

2009 MAR 30 P 1:10

**THE STATE EMPLOYMENT RELATIONS BOARD
FACT FINDING REPORT
MARCH 27, 2009**

TUSCARAWAS COUNTY SHERIFF,	}	
	}	CASE NO. 08-med-09-0885/0886/0887
EMPLOYER,	}	
	}	
and	}	FACT FINDER: JOSEPH W. GARDNER
	}	
FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.,	}	<u>FACT FINDING REPORT</u>
	}	
UNION	}	

APPEARANCES

For the **EMPLOYER:**

MICHAEL L. SEYER, *Representative*
 JONATHON NOE, *Clemans, Nelson &
 Associates*
 MATT JUDY, *County Auditor*
 TRACEY JUDY, *Executive Assistant*
 LT. DOUG GAUDY, *Jail Administrator*

For the **UNION:**

WES ELSON, *Representative*
 VONDA HAMILTON, *Corrections Officer*
 MATT STEIN, *Deputy*
 MIKE SNIDER, *Deputy*
 LARRY CANNON, *Sergeant*

INTRODUCTION

The parties reached impasse and chose fact-finding and this fact finder on November 19, 2008. The parties agreed to extend the date for fact finding, however, the "Extension Agreement" first signed by the Union representative was modified by the employer's representative. The extension agreement was admitted into evidence as an exhibit.

The parties agreed that the fact-finding conference be held on March 13, 2009 at the Tuscarawas County Sheriff's Department. On that date, the parties and this fact-finder

convened. The parties participated in mediation, and although no issues were resolved, this fact-finder learned relevant information that aided this fact-finder to understand the issues facing the parties.

The fact-finding conference was opened with the following issues:

1. Wages
2. Hours of Work/Overtime (Comp Time)
3. Hospitalization
4. Uniform Allowance
5. Extra Duty Assignments
6. Health and Safety
7. Duration of Collective Bargaining Agreement

Wage rate was the first issue discussed. Important financial evidence was initially presented by both sides and that evidence was considered for all subsequent financial issues.

Both parties introduced organized “notebooks” containing exhibits relating to the issues. These “notebooks” were referred to in the fact finding conference and were reviewed while preparing this fact finding report.

The representatives of both parties were well-prepared.

The parties presented evidence, both testimonial and documentary. Both parties were given the opportunity to cross-examine witnesses and challenge any documentary evidence. Both parties were given ample opportunity to present arguments, and both representatives provided persuasive arguments.

This fact-finder has taken into consideration the following factors as set forth in O.R.C. §4117.14(G)(7) and O.A.C. §4117-9-05(K):

- (1) Past collectively bargained agreements, if any, 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 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) Any 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.

FINDING OF FACTS

There are three bargaining units. Unit 1 consists of approximately twenty (20) individuals employed as road patrol and process servers. Unit 2 consists of approximately fourteen (14) individuals employed as road patrol sergeants and correctional officer sergeants. Unit 3 consists of approximately twenty-nine (29) individuals employed as corrections officers. In reviewing the budget worksheet prepared by the Tuscarawas County Auditor, the auditor presented a five (5) year projection of the county's financial picture. For those future years, the estimates are considered opinions by an expert witness since those years have not yet occurred.

The general fund cash balance as of January 1, 2009 shows a loss of \$977,970.70. The auditor testified that because there is a deficit, specific services that were provided by the County government have been discontinued. Since state law prohibits deficits, other departments within the county are required to spend fewer monies.

The auditor further testified that the Union demand will increase the amount of expenses by $\frac{3}{4}$ of a million dollars (\$750,000.00). The auditor testified that if there is an increase in one department, to wit, the Sheriff's Department, then the monies will have to be taken away from another department.

The Union, on cross examination, stated that these are projections, and there is no scientific basis for the projections. The Union also pointed out the total net assets for the 2005-2006 year increased by five million dollars (\$5,000,000.00). The Union further agreed that there will be \$4,400,000.00 of funds in the county on January 1, 2009. Furthermore, the Union representative pointed out that the local economy is doing well with tourism and it has created over \$3,000.00 in tax revenue.

When the Union made its presentation, it stated that it wants to bring its wages in parity with Guernsey County and bring up its rate above the state average. The Union argues that the base rate of the employees is below the state average.

The Union explained that in other comparable counties, the employees in those comparable counties have their basic wage rate bolstered by other fringe benefits and perks. Therefore, the bargaining unit employees in Tuscarawas County Sheriff's Office must rely predominantly on their basic wage rate for compensation. The overtime opportunities are limited for these bargaining units, and the Union members must depend upon the base salary. The Union representative pointed out that there is no shift differential, no pension pick up, no increase in longevity since 2002 and no other fringes or perks that employees in the adjoining counties enjoy along with their wages.

The Union representative further proved that the compensation for police officers in adjoining cities, such as Dover and New Philadelphia, receive well more than the law enforcement officers of Tuscarawas County.

The evidence shows that the law enforcement offices in Tuscarawas County do the same work as those in adjoining counties and as those in nearby cities, however, are paid a significantly lower wage rate, even though the work is the same. A review of the comparables shows that the bargaining unit members earn less than those in the comparables produced by the Union.

The Union argued that the current employees must now do more work with the same amount of people.

The representative of the Employer defended that there is an inability to pay.

During the terms of the last contract, all employees have incurred additional healthcare costs with zero increase in benefits.

ISSUE 1: WAGES

DISCUSSION

The Union is requesting \$1.25 adjustment, plus 3% per year for each three (3) years of the contract. The Union states that their compensation is under or at the average for the state, and, for each bargaining unit it is below most of the comparables. The adjustment and the increase will put the employees in parity with neighboring Guernsey County and other comparable counties. The Employer has proposed to maintain the current wage deal for the calendar year of 2009 and proposes a wage reopener to commence after November 15, 2009, for the wage rate in 2010, and another reopener in 2010 for the 2011 fiscal year.

With all things being equal, the wage demands of the Union are reasonable. However, all things are not equal. The nation is in a recession. The Employer appears to have less money now than it had in past recent years.

Maintaining the County Jail is a mandatory duty of the sheriff. Police protection is a serious duty of the sheriff. Those other county services cut by the county commissioners may or may not be mandatory duties. Mandatory duties or services are relevant to whether the Employer has ability or inability to pay. In order to keep the county operations going, some departments and services had to be cut. Although we debate the funding source as the Sheriff or the Commissioners, the ultimate funding source is the taxpayers. There is little evidence that the tax base will increase in the short term or in the long term. There is no evidence that there will be a tax increase.

The adjustment of \$1.25 will bring the wage rate of the employees close to parity with adjacent and comparable counties.

Reopeners should be given to both the Union and the Employer during the term of this contract. Either party can then quickly address wage issues. Retroactivity is also discussed in Issue No. 7.

The recommended adjustment in wages is an attempt at parity with comparable counties, and the reopeners allow for quick financial adjustments depending upon the facts within the next two years. If the financial status of the county improves, then the employer should readily consider wage increases. However, if the financial condition is static or worsens, then concessions or pay cuts must be expected.

RECOMMENDATION

There will be an upward initial adjustment of \$1.25 per hour for the 2009 wage scale for all bargaining unit members. This increase of \$1.25 per hour shall be retroactive to January 1, 2009. On November 15, 2009 and on November 15, 2010, either party may reopen the contract and seek a modification of wages or wage rate or both.

ISSUE 2: HOURS OF WORK/OVERTIME (COMPENSATORY TIME)

DISCUSSION

The current Collective Bargaining Agreement allows a maximum accrual of forty (40) hours of compensatory time. The Union proposes increasing the maximum accrual of compensatory time from forty (40) hours to one hundred and twenty (120) hours. The Union argues that during the term of the collective bargaining agreement, the Employer has permitted accrual of overtime in excess of forty (40) hours on specific instances.

The Employer has countered with testimony that “comp time” that exceeds forty (40) hours is quickly addressed to keep it to a minimum. Because of the 24/7 aspect of the Sheriff’s Office, there will be times when the Management will be forced to exceed the forty (40) hour maximum. There does not appear to be a situation where a significant amount of comp time has occurred over the forty (40) hour maximum.

The employees want to accumulate so they can take time off. The Union has made comparisons that include all sheriffs’ offices in the Appalachian region and east central region of Ohio, including all adjacent counties. With the exception of Belmont County, all comparisons permit an accrual in excess of forty (40) hours.

The Union argues that the additional compensatory time is reasonable and will not create an undue hardship for the Employer. The Employer argues that, in the 24/7 operation, the

granting of “comp” time in many instances causes additional overtime while maintaining staffing levels.

The main argument by the Employer is that if additional time off is allowed, the county must call in people on overtime. This will increase the cost for the county and, ultimately for, the taxpayers.

RECOMMENDATION

This fact-finder recommends that the accrual of “comp time” be limited to the forty (40) hour maximum. It is recommended that the contract language remain the same.

ISSUE 3: HOSPITALIZATION

DISCUSSION

The Employer proposes removing the sixty dollar (\$60) maximum contribution toward the monthly premium for healthcare. The Union wishes to retain the language, which specifies the dollar amount that employees contribute each month toward healthcare costs. That payment would remain at \$60.00 in 2009, increasing to \$70.00 in 2010, and \$80.00 in 2011.

The Employer argues that there are no caps in most of the current Collective Bargaining Agreements and there is no cap in the non-union employees plan. The history was that the non-union members had a \$60.00 cap. The Union then demanded a \$60.00 cap. For parity, the Employer states that the Union was given a \$60.00 cap. Now, the county removed the cap for non-union employees. The Employer believes it is parity that the Union employees agree to remove the cap. The Employer states that only two (2) unions are now left with caps.

The Employer states that with a uniform system, it is unlikely that the Employer will increase healthcare costs. If the Employer raises healthcare costs for the Union, it will also be an

increase in healthcare costs on themselves as non-union employees. The Employer proposes uniformity in the healthcare coverage, and desires that this unit does what the other units do.

The Union argues that the Employer could unilaterally change the amounts to be paid by the employee, without employee input. Historically, the Union gave up the right to bargain on certain healthcare benefits. When costs went up, the employer unilaterally took away those benefits without Union input.

If the Employer has unilaterally reduced health insurance benefits before, it is likely that the Employer will take unilateral action again.

This Employer and Union do not have a management/labor committee on healthcare. The forming of these committees has been vital in curbing costs internally and in “shopping” for healthcare underwriters. These committees also educate all employees as to the specifics of how each employee can help control healthcare costs.

RECOMMENDATION

The contract language will remain the same with the specific cap of \$60.00 in 2009, \$70.00 in 2010, and \$80.00 in 2011.

The contract will contain the following section:

The Employer and Unions shall form a management/labor healthcare committee with three representatives from the Employer and three representatives, one from each Union. The purpose of the committee shall be to obtain the best health coverage for the best price. The committee shall also have duties, decided by the committee, including but not limited to identifying any local causes of premium increases and how to lower those premiums, “shopping” for competitive healthcare providers, and educating the employees as what each person can do to help control healthcare costs. The committee will promulgate rules for meeting times, procedures and subcommittees.

ISSUE 4: UNIFORM ALLOWANCE

DISCUSSION

The Employer proposes to maintain the current annual uniform allowance and to replace the current payment system with a reimbursement plan. The Employer argues that this should give the sheriff greater control over purchases made by the employee and will ensure that the items purchased are law enforcement related.

The Union wants to retain the current process of a check being issued to the employee who is then responsible for ordering and maintaining uniforms. No increase in the amount is proposed.

There is no evidence that the employees are not maintaining their uniforms properly. There is no evidence that there have been any discipline issues. The only difference is that with the current way of payment, there must be some trust between the Employer and the employee. The evidence is clear that there has been no breach of this trust. This current system seems to be working fine and does not require change for any financial reason.

RECOMMENDATION

It is recommended that the current language in the Collective Bargaining Agreement regarding uniform allowance remain the same.

ISSUE 5: EXTRA DUTY ASSIGNMENTS

DISCUSSION

The Union complains that there are many details which require the services of a law enforcement officer but are worked by reserved deputies instead of the bargaining unit members. These duties are courthouse security, community corrections, litter crew, etc. There are also

details where reserves are working for private concerns, which could be staffed by full-time bargaining unit members.

The Union states that these reserves are doing bargaining unit work but at a lesser rate. The sheriff's office controls the venue and events that are worked. The details are administered through the sheriff's office and the sheriff's office assumes responsibility. The sheriff has the ability to discipline these reserves, and these reserves are required to follow the rules and regulations of the sheriff's office.

The Union argues that the reserve officers receive preference over full-time employees and that this is unfair and inequitable. The Union states that full-time employees are not being rewarded for their loyalty and commitment to the sheriff's office. The Union also argues that the reserve deputies should be used for the purpose of enhancing the functions of the sheriff's office. Instead, the reserve deputies are used to fill details which could be, and should be, for the full-time employees.

The FOP proposes that these details, on a rotation basis, be first offered to full-time employees. The Union further states that the minimum rate charged should be equal to the current rate, adjusted yearly, and paid for top step deputies.

The representative for the sheriff has objected to this issue. The representative states that issues of outside employment are not matters of mandatory bargaining but are permissive bargaining issues. The Ohio Revised Code, § 4117.14(G)(1) sets forth those subjects appropriate for submission to final offer settlement proceedings. In order to be submitted for resolution, the matter must be either, a) one mutually agreed upon by the parties for resolution or, b) an issue subject to Collective Bargaining as per §4117.08 and upon which the parties have not reached an agreement.

According to case law, the issue of “outside employment” is not a mandatory subject of collective bargaining under Ohio Revised Code § 4117. *Fraternal Order of Police, Ohio Valley Lodge #112, Plaintiff-Appellant, v. Clermont County Sheriff, Defendant-Appellee*, 1987 OH App. LEXIS 9298. This case is in the Twelfth (12th) Appellate District. Although the *Clermont County* case is in another appellate district than is Tuscarawas County (5th Appellate District), the *Clermont County* case is persuasive authority in this case.

The Seventh District Court of Appeals has accepted the rationale of the 12th District Court of Appeals in the *Clermont County* case. *Jefferson County Sheriff, et al., Petitioners-Appellants, v. Ohio Patrolmen's Benevolent Association, Respondent-Appellee*, 2006 OH App LEXIS 961; 2006 Ohio 1055. In the *Jefferson County Sheriff* case, the Court of Appeals allowed bargaining on a non-mandatory subject of collective bargaining because the Union representative in that case failed to object. In this Tuscarawas County case, the Employer's representative timely objected to the bargaining.

RECOMMENDATION

The representative for the Employer timely and clearly objected to this issue as a non-mandatory issue of bargaining. Since this Employer did not agree to bargain on this subject, and since it is not a mandatory issue of bargaining, this fact-finder has no authority to make a recommendation on this issue. Therefore, it is recommended that this issue not be a subject in the Collective Bargaining Agreement.

ISSUE 6: HEALTH & SAFETY

DISCUSSION

The Union desires to have language in the contract that currently does not exist that gives employees the right to grieve any safety conditions. The Union states that this will help ensure

safe equipment and working conditions by requiring both employee and employer to report and correct unsafe equipment or conditions. The Union states that the members have experiences reporting unsafe conditions, with no action being taken. An example is a shotgun rack that has gone unrepaired for two (2) years. Another argument is about tires being unsafe for the roads.

The Employer rejects this proposal because the sheriff has a detailed policy in the personnel policy manual. The Employer states that a different language regarding this issue is repetitive and unnecessary. The Employer also states that this will cause excessive grievances. Evidence was taken regarding a cracked windshield, worn tires, and a gun rack that has not been repaired for approximately two (2) years.

The employees in these bargaining units risk their lives everyday to protect us. Most law enforcement officers are cooperative and obedient to the chain of command. This fact-finder is not persuaded that these employees would abuse the grievance process.

At times, equipment or working conditions become unsafe through no one's fault. Without the ability to file a grievance, the officers are exposed to unsafe equipment or working conditions. An officer should be able to grieve unsafe conditions.

RECOMMENDATION

It is recommended that the following language should become part of the Collective Bargaining Agreement:

The sheriff's office agrees to maintain all buildings, facilities, vehicles, and equipment owned and operated by the sheriff's office in a safe and healthful manner. The sheriff's office will attempt to correct unsafe working conditions and ensure that safety rules and safe working conditions are followed by the employees.

The employees accept the responsibility to properly use and care for vehicles, equipment and work areas in a safe and proper manner, and also accept the responsibility to follow all safety rules and safe working methods. Employees shall be responsible for reporting any unsafe or unhealthy buildings, facilities,

vehicles, or equipment, and any unsafe practices by any employee of the sheriff's office. The employees shall have the right to grieve any violations of this health and safety article.

ISSUE 7: DURATION OF THE COLLECTIVE BARGAINING AGREEMENT

DISCUSSION

As was stated earlier in the fact-finder's report, when the Union representative originally signed the extension agreement, said agreement did not have the modification made in the last sentence of the last paragraph of the extension agreement. The Employer's representative stated that his interpretation of the amendment was that the fact-finder or the conciliator has the discretion to recommend or not recommend retroactivity back to January 1, 2009. It is the Employer's position that the fact-finder or conciliator had the discretion to, however, is not mandated to, make any changes retroactive to January 1, 2009.

Therefore, the undersigned interprets the arguments of both representatives that the extension agreement gives discretion to the fact-finder to make any accepted recommendations in this report to be retroactive to January 1, 2009.

The timelines for the fact-finding are short timelines. These timelines may be extended by an agreement between the parties. This mechanism forces the parties into fact-finding or into bargaining. If the parties agree to extend the fact-finding timelines, bargaining has begun.

It appears that both sides have acted in good faith bargaining. Both representatives were well-prepared for the fact-finding conference. Had extensions not been permitted, the presentation of facts and arguments may not have been as well done as it was. The parties and the taxpayers deserve the disclosure of all relevant facts before a decision is made.

The financial changes will have an impact on the county's budget. However, either party may reopen the wage issue in for the next two years.

RECOMMENDATION

It is recommended that all provisions of fact-finding report be retroactive to January 1, 2009.

Respectfully submitted,


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Fact-Finder

CERTIFICATION

I hereby certify that a copy of the foregoing has been sent via regular U.S. mail and/or via e-mail/facsimile to the following parties on this 27th day of **March, 2009**:

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March 27, 2009

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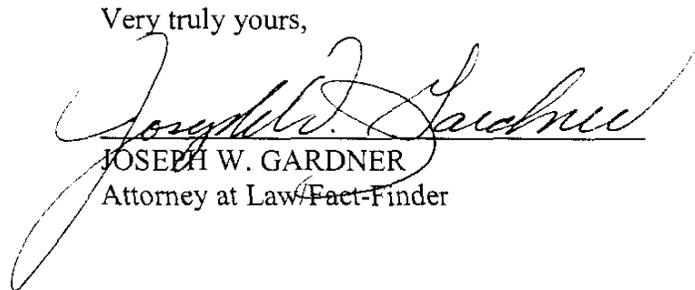
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**Re: Fraternal Order of Police, Ohio Labor Council, Inc.
and Tuscarawas County Sheriff
08-MED-09-0885; 08-MED-09-0886; 08-MED-09-0887**

Dear Sirs:

Please find enclosed the fact-finding report along with my invoice in the above-referenced matter. If you should have any questions, please do not hesitate to contact me.

Very truly yours,



JOSEPH W. GARDNER
Attorney at Law/Fact-Finder

JWG:law
Enclosures
Cc:

Edward E. Turner
Adminstrator, Bureau of Mediation