

STATE EMPLOYMENT RELATIONS BOARD
FACT FINDER'S REPORT AND RECOMMENDATION

IN THE MATTER OF:

CITY OF EAST CLEVELAND

AND

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

Case Numbers:

2010-MED-09-1204, Sergeants and above
2010-MED-09-1206, Community Policing Officers
2010-MED-09-1207, Patrol Officers

Before Fact Finder: Thomas J. Nowel
May 13, 2014

PRESENTED TO:

Michael D. Esposito, Esq.
Clemans, Nelson & Associates, Inc.
2351 S. Arlington Road, Suite A
Akron, Ohio 44319
Mesposito@clemansnelson.com

Lucy DiNardo, Staff Representative
FOP, Ohio Labor Council, Inc.
2721 Manchester Road
Akron, Ohio 44319
ldinardofop@wowway.com

Donald M. Collins, General Counsel
State Employment Relations Board
65 East State Street, 12th Floor
Columbus, Ohio 43215
med@serb.state.oh.us

INTRODUCTION

Thomas J. Nowel was appointed to serve as Fact Finder in the above referenced cases by the State Employment Relations Board on November 30, 2010 in compliance with Ohio Revised Code Section 4117.14 (C) (3). The original appointment included the five bargaining units at the City which are represented by the Fraternal Order of Police, Ohio Labor Council, Inc. The parties chose to focus on two of the bargaining units initially and proceeded to fact finding for the Dispatchers collective bargaining agreement (2010-MED-09-1208) and the Corrections Officers collective bargaining agreement (2010-MED-09-1205) in 2012. After two days of hearing, this Fact Finder issued a Report and Recommendation for these cases on November 1, 2012. The parties finalized negotiations using the Report and Recommendation as a basis for settlement. At the time the Report and Recommendation was issued, the City of East Cleveland had been placed in “fiscal emergency” by the Ohio Auditor of State. Negotiations between the parties for the other three bargaining units were delayed as the City attempted to develop solutions regarding its fiscal emergency status. Early in 2014, negotiations resumed for the three bargaining agreements which had not been finalized and which are noted on the cover page of this Report, and the parties reached impasse on a number of issues. This original fact finder was contacted, and hearing was scheduled on April 9, 2014 at East Cleveland City Hall. The parties discussed unresolved issues and engaged in mediation in an attempt to narrow proposals at impasse. A second day was necessary for the evidentiary hearing on April 18, 2014.

There are approximately thirteen employees in the bargaining unit representing Sergeants and Lieutenants (2010-MED-09-1204); there are approximately twenty-nine Patrol Officers (2010-MED-09-1207); and three employees in the Community Policing Officers bargaining unit (2010-MED-09-1206) who are all currently on layoff status. The collective bargaining agreements expired on December 31, 2010. The parties have engaged in multi-unit bargaining for purposes of these negotiations and this fact finding process.

Those participating for the Union at hearing include the following:

Lucy DiNardo, FOP Staff Representative
Ray Steadman, Gold Representative
Terry L. Wheeler, Gold Representative
Von E. Harris, Blue Representative

Those participating for the Employer at hearing include the following:

Michael D. Esposito, Clemans, Nelson & Associates
Kevin Shebestia, Clemans, Nelson & Associates
Nita Hendryx, Chief Program Manager, Ohio State Auditor
Tisha Turner, Assistant Chief Program Manager, Ohio State Auditor
Ronald Riley, Law Director
Anna Smith, HR Director

OUTSTANDING ISSUES:

1. Article 17, Overtime Compensation/Duty Hours, Section 17.1 (Patrol)
Article 19, Overtime Compensation/Duty Hours, Section 19.1 (Rank) (BPO/CPO)
2. Article 19, On-Duty Injury Leave (Patrol)
Article 21, On-Duty Injury Leave (Rank) (BPO/CPO)
3. Article 23, Clothing Allowance, Sections 23.1, 23.2, 23.3 (Patrol)
Article 25, Clothing Allowance, Sections 25.1, 25.2, 25.3 (Rank) (BPO/CPO)
4. Article 24, Wages (Patrol)
Article 26, Wages (Rank) (BPO/CPO)
New section for each Agreement, Pension Pick-Up

5. Article 29, Health, Dental, and Life Insurance (Patrol)
Article 30, Health, Dental, and Life Insurance (Rank) (BPO/CPO)
6. Article 35, Duration of Agreement (BPO/CPO)
Article 36, Duration of Agreement (Patrol) (Rank)
7. MOU, Suspension of Terms/Benefits (all Agreements)
8. Article 28, Supplemental Compensation (Patrol)
9. Article 32, Out-Of-Class Pay (Patrol)
10. Article 8, Rights of Bargaining Unit Members (Rank)
11. Disputed Tentative Agreements

BACKGROUND

In analyzing the positions of the parties regarding each issue at impasse and then making a recommendation, the Fact Finder is guided by the principles that are outlined in Ohio Revised Code Section 4117.14 (G) (F) (a-f) as follows.

1. The past collectively bargained agreement between the parties.
2. Comparison of the issues submitted to fact finding relative to the employees in the bargaining unit involved 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 interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service.
4. The lawful authority of the public employer.
5. The stipulations of the parties.
6. Other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact finding, or other impasse resolution procedures in the public service or in private employment.

During the course of the hearing, the parties had full opportunity to advocate for their positions, submit exhibits, present testimony and discussion and engage in rebuttal of the submissions and arguments of the other party. The Fact Finder will transmit the Report and Recommendation, by way of electronic mail, to the parties on May 13, 2014.

The City of East Cleveland was in Fiscal Emergency from 1988 to 2006. When it emerged from this status and oversight, the City was placed in Fiscal Caution by the State Auditor, but it was elevated to Fiscal Watch and then placed again in Fiscal Emergency in 2012. The City remains in Fiscal Emergency.

DISCUSSION AND RECOMMENDATIONS

Nita Hendryx is Chief Project Manager for the State Auditor's Office and has been assigned as the fiscal supervisor of the City of East Cleveland while it is in Fiscal Emergency. Ms. Hendryx has been assigned to the City of East Cleveland for a number of years and is intricately familiar with its finances. She stated at hearing that the City, while in Fiscal Watch status in 2012, was unable to develop a plan to emerge from deficit spending, and it was therefore placed in fiscal emergency. Since that time, the City has not developed a suitable recovery plan. Pursuant to the Ohio Revised Code, a seven member commission oversees City finances and is empowered to approve a recovery plan. Ms. Hendryx stated that the current recovery plan is not working and stated further that the financial condition has deteriorated further in 2014. As with other political subdivisions in the state, the

City of East Cleveland lost state funding; Huron Road Hospital closed; and other revenue has declined. The population of the City has declined significantly. While Cleveland Clinic provided an \$8,000,000.00 payment following the closure of Huron Road Hospital, those monies were quickly spent. As bad as the fiscal condition has been, the City realized a reduction in revenue of \$1.3 million. There currently are unpaid bills of \$1.6 million, and the City has not paid its utilities bill this year. Ms. Hendryx stated that the City has no money to pay its employee health insurance premium and is working with the provider on a payment plan. No payments have been made this year. She stated that the City may not have the ability to make payments on its health care plan until late summer or early fall. She stated further that fourteen funds are in deficit, and there is \$175,508.75 in the bank. One payroll costs \$400,00.00 every two weeks. Ms. Hendryx stated that the Mayor was advised to eliminate non bargaining unit positions, and every department realized layoffs and attrition. In rebuttal, the Union cited wage increases negotiated with the Fire Department bargaining unit, and stated that it is critical that Police Department employees also receive an increase as a wage freeze has been in effect for many years. The Union cited the loss of bargaining unit positions which makes for dangerous working conditions in a City fraught with crime. The Union stated that there are often only three Patrol Officers on duty during the night shift, and the Department is unable to respond, in a timely manner, to crime scenes. Morale in the Police Department is at an all time low, and, when job opportunities arise in neighboring jurisdictions, employees leave the Department. The wages of East Cleveland Police Department employees are the lowest in Cuyahoga County.

Generally, the Union did not challenge the fiscal condition of the City as illustrated by the testimony of State Auditor representatives.

A brief description of each issue at impasse and recommendation of the Fact Finder follows.

**1. Article 17, Overtime Compensation/Duty Hours, Section 17.1 (Patrol)
Article 19, Overtime Compensation/Duty Hours, Section 19.1 (Rank)
(BPO/CPO)**

The Employer proposes to modify language in the Agreements to reflect that overtime compensation will occur strictly based on FLSA standards and eliminating vacation, holidays, SWAT team pay and other non-work time as time worked for the calculation of overtime. The Union opposes the proposals and argues for no change to current language.

EMPLOYER POSITION: The Employer argues that this is a cost savings which the City needs based on budgetary constraint. Utilizing the FLSA standard is based on the law and is a fair way to calculate overtime payments. The Employer states that two other FOP Agreements at the City of East Cleveland contain the language proposed herein. The parties in the negotiations for the Dispatch bargaining unit and Corrections Agreement agreed to this language during previous bargaining.

UNION POSITION: The Union rejects the proposal and argues that its members of the bargaining units are the lowest paid in Cuyahoga County and the region. It is therefore unfair to reduce overtime compensation. The parties had previously

agreed that paid sick leave would not be considered active work time for purposes of overtime compensation. The Union states that, although the other FOP Agreements contain the language being proposed by the Employer, the City has, in fact, continued to count non work status as time worked for the purposes of overtime calculation. The Union wishes to maintain current contract language.

RECOMMENDATION: This Fact Finder presented recommendations to the parties in 2012 for the two FOP Agreements which were part of the multi-unit negotiations contained in the current State Employment Relations Board cases. The advocates for the respective parties have not changed since the first hearing and recommendation at Fact Finding. The issue of overtime calculation was not an issue at impasse at the previous fact finding hearing, but the Employer is correct in that the language changes proposed in the instant matter were incorporated during the negotiations for the Dispatch and Corrections Agreements. Apparently the parties agreed to the modifications. The Employer's arguments therefore are reasonable, but the Union has also put forth compelling arguments to maintain status quo. It is true that employees in the bargaining units are some of the lowest paid in the region. The Employer's proposal would further reduce the income of bargaining unit employees who have not realized a pay increase in a number of years. Furthermore, the Union's contention, that the Employer continues to calculate overtime based on non-active pay status for employees in the other FOP bargaining units, is clearly accurate. Those Agreements were finalized in 2012, but the Employer continues to pay overtime compensation as if the new language had not

existed. This suggests that these changes are not critical in the Employer's attempt at cost saving changes to the collective bargaining agreements. The recommendation is to support the Union's position to maintain current contract language in these sections of the Agreements.

**2. Article 19, On-Duty Injury Leave (Patrol)
Article 21, On-Duty Injury Leave (Rank) (BPO/CPO)**

The Employer proposes to modify the current provisions in the Agreements to require the approval of the Bureau of Workers' Compensation for an on-duty injury which qualifies for the contractual benefits. The proposal increases the use of sick leave during the initial days of an injury from three to seven days. It also establishes a light duty plan which would pay 70% of an employee's hourly rate of pay. This plan would be at an employee's option following exhaustion of IOD benefits. The Union is opposed to the modifications and in particular provisions which define qualifying injuries and proposes current contract language.

EMPLOYER POSITION: The Employer states that its proposal does not diminish benefits for legitimate injuries. And the Fact Finder recommended most of the changes it seeks here in the other FOP Agreements. Its proposal establishes safeguards to better manage injury claims, and utilizing BWC standards is reasonable. The proposal regarding the use of sick after seven days is reasonable and a BWC standard. The Employer states that this is also an important cost savings measure. The Employer states that its proposal of light duty would be an option

only after the injury pay benefit is exhausted, and an employee may instead revert to paid sick leave if available. The Employer requests the recommendation of its proposal.

UNION POSITION: The Union is opposed to the comprehensive proposal of the Employer. Although the Fact Finder recommended many of the changes the Employer seeks in the other FOP Agreements, the work of the employees in these bargaining units is more dangerous, and serious injuries are more probable. The Union states that the change regarding definition of injury is a concern, and the 70% of hourly pay for light duty is also unreasonable. The Union argues that moving from three to seven days before benefits are available is an unreasonable proposal in light of the dangerous conditions Patrol and Rank face on the streets. The Union requests that the recommendation maintains current contract language.

RECOMMENDATION: This Fact Finder considered a similar proposal by the Employer at Fact Finding for the Dispatch and Corrections collective bargaining agreements and stated that the proposals were reasonable. The parties adopted the recommendations for those Agreements. The light duty proposal is reasonable as it is available only after the 120 day paid injury leave benefit ends, and it is voluntary in that an employee may utilize other accumulated leave or apply for BWC benefits. The parties adopted a recommended provision regarding the termination of light duty, and there is no reason to not incorporate the same suggestion here. Although the Union is opposed to the proposed modification to the "Injury Defined" section of

the articles, a close analysis suggests that there is no loss of benefit or protection. In respect to the Employer's proposal to extend from three to seven days the time an employee is required to utilize sick leave before IOD benefits are activated, the Employer makes a credible case regarding its attempt at cost savings due to the financial condition of the City. The Dispatch and Corrections Agreements require a three day waiting period. The recommendation is to extend the period from three days to five days. The recommended language for the open sections of Articles 19 and 21 is as follows.

Article 19, On-Duty Injury Leave (Patrol)

Article 21, On-Duty Injury Leave (Rank and BPO/CPO)

Section 19.1 and 21.1. Line of duty is intended to recognize the unusual exposure to dangerous situations experienced by employees of the Police Department. If an employee of the Police Department suffers a serious injury as defined in Section 19.2 below as a result of a duty-related accident, he shall be eligible to be considered for a line-of-duty injury leave as follows:

- A. The injured employee shall make written application for line-of-duty leave on forms to be provided by the Chief. The application shall be reviewed by the Chief and the Mayor.
- B. File for Workers' Compensation benefits with the Ohio Bureau of Workers' Compensation and be approved for the receipt of benefits.
- C. The employee shall be charged for the first five (5) work days which he misses due to the accident. Beginning with the sixth (6th) work day and continuing for a maximum of one hundred twenty (120) calendar days from the date of the accident, the employee shall be paid his regular salary during the period of line-of-duty injury leave; notwithstanding this limitation, the City reserves the sole right to extend such injury leave on a case by case basis; and
- D. Furnish the City with a signed City of East Cleveland Authorization(s) to Release Medical Information relevant to the claim.

E. Provide a medical certification and seek treatment from a physician on the list of Employer approved providers opining that the claimant is disabled from employment in excess of five (5) consecutive days as a result of the work-related injury and specifying the injury, recommended treatment, and the employee's inability to return to work as a result of the injury along with an estimated return to work date.

F. This leave shall terminate no later than one hundred twenty (120) calendar days after the beginning of the leave or at such earlier time as follows:

- (1) On the date workers' compensation benefits are established pursuant to the Ohio law; or
- (2) When the employee is able to return to work as evidenced by a doctor's certificate.

Section 19.2 and 21.2. Injury Defined. For the purposes of this article, the term "injury" shall include but is not limited to gunshot wounds, stabbings and other acts or conduct certified by the BWC as resulting in an injury covered by the Bureau of Workers' Compensation.

Sections 19.7 and 21.7. Light Duty/Transitional Work after IOD Period. An employee incapable of returning to work beyond the one hundred twenty (120) day IOD period shall use accumulated sick leave or any other accumulated paid leave prior to going on an unpaid leave. Should the employee not have any accumulated paid leave available, the employee may apply for lost wages and benefits through the Bureau of Workers' Compensation. Additionally, the Employer, at its discretion, may require the employee to submit to a fitness for duty exam to ascertain whether or not a light duty/transitional position may be available. Should a fitness for duty exam determine that the employee is capable of performing in a light duty capacity, and the Employer determines that it wishes to offer a light duty position, an offer of light duty may be made to the employee. The light duty position will be compensated at seventy percent (70%) of the employee's regular hourly rate. It is within the employee's sole discretion whether or not he/she wishes to accept the Employer's offer of light duty. Nothing in this article shall obligate the Employer to offer or create a light duty position for an employee who is unable to return to work after the one hundred twenty (120) day period. The light duty assignment shall end when the employee's physician certifies that he/she is capable of performing the normal duties of the original position.

**3. Article 23, Clothing Allowance, Sections 23.1, 23.2, 23.3 (Patrol)
Article 25, Clothing Allowance, Sections 25.1, 25.2, 25.3 (Rank) (BPO/CPO)**

The Employer proposes to modify the manner in which employees are paid for clothing maintenance, shoe allowance and service weapon. The proposal is for the lump sum payments to be divided by twenty-six and paid bi-weekly with regular hourly wages. The Union opposes the proposal and wishes to maintain the current practice of making two lump sum payments in June and December of each year.

EMPLOYER POSITION: The Employer states that the making of two lump sum or balloon payments is a concern for the City based on limited cash flow and budgetary deficits. The Employer expresses the fear that it may not have the capability to make a lump sum payment. Its proposal is a better guarantee that bargaining unit members will receive their negotiated allowances. The Employer states that the other FOP Agreements provide for bi-weekly payments.

UNION POSITION: The Union opposes the proposal and states that, although the other FOP Agreements contain this provision, the Fire Fighters bargaining agreement provides for lump sum payments. The Union argues that this is a better comparable. The Union states that, by making two separate 50/50 payments, the perceived hardship on the Employer is minimized.

RECOMMENDATION: The State Auditor representative made it clear that the City is not able to pay many of its bills including health insurance and utilities. With many

outstanding and unpaid obligations, the Employer's argument, that it may not be able to make a lump sum clothing and equipment payment, is realistic. While it may be convenient for employees to receive the lump sums, the Employer's proposal provides a better option to assure payments of these benefits. It is also significant that the parties agreed to the twenty-six bi-weekly payments for the other FOP Agreements. The proposal of the Employer is therefore recommended and language is as follows.

Article 23, Clothing Allowance (Patrol)

Article 25, Clothing Allowance (BPO/CPO) (Rank)

Section 23.1 and 25.1. Each bargaining unit member shall receive a clothing maintenance allowance equal to six hundred twenty-five dollars (\$625.00) per year. Said allowance shall be divided and paid in twenty-six (26) bi-weekly installments over the course of the year.

Section 23.2 and 25.2. Shoe Allowance. Each bargaining unit member shall receive two hundred dollars (\$200.00) per year for the purchase of shoes. Said allowance shall be divided and paid in twenty-six (26) bi-weekly installments over the course of the year.

Section 23.3 and 25.3. Service Weapon. Each bargaining unit member shall receive two hundred dollars (\$200.00) for the maintenance of his off-duty service weapon to be divided and paid in twenty-six (26) bi-weekly installments over the course of the year. Upon retirement of the bargaining unit member, the City agrees to sell the employee his on-duty service weapon at the cost of one dollar (\$1.00), provided the officer is in good standing.

4. Article 24, Wages (Patrol)

Article 26, Wages (Rank) (BPO/CPO)

New Section for Patrol and Rank bargaining units, Pension Pick-Up

The Union proposes across the board wage increases and a wage re-opener as follows. Effective January 1, 2014, 1.5%; effective January 1, 2015, 1.5%; and a

wage re-opener for 2016. In addition, the Union proposes a pension pick-up provision whereby the Employer pays for a portion of the employee contribution to the Ohio Police and Fire Pension Fund as follows: Employer pays 5.45% of employee share beginning in 2014 when collective bargaining agreement is effective; increase the payment to 6.2% of the employee share effective July 1, 2014; increase the payment of the employee share to 6.9% effective January 1, 2015; and increase the payment of the employee share to 7.7% effective July 1, 2015. The Union proposes that the remainder of the employee share be paid based on the salary reduction method.

The Employer proposes that wage rates remain unchanged for the duration of the Agreement and rejects the proposal for pension pick-up.

UNION POSITION: The Union states that members of the bargaining units have not received a pay increase in almost five years. And members of the Police Department generate revenue for the City. The Employer has the ability to reduce the number of non-bargaining unit employees, and certain retired and former members of management continue to receive pay. The work is dangerous in a City which experiences a high crime rate, and some shifts are down to three Patrol Officers. Citizens and employees are at risk. The Union cites the recent contract settlement with the IAFF in behalf of East Cleveland Fire Fighters with wage increases of 1.5% in 2014 and another 1.5% in 2015 (Union Exb. 2). The Union states further that Fire Fighters received increases in pension pick-up and other benefits. The Union argues that Police Department employees must be treated in the same manner. The Union

states that, while the population of the City has declined and the ranks of Police Department employees has also been reduced, crime has increased. Employees are under a great deal of stress, and members of the FOP bargaining units expressed their concerns at hearing. When employees are forced to call off, they are not replaced due to a “no overtime” policy. The Union cited an example of a neighborhood fight involving 100 individuals. The small number of Officers on duty struggled to control the situation and was unable to respond to another call. The Union reminds the Fact Finder that comparable wage rates are critical in the development of a fact finding recommendation. The Union states that East Cleveland Police Department employees are the lowest paid in the region (Cuyahoga County) and at the bottom tier based on the State Employment Relations Board Clearinghouse Benchmark Report of April, 2014 (Union Exb. 4). The Union places emphasis on the wages and benefits provided by the Fire Fighter collective bargaining agreement and urges the Fact Finder to recommend its proposals for wages and pension pick-up.

EMPLOYER POSITION: The Employer reminds the Fact Finder that the City is in Fiscal Emergency, and that this status is far more severe than previous fiscal emergencies of East Cleveland. The Employer stresses its “inability to pay.” The Employer argues, in response to the assertions regarding the IAFF collective bargaining negotiations, that pay increases were granted based on the Fire Fighters’ Union granting of concessions in a number of areas including minimum manning. In addition, the Employer has the option, based on the new Fire Fighter Agreement, to

reduce staff and utilize part time employees. Compared to the cost of the wage and benefit increases for individual employees, the Employer realized an overall savings in the hundreds of thousands of dollars based on the recent negotiations with the IAFF (Emp. Exb. 1 and 2). These cost saving features will have an impact immediately and into future budget years. The Employer states that the pension pick-up provision in the Fire Fighter Agreement was negotiated years ago in lieu of an across the board pay increase. At hearing, the Employer stressed the loss of population and tax revenue. East Cleveland has lost more than half of its population since 1970 (Emp. Tab I). Per capita income is \$14,658 (Tab K-4). 31.9% of the population is at the poverty level. The Employer cites reports from Fact Finders and Conciliators who have declined to recommend or grant wage and benefit increases when cities were in fiscal emergency and asks the Fact Finder in the instant matter to take the same approach (Tab N). The Employer asks the Fact Finder to support its proposal of no wage increases for the term of the new Agreement. The Employer rejects the proposal for pension pick-up.

RECOMMENDATION: The Employer accurately states that the fiscal emergency status of the City is worse now than in past years. The Union did not rebut what was presented during the Employer's fiscal presentation by the State Auditor's representatives during the first day of hearing. East Cleveland has been in fiscal emergency for many years over the past three decades. Testimony and financial information, presented by the State Auditor's representative, Ms. Hendryx, painted a clear picture of a City in distress with a deficit in the millions of dollars and unpaid

bills and obligations including employee health care, utility bills and many other outstanding debt, and revenue continues to decline. The City has been unable to develop a plan to balance the budget, pay its bills and bring stability to its financial condition. With a cash balance of \$175,508 in the bank and a bi-weekly payroll of \$400,000.00, the Employer is able to pay only for its most immediate needs. The City's inability to meet its financial obligation regarding employee health insurance must be of serious concern to employees and the Union. The General Fund has a deficit of over \$3 million. Ms. Hendryx stated that it is still an unknown if payments for employee health care will be paid by late summer or early fall. Everything the Union argues is also correct. Patrol Officers, Sergeants and Lieutenants in the bargaining units are under paid. They perform their duties short handed and deal with the highest levels of crime in the region. Bargaining unit employees clearly deserve wage increases in excess of their current proposals. The Union cites, with emphasis, the wage increase granted Fire Department bargaining unit employees. But the parties in those negotiations created a win – win when small across the board wage increases were negotiated in exchange for certain contractual concessions which saved the Employer significantly. This Fact Finder stated in the Report and Recommendation for the FOP Dispatch and Corrections cases that “It would be completely irresponsible for this Fact Finder to recommend any increase of wages in the face of the dire financial condition of the City of East Cleveland.” This statement was true when it was written in 2012 and is more relevant today as the financial condition of the Employer has deteriorated further since that time. The recommendation in this matter is as follows. No wage increase in 2014, and no

wage increase for 2015. The recommendation includes the wage re-opener requested by the Union for 2016. By the end of 2015, employees in the bargaining unit will have experienced almost seven years of no wage increases. In the event the fiscal condition of the City realizes any improvement by the end of 2015 or the parties are able to create conditions which may allow for wage adjustments, the Union should have an opportunity to discuss wages for 2016. This recommendation does not support the Union's proposal for pension pick-up based on the fiscal condition of the Employer.

Article 24, Wages (Patrol)

Article 26, Wages (BPO/CPO) (Rank)

Wage rates for 2014 and 2015 shall remain unchanged. The parties agree to reopen the Agreement for the negotiations of wages only for 2016 wage rates.

Pension Pick-Up

Employer payment of portions of the employee cost of pension contributions to the state retirement plan, as proposed by the Union, is not recommended as part of this Report and Recommendation.

5. Article 29, Health, Dental, and Life Insurance (Patrol)

Article 30, Health, Dental, and Life Insurance (BPO/CPO) (Rank)

The Employer proposes modifications to the insurance provisions of the Agreements which include an increase of the employee contribution from 6% to 10% of the monthly contribution rate, a carve out of spousal coverage if available from another employer, and contribution toward the premium for dental coverage which is consistent with non-bargaining unit employees. The Union is opposed to the proposals of the Employer and would consider the 10% contribution rate only with caps.

EMPLOYER POSITION: The Employer is seeking cost savings and consistency with other collective bargaining agreements with the City. The Employer states that its proposal to increase premium cost sharing is comparable with other jurisdictions in the region and across the state according to the annual health insurance report published by the State Employment Relations Board (Tab 8-B). Additionally, the other FOP Agreements with the City include a 10% employee contribution rate, and the Fire Fighters Agreement parallels the proposal in the instant matter. The Employer states that its proposal should be included with the recommendation of the Fact Finder.

UNION POSITION: The Union argues that the 6% contribution rate should be continued for the duration of the new Agreement. The lack of pay increases over the past several years makes any increase in the employee cost of health insurance unaffordable. The Union would consider the increase to 10% only if the proposal was coupled with a cap or cash limit to the employee monthly premium cost, but the Employer has not given consideration to this option. Therefore the Union asks the Fact Finder to continue the status quo.

RECOMMENDATION: The Employer's argument, that its proposal to increase the employee premium share to 10% is consistent with state-wide and regional comparables, is meritorious. This Fact Finder recommended the same increase for the FOP Agreements for Dispatchers and Corrections in 2012, and the parties adopted the 10% recommendation. The IAFF Agreement also contains a 10%

employee premium cost. The increase from 6% to 10% is reasonable considering the financial condition of the City, and its inability to make payments to the administrator of the plan since the first of the year is very problematic. The increase is therefore incorporated as a part of the Recommendation. The other FOP Agreements contain spousal carve out comparable to the proposals in the instant matter, and, as the Employer states, the IAFF Agreement contains this provision. Again, based on the financial condition of the City, the spousal carve out proposal is reasonable and recommended. The Employer proposes dental insurance at a rate consistent with non-bargaining unit employees. Neither of the other FOP Agreements contain a similar provision, and it was not part of the Fact Finding Recommendation in 2012. Additionally, while the Employer relies on the Fact Finding Recommendation for the IAFF Agreement, this modification was not part of that recommendation, and it does not appear in the current IAFF Agreement. There was no evidence at hearing to indicate what the cost to employees may be based on the Employer's proposal and what impact, if any, the proposal would have regarding savings to be realized by the Employer. This portion of the Employer's proposal is therefore not included in this recommendation. Current language is recommended. Recommended language is as follows.

Article 29, Health, Dental, and Life Insurance (Patrol)

Article 30, Health, Dental, and Life Insurance (BPO/CPO) (Rank)

Section 29.1 and 30.1. The Employer shall make available to all employees comprehensive major medical, hospitalization, and prescription insurance coverage and benefits in the same manner as is offered to non-bargaining unit employees. The Employer shall select appropriate carriers/providers and otherwise determine the method of provision and coverage. The costs and/or terms and conditions of said insurance shall be at the discretion of the Employer and may be subject to

change. The Employer will meet with the Union prior to the implementation of a new plan and/or carrier to discuss new plan design. The participating employee may either select single, with spouse, with children, family or other coverage offered under the plan.

Section 29.2 and 30.2. Employees shall contribute the following amounts toward the monthly premium for their health care coverage/program beginning with the first full month following the effective date of this Agreement:

Ten percent (10%) per month.

Section 29.3 and 30.3. Deduction Procedure. Bargaining unit employees shall have their monthly premium amount deducted over two (2) paychecks per month.

Section 29.4 and 30.4. Spousal Coverage. Effective the first full month following the effective date of this Agreement, spousal coverage will be available only upon proof that the spouse does not have other medical insurance coverage available to him/her through the spouse's employer.

Section 29.5 and 30.5. Dental Coverage. Each full-time employee eligible and desiring participation in the City's dental service coverage shall be required to contribute, toward the premium charge, the following: as to single coverage the sum of fifteen dollars (\$15.00) per month and as to family coverage the sum of forty-two dollars (\$42.00) per month.

Section 29.6 and 30.6. 125 Plan Election. A bargaining unit employee shall have the option of designating his premium contributions and any additional amounts "pre-tax" in accordance with a "Section 125" cafeteria plan, which the City implemented May 1, 2004, and which all bargaining unit employees shall be eligible to participate in.

Section 29.7 and 30.7. Life Insurance. The City at no cost to the employee shall provide a Life Insurance policy for each bargaining unit member in the amount of Fifty Thousand Dollars (\$50,000.00).

6. Article 35, Duration of Agreement (BPO/CPO)

Article 36, Duration of Agreement (Patrol) (Rank)

The Employer proposes three year Agreements commencing with execution by the parties and terminating three years from the effective dates. The proposal includes extending the time for filing to negotiate a successor Agreement from ninety (90) to one hundred twenty (120) days. The Union proposes three year Agreements commencing January 1, 2014 and terminating on December 31, 2016. The Employer reiterates its desire for no re-opener during the term of the agreement.

EMPLOYER POSITION: The Employer states that stability and time away from the bargaining table are important for both parties. Its focus must be balancing the budget and exiting fiscal emergency status. For these reasons, the Employer argues against the Union proposal, in the wage section, for a re-opener for 2016 wages.

UNION POSITION: The Union states that it desires a time of stability as does the Employer, but proposes a start date of January 1, 2014 for the new Agreement with a termination date of December 31, 2016. The Union states the importance of the 2016 re-opener.

RECOMMENDATION: The previous Agreement officially commenced on January 1 and terminated on December 31. Historically, this has been the case for past collective bargaining agreements, and the recently negotiated Agreement with the

IAFF was executed in February 2014 but made effective on January 1, 2013. The Fact Finder is persuaded to not modify what has been the practice of the parties over many years, and, therefore, the recommendation is an effective date of January 1, 2014 and termination date of December 31, 2016. Neither party addressed the expansion of filing for negotiations to one hundred days at hearing. The recommendation is for no change in this section of the Article. The larger issue is that of the re-opener which has been addressed in the wage section of this Report and Recommendation. This fact finder generally does not recommend re-openers when the parties are at impasse over the issue. But in this case, the recommendation includes a re-opener for 2016 wages only based on the fact that employees in the bargaining units will not have received a wage increase for almost seven years by the third year of the new Agreement. This is not to suggest that the Employer will have the financial resources to provide an increase. Historically, the City of East Cleveland has had difficulty moving out of fiscal emergency. Nevertheless, this recommendation would allow the parties to review the financial condition of the City in relation to wages of bargaining unit employees.

Article 35, Duration of Agreement (BPO/CPO)

Article 36, Duration of Agreement (Patrol) (Rank)

This Agreement represents a complete understanding between the City and the Union, and it shall be effective January 1, 2014 through December 31, 2016, and thereafter from year to year, unless at least ninety (90) days prior to said expiration date, or any anniversary thereof, either party gives timely written notice to the other of an intent to negotiate on any or all of its provisions. If such notice is given, negotiations shall be promptly commenced, and this Agreement shall remain in full force and effect until an amended Agreement is agreed to or, on or after December 31, 2016, either party gives thirty (30) days notice of an intention to terminate this entire Agreement. The wage provision of this Agreement contains a re-opener for

2016 wages only. Either party must give ninety (90) days written notice, prior to January 1, 2016, in order to re-open the Agreement for 2016 wage rates only.

7. MOU, Suspension of Terms/Benefits (all Agreements)

The Employer proposes a Memorandum of Understanding which suspends certain contractual benefits temporarily and for the duration of the Agreements. Reactivation of the benefits would be subject to negotiations although, if the Fiscal Emergency Commission approves reactivation during the term of the Agreements, all or a portion may be paid. Those benefits subject to the suspension include Clothing Allowance, Longevity, Holiday Benefits, Personal Days and Supplemental Wage Payments. The Union is opposed to the proposed MOU.

EMPLOYER POSITION: The Employer states that the fiscal emergency status dictates suspension of the benefits as a way to reduce expenditures. The Fiscal Emergency Commission must develop a concrete plan to reduce spending and find a way to reduce and eventually eliminate deficits. The Employer cites a conciliation award of Harry Graham which imposed a temporary suspension of benefits because the jurisdiction was faced with serious budgetary deficits (Tab 10-B). Additionally the Employer cites this Fact Finder's 2012 Report for the other FOP bargaining units at the City which declined to recommend a similar proposal with the understanding that the Union would discuss benefit levels in the event the City moved to Fiscal Emergency. The Employer argues that the Union did not cooperate or enter into discussions with it when the State Auditor's office placed the City in fiscal

emergency. The Employer states that the proposed MOU is therefore critical, and it will result in a savings to the City of \$287,895.

UNION POSITION: The Union opposes the proposed Memorandum of Understanding. Its members are already the lowest paid Patrol and Rank employees in the county and region and cannot afford the reductions proposed by the Employer. The Union states that the recently negotiated collective bargaining agreement between the City and Fire Fighters' Union does not include a suspension of benefits MOU, and no other Agreement with the various Unions at the City contain this provision. The Union asks that the proposed MOU not be included in the recommendation.

RECOMMENDATION: The Employer's arguments are compelling as is the decision by Arbitrator Graham. This Fact Finder's Report and Recommendation for the other FOP Agreements at the City indicated that, in lieu of a similar MOU, the parties would be expected to work cooperatively if fiscal emergency was imposed, as occurred following the issuance of the Report. The Employer argues that the Union has continually failed to address the fiscal emergency. But there was no evidence at hearing that the Employer approached the Union with a proposal to address the fiscal concerns and no evidence that the Union refused to engage in said discussion. The Union's argument regarding the recently negotiated IAFF Agreement is compelling. This Agreement does not include a suspension of benefits MOU, and the Employer has not negotiated this provision with its other Unions. It is difficult to

understand the Fiscal Emergency Commission's role regarding reinstatement or negotiations of collectively bargained benefits during the term of the new Agreement. This Report and Recommendation includes a two year wage freeze, an increase in the employee share of the health insurance premium, and other benefit modifications. The MOU, Suspension of Terms/Benefits is not included in the recommendation.

8. Article 28, Supplemental Compensation (Patrol)

The Employer proposes to eliminate supplemental compensation contained in Article 28 of the Patrol collective bargaining agreement. This includes additional compensation for assignment to the detective bureau and S.W.A.T. team. The Union opposes the elimination of Article 28.

EMPLOYER POSITION: The Employer states that this is an important cost savings proposal which addresses its financial condition.

UNION POSITION: The Union is opposed to the proposal as it has a significant impact on the bargaining unit. Eight employees would lose the \$.45 per hour payment for assignment to the Detective Bureau, and fifteen members of the bargaining unit would lose the supplement for assignment to S.W.A.T.

RECOMMENDATION: The Employer's argument, that its fiscal condition requires specific cost savings as the new Agreements are enacted, is meritorious. Article 28,

in the Patrol Agreement, provides an opportunity to reduce costs while maintaining a portion of the benefits. The recommendation is to maintain Article 28 benefits at a reduced level, \$.25 per hour for assignment to the Detective Bureau and \$1375.00 for assignment to S.W.A.T., beginning with the execution of the new Agreement and ending on November 30, 2016 at which time the supplement for assignment to the Detective Bureau will return to forty-five cents (\$.45) per hour and compensation for S.W.A.T. Team membership will return to \$2750.00 effective December 1, 2016.

Article 28, Supplemental Compensation

Section 28.1. Detective Bureau. Members of the bargaining unit, who are assigned to the Detective Bureau, have received an additional forty-five cents (\$.45) per hour additional compensation. Effective with the execution of this Agreement, this amount will be reduced to twenty-five cents (\$.25) per hour. The forty-five cents (\$.45) per hour supplement will be reinstated effective December 1, 2016.

Section 28.2. S.W.A.T. Team Members Status Compensation. Bargaining unit members serving and assigned as S.W.A.T. team members have received additional compensation of two thousand seven hundred fifty dollars (\$2750.00) payable in twenty-six (26) bi-weekly payroll installments which has been added to the employee's base pay. Effective with the execution of this Agreement, this amount will be reduced to one thousand three hundred seventy-five dollars (\$1375.00), payable in twenty-six (26) bi-weekly payments. The two thousand seven hundred fifty dollar (\$2750.00) compensation will be reinstated effective December 1, 2016.

9. Article 32, Out-Of-Class Pay (Patrol)

The Employer proposes that Patrol Officers, who are assigned as Acting Road Sergeants, will receive the base rate of pay for a Sergeant per an eight hour shift. The current provision provides for one hour and one half compensatory time, in addition to regular pay, for the shift. The Union opposes the proposal.

EMPLOYER POSITION: The Employer states that the compensatory time benefit requires overtime and additional personnel expenditures. It is more efficient and cost effective to reimburse a Patrol Officer at the Sergeant's rate of pay. This is especially critical based on the financial condition of the City.

UNION POSITION: The Union states that, based on the low pay of bargaining unit employees, this is another proposal which has a significant and negative impact. The Union asks that current contract provisions be maintained in the new Agreement.

RECOMMENDATION: The benefit provided Patrol Officers for working as the Acting Road Sergeant is generous, but, due to the fiscal emergency, it is reasonable, as the Employer argues, to reimburse at the Sergeant rate of pay. The proposal of the Employer is recommended as follows.

Article 32, Out-Of-Class Pay

Section 32.1. Assignments as the Acting Road Sergeant shall be left to the sole discretion of the Officer-in-Charge. The Acting Road Sergeant shall receive the base rate of pay for a sergeant, per eight (8) hours shift for which he is designated to act in that capacity.

10. Article 8, Rights of Bargaining Unit Members (Rank)

The Employer proposes to delete portions of the current provisions of Article 8, which outline the process utilized by the Employer and rights of Rank employees during investigations which may result in disciplinary action, and replace current

language with provisions of Article 8 which are contained in the Patrol Officers collective bargaining agreement. The Union proposes to maintain current language.

EMPLOYER POSITION: The Employer states that the proposed language is currently contained in the Patrol Agreement. In addition, the FOP Agreements for Dispatchers and Corrections employees contain nearly the same language as that being proposed for Rank. The Employer argues that current language is duplicative and cumbersome and wishes to create uniformity regarding the investigative process among all five FOP Agreements. This will create consistency and streamlining for the Employer and Union. The Employer states that the language being proposed for Rank employees was accepted by the FOP for its other bargaining unit employees, thus establishing a pattern which must be noted by the Fact Finder.

UNION POSITION: The Union states that it is important to maintain current contract language. The timing and location of an investigative meeting are important. The Union argues that the language in the Rank Agreement is more effective than similar provisions in the other FOP Agreements. The Union states that an FOP representative participates in all investigative meetings, and current language aids in representation rights.

RECOMMEDATION: Significant weight must be given to internal comparables in the fact finding process. In this matter, the Employer's argument regarding the other four FOP Agreements is compelling. Upon examination, the Employer's proposal

does not diminish due process rights, and representation rights are not compromised. The Employer's argument regarding standardization is credible. This language was acceptable to members of the other FOP bargaining units, and there was no evidence that it was problematic or the subject of grievances. Law Director, Ron Riley, stated that the parties often waive provisions of Article 8 when a Rank employee is the subject of an investigation. There was no evidence at hearing to suggest that the Employer's proposal would inhibit the investigatory process or diminish, in any way, the rights of employees. The Employer proposal is therefore recommended as follows.

Article 8, Internal Investigations

Section 8.1. Internal Investigation Procedures. When a bargaining unit member is under investigation by the Employer for administrative rule violations, the following minimum standards shall apply:

1. Interview Timing. Questioning of the bargaining unit member shall be conducted at a reasonable hour, preferably when the bargaining unit member is on duty, unless circumstances otherwise require.
2. Interview Location. Questioning of the bargaining unit member will generally take place at the offices of those conducting the investigation or the place when such bargaining unit member reports for duty, subject to operational needs.
3. Breaks/Rest Periods. Any questioning of a bargaining unit member in connection with an investigation shall be for a reasonable period of time and shall allow for reasonable periods of rest and personal necessities of the bargaining unit member.
4. Garrity Warnings. Prior to being charged with insubordination for refusing to answer questions or cooperate in an investigatory interview, a bargaining unit member will be advised that his continued refusal could form the basis for a charge of insubordination and may result in discipline. A member shall not be charged with insubordination in such instances unless immunity has been granted by the proper legal authority for the statements that are to be made in connection with the interview.

5. Representation Rights. Upon the request of the bargaining unit member under investigation, and in circumstances where the results of the investigation could result in discipline of the member, the member shall be entitled to the presence of a union representative, and reasonable time to procure the presence of a representative.

6. Questioning/Identification of Interviews. Questioning of the bargaining unit member shall be conducted in a professional and business-like manner, and the interviewer shall identify himself to the member.

7. Subject Matter. Bargaining unit members will be advised of the subject matter of the interview prior to questioning.

8. Polygraphs. No polygraphs, VSA, or other stress measuring device shall be used during investigatory interviews.

9. Disclosure of Personal Assets. The disclosure of personal assets will not be required without a reasonable basis.

Section 8.2. Notification of Findings/Results. At the conclusion of the investigation, the Employer agrees that all public records under the Ohio Public Records law will be made available to the member or the FOP. The parties agree that any recordings or transcripts made during the course of an internal investigation and meeting the previous definition shall be made available.

11. Disputed Tentative Agreements

The Employer produced a number of documents which it claims were signed tentative agreements executed during negotiations for the renewal of the current Agreements. Although they are dated in May and June 2011, the Employer argues that they were finalized and executed during negotiations for the instant matter. The Employer states that a different representative of the FOP initiated and led the current negotiations prior to the current FOP representative who was assigned mid-

term of the bargaining process. The tentative agreements were negotiated and signed by the parties in good faith and must now be honored as part of the overall package representing the product of the bargaining process. The Employer states that the Fact Finder must incorporate these items as a part of the overall Report and Recommendation. The Employer states that the three negotiated agreements are as follows.

Article 14, Personnel Files (BPO/CPO; Patrol Officers; Rank)

Article 15, Probationary Periods & Promotions (BPO/CPO; Patrol Officers; Rank)

Article ____, Work Rules (BPO/CPO; Patrol Officers; Rank)

The Union states that the three items, as listed above, are not effective tentative agreements. They were negotiated with a different representative from the FOP, Ohio Labor Council, Inc. who was replaced by request of the East Cleveland Union membership. The current representative did not negotiate the issues with the Employer. Additionally, these issues were negotiated for different collective bargaining agreements. The Union states that the Fact Finder must not include the three issues as a part of the Report and Recommendation.

RECOMMENDATION: The termination date of the current collective bargaining agreements is December 31, 2010. Evidence indicates that negotiations for the renewal of the Agreements have occurred sporadically since that time. The initial State Employment Relations Board notice for fact finding was issued in 2011, and, according to SERB records, negotiations continued over a period of years. The inability to conclude bargaining is not the fault of either party as the Employer faced

almost insurmountable fiscal problems and is now in fiscal emergency. At the commencement of the bargaining process, the chief negotiator for the Union was a different individual. He negotiated and signed tentative agreements in behalf of the Union. While the Union states that the negotiations for the three issues in 2011 was for different collective bargaining agreements, evidence does not support this assertion. Negotiations in 2011 for the named bargaining units could only have been for the Agreements which expired on December 31, 2010. And the fact that the representative changed, does not invalidate agreements reached with the Employer during the continuing negotiations. If the agreements, reached by either management or Union, were invalidated by a change in representatives, the result would be chaotic. A change in representatives following the execution of a collective bargaining agreement does certainly not invalidate the terms and conditions of the Agreement. Representatives are transferred; they resign to take new employment; they move on due to health reasons; or they pass away. But their good faith work and signature continue to represent the collective bargaining performed in behalf of the employer or employee organization. The Employer's argument, that the tentative agreements were bargained in good faith during the current negotiations and must be considered as a part of the Fact Finding Report and Recommendation, is meritorious. Upon examination of the documents produced by the Employer the following recommendation is made.

Article 14, Personnel Files: Tentative agreement was signed by the parties on May 16, 2011. This issue is included in the recommendation.

Article 15, Probationary Periods & Promotions: Handwritten notes are difficult to read. There are no signature lines on the document. Although there are signatures and initials with dates on the document, it is not conclusive that this was a tentative agreement of the parties. This issue is not included in the recommendation.

Article ____, Work Rules: Tentative agreement was signed by the parties on June 13, 2011. This issue is included in the recommendation.

CONCLUSION

The Fact Finder has reviewed the pre-hearing statements of the parties, all facts presented at hearing and the extensive number of exhibits submitted by the parties during the evidentiary hearing. In addition, the Fact Finder has given consideration to the positions and arguments presented by the parties regarding each issue at impasse and to the criteria enumerated in Ohio Revised Code Section 4117.14 (G) (7) (a-f).

In addition to the specific recommendations contained in this Report and Recommendation, all tentative agreements, which were reached between the parties prior to fact finding, during mediation prior to the fact finding hearing and during the fact finding process, are hereby incorporated in this Fact Finding Report

and Recommendation. Any issues or sub-issues not addressed during negotiations are also intended to remain current contract language for the purposes of this Report and Recommendation.

Respectfully submitted and issued at Cleveland, Ohio this 13th Day of May 2014.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas J. Nowel
Fact Finder

CERTIFICATE OF SERVICE

I hereby certify that on this 13th Day of May 2014, a copy of the foregoing Report and Recommendation of the Fact Finder was served by way of electronic mail upon Michael D. Esposito, representing the City of East Cleveland; Lucy DiNardo, representing the Fraternal Order of Police, Ohio Labor Council, Inc.; and Donald M. Collins, General Counsel, State Employment Relations Board.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas J. Nowel
Fact Finder