BEFORE THE OHIO STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Fact Finding Between:

Employer: Montgomery County Board of Commissioners

- and -

SERB Case #09-MED-09-1034
(Fact Finding)

Union: American Federation of State, County and Municipal Employees, A.F.L.-C.I.O., Ohio Council 8 Local #101

Appearances:

For the County: Douglas M. Trout, Esq.
Assistant Prosecuting Attorney
Montgomery County Prosecuting Attorney Office
Dayton, Ohio

For the Union: Stacey Benson-Taylor
Staff Representative
AFSCME Ohio Council 8, Local #101
Dayton, Ohio

REPORT AND RECOMMENDATIONS OF THE FACT FINDER

Frank A. Keenan
Fact Finder

BACKGROUND:

This case involved two days comprised of mediation sessions and a formal Fact Finding hearing focused on Articles 31 and 32, the "money" issues. Concerning the twelve (12) issues at impasse at the commencement of these proceedings, the parties, through their good faith efforts, and with some assistance from the undersigned acting as mediator, reached a tentative agreement with respect to all but four (4) issues, to wit: Article 6 - Filling of Vacancies; Article 26 - Paid Personal Leave and Long Term Sick Leave; Article 31 - Wages; and Article 32 - Evaluations and Merit Increases.

It is noted that this proceeding concerns the parties' successor Contract for their 2007-2009 collective bargaining agreement, which is referred to in the Report as the "current" Contract.

In arriving at the Recommendations herein made, the Fact Finder has taken into account and relied upon the statutory criteria set forth in Ohio Revised Code 4117.14 (G)(7), (a) to (f), to wit: the factors of past collective bargaining agreements; comparisons 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; the ability of

the public employer to finance and administer the issues proposed; the effect of the adjustments on the normal standard of public service; the lawful authority of the public employer; the stipulations of the parties; and such other factors, not confined to those noted 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 Report's format is as follows:

The Record, comprised of each party's position on each issue at impasse, their salient evidence on each issue at impasse, and their principal arguments with respect to each issue at impasse; The Rationale, setting forth the major reasons for the undersigned's "Recommendation"; and The Recommendation of the undersigned with respect to each issue remaining at impasse.

The Record Re: Article 6:

The first issue addressed is the parties' impasse with respect to Article 6 - Filling of Vacancies. Article 6 in the current Contract is comprised of eight (8) Sections. Neither party proposes any changes to Sections 3 through and including Section 8 of the current Contract's Article 6.

The Employer would amend the language of the first sentence of Section 1 of Article 6 of the current Contract, by adding

thereto the phrase "on the Montgomery County website," thereby contractualizing that which is already a County practice. Thus the Employer would have Article 6, Section 1., first sentence thereof, read as follows:

> "Section 1. A notice of all vacancies shall be posted on the Montgomery County website, at the central location in the Montgomery County Human Resources Department, and throughout the various departments in the County for a minimum of five working days."

The Employer would additionally amend the last sentence of Section 1. of Article 6 of the current Contract by deleting the phrase "a written application" therein, and substituting in lieu thereof the phrase "an application." This change appears to be merely a "housekeeping" change, eliminating the concept of a "written" application, it being self-evident to the Employer at least that the parties are referring throughout Article 6 to a "written" application. Accordingly, the Employer seeks to have Article 6, Section 1., in its entirety, read as follows:

> "Section 1. A notice of all vacancies shall be posted on the Montgomery County website, at the central location in the Montgomery County Human Resources Department, and throughout the various departments in the County for a minimum of five (5) working days. Additionally, the vacancy list will be sent to the Union. The notice will show the job classification, rate of pay, geographic location of the job, and the time and place of the

examination, if an examination is required. Those individuals who wish to be considered for the posted job must file an application with the Human Resources Department by the end of the posted period."

Except for the aforesaid Employer-urged deletions and/or amendments to Section 1. of Article 6 of the current Contract, the Employer would retain the current Contract language for the remaining Sections in Article 6 of the current Contract, namely, Sections 2; 3; 4; 5; 6; 7; and 8.

The Union, however, would retain the language in the current Contract for Article 6 - Filling of Vacancies, Sections 1; 3; 4; 5; 6; 7; and 8. Between the first and second sentence of Section 2. of Article 6, of the current Contract, the Union would add the following sentence:

"The top ten (10) internal applicants and the top ten (10) external applicants, who meet the minimum qualifications, and pass the required assessment test, shall be granted an interview."

The Employer, in support of its proposal, contends that the Union's proposal would adversely impact the County's ability to efficiently administer the filling of job vacancies. Moreover, asserts the Employer, the Union's proposal would diminish a fundamental management right to choose the best applicants for a given job. Then too, the Employer in effect contends that the

Union has offered no persuasive reason to change the status quo. To the contrary, contends the Employer, due to budget-necessitated reductions in force, there are now fewer workers to perform the work required. Accordingly, argues the Employer, the filling of vacancies as quickly as possible has taken on a new urgency; but the Union's proposal would clearly add to the administrative burden on management and thereby further delay the filling of vacancies. In turn, delay in filling vacancies only serves to increase the workload of the work force remaining, a work force already stressed by the additional work they have had to take on due to staffing cutbacks.

The Employer takes the position that when there is a vacancy, it is management's goal to hire the most qualified person for the position as quickly as possible. In its argument in support of its rejection of the Union's proposal, the Employer asserts that said rejection is in no way intended to imply that the County does not want to hire internal candidates for vacant positions.

The Union, in support of its proposal, points in its post-hearing brief to the Employer's policies in "Recruitment And Selection," Section No. 010 of the County's policies, last revised on 9/1/04, and asserts that presently, the Employer's policy does not use a standard practice or formula to determine whether an internal applicant, who passes the assessment, will

receive an interview. It is the Union's contention that this lack of such a formula has resulted in qualified internal applicants being excluded from the interview process. It has also resulted, asserts the Union, in qualified applicants "losing out" on a promotional opportunity to an external applicant. Stated otherwise, the Union contends that internal applicants do not always get the opportunity to demonstrate their skills. Moreover, asserts the Union, the lack of a formula to determine whether an internal candidate who passes the assessment will receive an interview is inconsistent with the provisions, at Article 27 - Leave Of Absence, Section 5. Education Leave, upon which the parties are tentatively agreed, which provides for generous tuition reimbursement" for full-time employees to further their potential by attending any accredited school or institution."

Responding to the Employer's "administrative burden" contentions concerning its Article 6, Section 2. Proposal, the Union asserts that the alleged additional burden to the hiring process its proposal creates "must be considered in the proper context." And that "context," states the Union, is the fact that the Employer has in place numerous resources to assist it in the selection process for filling vacancies. Thus the Union notes that the Board of County Commissioners has available a full-service Human Resources Department, which includes a

Recruitment Manager, who oversees the vacancy filling process and who administers a system known as Neo Gov, which allows the County to electronically post vacancies, receive applications, and filter applicants who fail to meet the minimum qualifications. Additionally, notes the Union, the County's Departments of: Job and Family Services; Administrative Services; Environmental Services; and the Stillwater Center, each have their own fully functioning Human Resource Departments, which are responsible for most of the recruitment and selection processes in said County Departments. The Union concludes: "Considering all of the resources that the County relies upon when filling vacant positions, the argument that the process proposed by the Union would be too burdensome does not outweigh the need to have a clear process that gives internal applicants a fair chance in the selection process."

Rationale:

It appears that the current Contract recognizes that the Employer has the right to recruit and consider external applicants (i.e., non-bargaining unit employee applicants) in filling vacancies to positions held by bargaining unit employees, indeed the law may require that external applicants have access to such County jobs. In any event, the Union legitimately and understandably seeks to expand the chances of the bargaining unit employees, the internal applicants, being

selected to fill a vacancy, as opposed to an external applicant filling it.

I note at the outset that the filling of vacancies is one of management's most fundamental prerogatives, and whereas here the parties, prior to Fact Finding, have successfully negotiated terms somewhat limiting this managerial prerogative, neutrals, such as Fact Finders, are reluctant to recommend changes in the bargain already struck absent evidence of a significant problem with the status quo. As seen above, the Union perceives that the purported lack of a standard practice or formula to determine whether an internal candidate who passes the assessment will receive an interview has resulted "in qualified internal candidates [not only] being excluded from the interview process, but often internal candidates 'lose out' on promotional opportunities to external candidates." (Emphasis supplied.) How "often" was not quantified. The Union also noted that on a recent occasion, "the Union filed and settled a grievance where an internal applicant, who was one of three candidates [presumably another way of saying one of three "applicants"] [was] denied the opportunity to take the assessment or sit for an interview, and the job was given to one of the external candidates. . . . [That] case is a perfect example of how an employee does not always get the opportunity to demonstrate [their] skills." (Emphasis supplied.) The point to be made is

that the record made before the undersigned reflects an indeterminate number of instances under the current Contract language where the Union, at least, "perceived" that an internal applicant merited an interview, and was unfairly not given an interview, and one instance where the Union's perception that an internal applicant was unfairly denied the opportunity to take the assessment or sit for an interview was grieved by the Union and settled by the Union, apparently to its satisfaction. In my view, in this state of the record evidence there simply is insufficient evidence to establish that there is a significant problem which warrants the Recommendation the Union urges. Additionally, in my view, the language the Union urges be Recommended overreaches the Fact Finder's (and indeed the Union's) authority in that it seeks to require the Employer to grant interviews to the top 10 external applicants who meet the minimum qualifications and pass the requirement assessment test. Directly to the point, neither the undersigned nor the Union is vested with the authority to require such. Accordingly, the Union's proposed language changes cannot be recommended.

The Employer's proposal to change sentence one (1) of Section 1 of Article 6 of the current Contract, to reflect the present practice of posting vacancies on the County's website, and add the phrase, "shall be posted on the Montgomery County website," and retaining all the other methods of posting

vacancies now provided for in the current Contract, simply makes sense, and accordingly it will be recommended. With respect to the Employer's request that the last sentence of Section 1. of the current Contract's Article 6 be changed by dropping the word "written" therein, such will not be recommended. This is so because, as noted above, while apparently intended as just a housekeeping change, an abundance of caution persuades me that the law of unintended consequences may be lurking here in the event the requested change were made. On the record made before me there is no evidence that the language of the last sentence of Section 1. of Article 6 in the current Contract has caused any problems. As the adage goes: if a matter isn't broken, don't fix it.

RECOMMENDATION:

It is recommended that the parties amend Section 1. of Article 6 of the current Contract to read as set forth below, and adopt same as Section 1. of Article 6. Filling of Vacancies in their successor Contract:

> "A notice of all vacancies shall be posted on the Montgomery County website, at the central location in the Montgomery County Human Resources Department, and throughout the various departments in the County for a minimum of five working days. Additionally a vacancy list will be sent to the Union. This notice will show the job

classification, rate of pay, geographic location of the job and the time and place of examination, if an examination is required. Those individuals who wish to be considered for the posted job must file a written application with the Human Resources Department by the end of the posted period."

It is additionally recommended that the parties retain the current Contract's language at Sections 2, 3, 4, 5, 6, 7, and 8 of Article 6 - Filling of Vacancies in their successor Contract.

Record Re: Article 26-Paid Personal Leave and Long Term Sick Leave:

From what follows it is clear that the Employer was quite correct when in its post-hearing brief it in effect observed that Article 26 has created the greatest amount of difficulty over the course of the current Contract, and, I would add, over the course of the parties' present negotiations for a successor Contract, and over the course of the undersigned's mediation efforts. Thus, the record shows that the parties' 2004-2006 Contract (and apparently several contracts prior thereto), provided for what is perhaps best described as a standard or traditional sick leave program and provision entitled "Sick Leave Accumulation And Use" at Article 26. The parties' 2004-2006 Contract also provided for what is perhaps best described as a standard or traditional program and provision for paid

personal leave within Article 25, entitled "Vacation And Personal Leave." However, in the negotiations for the current Contract, the 2007-2009 Contract, the parties abandoned their traditional approach to both sick leave and paid personal leave, and, as the Employer put it, "transitioned" to the more innovative concept and mix of numerous no fault personal leave days and long term sick leave days. Thus, during the negotiations for the current Contract, the 2007-2009 Contract, the parties moved from fifteen (15) traditional paid days of sick leave and three (3) traditional paid days of personal leave to nine (9) long term sick leave days and ten (10) paid no fault personal leave days, set forth in Article 26 of the current Contract, and entitled "Paid Personal Leave and Long Term Sick Leave." As a consequence thereof, the concept of paid personal leave found within Article 25 of the 2004-2007 Contract, entitled "Vacation And Personal Leave," was transferred (as modified) to Article 26 in the current Contract, and Article 25 in the current Contract was retitled "Vacation Leave," the parties dropping any reference to "Personal Leave."

Suffice it to say that the parties' decision and agreement to abandon traditional sick leave concepts and traditional paid personal leave concepts in their 2007-2009 collective bargaining agreement, and to transition and adopt more innovative concepts of sick leave and paid personal days, can only be characterized

as a dramatic sea change in the manner in which their collective bargaining agreement allocated and provided for sick leave and paid personal days.

In the course of the implementation and administration of the current Contract a dispute arose as to just how the provisions of Article 27 were to be applied; the parties have a dispute concerning the proper "interpretation" of the language of Article 27 in the current Contract.

In a nutshell the Employer contends that the language of Article 27 is "clear and unambiguous." In particular, the Employer points to the language in Article 27 of the current contract at Section 1. Paid Personal Leave (PPL) paragraph B. Paid Personal Leave (PPL) usage, which reads: "…Employees may use PPL for illnesses of one (1) or two (2) days duration, so long as a balance remains in their PPL account." The Employer also points to the language in Article 27 of the current Contract at Section 2. Long Term Sick Leave (LtsL), paragraph B. Long Term Sick Leave (LTSL) usage, which reads "…Employees may use long-term sick leave, upon approval of Management, for absence on the third day and thereafter due to FMLA personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the Employee's immediate family…" This above-noted language, asserts the Employer, supports the

Employer's position that "PPL is to be utilized for the first two days of an illness and that long term sick leave is to be used the third day and thereafter."

Put another way, the Employer contends that "the [PPL] program is designed, and the [Contract] language states, that an employee can use PPL for the first 2 days of absence for any reason, including illness. If the employee is off work due to illness for more than 2 days, beginning on the third day, the employee is allowed to use LTSL provided they submit documentation and follow call-in procedures."

In sum, in its post-hearing brief, the Employer requests the undersigned, except as hereinafter specifically noted otherwise, to recommend retention of the current Contract's provisions at Article 26, and to interpret said language of the current Contract "so that long term sick leave is only applied after the third day of absence." In support of this requested interpretation, the Employer additionally asserted in its post-hearing brief that "County… Exhibit 15 also supports our interpretation of Article 27 and the intent of the parties. This document was shared with the Bargaining Unit during negotiations for the 2007 Labor Contract. It clearly illustrates [that] long term sick leave begins on the third day."

Following the filing and exchange of post-hearing briefs, the Union emailed the undersigned and the County as follows:

"In reviewing the brief submitted [by County Counsel] on behalf of Montgomery County Board of County Commissioners. On page 4 of their brief second paragraph [Counsel] states that exhibit15 was submitted during the 2007 collective bargaining negotiations. This is the first we have seen of this document and wanted to bring this to your attention. Also, I have contacted [Counsel] to inform him of this misinformation."

Thereafter the undersigned received an email from Counsel for the Employer reading as follows:

"The purpose of this message is to correct an error in the [post-hearing] brief I filed on behalf of Montgomery County. [Employer's] Exhibit #15 was not shared with AFSCME during the collective bargaining negotiations. The document clearly reflects Management's intent of the proposal, the language and implementation of PPL. It was included in the post-hearing brief to provide you with a visual depiction of the program.

We apologize for any confusion this may have caused. I am forwarding this message to representative at AFSCME as well."

Following my receipt of the above-noted email from the Employer's Counsel, I received no further communication from AFSCME concerning the matter of Employer Exhibit #15.

In light of the nature and reasons for the undersigned's recommended resolution of the parties' impasse concerning Article 26 of their successor Contract, set forth in the Rationale for the undersigned's Recommendation vis a vis Article 26, set forth below, I have found it unnecessary to give any consideration to Employer's Exhibit #15.

Still further in this matter, the Employer does seek to change some of the language of Article 26 in the current Contract. Thus the Employer would have the first (1st) sentence of Article 26, Section 1. Earnings of Paid Personal Leave (PPL)

and Long Term Sick Leave (LTSL), paragraph A. Paid Personal Leave (PPL) earnings - read, in lieu of how it now reads in the current Contract, as follows:

"A. Paid Personal Leave (PPL) earnings:

For each employee in active full time pay status, five (5) days (40 hours) shall be credited to a yearly PPL account at the beginning of the second (2^{nd}) pay period of the calendar year and five (5) days (40 hours) shall be credited to a yearly PPL account at the beginning of the pay period that includes July 1 of each calendar year, and shall not be accumulated in the Long Term Sick Leave account."

The Employer would also have the fifth (5^{th}) sentence of Article 26, Section 3. Conversion/Transfer of Paid Personal Leave and Long Term Sick Leave, paragraph A. Conversion or transfer of Paid Personal Leave (PPL) at year's end--read, in lieu of how it reads in the current Contract, as follows:

"A. Conversion or transfer of Paid Personal Leave (PPL) at year's end:

...The PPL cash out shall be paid no later than the end of the second pay period of the subsequent calendar year..."

The Employer urges that the above-noted changes are related to addressing stress on 24 hour operations and reducing the impact of pay outs all at once.

On its behalf, the Union asserts that in the 2007 negotiations the parties' intent was that employees would be allowed to utilize LTSL for days one (1) and two (2) of an illness if they were off sick for three (3) days or more. To remove any shadow of a doubt on the matter the Union proposes a

change to Article 26 as it reads in the current Contract, namely, a change to Section 2., paragraph B. Long Term Sick Leave (LTSL) usage, paragraph two, sentence one, which in the current Contract reads as follows:

> Employees may use long term sick leave, upon approval of Management, for absence on the third day and thereafter due to FMLA, personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury or death in the employee's immediate family."

The Union would revise the above sentence to read as follows:

> "Employees may use long-term sick leave, upon approval of Management, for absences of three (3) days or more due to FMLA, personal illness, pregnancy, injury, pre-planned medical appointments, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family."

The Union notes that the parties' new concepts of long term sick leave and no fault paid personal leave days were first implemented in July 2007. At that time, and for approximately a year thereafter, certain departmental human resources managers in certain departments, for example, in the Sanitary Engineering Department, administered these new concepts of no fault paid personal leave and long term sick leave, in a manner whereby employees who were off sick for three consecutive days, or more, could utilize LTSL for days one (1) and two (2), as well as for the third (3^{rd}) day of absence, and days subsequent to the third day of absence. It will be recalled that the bargaining unit is

made up of certain employees from several different County Departments. The Union contends that this initial manner of administering PPL and LTSL complied with what the parties intended in their negotiations for the 2007-2009 Contract. Moreover, asserts the Union, the fact that indeed the parties intent was to administer LTSL in this manner was echoed, and indeed affirmed, by an unknown manager in a memo sent to department supervisors and entitled "Points To Remember About PPL System." Thus, the Union draws the undersigned's attention to the following bullet points from this "Points" memo:

- Unplanned PPL days may not be used for more than 2 consecutive days….
- The first 2 days of any unplanned leave is considered PPL (with some exceptions), but if the third (and subsequent days) qualify as long term leave, the original 2 days will also convert to long term leave. The current policy regarding the verification of long term absences has not changed.

Indeed, in its post-hearing brief, the Union asserts that up until September of 2008, when the Employer changed the manner of administering Article 26, it appeared that the parties were in agreement as to the intent of the language of Article 27 of the current Contract. However, notes the Union, beginning in September 2008 the Employer began training supervisors to require employees to use PPL for the first two days of an illness of three (3) or more days, and LTSL for the third (3^{rd}), and remaining days, of said

illness. The Union acknowledges that the current Contract's language in Article 26 could be interpreted to support the Employer's change in the manner of administering Article 26, commencing in September of 2008, but contends that the clear intent of the parties was to have article 26 interpreted in the manner the Employer initially did, to repeat, in a manner whereby employees were permitted to utilize LTSL for days one (1) and two (2) of an illness if they were off sick for three (3) or more days. This being so, asserts the Union, it filed several grievances on behalf of employees who were required to use PPL for the first two days of a three or more day absence due to illness, which grievances were settled on a non-precedent basis in favor of the grievant, and concerning any new grievances, (there are presently ten (10) pending grievances) the parties agreed to hold same in abeyance "until the matter could be resolved in negotiations."

In its post-hearing brief the Employer addresses the Union's contentions concerning the County's initial manner of administering Article 26 of the current Contract. Thus, the Employer notes that Article 26 grants bargaining unit employees eighty (80) hours of Paid Personal Leave annually, and it also grants the option to receive a payout (up to 40 hours) at the end of the year for unused PPL

time, thereby providing rewards to those employees who are most physically at work and not on PPL. The Employer, in its post-hearing brief, notes that Article 26 of the current Contract, Section 1. B. reveals that the motive behind granting generous PPL and a payout feature is to encourage conservation of PPL and thereby reduce unplanned absences across the AFSCME-organized County workforce. The Employer contends in its post-hearing brief that the construction of Article 26 that the Union urges "is a clear tactic to preserve the maximum payout of PPL at the end of the year and contrary to the intent of the parties and the language in [Article 26]."

The County concedes in its post-hearing brief that some departments initially administered Article 26 in the manner the Union alleges. This initial administration was incorrect, however, asserts the Employer, and in any event, "such mistaken administration certainly does not constitute a past practice." The Employer notes that a memo was subsequently issued County-wide and from that point forward the clear unambiguous language of Article 27 was applied county-wide.

RATIONALE:

As is manifest from the foregoing, both parties seek to have the undersigned : 1. confirm their respective understanding of what the parties' negotiated as Article 26 in their negotiations for their 2007-2009 Contract, the current Contract; 2. articulate that confirmation; and 3. recommend that confirmation as Article 26 for their successor Contract. Put another way, both parties are implicitly asking the undersigned to act as a rights arbitrator. But the role of a Fact Finder differs significantly from that of a rights arbitrator. The Fact Finder is bound to reach his/her decision by taking into consideration the statutory criteria noted at the outset of this Report; the rights Arbitrator, however, must be guided by well established arbitral principles of construction relative to the written terms of the collective bargaining agreement, criteria and guidelines differing markedly from those applicable in the Fact Finding forum here. Nevertheless, both parties acted properly in bringing their issues concerning article 26 to Fact Finding, where they could use their urged construction as a bargaining chip in the adjunct mediation process involved in Fact Finding. Unfortunately, however, in the mediation phase of the Fact Finding process, ultimately, neither party was willing to modify or concede his position regarding Article 26.

Accordingly, Article 26 remains at impasse and was left to the Fact finder to deal with.

In my judgment the overarching statutory criteria applicable here is the factor set forth at O.R.C. 4117.14 (G)(7)(f), namely, "such other factors not confined to those noted 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." Thus, since the inception of O.R.C. 4117 some twenty-six years ago, Fact Finders appointed by the State Employment Relations Board have been extremely reluctant to depart from recently agreed-to Contract provisions in the absence of some very compelling reason to do so. This reluctance is grounded on the notion that the parties know best their needs and requirements and having gone through the rigors of the collective bargaining process and reached agreement and a resolution of a particular working condition at the bargaining table, they are to be expected to live with it awhile, at least through the immediate successor Contract, as here. And this is especially so, where the agreement reached (here the 2007-2009 Contract, the current Contract) constitutes, as here, a sea change and/or dramatic change from what obtained before. Furthermore, this overarching

principle is bolstered by the additional statutory factor of past collectively bargained agreements. Following adoption of this Recommendation the parties can proceed to arbitration. Both parties have points to make before a rights Arbitrator, and in my view, whoever prevails, the essence of the innovation the parties undertook in Article 26 will not be jeopardized.

Accordingly, it will be recommended that the parties retain the language of Article 26 of the current Contract, with the consequence that the language changes both parties seek are not recommended.

RECOMMENDATION:

It is recommended that the parties retain the language of Article 26 in the current Contract as their Article 26 in the successor Contract.

Record Re: Article 31 - Wages - and - Article 32 - Evaluations and Merit Increases:

These are self-evidently the compensation issues. In its pre-hearing position paper for the Fact Finding hearing the Employer proposed for Article 31 - Wages in the successor Contract, a 0% increase in year one of the Contract; for year two of the successor Contract, a

reopener; and for year three of the successor Contract, a reopener.

With respect to Article 32 - Evaluation and Merit increases, (also known as step increases) in the successor Contract, the Employer proposed a freeze of step increases in year 1 of the Contract, and a reopener for years 2 and 3 of the successor Contract.

In the course of the mediations sessions conducted in Fact Finding the Employer modified its wage proposal in an offer packaged with other items then still unresolved to a $300.00 lump sum payment payable within thirty (30) days following ratification by both parties for the first year of the Contract; a wage reopener for calendar year 2011; and another wage reopener for calendar year 2012. In its post-hearing brief the Employer no longer ties or packages its proposal to other unresolved issues as it did in mediation, and proposes for Article 31 - Wages, without conditions, one of its mediation proposals, to wit: a $300.00 lump sum payment payable within thirty (30) days following notification of the successor Contract by both parties for the first year of the Contract, with a wage reopener for calendar year 2011, and another wage reopener for calendar year 2012.

With respect to Article 32 - Evaluations and Merit Increases, the Employer, in its post- hearing brief, proposes that said increases be frozen for the life of the Agreement. As an alternative the Employer proposes that said step/merit increases be frozen for calendar year 2010; the step/merit increases be considered as part of the wage reopener for calendar year 2011; and that step/merit increases be considered as part of the wage reopener for calendar year 2012. In support of these proposals the Employer contends that the County is facing unprecedented financial challenges in this the toughest economy since the Great Depression. The Employer asserts that Montgomery County is one of the hardest-hit counties in Ohio relative to loss of jobs and consequent unemployment; unprecedented foreclosure rates; and lost revenue. The Employer also notes that while other Employers were seeking concessions from their bargaining unit employees under existing Contracts, the Employer took the position that they would honor the terms of all existing labor agreements and did not request such concessions. The County, financially strapped, was obliged to abolish many jobs, including jobs within AFSCME's bargaining unit here. Nevertheless, through the good faith efforts and cooperation of management and AFSCME every employee in the bargaining unit here who lost

their bargaining unit job but expressed an interest in taking another County job, was offered and placed with another job.

Going into fact finding the Union was proposing a 2% raise each year of the Contract, and a $1500.00 signing bonus for all bargaining unit employees, the Union contending that the County has a healthy "Rainy Day Fund"; has provided various types of increases/lump sums to other County bargaining units while it has been negotiating with AFSCME, and therefore, as an issue of internal comparables, the Employer is in a position to provide some form of compensation to the employees in this bargaining unit.

In the post-hearing brief, at page 6 thereof, the Union stated as follows:

"C. UNRESOLVED ISSUES

There were, however, four unresolved issues following the hearing. Those issues and the Union's position on two of the four issues are set forth below.

Parties presented testimony

Article 31 Wages

Article 32 Evaluations and Merit Increases

Testimony was not presented, parties agreed to brief the issues.

Article 6 Filling of Vacancies

Article 26 Paid Personal Leave and Long Term Sick Leave"

As seen above, the Employer has opted to modify its initial position and propose the $300.00 signing bonus it offered in a "package" proposal during mediation, as its final unpackaged and stand-alone proposal to the Fact Finder, as it was entitled to do.

In contrast thereto, as I read and understand page six (6) of the Union's post-hearing brief, the Union is not proposing any wage proposal it packaged with other proposals in mediation, as an unpackaged stand-alone wage proposal to the Fact Finder, as did the Employer, but rather, is proposing the wage proposal it had going into Fact Finding. The Union was entitled to take this approach.

With respect to Article 32 - Evaluations and Merit Increases, the Union again urges that the recommendation conform to the Union's proposal for Article 32 going into Fact Finding. Again, the Union was entitled to do so.

The Fact Finder has reviewed the many items of documentary evidence and his notes of the substantial testimony of Employer witness Deborah Feldman, Montgomery County Administrator and of Union witness Christopher Fox, a Fiscal Policy Analyst employed by AFSCME's International in Washington, D.C. Both of these witnesses did an excellent job. I note in particular County Administrator

Feldman's testimony that in the present reduced state of the County's finances it would be "irresponsible" to grant a traditional across-the-board percentage increase for any year of the parties' Contract or to take any action other than a freeze of merit/step increases in the first year of the parties' Contract, with reopeners concerning merit/step increases for the second and third years of the parties' Contract. And I note, too, in particular Union Analyst Fox's testimony to the effect that the Union was willing to accept a lump sum payment in lieu of across-the-board wage increases over the life of the Contract. This willingness on the Union's part was given expression in the course of the mediation sessions. Couple this with the fact that the parties have been working cooperatively in saving AFSCME bargaining unit jobs, it is clear that philosophically both parties are fully aware that in the current fiscal circumstances, this round of negotiations is not business-as-usual. It is clear that the union is focused in large measure on obtaining in Article 31 a fair settlement, as compared to other County bargaining unit employees, to the extent possible, taking into consideration the differing conditions of employment and different funding sources of other County bargaining units. And with respect to Article 32's provisions, the Union seeks at a minimum to maintain

the concept and structure of said Article, even if merit/wage increases must be frozen during one or more years of the successor Contract. And it appears to me that the County does not contend otherwise with respect to Articles 31 and 32. In this state of the record concerning Article 31, I will recommend a lump sum payment larger than that proposed by the Employer for the first year of the Contract and a wage reopener in years two and three of the Contract. Concerning Article 32, I will recommend a merit/step increase freeze in the first year of the Contract and a reopener for year two of the Contract, and again for year three of the Contract.

To the extent that the phraseology in the Employer's post-hearing brief with respect to its alternate proposal concerning Article 32, that "step increases can be considered as part of the wage reopener for calendar year 2011 and calendar year 2012," implies that wages and merit/step issues would meld into but one issue, I disagree. Hence, the Recommendation the undersigned is making embraces the concept that in the event the parties reach impasse during reopener negotiations in either 2011 or 2012 regarding step increases, "step increase issues" shall be regarded as a separate issue from "wage issues" in the Fact Finding process.

RECOMMENDATION RE ARTICLE 31:

With the caveat concerning the amount of the lump sum payment the Employer proposes, I recommend the parties' successor Contract at Article 31, comply with the Employer's proposal. The caveat is that I do not recommend the amount of $300.00 as the lump sum payment in year one of the Contract, but rather, I recommend the amount of $375.00 as the lump sum payment.

RECOMMENDATION RE ARTICLE 32:

With respect to Article 32, I recommend that "step increases" be frozen for calendar year 2010, with a "step increase" reopener for calendar year 2011, and a "step increase" reopener for calendar year 2012.

RECOMMENDATIONS RE TENTATIVE AGREEMENTS:

It is also RECOMMENDED that the parties ratify the Articles tentatively agreed to prior to the commencement of the hearings in Fact Finding. These Articles and the date on which the tentative agreement was reached are set forth in a chart on page 4 of the Union's post-hearing brief. It is further RECOMMENDED that the parties ratify the Articles tentatively agreed to by the parties in the mediation phase

of the Fact Finding proceedings, said Articles being enumerated at page 5 of the Union's post-hearing brief.

This concludes the Fact Finder's Report and Recommendations.

Dated: September 14, 2010

Frank A. Keenan
Fact Finder

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September 14, 2010

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Attn: Stacey Benson - Taylor, Staff Repr.
15 Gates Street
Dayton, OH 45402

Montgomery County Commissioners
Attn: Stephanie R. Echols
451 West Third Street
Dayton, OH 45422

Montgomery County Prosecuting Attorney
Attn: Douglas M. Trout, Esq.
Dayton-Montgomery County Courts Building
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301 W. Third St.
Dayton, OH 45422

State Employment Relations Board
Attn: J. Russell Keith, G.C. & Asst. Exec. Dir.
65 East State Street, 12th Floor
Columbus, OH 43215

Dear Ms. Benson-Taylor, Ms. Echols, Mr. Trout, and Mr. Keith:

Please find enclosed the Fact Finder's Report and Recommendations in the above-captioned case. I have also enclosed my bill.

Thank you for your cooperation throughout these proceedings.

Very truly yours,

Frank A. Keenan, Esq.
Fact Finder

FAK:jk
Encls.