

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

EMPLOYMENT
RELATIONS BOARD

2009 JAN 26 A 9:29

**FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.**

**CASE NO. 08-MED-09-1022
(Patrol Officers)**

AND

**RECOMMENDATION OF THE
FACT-FINDER**

THE CITY OF HURON, OHIO

FOR THE EMPLOYEE ORGANIZATION:

**Dennis E. Sterling
Jane L. Dean
Gregory Bodkin
Terry Graham**

**Staff Representative
Dispatcher Representative
Sergeant Representative
Patrol Officer Representative**

FOR THE PUBLIC EMPLOYER

**Terry R. Griffith
Andrew White
Catherine Raney**

**Law Director
City Manager
Director of Finance**

January 24, 2009

DESCRIPTION OF THE UNIT AND BARGAINING HISTORY

The bargaining unit covered by this Fact-Finding Report consists of eight (8) full-time employees of the City of Huron, Ohio Police Department in the rank/classification of Patrol Officer. This Fact-Finding bears SERB Case Number 08-MED-09-1022. This Fact-Finding Report relates to the collective bargaining agreement between the City of Huron, Ohio (hereinafter, the City) and the Fraternal Order of Police, Ohio Labor Council, Inc. (hereinafter, the F.O.P.) which will cover Patrol Officers. Dispatchers and Sergeants are covered under separate collective bargaining agreements between the F.O.P. and the City. The Sergeant and Patrol Officer Units were certified by SERB on October 25, 1985 and the Dispatcher Unit was certified by SERB on August 4, 1988. The prior collective bargaining agreement for each unit had a duration from January 1, 2006 through December 31, 2008. The parties negotiated in six (6) sessions between October 16, 2008 and December 23, 2008 and were unable to reach tentative agreement.

INTRODUCTION

Preliminary Matters:

The Fact-Finder was appointed on December 8, 2006. The parties thereafter mutually extended the period for negotiations and the issuance of the Fact-Finding Report. The Fact-Finding Hearing was held on January 16, 2009 with a Telephone Pre-Hearing Conference being held on January 15, 2007. Copies of the Collective bargaining agreement and the Position Statements of each party were timely received by the Fact-Finder as required under the Ohio Administrative Code. The parties were requested by the Fact-Finder to provide copies of tentatively agreed items, including sections from the collective bargaining agreements which the parties agreed would remain unchanged.

The Position Statements and representations of the parties confirmed that the following articles of the collective bargaining agreement were unchanged:

| | |
|------------------------------|--|
| Article 1 | Recognition – Officers |
| Article 2 | Management Rights |
| Article 3 | Prevailing Rights |
| Article 4 | Grammar |
| Article 5 | Severability |
| Article 6 | Non-Discrimination |
| Article 7 | No Strike/No Lockout |
| Article 8 | Labor Council Activity |
| Article 9 | Dues |
| Article 10 | Fair Share Fee Deduction |
| Article 11 | Labor/Management Meeting |
| Article 12 | Seniority |
| Article 13 | Job Description, Rules and Regulations |
| Article 18 | Travel Expenses |
| Article 19 | Vacations |
| Article 20 | Holidays |
| Article 21 | Scheduling Time Off |
| Article 23 | Safety and Health |
| Article 24 | Wellness and Fitness Program |
| Article 25 | Job Related Injury Leave |
| Article 26 | Restricted Duty Assignments |
| Article 27 | Leave for Family Death |
| Article 28 | Emergency Leave |
| Article 30 | Military Training Leave |
| Article 32 | Weather Emergencies |
| Article 33 | Special Assignment |
| Article 35 | Life Insurance |
| Article 36 | Insurance |
| Article 37 | Surety Bonds Required |
| Article 38 | Union Meetings |
| Article 39 | Bulletin Boards |
| Article 41 | Discipline |
| Article 43 | Promotional Testing |
| Article 44 | Copies of Agreement |
| Article 46 | Drug and Alcohol Policy |
| Article 47 | Extra Duty Events |
| Appendices A, C, D, E and G. | |

The parties indicated in their Position Statements that there were open issues relative to the following articles/appendices:

| | |
|------------|--------------------------------------|
| Article 14 | Hours of Work |
| Article 15 | Compensation |
| Article 16 | Education/Training Incentive Program |
| Article 17 | Uniforms and Maintenance |
| Article 22 | Sick Leave |
| Article 29 | Jury Duty |
| Article 31 | Maternity Leave and Medical Leave |
| Article 34 | Health Insurance |
| Article 40 | Personnel Files |
| Article 42 | Grievance Procedure |
| Article 45 | Duration |
| Appendix B | Wages |
| Appendix F | Wellness |

In the Telephone Pre-Hearing Conference, the parties confirmed that the copy of the collective bargaining agreement submitted by the F.O.P. was the proper collective bargaining agreement. It was further confirmed and stipulated that there are no separate Letters of Understanding or other side agreements governing the collective bargaining relationship of the parties. The size of the unit as stated by the F.O.P. in its Position Statement was confirmed and stipulated to be correct and it was acknowledged that the parties had entered into an agreement to make the provisions of the new collective bargaining agreements retroactive to January 1, 2009.

The parties stipulated that the Fact-Finder was to issue a separate report for the Patrol Officers Unit on or about January 24, 2009 and that email copies were to be forwarded to the representatives of the parties in order to facilitate the consideration and ratification processes of the respective parties.

THE 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 January 16, 2009 in the Municipal Building of the City of Huron. 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

The parties presented evidence and argument, being represented in the hearing by the following individuals:

For the F.O.P.:

Dennis E. Sterling
Jane L. Dean
Gregory Bodkin
Terry Graham

Staff Representative
Dispatcher Representative
Sergeant Representative
Officer Representative

For the City:

Terry R. Griffith, Esq.
Andrew White
Catherine Raney

Law Director
City Manager
Director of Finance

During the course of the Hearing, the City agreed with the F.O.P. proposal with respect to Article 14, Hours of Work and Shift Assignment and Article 17, Uniforms and Maintenance, the agreement regarding Uniforms and Maintenance being subject to the determination of the duration of the collective bargaining Agreement and the F.O.P. agreed to the City proposals regarding Article 40, Personnel Files. The parties also reached agreement with respect to language changes in Article 22, Section 22.04, Sick Leave. Article 29, Jury Duty and Article 42 Grievance Procedure, leaving the following issues for resolution by the Fact-Finder:

| | |
|------------|--------------------------------------|
| Article 15 | Compensation |
| Article 16 | Education/Training Incentive Program |
| Article 22 | Sick Leave |
| Article 31 | Maternity Leave and Medical Leave |
| Article 34 | Health Insurance |
| Article 45 | Duration |
| Appendix B | Wages |
| Appendix F | Wellness |

DISCUSSION OF THE ISSUES

ARTICLE 15 COMPENSATION

The parties presented four (4) issues relative to Article 15, Compensation. The first issue related to wage scales, the F.O.P. proposing wage increases of three percent (3%) in each year of the collective bargaining agreement while the City proposed increases of one percent (1%), one and a half percent (1.5%) and two percent (2%) along with a two tiered wage structure. The second issue related to Working Out of

Classification Pay (WOCP), the F.O.P. proposing that WOCP be paid on all shifts, including the day shift and the City proposing to maintain the present language and practice relative to WOCP. The third issue related to Shift Differential. The F.O.P. proposing a shift differential of twenty cents (\$.20) per hour on the second shift (4 P.M. to Midnight) and thirty-five cents (\$.35) per hour on the third shift (Midnight to 8 A.M.) and that the shift differential be added to the base rate for the purposes of calculating overtime compensation. The City opposed the creation of a shift differential.

DISCUSSION OF THE WAGE SCALES ISSUE

POSITION OF THE F.O.P.

The F.O.P., in negotiations, had proposed wage increases of five percent (5%) in each year of the collective bargaining agreement. Upon entering Fact-Finding, the F.O.P. modified its demand to propose wage increases of three percent (3%) in each year of the collective bargaining agreement. The F.O.P. opposed the creation of a two-tiered wage structure.

The F.O.P., in support of its position with respect to across-the-board wage increases, pointed to the existence of a pattern of wage increases in comparable collective bargaining agreements and to the bright economic outlook for the City as shown in a newspaper article. With respect to the City proposal to create a two-tiered wage structure, the F.O.P., points out that the starting rate for Patrol Officers in the City was already below the average starting rate under comparable collective bargaining agreements. The F.O.P. expressed concerns regarding the quality of applicants who might be available if the starting rate were to be lowered, pointing

out that there had a been a drastic reduction in applicants when the starting rate for the City lagged behind those of comparable communities.

POSITION OF THE CITY

The City has proposed annual wage increases of one percent (1.0%), one and one half percent (1.5%) and two percent (2.0%) and has proposed to reduce the number of steps in the wage scale from four (4) to three (3) for employees in the classification of Patrol Officer as of January 1, 2009. The City has also proposed a two-tiered wage schedule under which Patrol Officers hired on or after January 2, 2009 would be compensated under a separate wage structure containing two levels, the top rate of which for new hires would be over seven dollars (\$ 7.00) per hour less than the proposed top rate for Patrol Officer, \$ 17.68, as opposed to \$ 24.79.

The City cited the current national economic crisis and the current and impending layoffs at International Automotive, a major employer within the City as the rationale for its proposal with respect to the wage scales. The City maintains that it will be able to hire qualified employees at the proposed starting rates because of its overall benefit package and the distressed state of the job market.

WAGE SCALES RECOMMENDATION

The determination of the wage issue in this matter, had it been made in early 2008, would have been a bit of a slam-dunk. Patterns of annual wage increases of three percent (3%) seem to have been well-established. The budget of the City would not have indicated any problem with meeting the costs of such a wage package. Even today, there is not a wealth of information which would lead to the conclusion that the City of Huron

is in dire financial straits. Certain other facts, however, are undeniable. The national economy is in a recession as is the economy of the State of Ohio where State employees are being asked to take a five percent (5%) pay cut to help meet a budget deficit. Many local governments are in deficit positions and would be expected to lay-off employees in the classifications represented by the F.O.P. in this case, leading to a glut of employees who would be willing to accept employment at a significantly lower wage scale.

The present economic conditions might seem to encourage the creation of a two-tiered wage scale. Short-term “fixes”, such as the creation of two-tiered wage scales, and outsourcing, however, are the probable cause of the “fix” we are in where the economy has eliminated the purchasing power of the work-force which is its customer base. A two-tiered wage structure, moreover, can lead to dissention between employees. This is a significant factor in employment generally and even more so in safety forces where employees stake their very lives on their fellow officers. There is no indication, further, that a two-tiered wage structure exists among safety forces in the State of Ohio.

Generally, where employees' jobs have not changed and where there is no indication that there is any relative inequity, employees should retain the same economic position; that is, wage increases should match inflation such that the employee should have the same after-tax purchasing power each year. The inflation rate for the last quarter of 2008 was less than 2.0%. (October 3.66, November, 1.07, December .09, totaling $4.84/3 = 1.63\%$ (Bureau of Labor Statistics) Thus, a two percent (2%) increase should create the same after-tax purchasing power. It should be noted also that employees receiving step increases, longevity increments will receive more than a two percent (2%) increase. Anticipating an economic upturn, inflation rates should increase

such that a two and one half percent (2 1/2%) increase would be appropriate for 2010 and a three percent (3%) increase would be appropriate for 2011).

For the reasons stated above, a two-tiered wage structure, as proposed by the City, would be inappropriate since, as proposed, there would be a fifteen thousand dollar (\$ 15,000.00) permanent disparity in wages between upper tier and lower tier employees. This does not mean, however, that the City can not receive during the term of this collective bargaining agreement the benefits of its proposal. While the existing new hire wage rate is relatively low, the fact that there will probably be layoffs among safety forces in the area should provide qualified applicants at an even lower rate, especially in the City of Huron which enjoys a low crime rate, excellent schools, ready access to entertainment and leisure activities and an excellent overall reputation.

A lower new-hire and second year wage scale is proposed. The idea of a permanent two-tier wage scale, however, can not be recommended. The problem with a permanent two-tiered wage structure is that while an employer may be able to attract and hire applicants, it may have difficulty retaining those hired as second tiered employees since they do not have an adequate incentive to stay. A revolving door through which qualified applicants come and go is still a revolving door which leads to poor morale, inefficiency and additional costs.

It is recommended, therefore, that the modified wage scale be adopted, adding Step E at the bottom of the scale and modifying the Step D first year rate to match the City proposal for the one year rate for new hires as shown by Step A of that proposal and then applying the general wage increases to the 2009 wage rates. There appears to be a quirk in the language of the former collective bargaining agreement which seems to

imply different treatment of existing employees and “new appointees” in terms of the applicability of the wage scale and progression through the wage scale. That quirk is addressed in the language recommended below.

Anticipating that the City find it difficult to attract qualified applicants, the following language is also recommended to allow the City to hire employees at other than the entry level wage, based on legitimate factors, such as skill, ability, experience and market conditions. Language relative to the proper operation of the wage scale and calculation of “Base Rate” is also recommended as shown below:

ARTICLE 15
Compensation

15.01

All Patrol Officers shall be paid in accordance with Appendix “B” attached hereto and made a part hereof through the duration of this Agreement.

“Base Rate” shall be defined as the gross pay less all incremental adjustments resulting from training, education and longevity.

Each Patrol Officer shall progress from step to step of the wage scale upon his/her anniversary dates of employment in accordance with the example shown in Appendix B.

Employees hired on or after January 1, 2009 may be hired at such step of the Wage Scale as the City may determine is appropriate based on legitimate factors such as skill, experience, training and market conditions, provided there is no discrimination and further provided that the Union shall be notified of the hiring of any Patrol Officer at a step higher than Step E and the reasons for the hiring rate. Employees hired on or after January 1, 2009 shall progress from step to step of the wage scale upon their anniversary dates of employment in accordance with the example shown in Appendix B.

APPENDIX B

| <u>Patrol Officers</u> | <u>2009 (2%)</u> | <u>2010 (2.5%)</u> | <u>2011 (3%)</u> |
|------------------------|------------------|--------------------|------------------|
| A | 24.18 | 24.78 | 25.53 |
| B | 21.58 | 22.12 | 22.78 |
| C | 18.14 | 18.60 | 19.16 |
| D | 16.59 | 17.00 | 17.51 |
| E | 16.02 | 16.42 | 16.91 |

The rates shown in the above grid do not include individual adjustments resulting from training, education and longevity.

EXAMPLE A

Employee A, as of 12-31-2008 is at Step D of the old wage scale. That employee would continue to be compensated at Step D of the new wage scale for 2009 until his anniversary date when he would be advanced to Step C of the 2009 Wage Scale.

EXAMPLE B

Employee B is hired on February 15, 2009 at Step D because of special training, skills and experience. He would continue to be compensated at Step D on the 2009 wage scale until 1-01-10 when he would move to Step D on the 2010 wage scale. He would on February 15, 2010 advance to Step C on the 2010 wage scale.

DISCUSSION OF THE WORKING OUT OF CLASSIFICATION ISSUE

POSITION OF THE F.O.P.

The F.O.P. has proposed to add language to the WOCB section of Article 15, Compensation to state that WOPC would be applicable to all shifts, including the first shift. The F.O.P. contends that WOPC has not been paid on the first shift during the week when a Sergeant is not present even when a Patrol Officer is functioning as Officer in Charge based on the City contention that the Chief of Police is present. The F.O.P. argues that WOPC is paid on weekends on the first shift when a Sergeant is absent and contends that Chief is not really performing the duties of Officer in Charge during the

week. The F.O.P. points out that the cost of the proposal is minimal since it would only be applicable when a Sergeant is absent on a weekday on the first shift for at least four (4) hours and the Chief or another Sergeant is not acting as Officer in Charge.

POSITION OF THE CITY

The City does not seem to contend that WOPC should not be paid on the day shift during the week when a Patrol Officer is acting as Officer in Charge. The City seems to contend that the Chief is acting as Officer in Charge. The City, further, points out that there is no requirement that a Patrol Officer be assigned as Officer in Charge in the absence of the normally scheduled Sergeant.

WORKING OUT OF CLASSIFICATION RECOMMENDATION

The difference between the parties on this issue is not so much a matter of opposing language. The language proposed by the F.O.P. does not change the meaning of the present language. As stated, WOPC does apply to the first shift. In practice, there seems to be no dispute that WOPC applies to the first shift since it is being paid on the first shift on weekends. The real issue is what triggers the entitlement to WOPC. Adding the language proposed by the F.O.P. does not solve the problem which the F.O.P. seeks to address. Therefore, the Fact-Finder declines to accept the proposed language of the F.O.P. Where a proposed change in language can do no good, the only possibility is that it can do some unexpected harm. The City seems to indicate that if a Patrol Officer is actually performing the duties of Officer in Charge, regardless of which day or shift the Patrol Officer performs those duties and regardless of whether the Chief is physically present, WOPC is due. This issue must be addressed on a case by case basis, based on the facts regarding the duties being required of a Patrol Officer on a given day.

DISCUSSION OF THE SHIFT DIFFERENTIAL ISSUE

POSITION OF THE F.O.P.

The F.O.P. has requested a shift differential of twenty cents (\$.20) per hour on the second shift (4 P.M. to Midnight) and thirty-five cents (\$.35) per hour on the third shift (Midnight to 8 A.M.) and that the shift differential be added to the base rate for the purposes of calculating overtime compensation. The F.O.P. points out that most comparable jurisdictions provide some form of shift differential and that some jurisdictions provide shift differential at a higher rate than that proposed for this bargaining unit. The F.O.P. argues that employees should be compensated for working less desirable shifts.

POSITION OF THE CITY

The City opposes the creation of a shift differential for economic reasons. The City further points out that the City had bought out the shift differential for this unit in a prior collective bargaining agreement.

SHIFT DIFFERENTIAL RECOMMENDATION

There is good reason to provide for shift differentials. As a general proposition, employees should receive greater compensation for less desirable work. The Law of Supply and Demand would also tend to indicate that a less desirable job would garner a higher wage. Comparables also indicate that the existence of a shift differential is prevalent. In this case, however, the proposal for a shift differential is not recommended for several reasons. The first reason is that employees have the opportunity to bid on and off of shifts. Senior employees are not involuntarily working a non-preferred shift. A

second reason to decline to create a shift differential is the fact that the shift differential was bought out of prior contracts, albeit a fairly long time in the past.

The most pressing reason to decline to recommend a shift differential at this time is the consideration of the overall package. Creating a shift differential for the second and third shift would require a re-structuring of the total economic package, decreasing the funds available for first shift employees. The proposed shift differential would give second shift employees a first year increase of about three percent (3%) and third shift employees first year increase of about a three and three quarter percent (3.75). Such increases would have to be offset by lower general increases.

For the above reasons, the proposal of the F.O.P. for shift differentials must be rejected. The Fact-Finder recommends that no Shift Differential be created.

ARTICLE 16 EDUCATION/TRAINING INCENTIVE PROGRAM

INTRODUCTION

There were several language proposals of the parties under this Article. The F.O.P. proposed to correct a typographical error in Section 1, Education to change the word “or” to “in”. That proposal was accepted. The F.O.P. had proposed to add an increment for employees having attained a Masters Degree. That proposal was withdrawn and was not contained in the Position Statement of the F.O.P. The City proposed to limit the earning of educational credits to employees as of January 1, 2009. The City also proposed to correct what it perceived to be an error in the calculation of the Educational Incentive Pay (EIP) by inserting the word “one time” with respect to the payment of each of the three EIP increments. The final proposals under Article 16, Education Incentive Program, are proposals relating to increments earned by employees

based on years of service which is termed under the F.O.P. and expired collective bargaining agreement as “Experience” and under the City proposal “Longevity”. The proposal of the F.O. P. with respect to the earning and payment of said increments is that employees reaching the required years of service within a given calendar year are to be paid the increment whether or not they have reached that triggering anniversary date before the scheduled payout which is due under the language of the expired agreement in the first payroll in December. The City, with respect to the Experience/Longevity increments, did not accept the F.O.P. proposal. The City further proposed to correct what it perceived to be another mistake in calculations by inserting language that the longevity salary increments were also to be “one time” payments.

DISCUSSION OF THE EDUCATIONAL INCENTIVE PAY ISSUE

POSITION OF THE UNION

The F.O.P. has not made any proposals to change the language relative to Educational Incentive pay (EIP). The F.O.P. maintains that the calculation of the EIP has been done correctly since the inception of the provision over twenty (20) years ago. The F.O.P. is opposed to limiting the earning of EIP to current employees.

POSITION OF THE CITY

The City maintains that the EIP has been improperly calculated, indicating that the EIP should be based on the rate at which the employee was earning as of the date the particular increment was earned. The City also seeks to limit the payment of the EIP to current employees and only where the employee attains the increment with substantially continuous enrollment. The City also seeks to “freeze” the increments already earned.

EDUCATIONAL INCENTIVE PAY RECOMMENDATION

The first aspect of the City Proposal to be discussed is the “Two-Tiered” aspect of its proposal. The City seeks to limit (EIP) to existing employees, creating a two-tiered benefit structure. As indicated previously, a two-tiered wage structure for safety forces is felt by this Fact-Finder to be ill-advised in light of the fact of its divisive effect on members of the unit. Having a two-tiered educational credit program would result in an additional permanent three percent (3%) disparity between existing Patrol Officers and Patrol Officers hired after January 1, 2009. In addition, placing no premium on education would tend to send the wrong message to employees and, perhaps, to the community. The overwhelming majority of comparable jurisdictions do provide educational incentives for good reason. Generally, there is a “hidden benefit” to the employer in having well-educated police officers. Well educated police officers should be less likely to create liability issues for their employer. Obviously, one can not quantify the savings based on what did **not** happen, but that factor should be considered in deciding whether to eliminate an educational incentive. Considering all factors, the Fact-Finder recommends no change in the contract language relative to the EIP which would create a two-tiered benefit structure.

The next matter to be considered with respect to the EIP is the City proposal aimed at correcting what it perceives as a “mistake” in the calculation of the EIP whereby the incentive “creeps up” because of the annual increases in base pay. A productive question to ask before considering the proposal of the City is whether the past interpretation of the language of the EIP is correct. If it is correct, then the proposal of the City would amount to a takeaway of an existing benefit.

The City argues that the intent of the EIP was to provide an increase of one percent of the base pay at the rate in effect as of the date the increment was earned. Thus, under the City proposal, if a Patrol Officer who was at Step A had completed forty-eight (48) quarter hours toward an Associates Degree in 2006, completed his Associates Degree in 2007 and completed his Bachelors Degree in 2008, he would have permanent increments of \$ 469.29 (1% of \$ 46,929.00), \$ 481.02 (1% of \$ 48,102.00) and \$ 493.04 (1% of \$ 49,305.00), regardless of whether the employee advanced a step in the wage progression and regardless of whether the base rate went up or down. (See Appendix B, 2006-2008 Agreement)

The F.O.P. argued that had the parties intended that result, the language would have stated that the increment was to be calculated based on “ --- the officer’s base rate in effect at the time the increment was earned”. It is interesting to note that such language was utilized with respect to the Training Increment in the Dispatchers contract. The F.O.P. further argued that the language of the EIP has been consistently interpreted for over twenty (20) years.

Additional compensation for educational can be shown in collective bargaining agreements in various ways. In some contracts, such as in those for employees of boards of education or boards of mental retardation, the differentiation between the pay of a person holding a Master’s Degree and a person not holding a Master’s Degree may be indicated by treating the person holding the Masters Degree as being in a different classification. In such case, the value of the “increment” would “creep up” with the general wage increases applicable to the various classifications. Another way to indicate an educational differential would be to show the attainment of a degree as an additional

“step” on the wage scale. Likewise, the value of the “increment” would “creep up” with the general wage increases. Generally, premiums which are stated in terms of percentages such as overtime and not set forth at finite dollar amounts do “creep up”.

The language of the collective bargaining agreement is more supportive of an interpretation that the calculation of the EIP is based on the then current base rate. At best, it could be argued that the language is “ambiguous”. Even if ambiguous, however, past practice is generally used to resolve ambiguities. In this case, a clear past practice has been established whereby the EIC has been calculated based on the then current base rate. A past practice is established where the practice is 1) unequivocal, 2) clearly enunciated and acted upon, 3) readily ascertainable over a reasonable period of time as a fixed, established practice by both parties. **Celanese Corporation of America**, 24 L.A.

168. As further stated in **How Arbitration Works** at page 405:

Where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given to it by that practice.

The proper interpretation of the language of the EIP is that as advocated by the F.O.P. There is no good reason to alter the language of the collective bargaining agreement or the interpretation of that language as it relates to the EIP. It is recommended that the language remain the same.

DISCUSSION OF THE EXPERIENCE/LONGEVITY PAY ISSUE

The F.O.P. and the City have made proposals relative to Experience/Longevity Pay. The City seeks to correct a perceived error in the manner in which the Experience/Longevity Increment (ELPI) is calculated. The F.O.P. seeks to have the ELPI paid

in the calendar year in which it is earned, regardless of whether the employee has reached the requisite length of service prior to the date the increment is to be paid. These issues will be discussed separately as the “Calculation Issue” and the “Payment Issue”.

CALCULATION ISSUE RECOMMENDATION

POSITION OF THE CITY

One claim of the City relative to the calculation of the ELPI is the same claim it raised relative to the EIP, the claim that the increment had been improperly calculated, allowing the amount of the increment to “creep up” with increases in the Base Rate. For the same reasons stated with respect to the EIP, the Fact-Finder has determined that the increment has been calculated correctly and rejects the proposed language to correct the perceived error. The position of the City with respect a perceived error in the calculation/payment of the ELPI, however, has another element beyond that raised with respect to the EIP. City Manager, Andrew D. White, seemed to have concerns about whether the ELPI should be paid in years other than the increment years; the third, eighth, thirteenth, and twenty-third years.

A careful reading of the provision indicates that the increments are also to be paid in the interim years, the employee receiving the third year increment in the fourth, fifth, sixth and seventh years, and the third year and additional eighth year increments in the ninth, tenth, eleventh and twelfth years and so on through the progression. The language refers to “permanent incremental increases”, rather than bonuses within given years and also states that the increments shall be paid in “annual payments as a part of the first payroll in December in “each year”.

Another way to get an understanding of the ELPI is to refer to other collective bargaining agreements having longevity increases expressed in their wage scales. Typically, contracts in the private sector have gradients in their wage scales expressed in terms of Years of Service, rather than “Steps”, as shown below

| Years of Service | 2009 |
|------------------|-------|
| 0-1 | 7.00 |
| 1-2 | 8.00 |
| 3-7 | 9.00 |
| 8-12 | 10.00 |
| 13-17 | 11.00 |
| 18-22 | 12.00 |
| 23 or more | |

When there is an across the board increase, the longevity increments “creep up” along with the wage scale. It is clear also that the “third year increment” continues to be paid in the fourth, fifth, sixth and seventh years. The ELPI has been properly calculated and properly paid. No change in language relative to the calculation of the ELPI is recommended.

PAYMENT ISSUE RECOMMENDATION

POSITION OF THE F.O.P.

The F.O.P. feels it unfair that employees having anniversary dates in late December fail to receive their longevity increment earned during the year if their anniversary date falls after the date the increment is paid. The F.O.P. has proposed that the increment be paid even regardless of whether the employee has reached his anniversary date and that if the employee does not reach his anniversary date that a prorated portion be returned.

POSITION OF THE CITY

The City opposed the proposal of the F.O.P. in negotiations. At hearing, the City discussed alternatives to avoid what appeared to be a quirk in the system which produced unfair and unintended results. The City expressed a willingness to consider having the ELPI paid regardless of the employee's anniversary date, provided that the entire increment be repaid should the employee fail to reach the anniversary date.

PAYMENT ISSUE RECOMMENDATION

Discussions were had at hearing concerning the timing of the payment of the ELPI. It appeared that because the payments were made as a part of the first payroll in December, employees whose anniversary dates fell between the payroll cutoff date for the first payroll in December and December 31st were being denied their additional increment which would become fully earned as of their anniversary date. A suggestion was made to have the payments made in January to be sure that there was no question whether the increment was earned. While that suggestion would help the budget of the City for 2009, employees, however, probably anticipate the receipt of the increment for the purpose of Christmas shopping.

The problem should be addressed since incongruous results do occur. Employees may be granted their earned increment in some years and denied their increment in others, because of where their anniversary date falls compared to the payroll closing date in the respective years. A possibility might be to have those earning the bonus later in the year being paid and then returning the increment should they fail to reach their anniversary date or returning a pro-rata portion of the increment as suggested by the F.O.P. There is nothing in the collective bargaining agreement to suggest that the

increment is “accrued”, such that a pro-rata return would be appropriate. The problem with a full return of the increment, however, is that there may be less in the final paycheck than the amount owed to the City.

The recommendation of the Fact-Finder, therefore is that the following language be added to the end Article 16, Part 4, Experience

provided, however, that should an employee not have reached his anniversary date by the time of the close of said pay period, the salary increment shall be paid as part of the payroll during which the employee reaches his anniversary date.

ARTICLE 17 UNIFORMS AND MAINTENANCE

POSITION OF THE F.O.P.

The F.O.P. points out there has not been an increase in the Uniform and Maintenance Allowance (UMA) in six (6) years and proposes that the UMA be increased to \$ 800.00 in 2009, \$ 850.00 in 2010 and \$ 900.00 in 2011.

POSITION OF THE CITY

The City has not opposed the increase in the UMA, but maintains that it is not willing to agree to third year increases in the UMA due to its position that it is proposing two (2) year duration to the collective bargaining agreement.

UNIFORM AND MAINTENANCE RECOMMENDATION

Since the only objection of the City to the F.O.P. UMA proposal relates to the third year of the agreement, the F.O.P. proposal is recommended, the issue related to the third year UMA increase being discussed in the recommendation regarding the duration article.

ARTICLE 22 SICK LEAVE

POSITION OF THE F.O.P.

The F.O.P. proposes no change in the sick leave article. The F.O.P. opposes the limitation on the retirement/death payout on sick leave indicating that such a change will not produce a savings to the City. The F.O.P. points out that of the seven (7) employees leaving employment since the expiration of the 2005 collective bargaining agreement, only two (2) left under circumstances entitling them to the payout of sick leave and that neither received the full sick leave payout. The F.O.P. pointed out that only one (1) employee within the bargaining units covered by the collective bargaining agreements covered by the F.O.P. has the age and service to be entitled to retire during the term of the proposed collective bargaining agreement. The F.O.P. further indicates that the limitation on the Sick Leave pay out proposed by the City might change the way employees utilize sick leave and produce a real increased cost to the City.

POSITION OF THE CITY

The City proposes to limit the payout of Sick Leave upon death or retirement to 480 hours, rather than the 1750 hours as stated in the current collective bargaining agreement. The City would provide a window until December 31, 2009 for employees to retire and be entitled to receive the maximum 1750 hours of sick leave. The City also proposes to change the manner in which the payout is made in the case of an employee's death, stating that the payout is to be made to the estate of the employee, rather than to the "named survivor" as stated under current language. The City cites budgetary considerations in making its proposal, contending that it must budget for the payout.

SICK LEAVE RECOMMENDATION

The rationale for the City to propose a limitation on Sick Leave payout relates to the claim that it needs to budget for such a payout. While budgeting for a full sick leave payout for an entire bargaining unit creates a quite substantial number, the reality of the situation is that there is only one (1) employee within the F.O. P. bargaining units who is eligible to retire and there is no allegation that the employee will actually retire, or is even considering retirement. Even when budgeting for the retirement of an employee, one must take into account the savings to the City by the retirement.

Looking at retirement on January 1, 2010, a retiring employee would be likely to be earning \$ 26.02 per hour wages and longevity increments. In the best case scenario, the City would save a maximum of 1270 hours of pay (1750 – 480) \$ 33,045.40. The City, in 2010 would save \$ 19,968 (2080 x (\$ 26.02 - \$ 16.42) in wages and save a similar amount in 2011 when the retiring employee is replaced by a new hire. The City would save and should budget for the savings of nearly seven thousand dollars (\$ 7,000.00) over the course of the collective bargaining agreement based on the retirement of an employee.

For budgetary purposes looking at the term of this collective bargaining agreement retirement does not cost money, but saves money. Since retirement obviously saves money for the City, the question becomes, “Does the proposal create an incentive for the members of this bargaining unit to retire?” With the loss to the value of individual investments and the slow job market, it is very unlikely that the prospect of not losing some sick pay hours would be a strong incentive to give up a job providing a

salary of over \$ 50,000.00 a year in benefits. The chance of losing the value of sick leave benefits may actually be a disincentive to retirement.

The limitation on sick leave payout also encourages a change in sick leave usage. Where an employee is in a “use it or lose it” situation, the employee is more likely to “use it”. Even among the best of employees, if the option is to retire and get surgery on a knee or to get surgery on a knee and then retire, the latter option becomes more popular when the sick leave would only be paid out at 1/3 if the retirement comes first. In some cases, the choices made with respect to one-day absences tend to change in a “use it or lose it” situation, possibly leading to overtime.

While the “retirement incentive” aspect of the City proposal may make sense in some bargaining units or sectors of City employment, the proposal of the City does not make sense for this particular bargaining unit. One must also consider the impact on the ratification process of a takeaway provision. The fact-Finder recommends no change in the language of the collective bargaining agreement with respect to the amount of the sick leave payout on death or retirement.

The proposal of the City with respect to the sick leave payout payee does raise issues which should be addressed. The City proposal would have the sick leave payout made to the estate of the employee. Present language provides that the sick leave payout be made to the “employees named survivor”. The problem with the current language is that if the employee had not named a beneficiary or if the named beneficiary did not survive the employee, a question would arise as to whom the payment should be made. The City proposal does provide some certainty as to the payee. In all cases, the estate would be paid. There are problems with the City proposal. The opening of an estate

would cost the beneficiary money in attorney fees and court costs, in most cases, more than the amount of the sick leave payout. Ultimate payment, even in the best of cases would be delayed. Estate assets, moreover, are subject to estate creditors such that the beneficiary may receive nothing. There are also times when no estate is opened, leaving the City with no person or entity to pay out a small amount which would then remain on the books until processed as unclaimed funds.

There is another slight wrinkle in the language of the sick leave payout. Present language states”

If a **member** shall die while still employed as a **Police Officer** or Patrol Officer.

The recognition clause only refers to “patrol officers”. It appears that the benefit is to be paid to any member of the bargaining unit who dies while still employed. Stating particular classifications implies that there might be other bargaining unit members who would not be entitled to the sick leave payout on death.

It is recommended, therefore, that the following language be incorporated into the sick leave payout provision:

If an employees dies while still employed within the bargaining unit, the City shall pay to his designated beneficiary the employee’s accumulated, but unused sick time up to a maximum of one thousand seven hundred fifty (1750) hours Should there be no designated beneficiary or should the designated beneficiary and all alternate designated beneficiaries fail to survive the employee, said accumulated sick leave shall be paid to the employee’s surviving spouse, if any, or, if none, to his/her estate.

Employees should be advised to review and update their beneficiary designations to be sure that their designations are proper and current.

ARTICLE 27 JURY DUTY

The F.O.P. made a proposal to assure that employees from the second and third shift who performed jury duty would be granted overtime if they also worked their normal shift on the day jury duty was performed. Discussions between the parties lead to an apparent agreement, reflected below which would require that an employee on jury service to be transferred to the first shift to avoid the overtime issue.

27.08 A member who is called for jury duty shall, upon notice to the Chief of Police, be paid his regular salary or wages less the amount of pay received for jury duty service in accordance with Codified Ordinance 163.08 as in effect on January 1, 1988. Members called to report for jury duty shall notify the Chief of Police who may place the member on paid leave of absence status, otherwise, the member shall be placed on day shift for the duration of his jury service. For this period, other shifts may be adjusted to maintain required coverage.

ARTICLE 29 MATERNITY LEAVE

POSITION OF THE F.O.P.

The F.O.P. proposed to retain the current language on Maternity Leave and to add language relative to the Family and Medical Leave Act (FMLA). The F.O.P. opposed the proposal of the City to substitute FMLA for Maternity Leave, indicating that to eliminate Maternity Leave would be to reduce an existing benefit which provides six (6) months leave, rather than the twelve (12) weeks provided under the FMLA and further indicating that Maternity Leave might be available where FMLA would not apply such as in the case of an employee having less than a year of service.

POSITION OF THE CITY

The City proposes to replace the Maternity Leave provision with the provisions of the FMLA. The City argues that having Maternity Leave, a leave which applies only to females, would amount to discrimination on the basis of sex and further asserts that having both Maternity Leave and FMLA would be duplicative and could lead to the “piggybacking” of benefits.

MATERNITY LEAVE DISCUSSION

Maternity Leave provides an additional and different benefit than the FMLA, granting six (6) months of leave and granting leave which might not be available under the FMLA such as instances where an employee has not been employed for more than one year and/or has not worked in excess of 1250 hours in the year. There do not appear to be any employees within the City who are no longer covered by the City Maternity Leave since the Ordinance appears to remain in effect and there is no allegation that any other bargaining unit has agreed to the elimination of Maternity Leave. There is no substantial reason for eliminating the Maternity Leave benefit.

Regardless of the provisions of the collective bargaining agreement, bargaining unit employees are covered under the FMLA at the present time. Regulations under the FMLA specifically deal with the “double-dipping” issue. Both parties have proposed citing part of the criteria for qualification for family and medical leave. Citing part of the qualifications, however, may mislead employees with respect to their rights and the rights of the employer under the FMLA. The provisions and regulations of FMLA, further, may change from time to time. Therefore, it is recommended that a more generic reference to the FMLA be contained in the collective bargaining agreement.

It is therefore recommended that current language regarding FMLA be retained and that the following language be added to address entitlement to FMLA.

The City and the employees covered by the collective bargaining agreement are subject to the terms of the Family and Medical Leave Act. The conditions under which Family and Medical Leave is granted shall be in accordance with Federal law and regulations.

ARTICLE 34 HEALTH INSURANCE

POSITIONS OF THE PARTIES

Neither party has proposed a change in the language of the Health Insurance Article. The parties have also agreed on the terms of a new Wellness Plan. The point of contention between the parties appears to relate to the testing of spouses to earn credits toward the deductible. The F.O.P. requests that accommodating be made to provide spouses a longer time to be tested in order to earn credits toward the deductible.

The parties hereto acknowledge that the new Wellness Plan is better than the old plan and that the choice at this time is either to accept the new plan in its entirety or to revert to the old plan. The Fact-Finder appreciates the problem that employees may have difficulty in persuading their spouses to be tested for any number of reasons. It is felt, however, that additional time to reach the goal will not provide as much of an incentive as the potential loss of savings in terms of deductible. Time remains to earn substantial credits and testing is of benefit to all employees and their spouses, not only an economic benefit, but a health benefit. The fact-Finder must recommend the City proposal with respect to the Wellness Plan.

ARTICLE 42 GRIEVANCE PROCEDURE

The parties, in discussions at hearing, agreed that a duplicative access to the Personnel Appeals Board added unnecessary delay and confusion in the Grievance Procedure. Each party withdrew its proposal submitted to Fact-Finding and agreed to delete Section 3 (Section 42.03) from the collective bargaining agreement.

ARTICLE 45 DURATION

POSITIONS OF THE PARTIES

The F.O.P. has proposed a standard three (3) year agreement. The City proposed a two (2) year agreement, but indicated that a three (3) year agreement might be acceptable, based on economics.

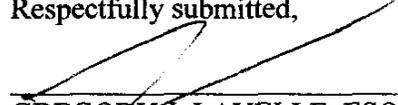
DURATION DISCUSSION

Generally, three (3) year agreements are preferred to promote stability. Negotiations are stressful and costly and additional negotiations should be avoided. The City, however, has expressed some trepidation regarding the economic future and has indicated that it needs to achieve the change in the Sick Leave payout during the term of a three (3) year collective bargaining agreement. Considering the aims of the City in negotiations, the fact that it is unlikely that bargaining unit member would retire in the next two (2) years and the probable negative effect on the possibility of ratification of a take-away provision regarding sick leave payout, a three (3) year contract with a limited re-opener after the second year is recommended as shown below:

ARTICLE 45 DURATION

This Agreement shall become effective and retroactive to January 1, 2009 and shall terminate on December 31, 2011, unless extended by mutual agreement of the parties, provided, however, that either party may choose to reopen negotiations for the third year of this agreement with respect to the issues of compensation and sick pay buyout only by giving the other party written notice of the intent to re-open negotiations not later than October 1, 2010.

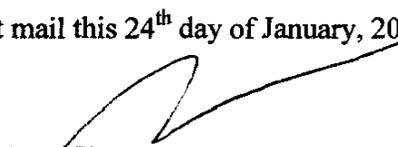
Respectfully submitted,



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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 City at 417 Main Street, P.O. Box 468, Huron, Ohio 44839 and to the F.O.P. at 222 East Town Street, Columbus, Ohio 43215, by overnight mail this 24th day of January, 2009.



GREGORY J. LAVELLE