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**STATE OF OHIO
BEFORE THE OHIO STATE EMPLOYMENT RELATIONS BOARD
IN THE MATTER OF THE FACT FINDING PROCEEDING IN
CASE NOS. 11-MED-03- 0274**

**AFSCME, OHIO COUNCIL 8, AFL-CIO, LOCAL 1093
and
HAMILTON COUNTY BOARD OF COMMISSIONERS, DEPARTMENT
OF PLANNING AND DEVELOPMENT, FIELD OPERATIONS**

FACT FINDING REPORT

**Submitted by John F. Lenehan
October 28, 2011**

TO:

VIA E-MAIL

Union Representative

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REPORT AND RECOMMENDATIONS

I BACKGROUND

On July 29, 2011 The State Employment Relations Board (SERB) appointed John F. Lenehan as the Fact Finder in the cases of AFSCME, Ohio Council 8, AFL-CIO, Local 1093 and the Hamilton County Board of Commissioners, Department of Planning and Development, Field Operations. The parties mutually agreed to extend the filing of the fact finding report until October 28, 2011, as provided under the Ohio Administrative Code, Section 4117-9-05 (G). A Fact Finding Hearing was held on October 21, 2011, 9:30 a.m., at the Hamilton County Administration Building, 130 E. Court Street, Room 707, Cincinnati, Ohio 45202. Present for and on behalf of the Employer were: 1) Brett A. Geary, Management Consultant, 2) David Helm, Human Resource Department, 3) Gary Van Hart, Planning and Development Department, and 4) R.K. Styll, Planning and Development Department. Present for and on behalf of the Union were: 1) Taurean J. Johnson, Staff Representative, 2) Walter J. Edward, Staff Representative, 3) Scott Wilson, Bargaining Team Member, 4) David Hoover, Bargaining Team Member, and 5) Jeff Wickham, Bargaining Team Member.

During the Fact Finding Hearing efforts were made to mediate the outstanding issues.

A. Description of the Bargaining Unit

The parties are AFCME, Ohio Council 8, AFL-CIO, Local 1093 (Union) and the Hamilton County Commissioners, Department of Planning and Development, Field Operations (Employer). The Bargaining Unit consists of employees in the Planning and Development Division of the Board of Commissioners and includes the Field Operations employees in the classifications of Maintenance Worker 1, 2, 3; Maintenance Worker 2/Mechanic; Maintenance Worker 3/Mechanic; and Administrative Secretary/Prevailing Wage Coordinator. The unit members number ten (10) employees, nine (9) maintenance workers and mechanics, and one (1), secretary.

The Employer is the Hamilton County Commissioners, Department (or Division) of Planning and Development, Field Operations. The Board of County Commissioners is responsible for the operation of the Hamilton County Government. According to the data submitted into evidence at the hearing, Hamilton County was established in 1790, has a

population of approximately 802,000 and covers approximately 407 square miles. The Department of Planning and Development provides planning for the county, and also provides various services to the unincorporated communities in the county, e.g., maintenance of the fire hydrants. The Field Operations Section, which consists of the bargaining unit described herein, is directly involved in providing services to the unincorporated areas of the county.

B. History of Bargaining

Since this will be the first agreement between the parties, there is no prior collective bargaining agreement or history of negotiations. The Union was certified as the exclusive representatives of the employees in the bargaining unit by the State Employment Relations Board on January 6, 2011 and official notice of the certification by SERB was sent to the parties by certified mail on January 27, 2011. A notice to negotiate was served by the Union upon the employer on March 8, 2011. Subsequently, the parties entered into negotiations and met on several occasions. A tentative agreement was reached on all issues and submitted to the Board of County Commissioners and the Union Membership for ratification. However, the Union membership rejected the tentative agreement finding that the provisions relating to wages, subcontracting, health and safety and hours of work and overtime were unacceptable. The parties attempted to resolve these issues, but were unsuccessful. At the time of fact finding hearing the following issues remained unresolved.

1. Article 12- Subcontracting
2. Article 16 – Wages
3. Article 17- Hours of Work and Overtime
4. Article 30 – Safety and Health

During the mediation phase of the fact finding hearing, the parties reached tentative agreements on all of the foregoing outstanding issues, except wages. Therefore, the tentative agreements on Article 12 –Subcontracting, Article 17- Hours of Work and Overtime and Article 30 – Safety and Health will be incorporated and made a part of this report.

II CRITERIA

Pursuant to the Ohio Revised Code, Section 4117.14 (G) (7), and the Ohio Administrative Code, Section 4117-95-05 (J), the Fact Finder considered the following criteria in making the recommendations contained in this Report.

- 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 employers in comparable work, given consideration to factors peculiar to the area and the classifications involved;
- 3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect on the normal standards of public service;
- 4) Lawful authority of the public employer;
- 5) Stipulations of the parties; and,
- 6) Such factors as not confined to those above which are normally and traditionally taken into consideration.

III ISSUES AND RECOMMENDATIONS

Issue #1

ARTICLE 12

SUBCONTRACTING

FINDING AND OPINION

On October 21, 2011, the parties successfully mediated the provisions of Article 12 and signed a Tentative Agreement. It is the finding and opinion of the Fact Finder that the Tentative Agreement is to be incorporated herein and made a part of this report.

RECOMMENDATION:

Therefore it is the finding and recommendation of the fact finder that a copy of the Tentative Agreement on Article 12 executed by the parties on October 21, 2011 be incorporated into this report as Appendix “A”.

Article 12 should read as follows:

ARTICLE 12
SUBCONTRACTING

Section 12.1 The Employer reserves the management right to subcontract pursuant to Chapter 4117. When the Employer subcontracts work that is normally performed by bargaining unit employees, and such subcontracting results in the layoff of any bargaining unit employee(s) pursuant to the terms of Article 11 of this Agreement, the Employer will meet with the Union to discuss the effects of such subcontracting. The Employer will demonstrate the rationale for such subcontracting and the Employer’s anticipated economic benefits.

Issue #2

ARTICLE 17

HOURS OF WORK AND OVERTIME

FINDING AND OPINION

On October 21, 2011, the parties successfully mediated the provisions of Article 17 and signed a Tentative Agreement. It is the finding and opinion of the fact finder that the Tentative Agreement is to be incorporated herein and made a part of this report.

RECOMMENDATION:

Therefore it is the finding and recommendation of the fact finder that a copy of the Tentative Agreement on Article 17 executed by the parties on October 21, 2011 be incorporated into this report as Appendix “B”.

Article 17 should read as follows:

ARTICLE 17
HOURS OF WORK AND OVERTIME

Section 17.1. The work period for all bargaining unit employees shall commence at 12:01 AM on Thursday and continue for seven (7) consecutive days to end at 11:59 PM on the following Wednesday. This work period is for the purposes of calculating overtime.

Section 17.2. Each employee's normal, regular work day shall be for an eight-hour period. In addition to this eight (8) hour work period, the employees' workday shall include a one-half hour, non-paid lunch period.

Section 17.3. The Employer reserves the right to schedule the employee's workday, including lunch periods.

Section 17.4. When an employee is required by the Employer to be in active pay status for more than forty (40) hours in a work week, he/she shall be compensated with overtime pay or compensatory time (at the employee's option) for such time over forty (40) hours at the rate of one and one half (1 ½) times his/her regular hourly rate for each one (1) hour, or fraction thereof, of overtime worked. Overtime shall be defined as being in active pay status for more than forty (40) hours in a workweek. The term active pay status as used in this Article shall include all hours worked and all hours on vacation leave, holiday leave, paid leave of absence, and/or compensatory time off, but shall not include hours on sick leave, disciplinary suspension, or any unpaid leave of absence. Compensation shall not be paid more than once for the same hours under any provision of this Article or Agreement.

Employees may accumulate up to one hundred (100) hours of compensatory time. Compensatory time may be used for any reason, so long as the employee requests such time through written request to his immediate supervisor. Requested compensatory time may be granted by the immediate supervisor based on the workload of the department or work area. Requests for use of compensatory time shall not be unreasonably denied. During special projects or any situation where an excessive amount of overtime is scheduled, the Employer may require that the employee accept overtime payment instead of compensatory time.

Accumulated compensatory time must be used within one-hundred and eighty (180) days of the pay period in which it was earned or it will be paid in cash at the current hourly rate during the pay period following the expiration of the 180-day time limit.

Upon termination, the employee shall be paid for all compensatory time at his/her current hourly rate of pay. Upon death of the employee, accumulated compensatory time shall be paid to the employee's estate.

Section 17.5. An employee who is called in to work for a period that does not abut his or her scheduled shift shall receive a minimum of two (2) hours pay at the overtime rate for the hours worked. When calculating actual time worked on a call-in, the Employer will include reasonable commuting time from and to the employee's home.

Issue #3

ARTICLE 30

SAFETY AND HEALTH

FINDING AND OPINION

On October 21, 2011, the parties successfully mediated the provisions of Article 30 and signed a Tentative Agreement. It is the finding and opinion of the fact finder that the Tentative Agreement is to be incorporated herein and made a part of this report.

RECOMMENDATION:

Therefore it is the finding and recommendation of the fact finder that a copy of the Tentative Agreement on Article 30 executed by the parties on October 21, 2011 be incorporated into this report as Appendix "C".

Article 30 should read as follows:

ARTICLE 30
SAFETY AND HEALTH

Section 30.1. The Employer and the Union recognize the need for both parties to participate in the development and implementation of practices that will:

- A. Ensure that worker health and safety concerns are fully considered;
- B. Provide an open environment in which employees may freely express concerns; and
- C. Allow workers and their representatives access to needed information relative to the safety and health aspects of their work environment.

Section 30.2. The Safety and Health Committee consisting of at least two Union members and at least one management representative will meet at least quarterly to discuss and address any safety and health issues that arise.

Issue #4

ARTICLE 16

WAGES

UNION'S POSITION

According to the Union's statement, Hamilton County uses a wage range to determine the pay for each classification. Under the wage range, an employee progresses through the wage scale based on merit. It is the Union's position that this structure has caused numerous disparities among employees in the bargaining unit who have been doing the same job for almost the same number of years. This was recognized by the Employer during negotiations and at one point was willing to move away from the pay ranges to a solid pay scale and give wage increases. As a result, the Union agreed and drafted a proposal accordingly. It structured a pay scale so that most of the proposed wages fell within the current pay ranges. The Employer, however, rejected it and decided against any increases.

The Union states that it is not seeking a huge pay increase, but instead an equity adjustment in order to create equality among employees in the bargaining unit. In addition, it wants to create a path toward making the wages match or be comparable to those in the region. According to the Union, Hamilton County falls significantly behind other cities and municipalities in the geographic region. To support its position, the Union submitted a wage proposal and evidence of collective bargaining agreements and wage rates paid by municipalities and other government entities in the geographic area.

EMPLOYER'S POSITION

According to the Employer, Article 16 and its language were part of a Tentative Agreement reached by the parties. The Employer proposes language identical to the Tentative Agreement, except for a change to the article number and section numbering, a non-substantive change to the classification description of the Administrative Secretary, and a cleaner description of hand-written changes to the original proposal.

The Employer further states that as a new unit, the bargaining unit employees should not be in a better position than the overwhelming number of County employees who will receive no wage increases for 2012. The Union originally proposed wage increases of 5% for each of the following years: 2011, 2012 and 2013. After a number of meetings, the parties agreed to language that permitted bargaining unit increases on the same basis as non-bargaining unit employees, i.e., a ‘me –too’ clause, with an opportunity for the union to re-open the contract on wages only for 2012 and 2013 if the Board of Commissioners does not grant a general wage increase.

The Employer argues that in 2012 the County Administrator is recommending a balanced budget which is less than the 2011 budget and does not include funding for general salary increases. Even with no increase in salaries, the Administrator cautions that the 2012 budget is unsustainable in future years due to its immediate reliance upon non-recurring resources and general fund reserves to an extent not contemplated by the County. While the County did its share of belt-tightening, it was still forced to lay off over 700 employees since the beginning of calendar year 2008. The total positions in Hamilton County government have fallen by over 1,300 positions in that same time. The Recommended Budget foresees additional layoffs in calendar year 2012.

The Employer further states that the forecast for future years is bleak. It is projected that there will be a \$13.6 million budget gap in calendar year 2013 if the current trends continue. Local Government funding from the State has been slashed and there will be a 50% reduction in mid-2012. The Estate Tax has been eliminated, and there will be a phase-out of the County’s tangible personal property reimbursement and elimination the public utility reimbursement. Other County revenue projections are either bleak and or uncertain. The 2012 estimate of the County’s main revenue sources represents a \$25.6 million decrease from 2008 actual receipts. Total fund revenue has fallen from \$248.2 million in 2008 to an estimated \$204.0 million in 2012. As stated previously, if a revenue solution is not found, it is anticipated that the 2013 budget will require department-wide reductions of an additional \$13.6 million.

There are also a number of risks to the 2012 budget, including a double –dip recession, loss of township payments for sheriff’s patrols, salary adjustments mandated through conciliations, infrastructure failures, and legal action of Board –approved budgets for some appointing authorities.

Regardless of how rosy the union tries to paint the future, it is clear that the reality for 2012 is belt-tightening again. The disturbing budget forecast is made even more precarious by

the fact the there will be a multi-million dollar deficit in the stadium funding if no ultimate resolution to that problem is found.

Although the County could have asked for reductions in wages, it did not. It could have asked for increases in employee premium contributions for 2012, but it did not. The County has done everything in its power to weather the financial storm of the last a few years. Any increase to this unit simply is not feasible.

In support of its position, the Employer submitted data on the County's finances, wage rates of the bargaining unit and other employees in the county, copies of the applicable wages provisions of the settlements with other county bargaining units.

FINDING AND OPINION

There are two aspects to the Union's claim for wage increases and adjustments. The first is a general across the board wage increase on the salary schedule. The second aspect is what the Union refers to as an equity adjustment to equalize wages among members of the current bargaining unit. The Fact Finder renders the following finding and opinion as to the first aspect of the Union's wage proposal.

Based upon the evidence submitted by the Union, it is clear that the wage rates for the bargaining unit are low, and no longer competitive, compared to surrounding governmental entities. It is also very clear, based upon the evidence submitted that the Employer is in a desperate financial situation which would make it irresponsible to grant the wage increases proposed by the Union. Both parties have presented clear and convincing evidence to support their positions.

Although the external comparables presented by the Union are clear and convincing, the Fact Finder finds that greater weight should be given to internal comparables and the Employer's current ability to grant pay increases, not only to this bargaining unit but to other bargaining units and non-represented employees. The Employer does not have the financial resources to make significant adjustments to wage rates at this time. Such would be impossible to perform considering the impact upon the relationship with other bargaining units and non-represented employees in the County. Thus, it is not that little or no weight should be given to external comparables, but that no weight, under current circumstances can be given at all.

An analysis of the evidence submitted at the hearing, especially wage rates and increases granted to other county employees, would not justify granting the increases proposed by the

Union in its pre-hearing submission. One estimate of those increases would result in a 13.9% overall increase. Except for the two County Sheriff's bargaining units, all other units and non-represented employees received no increase for the current year (2011) and none is provided for 2012. In addition, most of the bargaining units agreed to same language as set forth in the Tentative Agreement on Article 16-Wages, which provides for receiving the same increase as non-bargaining unit employees and the right to re-open the contract on wages only if no increase is granted to non-bargaining unit employees.

For these reasons, it is the opinion of the Fact Finder that the wage rates as set forth in the Tentative Agreement should remain in place and the language of Article 16, Section 16.2 of the Tentative Agreement should be incorporated into the Agreement providing for a "me-too" provision on wage increases to non-bargaining unit employees. Also, the trigger set forth in Article 16, Section 16.2 conditioning the re-openers in 2012 and 2013 on no wage increase being granted to non-bargaining unit employees should be adopted and incorporated in the Agreement.

The second aspect of the Union's proposal regarding equity adjustments has some merit. Apparently, there exist discrepancies among employees in the bargaining unit. Employees performing the same work could receive vastly different pay. One example is that an employee in a higher classification receives less pay than an employee in a lower position or classification. The employee in the lower classification who is receiving more pay may be reporting to the employee (his superior) in the higher classification. Although such a phenomenon is not unusual because of overlapping of salary ranges, the inequity in the salary ranges are eventually resolved under a system where increases are granted based upon advancement from one step to the next for each year of service. Likewise, any initial inequity in a merit system could eventually be resolved by proper administration and funding.

While a merit system has great appeal, it must be properly administered and, most importantly, be funded. A properly administered merit system must be fair and perceived as such by the employees being evaluated. A fair system would require objective criteria, consistent application of the criteria and periodic review of its implementation. To do this requires staff. More importantly, however, a merit system must be funded to be effective and fair. Unfortunately, it is this Fact Finder's experience that employers frequently fail to properly administer their merit systems and/or fail to provide the necessary funds for merit pay. This usually occurs when there are tight budgets. As a result, the so called "merit system" becomes meaningless or no system at all. Where an employer had no intention of properly administering

or funding its merit system, such is not only meaningless, but a cruel fraud upon the employees and the public.

Obviously, budget constraints over the years may have caused or prevented the Employer from granting merit increases to the employees now in this bargaining unit. These employees will have gone several years without any increase. As a result of not granting, any merit or other increase the inequities which existed because of overlapping salary schedules may have been exacerbated. Employees may be stuck at a level within the salary range without any opportunity for advancement or to catch up to other employees. It is also conceivable that there would be no opportunity for any pay increase during the term of the proposed Agreement.

It is the opinion of this Fact Finder that, in this case, any remedy for inequities or disparities in employees pay is best left to the parties. Also, based upon the evidence submitted herein, the Fact Finder does not have sufficient knowledge or information upon which to make a specific recommendation as to any remedy. However, the Fact Finder does believe that the parties should be given the opportunity to negotiate a remedy for any disparities or inequities in the existing salary schedule by allowing the parties to reopen the contract in 2012 for this specific purpose.

RECOMMENDATION

Therefore it is the finding and recommendation of the Fact Finder that the salary range set forth in Article 16 of the Tentative Agreement, the provisions for wage increases based upon increases granted to non-bargaining unit employees, and reopener in 2012, 2013 be adopted and incorporated into the Agreement. It is also the finding and recommendation of the fact finder that Article 16 be amended to allow for a reopener in 2012 to negotiate a remedy for any wage disparities or inequities.

Article 16 should read as follows:

ARTICLE 16 WAGES

Section 16.1. The pay range of all bargaining unit employees shall be as follows:

<u>CLASSIFICATION</u>	<u>MIN. HR</u>	<u>MAX. HR</u>
Administrative Secretary/PW Coord.	14.33	18.91

Maintenance Worker 1	13.17	17.37
Maintenance Worker 2	15.25	20.76
Maintenance Worker 2 – Mechanic	15.25	20.76
Maintenance Worker 3	16.90	22.98
Maintenance Worker 3 – Mechanic	16.90	22.98

As of the effective date of this agreement, the current pay rates for each individual employee covered by this agreement remains the established hourly rate for that employee until such a time that pay increases are awarded as described in Section 16.2 below.

Section 16.2. For contract years 2011, 2012, and 2013 (from effective date of this agreement on) bargaining unit employees shall receive the same general increase approved by the Hamilton County Board of County Commissioners (HCBCC) for non-bargaining unit employees of the Hamilton County Board of County Commissioners (except those employees with individual employment contracts). Such increase shall be effective on the same date as for non-bargaining unit employees of the HCBCC.

For contract years 2012 and 2013 if no increase is approved by the HCBCC for non-bargaining unit employees, the Union may request a re-opener of the contract for wages only. The Union shall be required to notify the Employer in writing of its decision to re-open on wages only not later than thirty (30) days after the HCBCC votes on the final budget for that contract year. The Union or the Employer must notify SERB in the appropriate manner for a re-opener on the contract for wages only. Such re-opener shall be subject to the normal statutory impasse procedures as described in ORC Chapter 4117. Any language agreed upon in the re-opener shall be included as an Appendix to this Agreement.

In addition, to the reopener for the contract years 2012 and 2013 set forth in the preceding paragraph, the Union in the contract year 2012 may request a re-opener of the contract for the purpose of resolving issues of any disparities or inequities in the salary schedule. The Union shall be required to notify the Employer in writing of its decision to re-open. The Union or the Employer must notify SERB in the appropriate manner for a re-opener. Such re-opener shall be subject to the normal statutory impasse procedures as described in ORC Chapter 4117. Any language agreed upon in the re-opener shall be included as an Appendix to this Agreement.

IV

CERTIFICATION

The fact finding report and recommendations are based on the evidence and testimony presented to me at a fact finding hearing conducted October 21, 2011. Recommendations contained herein are developed in conformity to the criteria for a fact finding found in the Ohio Revised Code 4717(7) and in the associated administrative rules developed by SERB.

Respectfully submitted,

/s/ John F. Lenehan
John F. Lenehan
Fact Finder

October 28, 2011

V

PROOF OF SERVICE

This fact-finding report was electronically transmitted this 28th day of October, 2011, to the persons named below.

Appearances:

VIA E-MAIL

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/S/ John F. Lenehan
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