

FACTFINDING REPORT

STATE EMPLOYMENT  
RELATIONS BOARD

STATE OF OHIO

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STATE EMPLOYMENT RELATIONS BOARD

August 15, 2008

In the Matter of:

Perrysburg Township Trustees )

and )

Ohio Patrolmen's Benevolent Association )

Case No. 07-MED-09-0992

Sergeants

APPEARANCES

For the Township:

Gary McBride, Attorney  
John G. Hrosko, Administrator  
Edward J. Stribny, Police Chief

For the Union:

Marilyn Widman, Legal Counsel  
J. Matt Gazarek, Sergeant

Factfinder:

Nels E. Nelson

## BACKGROUND

The instant case involves Perrysburg Township and the Ohio Patrolmen's Benevolent Association. The township is located in Wood County and had a population of around 14,000 in 2000. The Ohio Patrolmen's Benevolent Association represents three bargaining units. The command unit includes five sergeants. The non-command unit consists of 16 patrol officers. The remaining unit consists of the dispatchers. This report involves the sergeants and a separate report focuses on the patrol officers. The dispatchers reached an agreement with the township.

The parties are negotiating a successor agreement to the one that expired December 31, 2007. Pursuant to this, the parties agreed on October 26, 2007, to engage in Interest Based Bargaining and adopted ground rules, including provisions dealing with a transition from IBB to traditional bargaining. Between that date and February 15, 2008, the township held numerous joint and separate IBB bargaining sessions with the patrol officers' and sergeants' bargaining units. However, on February 15, 2008, the union notified the township that it wished to transition to traditional bargaining.

The parties continued negotiations using the traditional bargaining process. After several meetings, the township and sergeants reached a tentative agreement. However, on March 14, 2008, the union informed the township that the sergeants' unit had rejected the 12-hour work schedule, which was an important element of the agreement. Since the revised work schedule would have to be implemented in both units, the parties declared impasse.

The Factfinder was notified of his appointment on April 29, 2008. The hearing was held on June 13, 2008. The parties subsequently agreed that the report should be issued on August 15, 2008.

The recommendations of the Factfinder are based upon the criteria set forth in Section 4117-9-05(k) of the Ohio Administrative Rules. They are:

- (a) Past collectively bargained agreements, if any, between the parties;
- (b) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (c) 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;
- (d) The lawful authority of the public employer;
- (e) The stipulations of the parties;
- (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed upon dispute procedures in the public service or in private employment.

## ISSUES

The parties submitted two issues to the Factfinder. For each issue, he will set forth the positions of the parties and summarize the arguments and evidence presented by them in support of their positions. The Factfinder will then offer his analysis, followed by his recommendation.

### 1) Article 11- Hours of Work and Overtime, Section 11.4 - Active Pay

Status - The current contract provides that active pay status for purposes of computing overtime includes hours worked, paid sick leave, paid injury leave, bereavement leave, vacation, and holidays. The union wishes to include compensatory time as time in active pay status. The township opposes the union's demand.

Union Position - The union argues that comp time should count as time worked. It claims that “for the weeks in which an employee is scheduled to work 32 hours, he may be called in to cover a shift vacancy, work an ‘extra’ shift, and not be paid overtime for such hours.” (Union Pre-Hearing Statement, page 3)

The union contends that comparable data support its position. It points out that six of ten nearby departments include comp time as hours worked for the purpose of calculating overtime. The union states that under Section 124.382 of the Ohio Revised Code, an employee is eligible for sick leave credit for comp time and notes that the township’s previous attorney sent a letter to the township telling it that active pay status includes comp time. It adds that 29 CFR 553.22 defines comp time as “paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required.”

The union offers an alternative proposal. It suggests that active pay status include sick leave, vacation, holidays, and comp time but exclude injury leave and bereavement leave. The union indicates that this would correspond to the situation in Lake Township, Northwood, and Wauseon.

Township Position - The township argues that counting comp time as hours worked is inconsistent with Section 11.5, which prohibits the pyramiding of overtime, and Section 11.4, which bans the use of comp time if it creates additional overtime. It suggests that the union’s position is also contrary to the provisions of the Fair Labor Standards Act.

The township rejects the union’s claim that the ORC requires comp time to be included in calculating an employee’s eligibility for overtime. It acknowledges that Section 124.383 of the ORC and the township’s former attorney indicate that for

purposes of sick leave entitlement active pay status includes comp time. The township claims, however, that pursuant to the principle of “expressio unius est exclusio alterius,” comp time is not counted toward eligibility for overtime.

The township contends that the contracts of other departments support its position. It states that in every case where comp time is included in the overtime calculations, other time that it counts as time worked is excluded. The township reports that among the departments that include comp time in the overtime calculations Northwood excludes funeral leave, jury leave, injury leave, and military leave; the Lucas County Sheriff’s Department excludes sick leave; the Ottawa County Sheriff’s Department excludes all forms of paid time off; and Toledo excludes “unworked paid time off.” It stresses that not one collective bargaining agreement provides all of the time off it counts plus comp time.

Analysis - The Factfinder cannot recommend the union’s demand that comp time be counted as hours worked for the purpose of calculating overtime. First, a careful examination of the data for comparable departments does not support the union’s demand. While a number of departments do count comp time, those departments exclude from active pay status various kinds of paid time off that is included in active pay status in the township.

Second, the union’s demand appears to run contrary to the purpose of comp time. The FLSA allows public employers to offer comp time in lieu of pay for overtime hours. Counting comp time earned in one time period as hours worked in another time period generates additional overtime liability for an employer.

Finally, the data submitted by the township for 2007 indicate that three of the five sergeants earned \$11,835 or more of overtime. Granting the union’s demand would

increase the sergeants' overtime and would likely trigger demands by other bargaining units to count comp time as hours worked.

Recommendation - The Factfinder recommends no change in the current contract language.

2) Article 11 - Hours of Work and Overtime, Section 11.4 - Overtime in Short Weeks - The current contract establishes an annual work schedule of 2016 hours, consisting of 44 weeks of 40 hours and eight weeks of 32 hours and requires overtime pay after 40 hours in a workweek. The union proposes that overtime be paid for work beyond 32 hours during those weeks when sergeants are scheduled for four days of work. The township opposes the union's demand.

Union Position - The union argues that employees are entitled to overtime when they work more hours in a week than they are scheduled to work. It points out that during short weeks employees who are called in to cover a shift vacancy or to appear in court are not paid overtime. The union further complains that employees working a 32-hour week cannot be used on some of the work funded by grants when the grant provides for the work to be done on overtime.

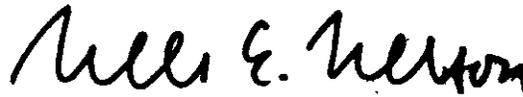
Township Position - The township rejects the union's demand. It states that the sergeants' unique schedule of periodic 32-hour weeks gives rise to the union's demand for overtime after 32 hours during those weeks. The township indicates that many years ago it agreed to the desires of police officers to have an occasional four-day work week so that days off would move and everyone would enjoy the full range of days off. It stresses that no contract provides for overtime after 32 hours.

The township recognizes the union's concern about the ability of sergeants to work on grants during their short weeks. It offers to permit them to work on grants at

time and one-half provided the grant allows for it. The township offers to incorporate this arrangement in a letter of understanding.

Analysis - The Factfinder must deny the union's demand for overtime after 32 hours during a sergeant's short week. The 2016-hour annual work year and the eight four-day work weeks enjoyed by the township's police officers may be unique. This arrangement was apparently agreed to by the township in response to the police officers' demand for more time off to be with their families. The union's demand for overtime appears to be an attempt to convert the agreed-upon time off to extra cash and is contrary to the intent of the provision. Furthermore, the demand for overtime after 32 hours of work in a week appears to be a unique demand and must also be denied on that basis.

Recommendation - The Factfinder recommends no change in the current contract language.



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Nels E. Nelson  
Factfinder

August 15, 2008  
Russell Township  
Geauga County, Ohio