

STATE EMPLOYMENT
RELATIONS BOARD

2010 FEB 23 A 11:50

IN THE MATTER OF IMPASSE X
X
BETWEEN X
X
CITY OF WILMINGTON, OHIO X
X
AND X
X
THE FRATERNAL ORDER X
OF POLICE X
OHIO LABOR COUNCIL, INC. X
(PATROL OFFICERS) X

REPORT OF
THE FACT FINDER

SERB FILE NO.: 2009-MED-09-0918

HEARING: January 29, 2010; Wilmington, Ohio

FACT FINDER: William C. Heekin

APPEARANCES

For the City

David S. Blaugrund, Attorney

For the FOP/OLC

Mark Scranton, Staff Representative

ADMINISTRATION

By way of an e-mail dated November 23, 2009, from the State Employment Relations Board (SERB), the undersigned was informed of his designation to serve as fact finder regarding a successor labor contract, negotiations impasse. On January 29, 2010, and following receipt of pre-hearing submissions, a fact finding hearing went forward. The record was closed at the conclusion of the hearing and the matter is now ready for the issuance of a fact finding report, where the recommendations are made in light of the following ORC 4117.14 criteria:

- Past collectively bargained agreements between the parties;
- 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;
- 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.
- The lawful authority of the public employer.
- Any stipulations of the parties.
- 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.

FINDINGS AND RECOMMENDATIONS

This impasse involves a bargaining unit made up of approximately 16 Patrol Officers who are represented by the Fraternal Order of Police, Ohio Labor Council, Inc. (the FOP/OLC") and the City of Wilmington, Ohio ("the City") located in south central Ohio.

Prior to the fact finding hearing, the City and the FOP/OLC ("the Parties") met a number of times in an effort to finalize a successor collective bargaining agreement ("the Agreement" or

“The Labor Contract”). Accordingly, it was agreed by the Parties that “The following Articles will remain as current contract language” (City Exhibit-8):

- | | |
|------------|------------|
| Article 1 | Article 29 |
| Article 2 | Article 30 |
| Article 3 | Article 31 |
| Article 4 | Article 32 |
| Article 5 | Article 33 |
| Article 6 | Article 34 |
| Article 7 | Article 35 |
| Article 8 | Article 36 |
| Article 11 | Article 37 |
| Article 12 | Article 38 |
| Article 14 | Article 39 |
| Article 19 | Article 40 |
| Article 20 | Article 41 |
| Article 21 | Article 42 |
| Article 22 | Article 43 |
| Article 23 | Article 44 |
| Article 26 | Article 45 |
| Article 27 | Article 46 |
| Article 28 | |

In addition, several tentative agreements were reached during these same meetings that involved modifications to Article 13, Seniority; Article 15, Layoff and Recall; Article 24, Insurances; and Article 47, Duration (City Exhibit-8). Also, a number of additional tentative agreements were reached on January 29, 2010, before the start of factfinding proceedings that involved modifications to the following contract articles: Article 10, Discipline; Article 17, Hours of Work and Overtime; and Article 25, Uniforms and Equipment. Accordingly, it is herein recommended that all of these tentatively agreed upon contract provisions be adopted.

Against this backdrop and as to the remaining contract items at impasse, upon fully considering the evidence in the record and the respective positions of the Parties, it is recommended that the following contract language be adopted:

ARTICLE 9 – HEALTH AND SAFETY

Section 9.1. It is agreed that the health and safety of the work force is a prime concern and responsibility of both parties. Therefore, the Employer accepts its responsibility to provide safe working conditions, equipment and working methods for its employees. The employees accept the responsibility to follow all safety rules and safe working methods of the Employer.

Section 9.2. All alleged unsafe working conditions or health hazards must be reported to the immediate supervisor as soon as such alleged conditions or hazards are known. The immediate supervisor shall investigate the condition as promptly as warranted and determine whether such condition does in fact present a significant threat to the safety or health of the employee(s) involved and, if necessary, initiate appropriate corrective action.

Section 9.3. In the event that a bargaining unit member is confronted with working conditions which the member reasonably believes present an imminent danger of death or serious harm, he may employ the provisions of the Public Employment Risk Reduction Act. This provision applies only in the case of working conditions which normally exist for, or reasonably might be expected to occur, in the law enforcement profession.

Section 9.4. An employee who utilizes this Article with intent to violate the purpose of this Article may be subject to discipline.

Section 9.5. Fitness Program.

1. Overview. The Employer and the FOP hereby establish a Fitness Program as follows:

2. Goal. The Fitness Program is intended to encourage members of the Employer's Police Department ("Members") to adopt and maintain healthier lifestyles and achieve and maintain higher levels of physical fitness. The Employer will facilitate this goal by holding fitness tests twice a year for non-probationary employees, as well as separate fitness tests for probationary employees.

3. Newly Hired Employees. Employees hired on or after the effective date of this collective bargaining agreement must undergo the Employer's physical fitness test upon employment or as soon thereafter as the Employer deems practical. Such employees must achieve the 50th percentile level on the Cooper Scale Single Fitness Norms (the Cooper Scale is explained in a document attached to this Agreement) when they take a fitness test and must maintain that level in future physical fitness testing while serving their new hire probationary period as a condition of employment. Probationary employees who fail to achieve the 50th percentile on the Cooper Scale Single Fitness Norms may be terminated or subject to other discipline, in the Employer's discretion.

Non-probationary employees hired on or after the effective date of this collective bargaining agreement are strongly encouraged ~~required~~ to undergo physical fitness testing twice a year. When such an employee takes a fitness test directed by the Employer under this Article and achieves a level of the 60th percentile on the Cooper Scale Single Fitness Norms, the employee

~~is entitled to a Fitness Incentive Payment, as specified in Section 9.5.5 below. Non-probationary employees who are hired on or after the effective date of this collective bargaining agreement and who fail to meet the 50th percentile level on the Cooper Scale Single Fitness Norms when they take a fitness test shall be retested thirty days later, and are subject to progressive discipline for each time that they fail to meet the 50th percentile level on a fitness test carried out under this Article.~~

4. Existing Employees. Non-probationary employees who were hired prior to the effective date of this collective bargaining agreement may choose to participate in the fitness testing given by the Employer twice a year. Such employees who participate in the testing and who achieve a level of the 60th percentile on the Cooper Scale Single Fitness Norms are entitled to a Fitness Incentive Payment, as specified in Section 9.5.5 below. Non-probationary employees who were hired prior to the effective date of this collective bargaining agreement and who participate in the testing, but fail to achieve the 50th percentile level on the Cooper Scale Single Fitness Norms, must prepare and submit an improvement plan to the fitness coordinator who will be appointed by the Chief. The fitness coordinator will be responsible for assisting members to increase their fitness level.

5. Fitness Incentive Payment. Non-probationary employees will receive a payment of three hundred dollars (\$300.00) after successfully completing each of the two (2) physical fitness tests per year. For purposes of the Fitness Incentive Payment, an employee successfully completes a test by meeting or exceeding the 60th percentile level on the Cooper Scale Single Fitness Norms. Thus, a non-probationary employee who meets or exceeds the 60th percentile level on the Cooper Scale Single Fitness Norms on both of the physical fitness tests held in a year will earn an additional six hundred dollars (\$600.00) in that year.

6. Impact on Assignments. The Chief of Police may consider failure to meet the fitness test standards in determining eligibility for elective training programs, assignments to the Detective Bureau, or other voluntary assignments. The Chief of Police agrees that a member's choice not to participate in the fitness program will in no way impact their eligibility for assignments.

7. Annual Physical. All employees are required to receive an annual health examination, conducted by a health care provider of the Employer's choosing. This examination shall include both a general health screening and a fitness for duty examination and will be paid for by the Employer. An employee may elect to have a health care provider of his/her choosing perform the physical, but in that situation, the employee will be responsible for any costs of the physical that exceed applicable medical insurance coverage.

7.1. Given that fitness for duty includes both physical and mental health, for the purposes of this Article, "health care provider" includes, but is not limited to, both physical and mental health professionals.

7.2. The Employer will attempt to schedule physicals during employees' regular work hours. Nevertheless, such time shall be treated and compensated as required regular duty and will not be paid as overtime, regardless of when it is scheduled.

7.3. The annual health and fitness for duty examination will include, any test that the examining health care professional determines to be necessary to assess the employee's ability to perform the essential functions of his or her position. Professional consultation and educational material will be available to each member during this screening.

7.4. The chosen health care provider will be given a copy of the employee's current position description for reference during the physical. Unless the parties agree, through a Memorandum of Understanding, to use a different position description, the description to be used for the physical is the version attached to this agreement as Appendix A. However, the Employer retains the right to change the position description for all other purposes.

After completing the physical, the chosen provider(s) will certify whether or not the employee is capable of performing all of the essential functions of the position. If the employee's chosen provider deems the employee is unable to perform any of the essential functions of the position, he/she will inform the Employer of this assessment and will inform the employee of the needed accommodation, if any, to request from the Employer in order to continue employment. In the event that the health care provider chosen by the Employer determines an employee is unable to perform the essential functions of his/her position, the Employer may, if applicable, implement appropriate action for cause under Article 10 of this Agreement. Regardless of whether the health and fitness for duty examination is conducted by an employee's chosen provider or an Employer's chosen provider, the employee will authorize, in writing (if requested by the provider), the release of the fitness assessment to the Employer.

7.5. Notwithstanding these scheduled annual examinations, the Employer reserves the right to send any employee to a health care provider for a fitness for duty examination at any other time if the Employer has probable cause to believe that such an examination is needed. For example, the Employer receives notice from the employee's chosen provider that he/she is unable to perform the essential functions of his/her position.

8. Fitness Standards. All scored fitness categories will be evaluated at the 60th percentile for the Cooper Scale Single Fitness Norms.

9. Fitness Testing. Fitness testing shall be administered by fitness coordinators and shall be conducted twice a year. The specific dates will be determined by the Chief in conjunction with the fitness coordinators.

9.1. The Employer expects to conduct fitness testing within its city limits.

9.2. The Employer will attempt to schedule fitness testing during Members' regular work hours. Fitness testing shall be treated and compensated as required duty. ~~Notwithstanding any other provision of this Article, a member will not be terminated for failing to satisfactorily complete the annual testing requirements imposed by this Article because of the Employer's failure to schedule a fitness test for that employee for any reason at least twice in a year.~~

9.3. Tests will consist of: A 1.5-mile run or equivalent (treadmill or bike), 1 bench press repetition (max) on a free weight system or push-ups to maximum, 1 leg press repetition (max) on a universal weight system or the vertical jump, sit-ups for 1 minute.

9.4. Members' work out time is not required duty and will not be compensated.

10. Fitness Coordinators. The Chief will appoint one or more Members to be "Fitness Coordinators." Fitness Coordinators shall be chosen from Members who volunteer for the role.

10.1. There shall be no additional compensation for service as a Fitness Coordinator.

10.2. All fitness Coordinators shall complete the Fitness Specialist class at the Ohio Peace Officer Training Academy. All training fees shall be paid by the Employer.

11. Fitness Statement. No Member may participate in the physical fitness program unless he/she signs a statement confirming the Member has no known medical or other condition which would restrict his/her participation in the physical fitness program.

12. Recognition of Participants in the Incentive Program. Members who participate in the physical fitness program shall be recognized as follows:

12.1. Members who successfully meet the 60th percentile physical fitness standards at least once during a calendar year will be awarded and authorized to wear a physical fitness award ribbon.

12.2. Members who have successfully completed their probationary periods and who thereafter successfully meet the 60th percentile physical fitness standard on one of the fitness tests held under this provision shall be awarded a Fitness Incentive Payment as described above in Section 9.5.5 of this Article.

12.3. Members who participate in the physical fitness program, but fail to meet the 60th percentile standards during a year, will be awarded a Certificate of Participation.

13. Temporary or Permanent Condition Preventing Participation in Testing. Employees can be excused from taking a physical fitness test called for under this Article if they have, and provide documentation from their physician confirming that they have, a temporary medical condition that would prevent the employee from participating in the testing. In such an event, the Employer will postpone the test for a defined period of time.

The Employer recognizes that employees with disabilities who can perform the essential functions of their job with or without reasonable accommodation may also experience difficulty in participating in the fitness tests called for under this Article. The Employer may amend the fitness test in appropriate ways to accommodate the condition of disabled employees.

ARTICLE 15 - LAYOFF AND RECALL

Section 15.1. When the Employer determines that a long term layoff or job abolishment is necessary, he shall notify the affected employees as soon as possible but not less than ten (10) calendar days in advance of the effective date of the layoff or job abolishment. Employees will be notified of the Employer's decision to implement any short-term layoff, lasting seventy-two (72) hours or less, as soon as possible. The Employer, upon request from the FOP agrees to discuss with representatives of the FOP, the impact of the layoff on bargaining unit employees. The layoff procedure shall not be used for disciplinary purposes.

Section 15.2. Layoff order shall be in the inverse order of classification seniority. Employees who are laid off shall be placed on a recall list for a period of ~~three hundred sixty-five (365)~~ one thousand and ninety-five (1095) calendar days. If there is a recall, employees who are still on the recall list shall be recalled, in the inverse order of their layoff, provided they are presently qualified to perform the work in the work section to which they are recalled. It is the responsibility of the employee to retain all job qualifications and be able to report to work from recall fit for duty. Any training necessary for a laid off employee to meet minimum requirements, as specified in the Ohio Revised Code so he can be recalled from layoff, shall be paid by the Employer.

Section 15.3. Notice of recall shall be sent to the employee by certified mail with a copy to the FOP. The Employer shall be deemed to have fulfilled its obligations by mailing the recall notice by certified mail, return receipt requested, to the last mailing addressee provided by the employee. It is the responsibility of the employee to provide the Employer with a written notice of any change of address and/or telephone number during his period of layoff.

Section 15.4. The recalled employee shall have five (5) calendar days following the date of receipt or attempted delivery of the recall notice to notify the Employer of his intention to return to work and shall actually return to work as soon as possible, but not more than fourteen (14) days following the receipt or attempted delivery of the recall notice in which to report for duty, unless a different date for returning to work is otherwise specified in the notice.

Section 15.5. The Employer agrees that no layoffs of bargaining unit members shall take place in the calendar years 2010 and 2011. The Employer shall maintain the personnel levels of bargaining unit members at a minimum of fifteen (15) officers during the calendar years 2010 and 2011. Should the personnel levels within the patrol officer bargaining unit drop below fifteen (15) officers during calendar years 2010 or 2011, the Employer will hire a replacement officer from a civil service list of patrol officers.

ARTICLE 17 - HOURS OF WORK AND OVERTIME

Section 17.1. The standard work period for all bargaining unit employees shall consist of eighty (80) hours in active pay status in a fourteen (14) day work period. The standard work period for Patrol Officers shall consist of twelve hours (12) per day allowing for one eight (8) hour day per period. Every attempt will be made in the scheduling to schedule necessary short days either the last work day before break days or the first work day following break days. An exception to this

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~~work schedule shall be deemed accepted when the Employer and Employee(s) mutually agree to do so (e.g., four [4] ten [10] hour days or five [5] eight [8] hour days). The start time for these shifts generally will be 0600 and 1800, although the Chief may establish a start time up to one hour earlier or one hour later than those listed to accommodate an overlap shift if desired. Upon the mutual agreement of the Chief of Police and the affected bargaining unit member, other starting times for job-related reasons may be established. The standard work period for all bargaining unit employees shall consist of eighty (80) hours in active pay status in a fourteen (14) day work period as established by the Employer. For the purpose of this Article, active pay status shall be defined as all scheduled hours on duty, all hours on vacation, personal day and all hours on compensatory time status.~~

Section 17.2. Bargaining unit employees required to work in excess of eighty (80) hours in active pay status in any fourteen (14) day work period shall be compensated at the rate of one and one-half (1-1/2) times his regular hourly rate of pay for all such excess hours actually worked. Payment for overtime shall be made in the pay period which follows the end of a fourteen (14) day work period. There shall be no pyramiding of overtime. For purposes of calculating overtime compensation, approved sick leave used in accordance with the terms of this agreement shall be deemed hours in active pay status.

Section 17.3. No employee shall be required to begin two (2) shifts within the same calendar day. This does not prohibit requesting an officer to be held over or brought in early for up to four (4) hours.

Section 17.4. Any member of the bargaining unit may request that any or all of his hours in active pay status in excess of eighty (80) hours within any fourteen (14) day work period be paid in the form of compensatory time at the rate of one and one-half (1-1/2) hours of compensatory time off for each hour worked in excess of eighty (80) hours. The granting of such compensatory time shall be at the sole discretion of the Employer and shall not interfere with the effective and efficient operation of the department. ~~Except for and not including the one time grant of compensatory time contained in Section 17.5 of this agreement, employees may accrue a maximum of eighty (80) hours of compensatory time per calendar year. Once an employee has accrued eighty (80) hours of compensatory time in a calendar year, that employee is ineligible to accrue any more compensatory time for the balance of the calendar year, notwithstanding that through the employee's authorized use of compensatory time, the employee's accrued compensatory time balance may then be less than the eighty (80) hour maximum. At the end of each calendar year, the Employer will cash out each employee's accrued, unused compensatory time at the employee's wage rate applicable at the time the compensatory time was accrued. The Employer will pay such cashed out compensatory time in January following the calendar year in which it was accrued. Employees may request to use compensatory time in maximum increments of one (1) week per request.~~

Section 17.5. ~~The Employer will grant two (2) full work days of compensatory time to bargaining unit employees for use in calendar year 2010 only. This award of compensatory time off will be available to each bargaining unit member as a separate compensatory time balance during calendar year 2010. For employees working twelve hour shifts, the Employer grants a total of twenty-four (24) hours of compensatory time. For employees working eight hour shifts, the Employer grants a total of sixteen (16) hours of compensatory time. This grant shall not add to the maximum accrual~~

~~limits set forth in Section 17.4 of this agreement, nor shall it be construed to change the rules governing the use and accrual of compensatory time contained in Section 17.4. This grant is in addition to and wholly separate from the compensatory time accrued by employees pursuant to Section 17.4 of this agreement. The Employer will not cash out or roll over the compensatory time hours granted under this Section.~~

ARTICLE 18 - WAGES

~~Section 18.1. Effective on January 1 of 2010~~07, 2008, and 2009~~, the pay ranges to which bargaining unit employees are assigned shall be frozen at the 2008 level in accordance with Appendix B of this Agreement, except for employees who received a step increase in 2009, who shall retain that step increase. After the successful completion of the probationary period, an officer will be placed on Step A of the pay range schedule in Appendix B. For the year 2007, Appendix B reflects a three percent (3%) raise; 2008 reflects a three percent (3%) raise; and in 2009 each member receives a four percent (4%) raise. The parties agree to re-open this Agreement for Article 18 - Wages on or about November 1, 2010 for 2011 and November 1, 2011 for 2012. The parties acknowledge that the Dispute Resolution Procedures under R.C. 4117.14 are available to the parties if impasse is reached in either the 2010 or 2011 reopener negotiations.~~

In the event that the Employer grants any group of bargaining unit or non-bargaining unit employees an annual wage increase, including by way of fact finding and/or conciliation, in excess of the ~~3%~~~~3%~~~~4%~~~~0%~~ annual increase provided by this agreement, the increase provided by this agreement shall be amended to conform to that higher percentage increase. This provision does not apply in situations where the Employer grants individual employees wage increases due to wage corrections, enhanced compensation for out of classification or other extraordinary work assignments, or similar increases in compensation addressing unique situations of individual employees.

~~Section 18.2. Except in 2010, each bargaining unit employee who has not reached the top step in his salary range in the Employer's pay plan shall be granted the appropriate step level increase on his anniversary date as provided for in such pay plan. The parties shall address whether or not such step increases shall be awarded as part of the reopener negotiations for the 2011 and 2012 wages.~~

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~~Section 18.3. The Employer will pay a shift differential to the members of the bargaining unit. The shift will be determined by the majority of time spent in any set of hours. Second shift: 1800-500 hours to 0600-2300 hours. Third shift: 2300 hours to 0700 hours. Employees eligible for shift differential will receive such shift differential for all hours of the shift, including the hours outside of the above limits which are a normal part of the shift.~~

~~Section 18.4. The employees will receive shift differential payment only for time actually worked, not for sick leave, disability leave, vacation, personal leave, holiday time off or compensatory time off. Authorized shift differential will be expressed as (flat rate) cents per hour. The established rate shall be ~~seventy-six cents (\$0.7060) per hour, for second shift and eighty cents (\$0.80) per hour for third shift.~~~~

Section 18.5. Employees who are assigned to serve on the Special Response Team (SRT) will receive a five percent (5%) increase in their base wage rate applicable while assigned to that team during the years 2007 and 2008. To the extent that an employee's SRT assignment extends over the course of more than one calendar year, the employee's base wage rate in the succeeding year is not compounded by the prior year's SRT pay. ~~In 2009, SRT members will receive a maximum payment of one thousand dollars (\$1,000.00) per year for each year they serve on the SRT. This payment will be made in two (2) parts: five hundred dollars (\$500.00) on the end of the first pay period after January 1, 2009, and five hundred dollars (\$500.00) on the end of the first pay period after July 1, 2009, for those eligible employees who have completed the prior six months of service in the SRT. Special Response Pay is a supplement to the base wage rate an eligible employee is entitled to at the time he serves on the Team; it does not create a new wage scale. In no event will any employee be entitled to this wage increase unless the Chief has assigned him/her to serve on the Team. The City will continue staffing an SRT for the duration of this agreement, and the current SRT employees will retain the 5% as part of their base wage for the duration of the agreement so long as they continue to be members of the Team.~~

Section 18.6. The Employer will pay five dollars (\$5.00) per day, for each of the 365 days in a year (for an annual total of \$1,825.00), to the Canine Officer for dog maintenance expenses. This amount shall be included in each paycheck received by this officer. This sum is intended to cover all dog maintenance expenses, other than dog food and veterinarian bills, and is specifically intended to cover, but is not limited to, grooming and boarding costs. The Canine Officer will not become entitled to payment exceeding this sum from the Employer for dog maintenance expenses, other than payment or reimbursement of veterinarian bills and dog food expenses, even if the Canine Officer actually incurs greater expenses than covered by the stated sum. This provision supersedes the general expense reimbursement provisions of Article 27 of this agreement with regard to dog maintenance expenses incurred by the Canine Officer.

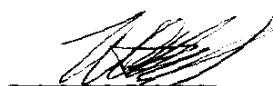
Section 18.7. Effective July 1, 2006, the Employer shall pay all bargaining unit employees by electronic funds transfer. Such electronic funds transfer shall take place in one of two ways, depending upon the employee's election: (1) direct deposit into an account at the employee's financial institution; or (2) stored-value debit card, which shall be opened in the employee's name and provided to the employee. Employees shall authorize the Employer to make direct deposits by completing the appropriate authorization agreement and providing the appropriate account information. Employees electing to receive a stored-value debit card shall cooperate with the Employer and the Employer's financial institution to create the stored-value debit card for the employee's benefit.

APPENDIX B: WAGE SCALE

	STEP A YEAR 2	STEP B YEAR 3	STEP C YEAR 4
2010*			
HOURLY	\$17.911	\$20.077	\$22.501
ANNUAL	\$37,255.	\$41,760.	\$46,802.

NOTE: Hourly rates were computed by increasing the previous year's rates by 3%; the annual rates were computed by multiplying the rounded hourly figure shown in the table by 2080 hours, and rounding to the nearest dollar.

*** Although noted as the 2010 scale, this is the 2008 scale that was in effect for employees in 2008 and 2009. ~~The Employer Proposes to~~ This scale continues the wage freeze for 2010. In 2008 and 2009 employees received step increases if they were eligible. This scale provides ~~The Employer proposes that no step increases will be given in 2010.~~**



William C. Heekin
February 22, 2010
Cincinnati, Ohio

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February 22, 2010

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RE: SERB Case No.: 2009-MED-09-0918; City of Wilmington – FOP/OLC;
impasse/factfinding

Gentlemen:

Enclosed, please find two (2) copies of the **REPORT OF THE FACT FINDER**. Also, enclosed is a copy of the INVOICE.

It has been a privilege to have served as fact finder.

Cordially yours,



William C. Heekin

WCH:bwh

cc: Mary Laurent (w/enclosure) ✓

STATE EMPLOYMENT
RELATIONS BOARD
2010 FEB 23 A 11:50