

**FACT FINDING REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
June 15, 2010**

IN THE MATTER OF:

Fraternal Order of Police,
Capital City Lodge #9

Employee Organization

and

City of Upper Arlington,
Franklin County, Ohio

Employer

CASE NO. 09-MED-10-1285 and 1286

FACT FINDER: Howard Tolley Jr.

APPEARANCES

Fraternal Order of Police, Capital City Lodge #9
Russell Carnahan, Attorney
Keith Ferrell, Vice President FOP
Daniel Quigley, Sergeant
Brian Correll, Officer
Greg Patrick, Lieutenant
Matt Smith, Officer
Heath Montage, Detective

City of Upper Arlington,
Mark Lucas, Chief Negotiator
Cathe Armstrong, Finance Director
Brian Quinn, Police Chief
Jeanine Hummer, City Attorney
Robin Sowry, Transcriber
Joe Valentino, Assistant City Manager
Regina Ford Drzewiecki, Human Resources

Introduction

The two FOP bargaining units certified by SERB currently include thirty-eight patrol officers and eleven supervisors at the rank of Sergeant and Lieutenant. The city has a population of about 32,000, collective bargaining agreements with four employee groups representing about 140 members and about 125 unrepresented employees. Their most recent three year agreement on December 1, 2009, and the parties had nine formal bargaining sessions, tentatively agreed to twenty-six articles, but were unable to reach agreement on four articles – 13 Political Activity, 14 Internal Review Procedures, 16 Wages (3 sections), and 19 Holidays.

The parties exchanged and submitted pre-hearing position statements that summarized their proposals. The parties prepared supporting documents for presentation at the hearing to address the criteria established by the Ohio Public Employees Bargaining Statute in Rule 4117-9-05:

- 1) Past collectively bargained agreements, between the parties
- 2) Comparison of unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- 3) The interest and welfare of the public, 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;
- 4) The lawful authority of the public employer;
- 5) Any stipulations of the parties; and,
- 6) Such other actors, 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.”

Fact Finding Hearing: June 11, 2010, City of Upper Arlington

The Fact-Finder conducted a hearing from 9:30 am until 4:25 pm with presentation of evidence, witness testimony and argument on four articles.

ARTICLE 13 POLITICAL ACTIVITY

City of Upper Arlington Position:

The employer proposed deleting language that allows political activity with a provision that expressly bars members from campaigning for or against candidates for elected positions in Upper Arlington. The city submitted the Ohio Revised Code Section 124.57 Prohibition against partisan political activity that applies to all classified employees in the state. Proposed new language would allow members to vote, sign petitions, express private political views, and respond to factual questions about matters involving official knowledge or expertise.

FOP Position:

In defense of current contract language granting members participation rights in the Lodge’s political screening committee, the union invoked ORC 4117 that bars employers from interfering with internal decision making of a labor organization.

Discussion:

At the hearing, the employer acknowledged there had been no problems with FOP members becoming involved in Upper Arlington elections, but noted that a member of another bargaining unit had behaved improperly. When asked by the fact finder why the city also

proposed deleting language enabling members to participate in political activity outside the City subject to express limitations, the employer's representative indicated that the restriction on political activity in Upper Arlington was the primary objective, but that the proposal ultimately was not a high priority.

Recommendation:

The Fact Finder recommends current contract language.

ARTICLE 14 INTERNAL REVIEW PROCEDURES

FOP Position:

The union offered a package of eight proposals emphasizing basic due process during internal administrative and/or criminal investigations based on similar language in other FOP contracts – 48 hours advance notice prior to an initial interview, written notice, specific allegations, copies of all evidence in the file including both a citizen complaint and written summary of the complaint, reasonable time to review, continuances of the interview, and limitations on questioning to the subjects identified in the written notice. The FOP noted the frequency of frivolous complaints and wanted early, full disclosure of all charges in order to obtain essential information and documentation that might be needed for the interview. The union representative sought improved procedures that would respect officers' due process rights in administrative investigations and spare members from a surprise ambush or sneak attack by the employer. The FOP provided Ohio Supreme Court decisions mandating disclosure of public records.

City of Upper Arlington Position:

The employer strongly rejected all the union's procedural demands based on the best practice for the initial investigatory interview to be conducted as soon as feasible, without prior disclosure of information received from others, and open to questioning about other matters of concern revealed during the interview. The city noted that the FOP was seeking to write into the Internal Review article the procedural safeguards found in the disciplinary article. When they first question a possible suspect, police investigators do not provide full disclosure of facts reported by others, and the right of discovery in criminal proceedings comes after formal charges have been filed. Similarly the city's administrative investigation of alleged police misconduct may lead to discovery at a later stage in the proceedings, but would be highly inappropriate in the initial fact finding interview.

Discussion:

The fact finder concludes that some of the union proposals are redundant, and others would frustrate an investigator by imposing unreasonable, arbitrary limits on the timing of the first interview and by mandating premature disclosure of information that would become available if needed after the interview. Section 14.5 Part B of the current agreement offers sufficient guarantees that the interview will be scheduled at a reasonable time without imposing an arbitrary 48 hour waiting period that might cause undue delay. The proposal for "written" notice of all allegations would be somewhat redundant and otherwise inappropriate given the current language in Section 14.5 part A that the member "be provided a copy of any citizen complaint of a written summary of the basic facts of any complaint made against the member."

The union proposes adding reference to ORC 149.43, the public records act, in a contractual requirement that the city disclose all file material related to an administrative investigation before the interview and in time for the member's representative to review before any questioning. Unless required to do share material under current contract language, the fact finder considers it reasonable for the city to withhold other public records until after the

interview when the member can file an information request whether or not the contract mentions the Ohio public records act. The investigator should not need to schedule a follow-up interview if additional concerns arise during the initial session, and the current language allows a break in the questioning to attend to physical necessities. A contractual mandate that a member has the right to seek continuance appears more appropriate for a formal disciplinary proceeding, and current language limits the interview to a “reasonable” period of time.

Recommendation:

The Fact Finder recommends current contract language with the addition to Sec. 14.5 Part B of the phrase “as a witness in, or as a focus of, the investigation.

ARTICLE 16.1 RATES OF PAY/WAGES

City of Upper Arlington Position:

The employer proposes a wage freeze in 2010, and one per cent increases in 2011 and 2012 for a total cost to the city of an estimated cost \$136,000 over the three-year agreement. The city argues that it can no longer tap reserves to fund ongoing expenses at a time of flattened and declining revenues. Upper Arlington recently privatized trash collection and contracted out custodial services as cost saving measures that resulted in laying off employees. When vacancies arise the city carefully reviews the need for a replacement. It appears likely that the state will soon require the employer to pick up a larger share of compensation to fund future pensions. The union’s prior contract gave its members higher raises than those enjoyed by other city workers, and the yet to be determined FOP raises in 2010 will influence negotiations with the IAFF scheduled for later this year. Prior labor agreements negotiated before the recession granted unsustainable annual increases during the downturn, and such recovery is still uncertain. All bargaining units must recognize that as a result of the recession and reduced investment income that new agreements cannot offer the level of wage increases granted in the past.

In the hearing statement the employer worried that the Fact Finder would split the difference with the union’s proposed 4% if the city had offered the FOP the same 1.5% increase in 2010 granted on average to unrepresented employees. The employer expressly rejected the need to keep pace with comparable jurisdictions that had higher income tax revenues and no obligation to fund a fire department. The Upper Arlington union enjoys superior fringe benefits, and matching wage increases should not be paid by any further drawing of down depleted reserve funds. Although the city is not destitute, prudent financial management is critical to maintaining solvency when forecasts project ongoing deficits.

FOP Position:

The union proposes four per cent wage increases for all three years of the agreement. The FOP contends that the city has avoided the economic crunch through prudent management that recently improved Upper Arlington’s bond rating from AA-1 to AAA bond rating, one of only four cities in Ohio. In 2009 the city’s General Fund reserves were 55% of expenditures, more than double the employer’s 20% target for restricted reserves that in turn considerably exceeds the Moody’s recommended guideline. Based on successful redevelopment of the Kingsdale shopping center with a new hub opening in September and the significant annual revenues from estate taxes Upper Arlington’s finances were secure. Union exhibits revealed that as a result of conservative budgeting, between 2004 and 2009 the city’s actual General Fund Revenues exceeded original projections by an average of more than 2% and actual expenses as a result of lapsed appropriations were on average more than 5% below original appropriations. The union submitted data on comparable jurisdictions showing that Upper Arlington’s compensation trailed seven other FOP units that were continuing to receive annual pay raises of three to four

per cent through 2012. Unless its proposed increases were approved the Upper Arlington FOP would fall further behind.

Discussion:

1. Ability to Pay:

In February the City Manager and Finance Director proposed reductions of over \$2 million in the 2010 Budget based on projected deficits and a sharp decline in fund balances. In response, Council reduced the budget line for merit pay increases to unrepresented employees from an average of 2.95% to 1.5% and approved other expenditure reductions. The Fact Finder carefully reviewed the Fund spreadsheets in the Biennial Budget Supplement submitted to Council and paid particular attention to the Consolidated Funds overview. The Fact Finder concludes that a) the City's projection of declining Fund Balances significantly over estimates the amount of that decline, and b) the decline is the result of a policy choice to spend heavily on capital projects.

Estate Tax Projection: Starting in 2010 the city has underestimated estate tax revenues by at least \$1.4 million per year, resulting in an erroneous projected total decline in fund reserves of \$5.6 million by 2013. The supplement at page 2 shows a projected deficit of \$1.8 million for 2013 in the Capital Funds balance, but the Fact Finder believes the projection should show a positive balance of \$3.8 million.

The supplement at page 1 "conservatively" estimates estate tax revenues allocated to the General Fund at \$2.1 million per year from 2010 through 2013. At page 62 however, the Supplement notes that over the past ten years, Estate Taxes have brought in a total of \$17.5 million beyond the \$2.1 million per year allocated to the General Fund. That surplus averaging \$1.75 million per year was all transferred to the restricted Estate Tax Capital Projects Fund. The Supplement however does not project any Estate Tax transfer into that Capital Fund from 2010 to 2013. At the hearing, the city insisted that its modest projections were reasonable but offered no convincing explanation of why future estate tax revenue would decline in a community with so many elderly, wealthy residents whose estates include extremely valuable homes. Over the past four years estate tax revenues have steadily increased despite a fall in stock prices and problems in the real estate market. The city's projects increases for future income tax revenues, but for the estate tax the city's projections for all four years are slightly below revenue from the lowest year in the past decade.

Methodology: In order to obtain a more realistic projection of consolidated fund balances, the Fact Finder re-calculated the estate tax revenue projections for the four year period 2010-2013 by increasing the expected revenues from \$2.1 million to \$3.5 million per year, a number based on the median Estate Tax Revenue for the past ten years. That is a more conservative approach than using the higher average of \$3.85 million per year that is more subject to distortion based on two years of extraordinarily high revenue in 2000 and 2009. In accord with established practice in Upper Arlington, the Fact Finder then added all income above \$2.1 million -- \$1.4 million per year -- in transfers from the General Fund to the Estate Tax Capital Projects Fund, a total of \$5.6 million over the four-year period. Those transfers would generate investment earning for the Capital Fund, but no additional revenues were included in the fact-finder's conservative projection for the fund balance.

Capital Outlays: Even with that additional \$5.6 million, Upper Arlington's other projections would still show a sharp decline in Fund Balances as a result of a \$40 million seven year capital improvement program. The decline has nothing to do with lost income tax revenue from retail workers as a result of the recession. The Supplement at page 4 notes that the city's

largest employers are in the health and public sectors; the projections through 2013 forecast a \$300,000 per year increase that also includes increased income tax revenues on company profits.

The fund balance decline began with three years of extraordinary capital outlays in 2008 – 2010, an average of 24% of total expenditures each year, averaging \$12 million per year. In the prior three years capital outlays averaged 15% of total expenditures, about \$6 million, and projections for 2010 - 2013 are below 14% per year, averaging less than \$6 million.

In 2010 the city will spend 30% of total expenditures, over \$15 million, on capital outlays including \$4.8 million to purchase property for commercial development in the Kingsdale Project. That expenditure reduces consolidated fund balances by over \$10 million, including a decline in the general fund balance of \$2.5 million.

Although the real estate purchase in 2010 results in a nearly \$5 million decrease in the fund balance, the city has acquired a multi-million dollar asset that should not be treated as a total loss of overall reserves. The purchase of the closed store will enable Giant Eagle to open a new Market District as the Kingsdale anchor this September in a building nearly twice the size of the prior outlet. Starting in 2011 income taxes on new retail employees and Giant Eagle profits as well as higher property taxes will be new revenue derived from the city's commercial investment. The Fact Finder believes that the city acquitted the property expecting that increased property and tax revenue at Kingsdale would offset the cost. Based on the city's plan for a commercial building on the Kingsdale property it acquired, the fact finder assumes that the city will ultimately sell that real estate and replenish fund reserves with the proceeds or derive rental income by leasing the commercial real estate.

Development and Infrastructure: In addition, Upper Arlington has significantly increased projected transfers from the General Fund to the Economic Development Fund, \$500,000 per year for 2011-2013, well above the \$200,000 per year average of prior years. A return on that investment would further increase revenue projections. Starting in 2011 the city also projects transfers of General Funds into the Street Construction Maintenance & Repair Fund of up to \$500,000 per year.

In 2009 consolidated fund ending balances were \$43,651,628 or 75.8% of the \$537,572,074 in total expenditures for that year. The employer has chosen to draw down the more than ample Fund reserves, including the General Fund balance, in order to finance capital and infrastructure projects while arguing that public outrage at salary increases and generous pensions for government employees justifies stringent limits on improved worker compensation. The employer's exhibits related to national public opinion rather than the attitudes of Upper Arlington taxpayers toward their local government. The fact finder has no information whatever on local resident's opinion about whether city expenses for personnel and/or major capital projects are excessive or wasteful.

The city is one of only four municipalities in Ohio with a AAA bond rating. Its fund reserves, even at the reduced levels projected in coming years, considerably exceed the percent balances recommended for public agencies by Moody's. The city's budget projections have consistently underestimated revenues and overestimated expenses, and the numbers for 2010-2013 significantly exaggerate the decline in Fund Reserves. The remaining decline in Fund Reserves reflects a policy decision to invest in development and infrastructure while limiting personnel costs. Projections for 2010 and beyond significantly underestimate revenues from those investments, income that should more than offset any need to use reserves this year to provide a reasonable wage increase that Upper Arlington has the ability to pay.

2. Comparables:

For purposes of base wage comparisons the fact finder selected seven jurisdictions from the lists provided by the city and the union – cities with populations between 26,000 and 36,000,

excluding considerably smaller jurisdictions with populations up to 16,000. Upper Arlington's base wages currently rank fifth of the seven, above Reynoldsburg and Westerville, and below the median Gahanna. Two of the comparable cities, Reynoldsburg and Grove City have concluded agreements with the FOP granting raises of between eight and nine percent over the three year period. The city's proposals for a 2% wage increase over three years would drop Upper Arlington to the bottom of the list, well below the median, and the union's proposals might raise the city to number three on the list of seven. The fact finder's recommendation seeks to maintain Upper Arlington's current rank.

Consumer Price Index: With the exception of 2009 the consumer price index for Cleveland and Cincinnati has been increasing at about 2.5% a year. Upper Arlington projects a 2.45% increase in operating expenses for 2012. The city's wage proposals of a 2% increase over a three year period subject employees to a net loss when considering CPI increases and the increased insurance premiums that amount to .2% to .4% of salary for the thirty-eight bargaining unit members with family coverage – a \$240 per year increase. The union received 3.75% annual increases in the last two years of the prior agreement, and should not expect an increase to 4% annual increases at a point of uncertain recovery from the recession.

Concluding Analysis

Based on methodology recommended by the employer's representative, the fact finder calculated that his recommendations would cost Upper Arlington a total of \$723,450 over the three year agreement -- \$589,209 in wages, \$114,895 in pension, \$8,453 for Medicare and \$10,803 for Workers Comp. The \$114,895 in pension would be paid from the Police and Firemen's Pension Fund that has sufficient reserves derived from a special property tax levy. Although the city's revised 2010 budget does not provide for any wage increase, it also fails to provide for \$1.4 million in estate tax revenues that would be more than adequate for the \$87,590 in wage increases recommended by the fact finder in the current year. The city would still be able to implement the planned transfer in 2010 of over \$3 million from General Fund revenues to restricted funds for infrastructure, development, and capital outlays.

The city may decide against raising FOP compensation to the level paid in Dublin, a comparable city with a AAA bond rating, but has no financial need to fall behind all six of the comparable jurisdictions. The fact finder recommends that the more affluent, well endowed City of Upper Arlington pay salary raises it can afford in order to stay ahead of Reynoldsburg and fall no further behind Grove City.

Recommendation:

The Fact Finder recommends a 2.5% wage increase in 2010 and 3% increases in 2011 and 2012.

ARTICLE 16.6 SHIFT DIFFERENTIAL

FOP Position:

The union proposes an immediate increase in the shift differential from \$1.00 per hour to \$1.25 per hour for the life of the three year agreement based on the adverse impact on the member's health and family lives for work done between 3 pm and 6 am. The FOP seeks the equivalent of higher shift differentials in other local bargaining units.

City of Upper Arlington Position:

The employer opposes any increase, considers the current differential competitive, and notes the overall need to avoid new expenses.

Discussion:

The prior agreement increased the shift differential from \$0.95 per hours to \$1 per hour in the final year 2009. In comparable jurisdictions shift differentials have been increased in steps over the term of the agreement, and comparable cities have raised the differential to at least \$1.10, with a few that may reach \$1.20 by 2012, but none at the \$1.25 rate proposed by the union.

Recommendation:

The Fact Finder recommends an increase to \$1.05 in 2011 and to \$1.10 in 2012.

ARTICLE 16.8 TUITION REIMBURSEMENT

FOP Position:

The union proposed increasing the maximum annual reimbursement from \$3,500 to \$4,000 and adding “instructional materials” to the list of reimbursable items. The FOP notes that in addition to textbooks, classes often require the purchase of software or other instructional materials that are equally needed for satisfactory completion of course requirements. Overall cost increases in supplementary materials warrant an increase in allowable reimbursements.

City of Upper Arlington Position:

The employer proposes current language, noting the existing tuition benefit is generous and increasing a perk unavailable to other taxpayers is unwarranted.

Discussion:

Apparently only one bargaining unit member currently takes advantage of the benefit, and the union failed to document any concrete need for the two proposed changes.

Recommendation:

The Fact Finder recommends current contract language.

ARTICLE 19 HOLIDAYS

FOP Position:

The union proposes increasing the pay for required work on a holiday from time and a half to two times the regular hourly pay rate, and increasing in the same way overtime for those scheduled to work a holiday who go beyond the normal eight hours. The FOP argues that employees who are called in to work a holiday or held over on a holiday are entitled to premium pay for the loss of planned time for family and personal celebration on special days. The union offered examples from comparable jurisdictions where FOP members received double time for holiday work.

City of Upper Arlington Position:

The employer proposes current language, noting the existing holiday compensation is already more generous than that offered other city employees. FOP members receive 12 hours of holiday time when not working an eight hour holiday shift, but other employees receive only 8 hours. The current addition of time and a half pay for those working holidays is more than adequate and should not be increased to double time.

Discussion:

The fact finder concludes that the current step up in pay for call in or overtime holiday work is sufficient premium and does not depart significantly from the approach taken in comparable jurisdictions.

Recommendation: The Fact Finder recommends current contract language.

Recommended Contract Language

All Articles Accepted Prior to Fact Finding are to be incorporated in this report

ARTICLE 13 POLITICAL ACTIVITY

Current language, no change

ARTICLE 14 INTERNAL REVIEW PROCEDURES

Section 14.5 Conduct of Internal Investigations.

B. Any internal investigation questioning of a member as a witness in, or as a focus of, the investigation, shall be conducted . . .

ARTICLE 16 RATES OF PAY/WAGES

Section 16.1. Wages. The following straight time regular wage rates shall be paid to members by ranks on the first day of the pay period that includes the date specified:

Pay Grades & Steps

January 1, 2010

(INSERT NEW RATES, 2.5% above 2009 Rates)

Pay Grades & Steps

January 1, 2011

(INSERT NEW RATES, 3% above 2010 Rates)

Pay Grades & Steps

January 1, 2012

(INSERT NEW RATES, 3% above 2011 Rates)

Section 16.6 Shift Differential. Shift differential pay shall be paid at the rate of one dollar (\$1.00) per hour for any regularly assigned eight (8) hour workday for which one-half or more of the work hours occurred between 3:00 pm and prior to 6:00 am, and for all hours of overtime worked between these hours, excluding hours in paid status while on approved holiday leave, vacation, sick leave, military leave, compensatory time and off-duty stand-by hours. Effective the first day of the pay period that includes January 1, 2011, that shift differential rate shall be increase to one dollar and five cents (\$1.05) per hour. Effective the first day of the pay period that includes January 1, 2012, that shift differential rate shall be increased to one dollar and ten cents (\$1.10) per hour. Shift differential is not . . .

Section 16.8 Tuition Reimbursement

Current language, no change

ARTICLE 19 HOLIDAYS

Current language, no change

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Fact Finding Report has been served via electronic mail to Russell Carnahan, Hunter, Carnahan, Shoub & Bayard, 3360 Tremont Road, Columbus, OH 43221, rcarnahan@hcands.com, Mark Lucas, Cleamans, Nelson & Associates, 6500 Emerald Parkway, Suite 100, Dublin OH 43016 MJLucas@clemansnelson.com and Catherine Armstrong, City of Upper Arlington, 3600 Tremont Ave., Upper Arlington, OH 43221 carmstrong@uaoh.net, and to the State Employment Relations Board, Columbus, Ohio Mary.Laurent@serb.state.oh.us on this 15th day of June, 2010.

Howard J Tolley

Howard Tolley

June 15, 2010

Date