

**FACT FINDING REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
March 15, 2011**

In the Matter of:

The City of Ontario, Ohio

and

Fraternal Order of Police, Ohio Labor
Council, Inc.

10-MED-06-0957

10-MED-08-0958

10-MED-06-0959

10-MED-06-0960

**REPORT AND RECOMMENDATIONS OF FACT-FINDER
TOBIE BRAVERMAN**

APPEARANCES

For the Employer:

Harry M. Welsh, Assistant Law Director
Allan D. Sowash, Law Director
Rodney D. Smith, Chief of Police
Larry C. Collins, Mayor
Roger Heston, Safety-Service Director

For the Union:

Frank Arnold, Staff Representative
Michael Wright, Dispatcher Associate
Brian Williams, Police Officer
Adam Gongwer, Sergeant

INTRODUCTION

The undersigned was duly appointed by SERB by letter dated November 24, 2010 to serve as Fact-Finder in the matter of the City of Ontario (hereinafter referred to as "Employer") and Fraternal Order of Police, Ohio Labor Council, Inc. (hereinafter referred to as "Union") pursuant to OAC 4117-9-5(D). The Union represents employees of the City in three separate bargaining units as follows: Dispatchers and Parking Enforcement Officer, Patrol Officers and Supervisors. The current collective bargaining agreements for all three units expired on December 31, 2010 and the parties in bargaining agreed to extend the terms of the Agreements until December 31, 2011. That extension agreed upon at the table, however, was rejected by the City Council. Hearing was held at Ontario, Ohio on March 1, 2011. The parties agreed to extend the deadline for the Fact-Finder's Report until March 15, 2011. The Union was represented by Frank Arnold, Staff Representative, and the Employer was represented by Harry M. Welsh, Assistant Law Director. Both parties submitted position statements prior to hearing and presented evidence in the form of documentary evidence and oral testimony at hearing. The parties agreed to waive service of the Fact-Finder's report via overnight delivery and agreed upon service via email.

FACTUAL BACKGROUND

The City of Ontario is located in Richland County, Ohio. It is geographically 10.9 square miles, and has a population of approximately 5,200. In 2009 the City's largest employer, General Motors, ceased production and closed its plant over the course of the following year, resulting in a significant loss of jobs and income to the City. The City was successful in passing a safety services income tax in 2010, but the full realization of that tax will not be known until after April 15, 2011. With the passage of this tax, a significant portion of costs for the police budget is removed from the general fund. Employer representatives indicated that while the City's finances are brightening

somewhat, the financial situation is still, at best, difficult. The City ended 2010 with a 1.8 million dollar carry over in its budget, the largest in four years. However, a significant portion of that carry over is attributable to substantial budget cuts in 2009 and the deferral of significant expenditures for capital improvements, replacement of vehicles and equipment and replacement of personnel. The City will also have to spend significant sums on sewer improvements as mandated by the EPA in the near future.

The City employs approximately a total of twenty officers and five dispatchers in the three bargaining units. As noted above, bargaining for the current Agreement was brief. After the City Council rejected the agreed upon one year contract extension, the parties had only one bargaining session in October, 2010 and engaged in one exchange of written responses to proposals. At that juncture, the Employer declared an impasse, and the parties submitted their remaining disputed bargaining issues to fact finding. The parties opted not to engage in mediation of the disputed items. All tentative agreements made between the parties are deemed to have been incorporated herein and are adopted as part of the parties' final agreement. Articles on which agreement has been reached include:

Article 8 - Contracting Out

Article 13 - Seniority

Article 14 - Layoff and Recall

Article 25 - Holidays (in part - Memorandum of Understanding)

Article 28 - Wages

The unresolved issues are as follows:

Article 22 - Uniforms/Equipment

Article 25 - Holidays

Article 26 - Sick Leave

Article 39 - Insurance

Article 40 - Tuition Reimbursement

Article 45 - Duration of Agreement (including re-openers on insurance & wages)

Based upon the considerations enumerated in Ohio Revised Code §4117.14 including past collectively bargained agreements between the parties, comparison of the issues submitted relative to other public employees doing comparable work, the interests and welfare of the public, the ability of the 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 Employer, and other factors traditionally considered in the determination of issues submitted, the Fact-Finder makes the following recommendations.

ISSUES

ARTICLE 22 - UNIFORMS/EQUIPMENT

Employer Position: The Employer proposes language in all three Agreements regarding uniforms which would change the current automatic up-front payment of \$250.00 per employee per year for dispatch and \$400.00 per year per to sworn personnel to a reimbursement up to that amount upon presentation of receipts. The change in language is intended to serve as a cost cutting measure to hold down uniform costs. Replacement of uniform pieces at no cost as well as reimbursement for shoes, dry cleaning and other costs would remain the same. The difference would be that the requirement of presentation of a receipt would ensure that the money paid to the employee for uniforms would be spent only for the purpose intended. The Employer has also proposed language which would allow it to eliminate the use of uniforms for dispatch so as to potentially eliminate the use of uniforms. This, again, is an effort to save uniform costs depending on budget allowances. Currently dispatchers still wear uniforms, but the option to eliminate uniforms for this group could be utilized as a cost saving measure.

Union Position: The Union opposes the change in the language. Currently employees in these bargaining units are provided with the uniform allowance monies up front. The cost savings which may be reaped is minimal in a unit this small. In a year in which the Union has already agreed to

accept a wage freeze, and has asked for very little in these negotiations, this small additional savings should not be garnered by the Employer at the expense of the employees. The Union should not be expected to give up this small benefit in part in a year in which the Employer has passed a Safety Levy, has a 1.8 million dollar carry over, and the employees will not be provided with pay increases.

Discussion: The Employer's proposal that employees be reimbursed for the purchase and maintenance of the same uniform items that are not currently supplied at Employer expense as they incur those expenses, is not an unreasonable one. The payment is intended for that purpose and the proposed language seeks to save money in the police budget by limiting the payment to its intended purpose. While the amount of cost savings which can be anticipated from changing the method of payment for uniform expenses from a lump sum up-front payment to a reimbursement for actual expenditures is unclear at this time, it is certainly not unreasonable to expect that a uniform allowance be spent on the actual purchase, repair and maintenance of uniforms. Nor is unreasonable for the Employer to have the option to eliminate uniforms for employees not in the public eye should it determine that it is necessary to take such a step in the interest of cost savings.

While to this extent the Employer's proposal is reasonable, the proposal further gives the Chief of Police the sole discretion to determine if a item submitted for reimbursement should in fact be subject to reimbursement. The language itself does not spell out all of the items which are currently reimbursed, and there is therefore some room for disagreement as to whether a particular reimbursement is appropriate. There was no explanation given at hearing as to why the Chief of Police should possess the sole discretion to deny reimbursement when the parties have in place a grievance procedure which can resolve such a dispute. Since there was no discussion at hearing on this point, and the Employer did not present any evidence or contention which would militate against submitting any such disputes to the grievance procedure, that is the appropriate forum for resolving such disputes.

Recommendation: Article 22 of the Dispatch Agreement shall read as follows:

Section 22.1 The Chief of Police will designate the approved clothing for civilian employees of the police department. If uniforms are required, the City of Ontario will

provide three (3) uniforms including all necessary and issued equipment except shoes, upon hire to all employees covered under this Agreement. Any items of uniform, if required, that become worn or unserviceable shall be replaced at no cost to the employee by the City of Ontario. The Chief or Police or his designee may require a piece of uniform equipment to be replaced at any time the item is considered worn out or unserviceable.

Section 22.4 The City of Ontario shall provide reimbursement up to two hundred fifty dollars (\$250.00) per calendar year for replacement and maintenance of items necessary for the function of the police service that are not covered in Section 22.1 for civilian employees of the police department. Reimbursement will be provided up to four (4) times per year per employee upon presentation of proof of purchase or receipt by the employee. Any dispute as to payment shall be resolved through the grievance procedure.

Article 22 of the Patrol Officers and Supervisors Agreement shall read as follows:

Section 22.5 The City of Ontario shall provide reimbursement up to four hundred dollars (\$400.00) per calendar year for replacement and maintenance of items necessary for the function of the police service that are not covered in Section 22.1 for police officers. Reimbursement will be provided up to four (4) times per year per employee upon presentation of proof of purchase or receipt by the employee. Any dispute as to payment shall be resolved through the grievance procedure.

ARTICLE 25 - HOLIDAYS

Union Position: The Union proposes an eleventh paid holiday, Veteran's Day, for all three Agreements. Comparable groups have eleven holidays and this is a small additional benefit in a year in which the Union has agreed to a wage freeze and has expressed its willingness to accept a substantial insurance contribution increase. The Union further proposes that officers in the two sworn units be paid double time for overtime work performed on holidays, which is currently paid at time and one half. Employees in the dispatch unit are already paid double time for overtime work on holidays. While officers are compensated at time and one half plus holiday pay for regular hours worked on holidays, they drop back to time and one half if required to work overtime on the holiday. This situation does not occur very often, and would therefore not be a significant expense. It would, however, fairly compensate employees for the inability to spend those overtime hours with their families and for the disruption of holiday plans which result in those instances when overtime work is required on a holiday.

Employer Position: This is an additional financial obligation during a difficult financial time,

and should therefore be rejected on that basis alone. The overtime proposal would in effect pay officers triple time for overtime on a holiday since they also get holiday pay. The dispatch unit is paid double time for overtime worked on holidays because it is a much smaller group of employees. Dispatchers are generally forced to work overtime, while police officers and supervisors have more flexibility to take time off due to the larger number of employees. Officers often have an option to take holidays off, while this option is not available to dispatchers. The additional overtime pay for dispatchers was implemented to compensate for their lack of flexibility, which is not applicable to the police and command bargaining units.

Discussion: While the Union contends that the expense of adding an additional holiday would be relatively small, the reality is that if the holiday were added in these bargaining units, it would likely also be provided to all other City employees, adding significantly to its cost. While, as the Union notes, the Employer has a 1.8 million dollar carry over for 2010, this carry over has been garnered in significant part through budget cuts and the deferral of needed expenditures. The City is certainly not flush with cash. The Union has provided two nearby jurisdictions, Mansfield City and Richland County, as comparable entities which provide eleven holidays. However, while both of these jurisdictions are close geographically, neither is comparable in size to this Employer, both being significantly larger, making them less than ideal comparisons.

The additional compensation for overtime hours worked on a holiday similarly does not appear to be a warranted expenditure in the current economic climate. While employees clearly should be compensated for having to work on a holiday, including overtime holiday hours, there was no evidence presented that this situation occurs sufficiently often to justify the additional premium pay. Unlike in the dispatch unit wherein the employees cannot either take holidays for which they are scheduled to work off or refuse overtime on a holiday, the other two bargaining units have additional flexibility, and are asked to work overtime on a holiday far less often. The additional pay is not sufficiently warranted in light of extant budget constraints.

Recommendation: Current Language.

ARTICLE 26 - SICK LEAVE

Employer Position: The Employer proposes two changes to the sick leave language. The first proposal would add language requiring an employee on any form of leave of five days or more to contact the Chief of Police once per week to advise him of "their situation and status of their leave". This requirement would allow the Employer to better plan without placing any great imposition on the employee. The Employer has experienced situations wherein an employee is incommunicado during an extended leave, and it creates a difficulty in scheduling when the employer is unaware of the employee's continued status. This proposal is intended keep the Employer appropriately informed by placing a small burden on the employee to simply stay in touch on a weekly basis. The Employer's second proposal includes new language which would require that employees on sick leave be restricted to their homes during the hours which they are scheduled to work unless traveling to or from a medical facility or to obtain needed medical items related to their illness or injury. Employees would be required to report any other travel outside of their home to the Chief of Police as soon as possible. The purpose of this language is to prevent abuse of sick leave which has occurred in the past by two employees. If employees are being paid to be off work, they should be under restriction during those hours for which they are being paid.

Union Position: The Union argues that current language should be maintained. The language regarding weekly check-in is simply unnecessary. Employees are already required to report their status under the provisions of the FMLA. In the event that an employee is already scheduled to be on leave for an extended period of time, that time is already known to the Employer, and there is no compelling reason to require that employee to call in weekly to reiterate what is already known to the Employer. As to the second proposal, the Union argues that if an employee is abusing sick leave, that employee should be disciplined for his conduct on an individual basis. The proposal in effect punishes all employees for the conduct of a few, and places all employees on house arrest while on sick leave. If an employee is off work for a legitimate reason he should not be required to justify his every move beyond the confines of his home.

Discussion: The Employer's first proposal regarding a weekly check in by employees on extended leave of more than five days does have some merit in terms of requiring an employee to stay in touch and keep the Employer apprised of his status. However, the Union's point that in the event an employee has been placed on leave for a specified period of time by his physician, the Employer is well aware that that employee will not be returning to work during that period of time, is equally well taken. There does not appear to be any good reason to have the employee make a weekly phone call to discuss his status in that case. There is, however, reason for such a conversation in the event that the employee is off work for an undefined period of time. The language should therefore be tailored more precisely to the circumstance for which it is intended.

The Employer's proposal regarding restrictions on activities during an employee's regularly scheduled work hours while on approved sick leave is similarly overbroad. As the Union argues, the provision essentially places all employees on home confinement regardless of the reason for their absence except for medical travel and other short absences from home which must be reported to the Chief of Police. The provision, which seeks to curb sick leave abuse, rather than punishing those few sick leave abusers, treats all employees as if they are presumed guilty of sick leave abuse. This restriction is not only unfair, but may well be illogical. The example of an officer who breaks his leg illustrates the point. While that individual clearly cannot perform regular duties as a police officer, there is no reason why that employee should not be able to go out to dinner and a movie on a Saturday night merely because he would have been scheduled to work had he not suffered the injury. Abuse of sick leave must be dealt with through discipline of the individual employee, not by restricting all employees as if they are presumed to be abusers. The Employer's contention that it was prevented from disciplining those officers who abused sick leave in the past does not appear to be correct based upon the broad disciplinary language of Article 10 of the Agreement, which allows discipline for "dishonesty", "neglect of duty" or any conduct unbecoming a law enforcement officer". Clearly charges under any or all of these categories could be utilized for discipline of an employee who engages in conduct which amounts to an abuse or misuse of sick leave.

Recommendation: Section 26.14 shall read as follows:

Any employee on any form of paid or unpaid leave, excluding approved vacation, which is five days or more who does not have on file with the Employer a statement from the employee's physician stating a specified date of return to work, or at any time after that stated return to work date in the event the employee remains off work, shall contact the Chief of Police once per calendar week to update their leave status.

Section 26.15 shall read as follows:

Any employee receiving pay for sick leave as a benefit from the City and unable to perform their duty shall be subject to discipline pursuant to Article 10 of this Agreement in the event that the employee engages in conduct inconsistent with the reason for sick leave during their assigned duty hours.

ARTICLE 39 - INSURANCE

Employer Position: The Employer changed its insurance to a high deductible plan with an HSA several years ago. It is currently paying the entire premium as well as contributing all but \$400.00 for family coverage and \$200.00 for single coverage into each employee's HSA account for the deductible expenses. The Employer proposes to limit its contribution to the HSA accounts to \$1,125.00 for single coverage and \$2,200.00 for family coverage per employee. The deductible under the currently negotiated insurance plan will be \$2,500.00 for single and \$5,000.00 for family coverage. Each employee would contribute the difference in the deductible. The Employer would continue to pay 100% of the premiums. The Employer further proposes elimination of all Employer contribution for vision and dental coverage. The coverage would still be available, but would be entirely at employee expense. Again, these are cost savings measures. They would also increase employee responsibility for health care usage, thereby giving employees a greater stake in health care costs. Although the City was successful in passing an income tax increase, it is unknown how much income will be realized from that increase until April 15, 2011. The City contends that the Union's proposal regarding the method of payment into the HSA was not proposed in negotiations until fact finding and should therefore not be the subject of fact finding. There is a grievance pending on this issue, and it should be left to the grievance procedure for resolution.

Union Position: The Union acknowledges that an increase in the employee contribution to insurance is inevitable, and agrees that there should be an increase in the employee contribution. The

Employer's proposal, however, is simply unreasonable. The cost to employees for dental and vision would be approximately \$1,250.00. In addition, the employee's share of the HSA contribution would increase from \$200.00 to \$1,475.00 for single coverage and from \$400.00 to \$2,800.00 for family coverage. These increases in a year in which employees have agreed to forego wage increases, the Employer had a 1.8 million carry over and in which tax receipts for safety will increase due to the passage of a new income tax, is simply unfair and unreasonable. The Union proposes that the employee contribution to the HSA deductible be increased from \$200.00 to \$450.00 for single coverage and from \$400.00 to \$900.00 for family coverage. This is a fair increase under the circumstances presented in this case. The Union further proposes a re-opener to reassess insurance in each of the last two years of the agreement. The Union further proposes a change in the language of the insurance provision so that it refers to "employees" consistently in all three Agreements. Finally, the Union proposes language which would require the Employer to pay its HSA contributions in a single lump sum at the beginning of the year. The payments were previously made this way, but were changed to monthly payments, resulting in significant costs to some employees. There is a pending grievance on this issue.

Discussion: The Employer's proposed increased cost to employees for insurance is substantial to say the least. While neither party had the actual premiums available for single and family coverages for vision and dental, the cost was estimated to be \$1,250.00. The Employer proposes that the employees absorb this entire cost. It is unclear, however, if the insurer would even be willing to offer the coverage if not provided to all employees, and surely, if still available, the cost would increase since the number of employees opting to maintain the coverage would clearly decline. There was no evidence presented at hearing to suggest that these issues had ever been considered or examined. The Employer's proposal regarding dental and vision coverage simply does not appear to have been fully thought out and researched.

Additionally, the Employer proposes increases in the employees' contributions to the HSA deductibles which amount to a 637% increase for single coverage, and a 600% increase for family

coverage. While, as the Employer notes, employees do not have to contribute the entire deductible amount if they do not anticipate having medical expenses up to the deductible amounts of \$2,500 and \$5,000.00, failure to do so is clearly a gamble. Absent some special clairvoyant abilities, even the healthiest of employees cannot predict what medical expenses will be for themselves or their families. As a result, in order to insure against a possible financial medical disaster, the employees must either absorb the more than seven fold increase, or play a game of insurance roulette. The Union's proposal, which slightly more than doubles the employee contribution, presents a far more reasonable approach, particularly in a year when employees have foregone a wage increase.

The Union's language change as it relates to payment into the HSA accounts, was not presented to the Employer until fact finding. While it was discussed briefly at hearing, its full impact and ramifications have evidently not been sufficiently discussed by the parties. Further, although the issue is the subject of a pending grievance, there was no discussion concerning whether that grievance would be resolved by this language. Due to these circumstances, the Fact-Finder does not address this portion of the proposal, but instead leaves its resolution to the pending grievance.

Recommendation: Section 39.1 shall read as follows:

The Employer shall provide paid medical insurance that includes dental, vision and prescription drug coverage insurance to all bargaining unit members in the same manner as provided to other City of Ontario employees. The Employer shall pay the cost of this insurance. The Employer shall choose the insurance carrier. The Employer will fund the Health Savings Accounts in the same amount as 2010. The deductible amount reflects a \$450.00 and \$900.00 gap between what the Employer is funding into the Health Savings Accounts and the deductible amounts for single and family coverage, respectively. The parties shall re-open to negotiate regarding insurance upon the request of either party in the second and third years of this Agreement.

ARTICLE 40 - TUITION REIMBURSEMENT

Employer Position: The Employer proposes that the tuition reimbursement benefit, currently provided so long as the conditions of the contractual language are met, be converted to a discretionary benefit. The proposal also decreases the annual per employee maximum from \$2,000 to \$1,000 for the Supervisors bargaining unit. The proposal finally adds language which requires that the

employee provide notice before beginning a class that reimbursement will be sought so that the Employer can anticipate its costs. While acknowledging that additional education for officers is of value both to the police department and to the employee, the Chief of Police desires the flexibility to determine not to fund the benefit or to deny the benefit for other reasons at the Chief's discretion. In recent budgets, the Chief has been asked to cut his budget to the bone, and this benefit, if discretionary could be among those cuts.

Union Position: The benefit is of value to both parties. The proposed language would allow an officer to be denied payment for tuition for reasons unrelated to budget, giving the Chief discretion to deny the reimbursement based upon any basis, including dislike for a particular employee. The benefit is sparsely utilized and its elimination therefore does not provide any real budgetary savings. The Union does not object to the addition of language requiring the employee to notify the Employer of the intention to utilize the tuition reimbursement before the class commences.

Discussion: While the Fact-Finder understands the Employer's desire to save money in difficult economic times, the change proposed in this instance is in reality a phantom savings. The tuition reimbursement benefit has been utilized by only two employees in the past five years, and has cost less than \$2,000.00. The benefit reaped from the additional education of officers inures to the benefit of not only the employee but the Employer, and this effect is well recognized throughout the business world. The proposed change from a benefit to which the employee is entitled to one which is at the sole discretion of the Employer, even though it too will benefit from the education, is simply not warranted by the very small cost which the Employer has incurred under the current contractual language. The addition of the prior notification language is reasonable and accepted by the Union. It should therefore be incorporated into the Article.

Recommendation: Article 40 shall be amended to read as follows:

Section 40.1 ...

9. The Employee must advise the Chief of Police of the class to be taken and the employee's intention to seek tuition reimbursement prior to beginning the class.

ARTICLE 45 - DURATION OF AGREEMENT

Employer Position: The Employer proposes an eight month Agreement which will expire on December 31, 2011. Although the Employer's financial situation has appeared to brighten a bit since the parties' bargaining session in October, 2010, the full extent of the financial situation is not known. The Employer therefore seeks to revisit both financial and language issues at the end of the current year.

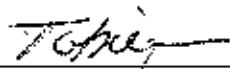
Union Position: The Union proposes a three year agreement with re-openers on the issues of wages and insurance in each of the remaining two years of the Agreement. These parties have historically had three year contracts, and there is simply no need to re-open all of the contractual language less than a year from now.

Discussion: As the Union notes, the parties have historically had three year agreements. There is nothing which the Employer presented at hearing which would dictate a change in that time other than its representation that it will know more about its finances. The difficulty with this argument is that it is impossible to foresee what the financial situation will be at any point in the future, and there simply does not appear to be any compelling reason to break with the parties traditional three year collective bargaining agreements except as to the issues of wages and insurance. A three year agreement is further supported in view of the current uncertainty of the status of collective bargaining in Ohio. Since the Union has agreed to a wage freeze and since, as usual, insurance presents a volatile expense, it is appropriate that the parties re-open to negotiate on those two items in the second and third years of the Agreement.

Recommendation: Article 45 shall be amended as follows:

Section 45.1 This Agreement shall be effective January 1, 2011 at 12:01 a.m. and continue in effect until December 31, 2013. The parties shall re-open to negotiate concerning wages and insurance in January, 2012 and January 2013.

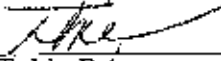
Dated: March 15, 2011



Tobie Braverman, Fact-Finder

CERTIFICATE OF SERVICE

The foregoing Report was delivered via email and this 15th day of March, 2011 to Harry M. Welsh, Assistant Law Director, City Ontario, harry@rvblawoffice.com and to Frank Arnold, Staff Representative, FOP, Ohio Labor Council, Inc., farnold1968@yahoo.com.


Tobie Braverman