

**STATE OF OHIO**

**STATE EMPLOYMENT RELATIONS BOARD**

In the matter of \* 07-MED-07-0716  
\*  
Fact-finding between: \*  
\* Fact-finder  
City of Cleveland \* Martin R. Fitts  
\*  
and \*  
\*  
Municipal Construction Operators' Labor \* July 2, 2009  
Council \*  
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**REPORT AND RECOMMENDATIONS OF THE FACT-FINDER**

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**APPEARANCES**

For the City of Cleveland (the Employer):  
George S. Crisci, Attorney

For the Municipal Construction Operators' Labor Council (the Union):  
Stewart D. Roll, Attorney

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## **PRELIMINARY COMMENTS**

The bargaining unit consists of all regular, full-time employees of the City of Cleveland (the Employer) serving in the following classifications: Building Stationary Engineers, Chief Building Stationary Engineers, Chief Stationary Engineer, Stationary Boiler Room Operator, Water Plant Operator I and Water Plant Operator II. There are approximately one hundred (100) employees in the bargaining unit.

The parties are negotiating an initial agreement following the replacement of the prior representative by the current union.

SERB appointed the undersigned as Fact-finder in this dispute on April 6, 2009. A fact-finding hearing was held on June 3, 4 & 5, 2009 at the offices of Climaco, Lefkowitz, Peca, Wilcox & Garafoli at 55 Public Square, Cleveland Ohio. Prior to the hearing the parties presented the Fact-finder with written Position Statements. Both parties attended the hearing and elaborated upon their respective positions, presenting both testimony and exhibits. At the hearing the parties reached tentative agreements on a number of issues. There were 19 issues that remained at impasse: Management Rights; Union Security and Check-off; Sick Leave with Pay; Voluntary Sick Leave Contribution; Assignment of Work Temporary Transfer; Job Evaluation and Descriptions; Hours of Work; Overtime; Equalization of Overtime; Shift Premiums; Holidays; Vacations; Call-in pay; Clothing and Maintenance Allowance; License Renewal; Parking Tickets; Duration; Staffing; and Drug/Alcohol Testing. Thus these 19 remaining issues were submitted for fact-finding.

In rendering the recommendations in this Fact-finding Report, the Fact-finder has given full consideration to all testimony and exhibits presented by the parties. In compliance with Ohio Revised Code, Section 4117.14 (G) (7) and Ohio Administrative Code Rule 4117-9-05 (J), the Fact-Finder considered the following criteria in making the findings and recommendations contained in this Report:

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

Any and all references by the Fact-finder in this report to the Employer's proposal and the Union's proposal are references to their respective Position Statements that were presented in writing in the to the Fact-finder prior the June 3, 4, & 5, 2009 hearing. Further, the Fact-finder's references to the "current" contract are references to the agreement in place that was negotiated by the prior union representative that has been used as a framework by the parties for these negotiations.

## **ADDITIONAL COMMENTS**

The City presented a compelling argument that it is experiencing difficult financial times. In fact, it has managed its finances considerably better than many public entities over the last several years, and is better prepared to deal with the current economic conditions in Ohio than many others. One thing that has clearly benefited the City has been the collective bargaining agreements it has been able to reach with the City's other bargaining units. In fact, as of the date of the instant fact-finding hearing, 21 unions representing over 6,000 City employees had settled on a 2% pattern and package of operational reforms for their respective labor agreements.

This bargaining unit represents approximately 100 employees, with about 15 of them working for the Division of Property Management and paid out of the City's general fund, while the remainder work for the Division of Water and are paid out of that department's enterprise fund. This means that the funding sources for the two groups are two separate revenue streams. While the City's general fund is in deep financial crisis, the argument can be made that the enterprise fund for the Division of Water is more stable and thus the employees should not be subject to the same pattern and call for operational reforms.

There is some merit to the Union's contention that the enterprise fund for the Division of Water is not in the same fiscal crisis as the City's general fund. However, the Fact-finder cannot ignore the fact that not everyone in this bargaining unit is paid out of that enterprise fund, and it would be unfair to the other City employees, and indeed the taxpayers of the City of Cleveland, to create an economic exception for employees in this bargaining unit that do get paid from the City general fund.

What also cannot be ignored is that the enterprise fund is still dependent on fees generated by the sale of water, and that per capita consumption has dropped, and that the enterprise fund revenues were enhanced recently by a rate increase which, given the current economic times facing northern Ohio, is unlikely to be duplicated in the duration of this new bargaining agreement.

Additionally, the Division of Water does incur considerable capital expenses requiring a long-term view and long-term financial planning, which the city capably presented during the hearing. The long term health of the water system depends on these improvements, and as many of projects require borrowing funds at reasonable interest rates, a fiscally well-managed Division of Water is a must. That requires balancing fair operational and financial needs with providing for fair wages and working conditions for the employees.

It is with these considerations that the Fact-finder viewed each of the issues discussed below, and which were major factors in the Recommendations found for each of them.

The Fact-finder would also like to state that, despite what has been a contentious and extended negotiation, the parties conducted themselves admirably during the three days of hearing. This allowed the generation of a full and comprehensive record in a respectful atmosphere, which was much appreciated.

## ISSUES AND RECOMMENDATIONS

### Issue: Management Rights

#### **Positions of the Parties**

The Employer proposed removing limitations on its ability to privatize or subcontract services.

The Union proposed a number of changes that would dramatically limit the management rights.

#### **Discussion**

The Employer's proposal would effectively remove any and all limits to privatization and subcontracting, providing the bargaining unit employees with no protections whatsoever. This is simply unreasonable, and also not in concert with the City's other collective bargaining agreements.

The Union's proposal, on the other hand, moves so far on the opposite direction that it is also unreasonable in its scope. It would effectively remove all management rights unless those rights are specifically provided for in the agreement.

#### **Findings and Recommendation**

In consideration of the considerable testimony and evidence, the Fact-finder believes the proper resolution for this issue is the retention of current language except for that which deals with privatizations and subcontracting. In that instance, the language the Employer submitted in its Employer Exhibit P-12 (the agreement between the City and the International Union of Operating Engineers local #19) is a reasonable and fair approach to this issue.

Therefore, the Fact-finder recommends the retention of current language in Article 3 except for section (5 - L) covering privatization and subcontracting which should read as follows:

*The City shall have the right to privatize or subcontract services, provided that sixty-five (65) calendar days prior to any subcontracting the City shall meet and confer with the Union on no less than a weekly basis and the City will disclose the nature, supervisory labor costs, and the costs of the proposed contract. Where the City's primary objective is to achieve financial economy, improved operating efficiency, and/or better quality of service, the Union shall have the right to make an offer of a competitive alternative. If that alternative yields financial savings, improved operating efficiency, and/or better quality of service genuinely equivalent to or greater than those the City can achieve through subcontracting, the City will accept the Union's alternative*

*Should employees be subject to layoff as a result of the decision to subcontract, the City will make a good faith effort to assign those employees to vacant City*

*positions for which they are qualified or can be trained to become qualified within a reasonable period of time and submit a list of laid off employees to outside contractors.*

*The City and the Union agree that if there is a disagreement regarding the above, including over the true value of the Union's competitive alternative (financial savings, improved efficiency, quality of service – including the payment of a living wage), the Union will have the right to submit the issue of whether or not the Union's alternative "genuinely" meets or exceeds the City's objective to final and binding arbitration by requesting arbitration with the American Arbitration Association within fourteen (14) days of the expiration of the 65-day meet and confer period.*

In addition that Fact-finder recommends a housekeeping change in section (6) replacing the reference to *Local 18.5* with *CEO Union*.

### **Issue: Union Security and Check-off**

#### **Positions of the Parties**

The Employer proposed the retention of current language for dues collection that does not include a provision for a fair share fee, except that it also argued for greater protection should the Union face a legal challenge in this regard.

The Union proposed replacing the current language with considerably different language that mirrors that of a City agreement with the Cleveland Building and Construction Trades Council.

#### **Discussion**

The Employer based its argument for greater legal protection on its concerns over possible future litigation. This is purely speculation. As this Union is relatively new in representing this bargaining unit, there simply is no compelling argument that can be made to afford the City the greater protection it proposed.

Likewise, the Union did not make a compelling argument for the changes it proposed. While a fair share fee is not an unreasonable demand, the newness of the Union's representation of this bargaining unit makes it premature at this time.

#### **Findings and Recommendation**

In consideration of the evidence and testimony, the Fact-finder believes the retention of current language except that the effective date needs to be amended.

Therefore, the Fact-finder recommends the retention of current language except that the effective date shall be amended to reflect the effective date of this agreement.

### **Issue: Sick Leave with Pay**

#### **Positions of the Parties**

The Employer proposed three changes to the current language: reflecting sick leave exclusively in hours and not days; requiring employees to provide one-hour's notice before the start of their shift; and requiring employees who claim emergency sick leave after receiving a mandatory overtime assignment to provide medical verification immediately upon returning to work.

The Union also proposed reflecting the sick leave exclusively in hours, but proposed increasing the accumulation of sick leave to a rate of 15 hours per month up from the current rate of 10 hours per month.

#### **Discussion**

The Employer's proposal to reflect the sick leave accumulation rate in hours is consistent with other proposals it has made, and which are recommended elsewhere in this Report. The Union's *proposal to expand this benefit, however, is without basis. The record showed extensive use of sick leave by this bargaining unit. While the use of sick leave is an earned benefit, unless the overall health of the members of this unit is outside the average, then the sick leave provided for in the existing agreement should be adequate. Additionally, the provision in the contract for a transfer of sick leave provides protection for an individual case where sick leave might be legitimately exhausted.*

Additionally, the City's proposal for call-in to occur not less than one-hour prior to the start of the shift is reasonable and found commonly in private-sector labor agreements with much less generous provisions for leave. There is already a provision for handling situations where the employee is prohibited for valid reason from providing the required notice. However, the Employer should know that while the contract language may be silent in regard to how that call-in is handled administratively, it is assumed by the Fact-finder that the Employer recognizes it needs to have a reasonable system in place for that one-hour notification to occur.

Lastly, the one issue that is proposed by the City that the Fact-finder does not believe warrants recommendation is the proposed requirement that an employee "must" supply medical documentation should they become ill after reporting to work or after being notified of mandatory overtime. Rather, a more reasonable requirement is "may be required" which provides the Employer with protection against abuse but respects the fact that sometimes employees do become legitimately and obviously ill during the work day.

## **Findings and Recommendation**

Therefore, the Fact-finder recommends the City's proposal for this Article in its entirety except that Paragraph 55 (e) should read as follows:

*e. An employee who wishes to take sick leave either after reporting to work or in response to a need to work mandatory overtime may be required to supply a certificate from a licensed physician verifying the emergency situation. Such certificate must be supplied within 24 hours upon returning to work, unless unusual circumstances satisfactory to the City exist for granting additional time.*

## **Issue: Voluntary Sick Leave Contribution**

### **Positions of the Parties**

The City proposed three changes to the sick leave contribution provisions. First, it proposed to limit the 40-hour contribution to the duration of the agreement. Secondly, it proposed that *employees on the sick abuse list would be ineligible to receive sick leave contributions.* And thirdly, it proposed to specifically give the City the right to discharge an employee determined to have sold sick leave to another employee.

The Union proposed the retention of current language save specifying the Union's name throughout the article.

### **Discussion**

There is justification for the City's proposal to limit to one 40-hour contribution to sick leave. Given the paltry sick leave balances of many of the employees, this restriction will only have limited impact on the ability of the employees to contribute. Secondly, the rationale for eliminating an individual from the ability to receive sick leave contributions is sound. There should be no reward for those who abuse the legitimate use of sick leave.

However, as vile as the selling of sick leave to another employee is, and even the union witnesses testified to that, the City's proposal in this regard seems unreasonable. Unspecified is exactly how the City would actually determine such a transaction took place, what its burden of proof would be, and what its investigatory ability would be.

## **Findings and Recommendation**

In consideration of the above, the City's proposal to limit the contribution to 40-hours during the life of this agreement is reasonable, as well as the proposal to ban employees on sick leave abuse from receiving such contributions. However, the third proposal is found to be too vague and unworkable.

Therefore, the Fact-finder recommends the City's proposal for paragraph 58 (a) that in the first sentence the first word "An" should be preceded by:

*During the duration of this Agreement...*

Further, the Fact-finder recommends the City's proposal for paragraph 55 (e) in its entirety.

Lastly, the Fact-finder does NOT recommend the City's proposal for a new paragraph 55 (f) regarding the selling of sick leave.

### **Issue: Assignment of Work – Temporary Transfer**

#### **Positions of the Parties**

The Employer proposed the retention of current contract language.

The Union proposed an amendment to provide that the temporary transfer of an employee could not exceed thirty working days in six-month period.

#### **Discussion**

The Union presented testimony that these circumstances have only occurred only a couple of times, and that the most recent occurrences were about seven years ago. Given the fact that this is rare, and there was no evidence presented to lead the Fact-finder to believe it will likely become a recurring problem in the future, there is simply no compelling reason for a change in the contract language.

#### **Findings and Recommendation**

There can be found no compelling reason to change the current provisions of the agreement.

Therefore, the Fact-finder recommends the retention of current contract language.

## **Issue: Job Evaluation and Descriptions**

### **Positions of the Parties**

The Employer proposed the retention of the language in the current agreement.

The Union proposed several changes. It proposed that the City be required to consult with the Union prior to making job evaluations and job descriptions and creating job classifications. Further, it proposed that if an agreement could not be reached on the change in classification, the matter would be subject to arbitration. And lastly, it proposed that if either the Union or the City believes the current Civil Service job descriptions are inaccurate, the parties would be compelled to work together to cause that description to reflect actual job duties.

### **Discussion**

Among the City's concerns here are that the Union's real motive is to preclude the City's ability to unilaterally petition for a classification change that would combine the Water Plant Operator 1's and 2's into a single classification. The City acknowledges that it has considered this.

Regardless, the management right to determine the job classifications should not be subject to the *ultimate ruling of a neutral third party*. The current language allows for the arbitration of the effects of a classification change, and this is protection enough for the bargaining unit members. The lack of language forcing the City to "consult" with the Union, or "work together" with the Union, does not preclude the City from doing so. While it is good labor relations practice to *consult with and work with the Union on issues such as the creation or change in job classifications*, mandating it through contractual provisions does not seem to be a reasonable approach.

### **Findings and Recommendation**

In consideration of the facts provided at the hearing, the Fact-finder does not see a compelling reason to support the Union's proposals for this Article.

Therefore, the Fact-finder recommends the retention of the current contract language as proposed by the City.

## **Issue: Hours of Work**

### **Positions of the Parties**

The Employer proposed to memorialize in the agreement its decision, recently upheld by an arbitrator, to return most Water Plant Operators to an 8-hour day from the prior 12-hour day.

The Union proposed language that would mandate that the City “maintain sufficient staffing levels so that enough personnel are available to perform all necessary work without mandatory overtime or extra shifts.” In addition, the Union proposed changing the shift rotation from once every 28 days to once every six months.

### **Discussion**

The City’s proposal is generally reasonable. The Union’s language for “sufficient staffing” is vague, and likely would result in further disputes between the parties. Logically, without minimum manning requirements from OSHA or other regulatory agencies, the decision as to adequate staffing should rest with the City. Further, if insufficient staffing is, in fact, the primary cause of undue overtime costs to the City, it is well within its authority and ability to add additional staffing rather than bear the overtime costs.

*The Union’s argument for a longer rotation period between shift rotations is compelling, however. Certainly the bargaining unit employees will benefit from working on a shift for more than a four-week period of time.*

### **Findings and Recommendation**

The City’s proposal for the 8-hour shifts logically places into the agreement the current practice, recently upheld in arbitration. However, the Union makes a legitimate argument that shift rotation every 28 days is an unnecessary burden on the

Therefore, the Fact-finder recommends the City’s proposal for this Article as presented at the hearing, with one important change. The Fact-finder recommends that the last sentence of the Article be amended to read as follows”

*Shift rotation shall occur every sixth payroll or 84 days..*

### **Issue: Overtime**

#### **Positions of the Parties**

The Employer proposed to amend this article to eliminate overtime for work beyond an employee’s regular shift, to eliminate sick time as “hours worked” for purposes of meeting the threshold for overtime, and to require an employee to accept an overtime assignment for emergency or operational needs if overtime equalization efforts have been exhausted.

The Union proposed amending this article to make the City’s determination of overtime rights subject to other terms of the collective bargaining agreement. In addition, the Union proposed requiring the payment of overtime for hours worked in excess of 8 during any 24-hour period, double time for work in excess of 40 hours in any 5-day period, without 2 consecutive days off,

and require the payment of 3 times the normal rate of pay for work on a scheduled day off, vacation day or emergency overtime.

## **Discussion**

First, as to the Union's proposal for subjecting the overtime rights of the City to other parts of the collective bargaining agreement, the proposal did not specify which parts of the agreement the Union had in mind. Labor agreements should always be read as a complete document, and provisions in one article cannot conflict with other provisions, thus an argument can easily be made that the City's rights with regard to overtime are already subject any existing provisions that limit or affect overtime in the remainder of the agreement. The vague wording in the Union's proposal is at best, overkill, and at worst, an open invitation for unnecessary future disputes.

Secondly, as to the Union's proposal to require the payment of overtime for hours worked in excess of 8 during any 24-hour period, double time for work in excess of 40 hours in any 5-day period, without 2 consecutive days off, and require the payment of 3 times the normal rate of pay for work on a scheduled day off, vacation day or emergency overtime, this proposal as a whole is simply too costly and unnecessary. The City provided sufficient evidence of its high costs of overtime in this bargaining unit. The Union complained on the one hand that its members were forced to work too much overtime, yet its high sick leave usage does significantly add to the working of overtime. Adding to the premium wages paid for overtime will only encourage greater use of sick leave resulting greater amounts of overtime opportunities.

As for the City's proposal in paragraph's 70(a) and 71 of its Position Statement to amend this article to eliminate overtime for work beyond an employee's regular shift, it is easy to see how the City will save in overtime costs by its adoption. However, there is no minimum manning requirement in the collective bargaining agreement. The City is able to determine how many employees it needs to perform work, and thus does have a certain amount of control over the amount of overtime it pays. Further, the Fact-finder has made recommendations under the Staffing article that would give the City even more flexibility to handle emergency and non-routine work when necessary. Lastly, this is a natural trade-off for the gain for the Employer recommended regarding mandatory overtime. Therefore there is no compelling reason found by the Fact-finder to recommend this proposal.

The City considered its proposal to eliminate sick time as "hours worked" for purposes of meeting the threshold for overtime to be a core proposal. It noted that this was also a core issue with the other City bargaining units, and has been incorporated in most of the other agreements. This provides a strong internal comparable for the recommendation of this proposal. Further, the FLSA allows it, and it is a common practice in other labor agreements with which this Fact-finder is familiar. The high costs of overtime in this bargaining unit and high usage of sick leave also provide compelling reasons to recommend this change.

As to the City's proposal to require an employee to accept an overtime assignment for emergency or operational needs if overtime equalization efforts have been exhausted, this appears to provide the Employer with a needed ability to manage its operations while protected the bargaining unit's right to having the fair opportunities for overtime. The City's stated determination to reduce overtime should serve as a barrier to misuse of this management right by the City.

## **Findings and Recommendation**

In consideration of the

Therefore, the Fact-finder does NOT recommend the Union's proposal to amend this article to make the City's determination of overtime rights subject to other terms of the collective bargaining agreement.

Additionally, the Fact-finder does NOT recommend the Union proposed requiring the payment of overtime for hours worked in excess of 8 during any 24-hour period, double time for work in excess of 40 hours in any 5-day period, without 2 consecutive days off, and require the payment of 3 times the normal rate of pay for work on a scheduled day off, vacation day or emergency overtime.

Further, the Fact-finder recommends the City's proposal to eliminate sick time as "hours worked" for purposes of meeting the threshold for overtime.

The Fact-finder does NOT recommend the City's proposals in paragraphs 70(a) and 71 of its Position Statement to amend this article to eliminate overtime for work beyond an employee's regular shift.

Lastly, the Fact-finder recommends the City's proposal to require an employee to accept an overtime assignment for emergency or operational needs if overtime equalization efforts have been exhausted.

## **Issue: Equalization of Overtime**

### **Positions of the Parties**

The Employer proposed amending this article with what it considered two of its core proposals. The first would require employees to notify management on a semi-annual basis if they wish to work voluntary overtime, and would provide sanctions if they subsequently refuse voluntary overtime requests. The second proposal would establish a rotational "on-call" system for employees to respond to overtime requests, and would add "operational needs" as a condition where an employee could not refuse overtime.

The Union proposed to amend the article to provide a definition of "emergency" as "an event which jeopardizes life, health or may cause material damage to property."

### **Discussion**

The City's first proposal, to require employees to notify management if they wish to work voluntary overtime, and providing sanctions if they subsequently refuse voluntary overtime requests, is reasonable. The employees currently work a lot of overtime. This will ensure that those who so desire can work more, and reduce the occurrences of the other employees being

required to work. While it creates some administrative work for the City, it likely provides a benefit for those employees who, for personal reasons, would like to work more overtime rather than less.

The City's second proposal, to establish a rotational "on-call" system for employees to respond to overtime requests, and to add "operational needs" as a condition where an employee could not refuse overtime, is reasonable and fair. The employees will gain some idea of when they might expect to be working overtime, and the addition of the "operational needs" condition would bring this article in line with what the Fact-finder has recommended in the previous article.

The Union proposed to amend the article to provide a definition of "emergency" as "an event which jeopardizes life, health or may cause material damage to property." It is the Fact-finder's assumption that the Union intends this to be the only time mandatory overtime could be imposed, and that if the Fact-finder recommended this he would also reject the City's proposal for adding "operational needs" to this article. As the Fact-finder does, however, intend to recommend the "operational needs" language, this proposal would not have any real affect on the City's right to impose overtime and thus is unnecessary. Further, the ordinary meaning of "emergency" should be sufficient for the implementation of these provisions.

### **Findings and Recommendations**

The Fact-finder recommends the City's proposal for paragraph 79 as presented at the hearing to amend this article to require employees to notify management on a semi-annual basis if they wish to work voluntary overtime, and providing sanctions if they subsequently refuse voluntary overtime requests.

Further, the Fact-finder recommends the City's proposal for paragraph 80 to establish a rotational "on-call" system for employees to respond to overtime requests, and adding "operational needs" as a condition where an employee could not refuse overtime.

Lastly, the Fact-finder does NOT recommend the Union's proposal.

### **Issue: Shift Premiums**

#### **Positions of the Parties**

The City proposed amending this article to reflect the current schedule for shifts.

The Union proposed amending this article to change the shift premium from 35 cents per hour to 47 cents per hour. The Union also proposed adding premiums for certifications, performance of certain duties, and for license acquisitions.

## **Discussion**

The City's proposal for the change in shift times is reasonable and brings the contract in line with the current practice.

The Union's proposal for an increase in the shift premium is based on its contention that the premium has not increased in about 15 years, and that inflation has eroded the intended value of the premium. On its face this is a reasonable argument, and the increase would not unduly harm the City's financial condition.

The Union's proposals for adding various premiums for certifications, performance of certain duties, and for license acquisitions, however, are not reasonable. Given the overall financial condition of the City, and considering the future capital obligations of the water system, the proposals would prove quite costly and difficult for the Employer to fund.

## **Findings and Recommendations**

Therefore, the Fact-finder recommends the City's proposal for amending the shift times as presented in its final proposal at the hearing.

The Fact-finder also recommends the Union's proposal for changing the shift premium to forty-seven cents (47 cents) per hour.

Lastly, the Fact-finder does NOT recommend the Union's proposal to add premiums for certifications, performance of certain duties, and for license acquisitions.

## **Issue: Holidays**

### **Positions of the Parties**

The Employer proposed two amendments that were core to its overall package settlement offer prior to Fact-finding. One would require personal days to be used in one-day blocks, but provide for shorter increments in an emergency upon management approval. The second would require an employee to either be working or taking a vacation day or personal holiday on the employee's last scheduled day of work before or after a holiday to receive holiday pay. Another proposal would clarify the earning of personal days for Water Plant Operators depending upon whether they work 8-hour or 12-hour shifts.

The Union proposed the retention of current language.

## **Discussion**

The City's proposal for the requirement for usage of personal days in one-day blocks is reasonable, considering that provisions for emergency usage, if necessary, are included. Certainly administratively it makes sense. The proposal requiring employees to be at work or on vacation or personal days prior to holidays to receive holiday pay is likewise reasonable, and common in the private sector.

## **Findings and Recommendations**

The Fact-finder considers the City's entire proposal for this Article to be reasonable and that compelling arguments support it.

Therefore, the Fact-finder recommends the City's proposal for this Article as presented at the hearing.

## **Issue: Vacations**

### **Positions of the Parties**

The Employer proposed that vacation time would be expressed only in hours rather than days.

The Union proposed the exact opposite of the City, that being expressing vacation time only in days and not hours.

## **Discussion**

The City's proposal makes inherent sense, the accumulation and expense of vacation time should correspond to the actual hours earned and used. As some employees work 12-hour days, it will allow for a more accurate accumulation and expense of vacation time and would eliminate any disparities that now exist. The accumulation of vacation time in hour increments is not uncommon in the other bargaining agreements.

## **Findings and Recommendations**

The Fact-finder finds the City's proposal to be compelling, and fair to all the employees of the bargaining unit.

Therefore, the Fact-finder recommends the City's proposal for this article in total.

**Issue: Call-in pay**

**Positions of the Parties**

The Employer proposed amending the current language to reflect its current practice with regard to paying call-in pay. It proposed the clarification in response to a grievance in another bargaining unit.

The Union proposed the retention of current language.

**Discussion**

There was no evidence presented that this issue has been a problem between this bargaining unit and the City. No history of grievances or other indications of any dispute over the City's practice was shown.

**Finding and Recommendation**

There simply is no compelling reason found for amending the language in this Article.

Therefore, the Fact-finder recommends the retention of current language.

**Issue: Clothing and Maintenance Allowance**

**Positions of the Parties**

*The Employer proposed to modify the current provisions slightly in order to provide that new employees who have worked less than a full year would receive a pro-rated share of the allowance the first year.*

The Union proposed amending the contract to incorporate an allowance of \$640 per year, instead of the current \$100 per year. In addition, the Union proposal would also specify what "uniforms" would be provided to the employees based upon their job classification.

**Discussion**

The Union argued it was attempting to recapture the actual cost of buying and maintaining adequate work clothes for the employees, and argued further that the dollar amount had remained unchanged in the agreement for a long period of time.

However, while this is a proposal that may have some merit as to providing an increase on a more regular basis, the current economic climate in the City of Cleveland makes it unreasonable to consider at this time. The Union did not offer any compelling testimony or evidence that the employees in the bargaining unit are in an unreasonable situation with regard to their work attire.

### **Findings and Recommendation**

In consideration of the evidence, the Fact-finder is not convinced an increase in this allowance is warranted at this time. Neither is the Fact-finder convinced that the City is harmed by providing the full allowance to employees with less than one year of service, as they have likely incurred some expense even with a relatively short term of employment, and as the allowance is currently a very modest amount.

Therefore, the Fact-finder recommends the retention of the current contract language.

### **Issue: License Renewal**

#### **Positions of the Parties**

The Employer proposed retention of current language providing for the City to pay the actual cost of license renewal for stationary engineers, currently \$35. In addition the City's proposal makes the provisions of this Article effective upon ratification.

The Union proposed amending the contract to reimburse water plant operators and stationary engineers for educational expenses of up to \$600 per year for the educational expenses incurred in renewing their licenses. In addition, the Union's proposal makes the provisions of this Article retroactive to April 1, 2007.

#### **Discussion**

The Union argued that both water plant operators and stationary engineers incur considerable educational expense in maintaining their licenses. However, as with several other proposals, the Union's proposal represents a costly expansion of benefits that does not take into consideration the City's current financial picture.

### **Findings and Recommendation**

In consideration of the above, the Fact-finder believes that the City's proposal is warranted.

Therefore, the Fact-finder recommends the City's final proposal as presented at the hearing.

**Issue: Parking Tickets**

**Positions of the Parties**

The Employer proposed that Article 44 be amended to add "moving violations fines" to the current provisions that authorize the City, upon the exhaustion of the appeal process, to deduct the amount of fees for parking tickets/fines from their pay.

The Union proposed the retention of current language.

**Discussion**

Among the wide realm of issues at impasse, this is one of minor consequence. The City's proposal is reasonable and of no detriment to the members of the bargaining unit, providing they obey traffic laws while driving City vehicles.

**Findings and Recommendation**

In consideration of the evidence and testimony, the City's proposal is found to be reasonable

Therefore, the Fact-finder recommends the City's proposal to amend the first sentence of paragraph 129 in Article 44 to read as follows:

*129. Employees who fail to pay moving violation fines and parking tickets/fines received on vehicles after the ratification of the collective bargaining agreement will authorize the City to deduct the amount of fines from their pay once that administrative appeal process, if applicable, has been exhausted.*

**Issue: Duration**

**Positions of the Parties**

The Employer proposed that the contract's duration be from the date of ratification to March 31, 2010, with any wage increase retroactive to April 1, 2009.

The Union proposed duration of three years commencing from the date of execution of the new agreement.

## **Discussion**

The City proposed the unusually short duration for the agreement in order to get it in line with the expiration of other labor agreements the City has. Further, it argued that the Union itself has protracted the negotiations for this agreement, so the resulting short duration it proposed would only penalize the Union for its own actions.

The Union argued that to begin negotiations for a new contract less than a year after ratifying this one would be nonsensical and cause unnecessary expense for the Union.

This contract will be the first between the City and this Union for this bargaining unit, and undoubtedly has been protracted and contentious. It covers an incredible amount of ground, and in reality only lays the foundation for future negotiations. The City's argument for keeping this agreement in sync with the other bargaining agreements is compelling, and the past bargaining history of the City with this unit, irrespective of which union was representing the members of the unit, supports getting the parties back in sync with the City's other bargaining agreements.

## **Findings and Recommendation**

The reality of the situation is that while the City's proposal is for a very short duration, it makes sense in this unique circumstance.

Therefore, the Fact-finder recommends the City's proposal for the duration be from the date of ratification through March 31, 2010, with any wage increase retroactive to April 1, 2009.

## **Issue: Staffing**

### **Positions of the Parties**

The Employer proposed amending the agreement to add "non-routine" situations to those already allowing management employees to perform bargaining unit work, and to permit such work to continue until completed rather than have a two-hour limit.

The Union proposed the retention of current language with regard to the Employer's proposal above. It also proposed amending the agreement to provide for the reimbursement of Water Plant Operators 1 & 2 for the cost of approved educational classes.

## **Discussion**

First the Fact-finder notes that the parties did reach a tentative agreement on another issue within this Article.

As to the addition of "non-routine" work, the Union is concerned with the erosion of bargaining unit work. However, the provisions already in place require the City to demonstrate its attempts to contact bargaining unit members for the purposes of call-in. While the definition of "non-

routine” is not present, the Fact-finder would assume that a “reasonableness” standard must be applied on a case-by-case basis.

Lastly, as with other proposals with economic costs, the Union’s proposed reimbursement for educational expenses, which lacked evidence to provide a substantive argument, simply lacks a compelling reason to recommend.

### **Findings and Recommendation**

In consideration of the protection that exists that requires a demonstration of attempts to call-in bargaining unit employees, the City’s proposal for the addition of “non-routine” and its other proposed changes for paragraph 134 of its proposal are found to be reasonable and compelling.

Therefore, the Fact-finder recommends the City’s proposal for paragraph 134 of its proposal as presented at the hearing.

As to the Union’s proposal for the provision of reimbursement for educational expenses, the Fact-finder does not recommend any change from the current contract language.

### **Issue: Drug/Alcohol Testing.**

#### **Positions of the Parties**

The Employer proposed several changes to the existing drug/alcohol testing procedures: post accident testing if there is an injury or property damage of \$500; clarifying the language regarding discharge if an employee tests positive; modifying the employee’s right to have a representative observe the testing procedures; clarifying the procedures for selecting a second testing lab to conduct the test; and extending the random testing requirement for “safety sensitive” positions to include Chief Building Stationary Engineer, Stationary Engineers and Boiler Operators.

The Union proposed the retain current language except to remove the positions of Water Plant Operator I, Water Plant Operator II, and Stationary Boiler Room Operator from the list of “safety sensitive” positions.

#### **Discussion**

Among the considerations is what the other bargaining units in the City have agreed to in their recent contracts. The City asserted that part of its core proposal to all unions included the changes in the drug/alcohol program, with the exception of the addition of the three classifications from this bargaining unit. Additionally, the City proposed to modify the provisions for Union representatives to be present for testing, by changing it from an absolute mandate to allow for instances when a Union representative is unavailable and further delay could compromise the validity of test results.

The Union argued that the City's proposal was unnecessarily intrusive and that there was no evidence of a need for the changes.

### **Findings and Recommendation**

In consideration of the City's core proposals that have been adopted in the majority of the City's other labor agreements, most of the City's proposal is acceptable and reasonable. However, there was no compelling reason given for the inclusion of Chief Building Stationary Engineer, Stationary Engineers and Boiler Operators on the list of "safety sensitive" positions subject to random testing. Further, while the City's proposal that would modify the requirement for a Union representative to be present to allow for instances when a Union representative is unavailable and further delay could compromise the validity of test results is reasonable, it should be changed to mandate an attempt to consult the Union representative.

Therefore, the Fact-finder recommends the City's final proposal for amending the Drug/Alcohol Testing procedures with the following exceptions:

Paragraph 144 should read as follows:

*A Union representative shall be consulted before testing is administered unless a Union representative is unavailable when the test is to be conducted and any further delay will potentially compromise the test results.*

Paragraph 152 should include only the following "Safety Sensitive" positions:

*Water Plant Operator 1  
Water plant Operator 2  
Stationary Boiler Room Operator*

### **Issue: Wages**

#### **Positions of the Parties**

The Employer proposed a 2% general wage increase retroactive to April 1, 2009. Further, it proposed language to clarify exactly when the wage increases would take effect.

The Union proposed a complex formula which included raising the base wages based upon inflated wage rates reflecting increases mirroring the CPI from April 2006 through May 2009, then adding the 2% standard wage increase offered by the City in its pattern bargaining with other bargaining units, and then adding an additional amount for each classification as expressed in Union Exhibit D in its proposal.

## **Discussion**

As with most of the other recommendations contained herein, the City's proposal, based upon its pattern bargaining with its other unions, offered compelling internal comparables upon which to determine its reasonableness. On this issue the 2% wage increase may seem unreasonable to the *bargaining unit members that have not received an increase since 2006*, but the facts demonstrated that the Union bears considerable responsibility for the delay in completing negotiations.

## **Findings and Recommendation**

In consideration of the internal comparables offered by the City, and the other recommendations contained herein, the Employer's wage proposal and additional clarifying language is compelling.

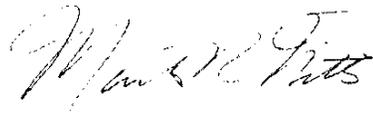
Therefore, the Fact-finder recommends the City's proposal for a 2% general wage increase and other clarifying language for this article.

## **Additional recommendations of the Fact-finder**

The parties expressed to the Fact-finder that they had reached agreement on a number of other issues during their negotiations. As noted above, the parties reached a number of tentative agreements at the hearing.

The Fact-finder has reviewed all the agreements reached by the parties during their negotiations, and finds them reasonable and fair to both of the parties and to the public.

Therefore, the Fact-finder recommends all agreements reached by the parties during their negotiations.



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Martin R. Fitts  
Fact-finder  
July 2, 2009

# Martin R. Fitts

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July 2, 2009

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Re: SERB Case No. 07- MED-07-0716  
City of Cleveland  
- and -  
Municipal Construction Equipment  
Operators Labor Council

Gentlemen:

With this letter I am sending overnight to each of you my Fact-finding Report in the above-referenced matter. By copy of this letter a copy is being sent via regular U.S. mail to SERB.

An invoice for my services will be sent to you under separate cover.

Sincerely,



Martin R. Fitts  
Fact-finder  
Direct Phone: 419-530-3542

Encls.

Cc w/Encls: SERB

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