

**IN THE MATTER OF FACT-FINDING
BEFORE GREGORY J. LAVELLE, FACT-FINDER**

EMPLOYMENT
RELATIONS BOARD

2008 JAN 14 A 10:23

IN THE MATTER OF FACT-FINDING BETWEEN

**FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL**

**CASE NO. ⁰⁷06-MED-09-0834
(Road Deputies and Detectives)**

Employee Organization

AND

**RECOMMENDATION OF THE
FACT-FINDER**

**OTTOWA COUNTY SHERIFF'S
OFFICE**

Public Employer

FOR THE EMPLOYEE ORGANIZATION:

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FOR THE PUBLIC EMPLOYER

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January 10, 2008

DESCRIPTION OF THE UNIT

The bargaining unit covered by this Fact-Finding Report consists of approximately thirteen (13) Road Deputies (including employees in the job classifications of Civil Deputy and Civil Deputy/Administrative Aide) and three (3) Detectives covered under a collective bargaining agreement between the Fraternal Order of Police Ohio Labor Council (hereinafter, the F.O.P.) and the Ottawa Sheriff's Office (hereinafter, Ottawa Sheriff) as described in the State Employment Relations Board Order of December 19, 1990 in Case No. 90-REP-0219.

BARGAINING HISTORY

This Fact-Finding Report relates to a collective bargaining agreement between the F.O.P. and the Ottawa Sheriff. The prior collective bargaining agreement had a duration from January 1, 2005 through December 31, 2007. The F.O.P. also represents employees in another bargaining unit consisting of Full-Time Dispatchers, Correction Officers, Corrections Corporals, Sergeants and Corrections Administrator Lieutenant.

Bargaining was conducted on June 8, 2007 and June 22, 2007. On July 16, 2007, a tentative agreement was reached. The tentative agreement, however, was rejected by the bargaining unit. An additional negotiation session was held on September 4, 2007. No agreement was reached and the parties agreed to proceed to Fact-Finding.

INTRODUCTION

Preliminary Matters:

The Fact-Finder was appointed on or about November 26, 2007. The parties thereafter mutually extended the period for negotiations and stipulated to the issuance of

the Fact-Finding Report on January 10, 2008. The Fact-Finding Hearing was ultimately held on December 27, 2007 with a telephone Pre-Hearing Conference being held on December 26, 2007. Copies of the current Collective Bargaining Agreements and the Position Statements of each party were timely received by the Fact-Finder as required under the Ohio Administrative Code.

The copy of the current collective bargaining agreement which was provided to the Fact-Finder appeared to have a discrepancy between what was shown in the Table of Contents and what was included in the document. The parties were requested to review the document and to clarify and confirm the proper contents of the collective bargaining agreement.

The parties were requested by the Fact-Finder to provide copies of tentatively agreed items, including sections from the prior collective bargaining agreements which the parties had agreed would remain unchanged. Newly negotiated agreed items were provided by the parties.

The parties, in their Position Statements, indicated that there were four (4) issues which remained unresolved by the parties; Article 22 – Uniforms and Equipment, Article 24 – Wages and Compensation, Article 32- Call-In Time and Article 45 – Pager Pay. The parties reviewed and agreed that the compilation of the Fact-Finder with respect to the items agreed as unchanged in the collective bargaining agreement was correct, except that an additional tentative agreement had been reached with respect to Article 19, Section 19.1 and except that Article 28, Section 28.12A was to remain unchanged. The parties further confirmed the provisions which were to be considered a part of the appendices of the collective bargaining agreement.

The parties, after confirming the agreed and outstanding items, requested mediation. In discussions between the Fact-Finder and the Ottawa Sheriff, it was discovered that the Uniform Allowance Policy was to be Administered such that the cost of replacing damaged uniforms was not to be counted against the employees' Uniform Allowance. The parties agreed to retain the present level of uniform allowance and to amend the language of the Uniform Allowance stated in the Memorandum of Understanding of the parties to add clarifying language stating:

It is understood that the costs of replacing damaged uniforms shall not count against the uniform allowance.

No other progress was made through mediation and the parties proceeded to hearing on the remaining three (3) issues; Article 24, Wages, Article 32- Call-In Time and Article 45 – Pager Pay.

Hearing in Chief:

The Fact-Finding Hearing was conducted pursuant to the Ohio Collective Bargaining Law and the Regulations of the State Employment Relations Board on December 27, 2007 at the Ottawa County Courthouse the City of Port Clinton, Ohio. The parties were given full opportunity to present testimony and documentary evidence in support of their respective positions.

In making the recommendations in this report, consideration was given to the following criteria listed in Rule 4117-9-05(K) of the State Employment Relations Board:

- (1) Past collective bargaining agreements between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing

comparable work, giving consideration to the factors peculiar to the area and classification involved;

- (3) The interest and welfare of the public, the ability of the Public Employer to finance and administer the issues proposed and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the Public Employer;
- (5) The stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment

Representing the parties were the following individuals listed after their respective parties:

For the Ottawa Sheriff:

Lorri Torriero, Esq.
Pam Courtney
Bob Bratton
Randy Reismaier

Attorney/Advocate
Human Resources Director
Sheriff
Chief Deputy

For the F.O.P.

Jackie Wegman
James L. Karr
Doug St. Clair

Staff Representative/Advocate
Road Representative
Road Representative

DISCUSSION OF THE ISSUES

ARTICLE 24 – WAGES

POSITION OF THE F.O.P.

The F.O.P., in face-to-face negotiations, had last proposed wage increases of five percent (5%) in each year of the collective bargaining agreement. With the submission of the Position Statement, the F.O.P. modified its proposal to seek wage increases of four point five percent (4.5%) in each year of the collective bargaining agreement.

The F.O.P. pointed out that the other unit represented by the F.O.P. received more than the three percent (3%) per contract year offered by the Ottawa Sheriff. The F.O.P. further pointed out that according to the comparables offered by the Ottawa Sheriff, the Road Deputies at the top level with Ottawa County, earn seven hundred dollars (\$ 700.00) less per year than deputies of comparable counties who are at the top level of their respective wage scales.

The F.O.P. further argues that Ottawa County, with its tourist population and Attractions, its nuclear power plant and its ten (10) terrorism targets is not like the other counties which the Ottawa Sheriff had cited as comparables because of their similar populations. The F.O.P. argued that Geauga County where top level deputies earn over fifty-six thousand dollars (\$ 56,000) per year would be a proper comparable.

The F.O.P. pointed out that the average police unit in the State of Ohio received average wage increases of three point two three percent (3.23%) in 2006 compared to the three percent (3%) received by this particular bargaining unit. The F.O.P. also pointed out that average county employers granted wage increases of over three percent (3%) in 2006.

The F.O.P. claims that this is not an “inability to pay” case, but is instead an unwillingness to pay” case, pointing out that the County had over 2.6 million dollars in unreserved and undesignated funds according to the Balance Sheet for Governmental Funds as of the end of 2005. The F.O.P. pointed out that the Sheriff had returned funds to the County in past fiscal years. The F.O.P. also argued that funds were available to the County under Ohio Revised Code Section 4913.65 due to its operation of a “countywide wireless enhanced 911”.

POSITION OF THE OTTOWA SHERIFF

The Ottawa Sheriff points out that a tentative agreement had been reached with the bargaining unit and further points out that no unit is receiving significantly over three percent (3%) per contract year. The Ottawa Sheriff argues that the F.O.P. has not cited any justification for an additional wage increase.

The Ottawa Sheriff points out that although there was a surplus in 2006, there is a projected deficit of \$ 300,000 for 2007.

DISCUSSION OF THE WAGES ISSUE

The representatives of the parties did an exceptional job in advocating their respective positions. Comparables were presented in support of the various positions. One problem with “comparables” is that they can be “cherry picked”. They can also be viewed as supporting alternate propositions. For example, using the comparables cited by the Ottawa Sheriff, it could be argued that the bargaining unit is both overcompensated and undercompensated, depending on what seniority level is considered.

There are two (2) facts which clearly emerge as comparables. The fact that the other F.O.P. unit with the Ottawa Sheriff received a package that slightly exceeded three percent (3%) and the fact that the wage schedule for the bargaining unit is out of step with other similar bargaining units. Under this collective bargaining agreement, employees reach the top level within twelve (12) months unlike in other counties where employees reach the top level in several years. In addition, the difference between the entry level and the maximum level is quite small, less than one thousand dollars (\$ 1,000.00) not counting Longevity Pay. As a result, the new hires could be considered to be overcompensated by as much as seven thousand dollars while the long-term employees are relatively undercompensated.

RECOMMENDATION

Taking into account the problems with the wage scale and the fact that the other F.O.P. bargaining unit received slightly more than a three percent (3%) in terms of the cost to the Ottawa Sheriff, the package recommended is, in the first year, more than that offered by the Ottawa Sheriff with respect to the top rate and lower than that offered by the Ottawa Sheriff with respect to start and six (6) month rate. With respect to the second and third years, and for the future, the total cost of the wage package will, depending on turnover, approach the cost of the package proposed by the Ottawa Sheriff and may even be less costly than the proposed package. There is also recommended language to make sure that any employee not at the top of the scale at the time of ratification does not lose out as a result of the change in wage scale. The wage scale should be fixed at some time. This appears to be as good a time as any. Article 24, Section 24.1 is recommended to read as follows:

ARTICLE 24
WAGES AND COMPENSATION

SECTION 24.1 Employees in the bargaining unit consisting of Road Deputies and Detectives will be paid based on the following base hourly rates.

	Effective January 1, 2008	Effective January 1, 2009	Effective January 1, 2010
Starting Patrol Non-Certified	18.01	18.01	18.01
After 6 months service	19.28	19.28	19.28
After 12 months service	19.99	20.19	20.59
After 24 months service		20.59	21.21
Starting Patrol Certified	18.84	18.84	18.84
After 6 months service	19.77	19.77	19.77
After 12 months service	20.01	20.21	20.61
After 24 months service		20.61	21.23
Civil Deputy	20.01	20.61	21.23
Civil Deputy Administrative Aide	20.01	20.61	21.23
Detective	22.11	22.77	23.45

Notwithstanding the foregoing, no employee within the bargaining unit at the time of ratification shall receive less than an increase of three percent (3%) each contract year.

ARTICLE 32 – CALL IN TIME

POSITION OF THE F.O.P.

The F.O.P. seeks to increase Call-In Time from two (2) hours to four (4) hour. The F.O.P. contends that a two (2) hour minimum payment is not sufficient to compensate employees the disruption of being called in.

POSITION OF THE OTTOWA SHERIFF

The Ottawa Sheriff proposes that the minimum pay for being called in should remain two (2) hours. The Ottawa Sheriff further points out that 63.3% of Sheriff contracts have a two (2) hour minimum and asserted that the F.O.P. has not provided any justification for the change.

RECOMMENDATION

Under the procedures of the Ottawa Sheriff, employees drive county cars and are compensated from the time they announce that they are “in service” when leaving from home to the time they announce that they are “out of service” upon returning home. Since the bargaining unit is made up of full-time employees, it is likely that the Call-In Pay would be at overtime rates. No data could be provided as to the number or percentage of times employees would actually derive benefit from the change by putting in at least two (2) but less than four (4) hours on a Call-In.

In light of the lack of specific cost and benefit data and in light of the difficulty of a small employer like the Ottawa Sheriff having to deal with two (2) different Call-in-Pay provisions, the change recommended by the F.O.P. is not recommended.

PAGER PAY

POSITION OF THE F.O.P.

The F.O.P. proposes that the Pager Pay for Road Deputies be increased from five cents (\$.05) per hour to twenty-five dollars (\$ 25.00) per week. The F.O.P. further proposes that Detectives receive an additional twenty-five dollars (\$ 25.00) for weeks in which they are On-Call.

The F.O.P. argues that employees who have pagers and who are on-call suffer a loss of liberty and should be compensated under the terms of the Fair Labor Standards Act. The F.O.P. contends that money is available to the County under Ohio Revised Code Section 4931.65 since the County provides "countywide wireless enhanced 911".

POSITION OF THE OTTOWA SHERIFF

The Ottawa Sheriff proposes no change in the Pager Pay provision, indicating that, at least with respect to the Road Deputies, the employees are generally unrestricted in their activities. The Ottawa Sheriff points out that no Road Deputy has been disciplined for failing to have answered a page. The Ottawa Sheriff complains that the additional five cent (\$.05) given to the other F.O.P. bargaining unit was given to bring parity and that the employer should not be allowed to be "whip-sawed" between by the bargaining units.

RECOMMENDATION

Part of the F.O.P. argument is the claim that funds are available to pay for that benefit. It was unclear from the evidence whether such funds were actually available. Funds being available, further does not entitle employees to additional compensation.

Consistency is also a concern. Having two (2) sets of employees represented by the same the same Employee Organization receive grossly disparate compensation for the same task is ill-advised, even without considering the issue of having a small employer having to deal with two different policies for the same benefit.

For the above reasons, the request for additional Pager Pay must be denied. The same type of argument, however, does not apply to the On-Call Pay for Detectives. Being On-Call is significantly different than just carrying a pager. While the regulations under the FLSA give no real “bright line” definition as to which “On-Call” activities are to be compensated, significant factors are the required response time, the degree to which the employee is free to engage in personal pursuits and any agreements that may exist between the employees and the employer. Owens v. Local No. 169, 971 F. 2d 347 (9th Cir., 1992). There are factors which would mitigate toward On-Call Time being compensable under the FLSA. The determination of whether On-Call Time is compensable, however, is very fact-specific and there are insufficient facts on the record by which to make a proper determination. One of the key factors in the determination, however, is the agreement between the employees and the employer. In other words, if there were factors leading to a high level of compensation, the Wage and Hour Division may give some deference to the agreement of the parties. Having some level of compensation for On-Call Time, therefore, can be seen as a hedge against a finding of a higher level of liability.

It is clear that there are real differences in the level of restriction on activities applicable to On-Call Detectives as compared to the level of restriction on the activities of persons who are simply required to carry a pager. Some level of compensation to the

On-Call Detectives appears to be a good idea for the interests of the employees and the interests of the employer.

The Fact-Finder recommends a premium of sixteen dollars (\$ 16.00) per week as On-Call Pay the Detectives who are On-Call. This recommendation has a certain symmetry in that it amounts to a (\$.05) per hour cost when spread over the bargaining unit. Sixteen dollars (\$ 16.00) a week equals forty cents (\$.40) per hour. Since only two (2) of sixteen (16) employees or 1/8 of the bargaining unit would be receiving the benefit in any given week, the cost spread over the bargaining unit would match the “extra nickel” given to the other unit. The language of the On-Call Pay provision is recommended to read:

ARTICLE 45
PAGER AND ON CALL PAY

SECTION 45.1 All employees of the bargaining unit who are required to carry a pager shall receive a stipend of \$.05 per hour for wearing a pager twenty-four hours a day/seven days a week.

SECTION 45.2 Detectives scheduled for weekly on-call shall receive an additional sixteen dollars (\$ 16.00) for the week.

UNIFORM ALLOWANCE

The parties have agreed to incorporate the prior Memorandum of Understanding into the collective bargaining agreement with the additional approved language. Simply incorporating the language of the prior Memorandum of Understanding into the collective bargaining agreement, however, would lead to some confusion since the Memorandum of Understanding specifically refers to the prior collective bargaining agreement. Merely changing the dates in the Memorandum would lead to possible

confusion as to whether the provision is intended to survive this recommended collective bargaining agreement. The parties appear to intend that the language of the Uniform Allowance provision become a permanent part of the relationship of the parties. Therefore, for the sake of clarity, the following is the recommendation of the Fact-Finder with respect to the Uniform Allowance provision:

ARTICLE
UNIFORM ALLOWANCE

The employer will set aside a uniform allowance of \$ 650.00 a year for each employee, dates to be established by the employer. The employee will be responsible to provide a request form with items to be ordered, amount of order and location the order will be placed. This will be submitted to the employer for approval and to determine if the employee has money available on his/her uniform allowance and it meets the purchasing criteria. This will be done in a timely manner. Any emergency orders may be submitted after the close out date on an emergency replacement order only, with the approval of the employer or designee. The employee will be held accountable to make sure that uniforms are in good repair. A committee will be established to include, but not be limited to, the employer or designee, and one member from each division of the bargaining unit. The committee will review all ordering and any disputes in the ordering process. All uniforms and/or equipment will still remain property of the employer, and will be turned in on termination of employment with the sheriff's office. The probationary employee's first order will not be subject to this uniform allowance, and will not be taken off the yearly amount allowed. It is understood that the costs of replacing damaged uniforms shall not count against the uniform allowance.

SUMMARY

This cost of this recommendation, over the three (3) year duration of the collective bargaining agreement, should be practically identical to that of the slightly over three percent (3%) package given to the other F.O.P. unit. The recommendation corrects some obvious problems with the wage scale while bringing equity and predictability to the On-Call compensation of the Detectives. The Fact-Finder was impressed with the professionalism of both parties and the obvious good relationship they have enjoyed while providing the public with outstanding service and urges ratification.

Respectfully submitted,



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S E R V I C E

A copy of the within Recommendation of the Fact-Finder was sent to the F.O.P. c/o Jackie Wegman, 4854 Waterbury Lane, Maumee, Ohio 43537 and to the Ottawa Sheriff, c/o Lori F. Torriero, Esq., Downes, Hurst & Fishel, 400 South High Street, Suite 200, Columbus, Ohio 43215 by both overnight mail and email this 10th day of January, 2008.



GREGORY J. LAVELLE