or consider the compounding effect of the Union's proposed wage increases and other compensation enhancements over the three-year period.

alleges that its starting rate is competitive with those offered in comparable jurisdictions, and the compensation paid the Department's Promoted Officers, who enjoy a 16% differential above the immediately lower rank, compares favorably with that paid their peers in other jurisdictions.

The Fact-Finder considers each of these contentions in turn as he appraises the merits of the City's position.

A review of the history of wage increases offered Bargaining Unit members since 1985 until 2004 reveals that until the expired 2004 Contract, Bargaining Unit members received a minimum of a 3% increase in every year. Thus, 3% was offered in nine years, 3.25% in two-years, 3.5% in five-years, 3.75% in one-year, 4% in one-year and 4.45% in one-year.

Akron's financial ability to maintain this rate of wage increases is the first issue to be examined.

Akron's income tax rate of 2.25%, effective since 2004, is among the highest among the six largest cities in the State, being matched only by Dayton and Toledo, and is not likely to be increased. However, .25% is earmarked for support of Community Learning Centers, and not available to defray other expenses.

While the returns from the income tax dipped in 2006, over the past five-years revenues have increased on average some 3.5%.

Based upon the 2000 census report showing Akron with a population of 217,074, per capita revenue has increased in each year from 2000 to 2005,

Akron's per capita revenues in 2005 amounted to \$675.77, an amount which exceeded the per capita revenues of Canton, Youngstown and Dayton, but fell below the per capita revenues available in Cleveland, Toledo, Columbus and Cincinnati.

Standard & Poor's Bond rating report found that the City's 2006 unemployment rate of 6.60% was higher than the State average of 5.9%, but had improved from the rate of 7.74% in 2004.

Standard & Poor's Bond rating report also found the City's tax base has grown an average of 3.1% since 2001.

Over the twenty-years between 1985 and 2004 the City has been able to maintain annual wage rate increases consistent with the mainstream of increments offered Police Officers in comparable cities throughout the State. But, per capita expenditures in 2002, 2003 and 2004 exceeded the per capita revenues.

Exploration of the City's prior receipts and expenditures statistics is useful only insofar as it informs judgment as to what the revenues and expenditures will be in the three-years covered by the Contract.

But, while the past is not necessarily prologue to the future, there are sufficient indications to believe that the City's financial posture will improve over the foreseeable future.

An October 22, 2006 Report appearing in the Akron Beacon Journal noted that the "Ohio Labor Market Review", a monthly publication of the Ohio Department of Jobs and Family Services reported that the so-called "leading indicators" - unemployment claims, building permits, inventory changes and money supply - designed to predict changes in employment, forecasted Akron's short-term future to be more promising than other Ohio cities.

The General Fund surplus carried over from year-to-year, is designed to assure the City's responsibility to meet its debt obligation and unexpected financial contingencies.

As of December 31, 2005, Akron's unreserved General Fund balance was \$8,600,000.00 representing some 5.7% of expenditures.<sup>5</sup> No statistics were presented for 2006.

However, the City floated a \$22.44 million dollar issue of "various purpose improvement bonds, series 2006" which was assigned an A-1 rating by Moody's Investors Service as of November 29, 2006. Its opinion noted that "the A-1 rating reflects the City's stable financial operations supported by below average, but adequate reserve levels and some operating flexibility; sizeable and increase diverse economic based; and favorable debt profile."

Similarly, Standard & Poor's rated Akron's credit profile as AA-.

A Union analysis of the City's financial position noted that the General Fund has a net receivable obligation from other Funds amounting to \$5.3 million dollars, and remains adequate to support the City's favorable credit rating.

The City expressed concern about a "multiplier effect" of any wage increase beyond that negotiated with the other

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<sup>5</sup> The Union's financial study noted that \$2.9 million were transferred from the General Fund to other funds in 2005, representing 92% of the reduction in the General Fund balance over the previous year.

Bargaining Units as a result of the "me too" clauses in their Contract, the Fact-Finder believes that this concern is illusory.

The City has the option of rejecting the Fact-Finder's Report and presenting its wage proposal before a Conciliator. Should the Conciliator Award any amount greater than the City's proposal, the "escape clause" in those "me too" clauses comes into effect. This provision states that "this [me too] provision is not applicable if said wage increases are awarded to another bargaining unit by a third party."

The Fact-Finder has considered the practice of "pattern bargaining" which had been accepted by the Fraternal Order of Police and the other Unions, presumably because the amounts were in line with mainstream increases awarded in other jurisdictions. But in no prior Contract did the City propose an increase as low as 1%, as it has done in the present negotiations.

The Fact-Finder has no information as to the compensation status of the members of the City's other Bargaining Units in comparison to their counterparts in comparable jurisdictions. Perhaps their relative ranking has not changed. However, it is clear that the relative position of Akron's Police Patrol Officer's wages,

considered in comparison with those of other jurisdictions, has declined since 2001 and particularly since 2004. The equal treatment of unequals, in such cases, does not represent "equity".

The Fact-Finder has also considered the City's argument that its starting rate for Police Officers and its Promoted Officers compensation are competitive with those of other jurisdictions. That may well be so, but the overwhelming majority of members of the Bargaining Unit are at the top step of the wage scale, not the entry level. Indeed, 320 of the 457 members of the Bargaining Unit have ten or more years of service with the Department. Therefore, it is appropriate to compare the wages of Akron Police Officers with those of their counterparts in other cities at the top rate level.

While Akron's starting salary of \$42,390.00 compares favorably with the five other largest cities in Ohio and those of smaller communities, the 2006 top step wage of Akron's Patrol Officers of \$49,497.00 was lower than that of any of the other five.

A survey of thirty-seven cities in Ohio undertaken by the City in 2006 revealed that Akron's maximum Patrol Officer's wage rate was exceeded by twenty-six of these jurisdictions.

Ten years earlier, Akron's maximum Patrol Officer wage ranked in the middle of the group.

As of January 1, 2006, Akron's Patrol Officers' maximum salary was some \$3,223.00, or 6.5%, below the average of the thirty-six other cities surveyed.<sup>6</sup>

The Union's report on the City's ability to pay, prepared by a Certified Public Accounting firm, concluded that as of the end of 2006, Akron's Police Officers were receiving 11.5% less than the average of ten nearby albeit much smaller, Summit County communities and the five largest cities in Ohio.

For 2007 the percentage Police Department wage increase in all of these jurisdictions, except Cleveland, Toledo and Barberton, was 3%. Cleveland offered 2% while Toledo Police Officers received 1.5%. Akron's offer of 1% for the current year would place Police Officers compensation some 13.81% below the average of the group.

The 2008 percentage increases the in wages for these cities, as reported by the Union were 2% for Cleveland and Toledo, 3% for Cincinnati, Norton, Talmage and Twinsburg, 3.25% for Bath Township and 4% for Columbus. The Union

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<sup>6</sup> It should be noted that this result probably understates the disparity in view of the fact that thirteen of the reporting cities were then in negotiations over 2006 wages.

estimates that the City's 2008 1% wage increase offer would put Akron Police Officers 16.84% below the average of the group.

Only five of the communities have agreed upon wage increases for 2009. Officers in Cleveland will receive 2% more, while those of Toledo, Talmage and Twinsburg will receive a 3% increase and Officers in Bath Township will receive a 3.15% increase.

On the other hand, the Fact-Finder notes that although the Police Department's budget has increased every year since 2000 to a total of \$45,207,000.00 in 2006, the actual expenditures by the Department in three of those years exceeded the budget allowance.

Overall, the current total compensation for an Akron Police Officer at the top step of the wage scale including an average overtime allocation and applicable "roll-ups", (employer-paid benefits) amounts to \$93,748.00.

Whether reflected in a pension pick-up or a increase in the hourly wage rate, each 1% wage increase results in a cost increase of \$281,540.00 for 2007.

The Union's proposal for a 4% wage increase and a 2% pension pick-up in each year, coupled with a shift differential allowance, as discussed in the next section of this Report, would drive-up the average cost per Patrol

Officer to \$100,130.00 in 2007, \$105,987.00 in 2008 and \$112,205.00 in 2009. The total percentage increase over the three-years would amount to approximately 20%.

For Promoted Officers in the ranks of Sergeant, Lieutenant and Captain, these totals would be increased by the respective 16% wage differential each rank enjoys.

For the three-year period the total increase in compensation of Police Officers, if the Union's proposal were adopted, would amount to some \$7,707,000.00, as compared to \$1,284,000.00, were the City's wage increase proposal adopted.

"Forecasting" is an uncertain art, however, the best judgment of the Fact-Finder is that the City will be able to financially support an average 3% wage increase in each of the three-years of the Contract. The Union's request for twice that in each year is unrealistic in terms of the likely financial situation of the City over the triennium.

The City's resources are, by whatever measure, finite. The demands upon those resources, however, are potentially infinite. Every dollar spent for Police Officer salaries, however justified by comparative studies, means one dollar less available for other services and activities.

The Fact-Finder cannot ignore these competing claims. Accordingly, giving effect to the Union's request that the

compensation increase be divided between wages and pension pick-up, he finds appropriate and recommends that Article XXIV be amended to read as follows, and as so amended, incorporated into the 2007 Collective Bargaining Agreement

"A. Effective December 31, 2006, all bargaining unit members shall receive a wage increase of two percent (2%).

"A(1). Also effective December 31, 2006, all bargaining unit members shall have a 'pension pick up plan' under which the City shall pick up 1% of the contribution of the covered employees to the Police and Fire Pension Fund ('OP&F').

"A(2). The pick-up plan is intended to comply with the requirements of Section 414(h)(2) of the Internal Revenue Code of 1986, as amended.

"A(3). The aforementioned pick-up is mandatory and no covered employee shall have the option of choosing to receive the contributed amounts directly instead of having them paid by the City to OP&F.

"A(4). The City specifically acknowledges that the contributions, although designated as employee contributions for purposes of OP&F, are to be paid by the City in lieu of contributions by its covered employees.

"A(5). The City shall pay to OP&F the contributions designated as employee contributions from the same source of funds as used in paying salaries.

"A(6). The pick-up by the City, as provided for in this section shall apply to the employees covered in this Agreement.

"A(7). The administration is hereby directed to implement all procedures necessary in the administration of the pay of all covered employees in this contract to effect the pick-up of a portion of the statutorily required contributions to OP&F so as to enable the covered employees to obtain the resulting Federal and Ohio tax deferments and other attendant benefits.

"A(8). The pension pick-up plan, as set forth in this Article, may be amended from time-to-time by the City, but only for the limited purpose of satisfying any additional requirement(s) arisen from any future admendment(s) to Section 14(h)(2) of the Code.

"B. Effective December 30, 2007, all bargaining unit members shall receive a wage increase of two percent (2%).

"B(1). Also effective December 30, 2007, all bargaining unit members shall have a 'pension pick-up plan' under which the City shall pick-up 1% of the contribution of the covered employees to OP&F. In addition, all provisions of Sections A(1)-(8) above shall also apply.

"C. Effective January 4, 2009, all bargaining unit members shall receive a wage increase of two percent (2%).

"C(1). Also effective January 4, 2009, all bargaining unit members shall have a 'pension pick-up plan' under which the City shall pick up 1% of the contribution of the covered employees to OP&F. In addition, all provisions of Sections A(1)-(8) shall also apply."

## **VII. Article XXIV - "Wages - Shift Differential"**

### **A. The 2004 Contract:**

The expired Contract does not provide an increased hourly pay rate for Officers assigned to other than the steady day shift.

### **B. The Union's Proposal:**

The Union proposes to add a new Section to Article XXIV to read as follows:

"D. All members whose regular duty assignment starts between the hours of 1:30 p.m. and 11:30 p.m., or who work rotating shifts, where at the least one of those shifts begins during the aforementioned times, will be paid at a rate of 1.5 percent greater than the regular pay rate for a member with equal seniority."

The Union believes that a shift differential is appropriate to reward officers who are required to work the least desirable shifts - those which start in the late afternoon or during the evening, and end in the late evening or early morning.

The Union points to a study for the National Sleep Foundation which reports that workers whose schedule is outside the typical 9:00-5:00 business day face increased risks of illnesses and sleep disturbances.

The Akron Police Department operates with ten fixed shifts whose starting times differ along with rotating shifts for the SNUD and Gang Units. Six of these shifts begin at or after 2:00 p.m.

The parties negotiated a seniority driven shift selection process, rather than one where assignments are made by the Chief. But, the system by no means assures that, as Officers' years of service increase, they will have the opportunity to select the shift of their choice. The Police Department has followed a "cyclical hiring schedule" whereby a large percentage of officers retire and an equally large number are hired. Those officers hired at the beginning of this "turnover period" tend to choose the preferred day shift, leaving the Officers hired towards the

end of the turnover period, despite the relatively small difference in their seniority, permanently assigned to the least desirable shifts. Providing a shift differential would partially alleviate the low morale attributable to this situation, and entice more senior Officers to choose less preferred shifts.

Akron is the only major City in Ohio without a shift differential. Cleveland, Columbus, Dayton and Cincinnati all have shift differentials ranging from \$.33 to \$.85 an hour. The neighboring communities of Bath Township, Twinsburg and Stowe all have shift differentials ranging from \$.50 to \$2.89 an hour.

The Union's request of a five (5%) percent base wage differential would result in an Officer who currently earns \$23.80 an hour receiving a differential of some \$.36 an hour.

**C. The City's Proposal:**

The City rejects the introduction of any shift premium payment.

It observes that the present system of shift selection by seniority bid had been agreed upon by the Union and the City, and administered for many years without significant problems.

The City states that the Union's proposal would be too hard to administer because there are several levels of seniority within the Police Department, and the City would have to make an individualized analysis for each Officer to determine, first whether the Officer's shift qualified for the differential based upon the Officer's starting time. If so, the City would have to ascertain the amount the Officer would be entitled to be paid based upon his seniority, and then adjust that amount each time the Officer received a wage raise or a step increment. The City's computerized payroll system would have to be significantly reprogrammed to accommodate these individual pay adjustments.

Furthermore, the proposal would unduly escalate total payroll costs because of the multiplier effect of the sequential 16% rank pay differential structure. Bluntly put, the City cannot afford the Union's proposal.

**D. The Fact-Finder's Analysis, Findings and Recommendations:**

The virtue of a shift selection system based upon relative seniority is that it encourages job tenure by awarding loyalty and longevity with preferred working hours. The Union contends that the process is flawed in the present case because large numbers of Officers are

hired in a relatively short period of time so that although the difference in the seniority dates is not significant, those Officers hired at the end of the cycle, will, for virtually all of their career, be relegated to a shift other than the one of their preference, typically - the day shift.

Offering a shift differential would not obviate this perceived inequity. There are a number of different alternative solutions available to rectify the problem. For example, shift assignments can be made for terms of three-years, with employees moving sequentially to other shifts so that, at the end of a nine-year cycle, all members of the Force will have had an equal opportunity to be assigned to a preferred shift. Moreover, flexibility is introduced into the system by allowing employees, with the consent of the Chief, to trade shifts.

No proposal was offered by the Union to change the method of shift selection, and the record before the Fact-Finder does not permit him to make a recommendation as to which of the many possible alternative systems might best suit the Akron environment.

There remains the related, but separate question, of whether employees who are assigned to other than the day shift should receive compensation. The theory is that

those who are assigned to the afternoon or evening shifts are out of phase with the work-recreation cycle of family and friends, run greater risks of health problems and sleep disturbances, and are therefore deserving of additional compensation.

The Fact-Finder is not unsympathetic to this claim. But, where there are limited funding resources available, the choice comes down to using available funds to increase wages across-the-board for all members of the bargaining, or using the money to reward those on alternative shift schedules.

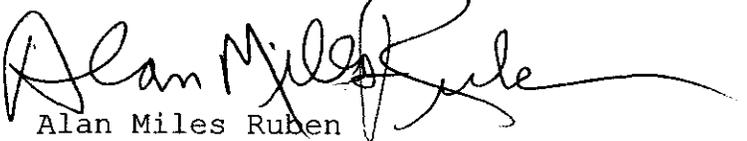
The Fact-Finder has opted to recommend significant wage increases for all employees, over and above the City's proposal.

Considering the financial resources available to the City, the Fact-Finder declines to recommend introduction of a shift differential for this Contract.

Accordingly, the Fact-Finder does not find appropriate and does not recommend adoption of the Union's proposal.

The Fact-Finder's Report of Findings and  
Recommendations issued at Cleveland, Ohio this 11<sup>th</sup> day of  
April, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan Miles Ruben". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Alan Miles Ruben  
Fact-Finder

AMR:ljb