

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF FACT-FINDING	:	SERB Case Number: 11-MED-10-1420
	:	
BETWEEN THE CITY OF	:	
	:	
UPPER ARLINGTON, OHIO,	:	
	:	
Employer	:	Date of Fact-Finding Hearing:
	:	April 25, 2012
AND THE	:	
	:	
	:	
FRATERNAL ORDER OF POLICE,	:	
OHIO LABOR COUNCIL, INC.,	:	
	:	Howard D. Silver, Esquire
Union	:	Fact Finder
	:	

REPORT AND RECOMMENDED LANGUAGE OF THE FACT FINDER

APPEARANCES

For: City of Upper Arlington, Ohio

Mark J. Lucas, Sr., President and CEO
Clemans, Nelson and Associates, Inc.
6500 Emerald Parkway, Suite 100
Dublin, Ohio 43016-6235

For: Fraternal Order of Police, Ohio Labor Council, Inc., Union

Tracy Rader
Staff Representative.
Fraternal Order of Police, Ohio Labor Council, Inc.
222 East Town Street
Columbus, Ohio 43215-4611

PROCEDURAL BACKGROUND

This matter came on for fact-finding hearing at 9:30 a.m. on April 25, 2012 within the administrative offices of the city of Upper Arlington, Ohio, 3600 Tremont Road, Upper Arlington, Ohio 43221. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. Following the presentation of evidence and arguments the hearing record was closed at 4:35 p.m. on April 25, 2012.

This matter proceeds under the authority of Ohio Revised Code section 4117.14(C) and in accordance with Ohio Administrative Code section 4117-9-05. Both parties have met their respective obligations in carrying out pre-hearing procedures. Prior to the hearing the parties submitted to the fact finder their positions on the issues raised by this fact-finding process. This matter is properly before the fact finder for review, report, and recommended language.

FINDINGS OF FACT

1. The parties to this fact-finding procedure, the city of Upper Arlington, Ohio, the Employer, and the Fraternal Order of Police, Ohio Labor Council, Inc., the Union, are parties to a collective bargaining agreement in effect from January 1, 2009 through December 31, 2011.
2. The parties' collective bargaining agreement covers a bargaining unit comprised of all full-time Communications Operators/Dispatchers of the Police Division of the city of Upper Arlington, Ohio, a bargaining unit

certified by the Ohio State Employment Relations Board on September 22, 1992 in SERB case number 92-REP-06-0121.

3. The bargaining unit covered by the parties' collective bargaining agreement is comprised of seven bargaining unit members.

4. The bargaining unit secured a 3.0% wage increase in 2011.

5. The Employer and the bargaining unit have a bargaining history that goes back twenty years.

6. The Communications Operators/Dispatchers in the bargaining unit operate a communication system that is operated twenty-four hours per day, seven days per week, requiring readiness at all times while on duty to receive and dispatch information, including emergency 911 calls, police calls, fire calls, and calls to other public safety and public service departments.

7. The Communications Operators/Dispatchers in the bargaining unit handle calls that can be very difficult and highly stressful.

8. The operations of the city of Upper Arlington, Ohio are paid through the city's General Fund, a fund that is funded through the city's income tax, the city's property taxes, local government funding from the state of Ohio, and the estate tax.

9. A substantial source of revenue paid to the city of Upper Arlington, Ohio, the estate tax, is being eliminated effective January 1, 2013.

10. The state of Ohio reduced the amount of local government funds available from the state of Ohio by 25% effective July 1, 2011, and reduced this funding by 50% effective July 1, 2012.
11. The reduction in local government funding and the elimination of the estate tax will create a fiscal hole in the operating budget of the city of Upper Arlington, Ohio that will require millions of dollars to plug.
12. The city of Upper Arlington has imposed a hiring freeze since January 1, 2011.
13. In 2011, the estate tax provided 3.125 million dollars to the city of Upper Arlington, Ohio's General Fund, 11% of the General Fund, with one million dollars of this amount placed in the Estate Tax Capital Project Fund. See Employer's Exhibit N, pages 1 and 2.
14. Most of the residents of Upper Arlington, Ohio who work outside the home are employed outside the municipal limits of the city of Upper Arlington, Ohio.
15. Municipal income taxes are paid to the city in which the work is performed.
16. The city of Upper Arlington, Ohio's income tax revenue in 2011 amounted to \$12,707,367, 45% of the General Fund available for city operations.
17. Less than 5% of the territory that comprises the city of Upper Arlington, Ohio is being used as commercial property.

18. Because of the financial challenges faced by the city of Upper Arlington, Ohio caused by substantial reductions in local government funding paid by the state of Ohio, and by the elimination of the estate tax effective January 1, 2013, the city of Upper Arlington, Ohio is considering different operating models intended to increase efficiency and make better use of the limited financial resources available to the city of Upper Arlington, Ohio to meet the needs of the city.

19. One of the possibilities considered by the city of Upper Arlington, Ohio involves sharing services among a number of political subdivisions.

20. Among a variety of service areas overseen by the city of Upper Arlington, Ohio, 911 and dispatching services are considered to be services that could be shared among political subdivisions.

21. The city of Upper Arlington, Ohio has made no decision as to the future work of the Communications Operators/Dispatchers bargaining unit; the Employer is subject to no deadline or timeline in determining whether or how the work of the bargaining unit is to be affected.

22. The Employer wishes to secure the greatest discretion possible in determining how the work of the city of Upper Arlington, Ohio will be organized, performed, funded, and supervised.

23. The Union expresses no position on the considerations of the Employer except to emphasize that any action by the Employer affecting the bargaining unit must comply with the express language in the parties' collective bargaining agreement.

TENTATIVELY AGREED ARTICLES

The following Articles have been tentatively agreed by the parties for inclusion in their successor collective bargaining agreement. The fact finder recommends that these tentatively agreed Articles be included in the parties' successor Agreement.

Article 3 – FOP/OLC Security

Article 4 – Non-Discrimination

Article 7 – Corrective Action and Records

Article 8 – Work Rules and Regulations

Article 9 – Labor Relations Meetings

Article 10 – Layoffs and Recall

Article 11 – Miscellaneous Provisions

Article 13 – Political Activity

Article 14 – Internal Review Procedures

Article 16 – Rates for Members Following Certain Personnel Actions

Article 18 – Holidays

Article 20 – Sick Leave With Pay

Article 21 – Occupational Injury and Disability

Article 22 – Special Leave

Article 24 – Miscellaneous Economic Provisions

Article 25 – Drug and Alcohol Testing

Article 26 – Attendance

Article 27 – Uniforms

Article 29 – Duration (January 1, 2012 through December 31, 2014)

UNRESOLVED ARTICLES

The following Articles remain unresolved between the parties:

New Article

Article 1 – Agreement

Article 2 – Recognition

Article 5 – Management Rights

Article 6 – Grievance Procedure

Article 12 – Employee Assistance Program

Article 15 – Rates of Pay and Wages

Article 17 – Hours of Work and Overtime

Article 19 – Vacation Leave

Article 23 – Insurance

Article 28 – Entire Agreement.

DISCUSSION OF UNRESOLVED ARTICLES AND RECOMMENDED LANGUAGE

New Article

The Employer proposes that a new Article be included in the parties' successor Agreement that would make explicit the Employer's right to regionalize or subcontract the work of the bargaining unit. The Employer points to the financial challenges faced by

the city of Upper Arlington, Ohio caused by severe reductions in state funding, the elimination of the estate tax, the limited amount of revenue from the city's income tax, and the increasing costs of services, healthcare coverage, and operations. The Employer emphasizes the need for flexibility in negotiating with other political subdivisions for the purpose of sharing services. The Employer points to economies of scale that arise in a broader system and the Employer intends to lay the groundwork now for the flexibility needed during future negotiations with other political subdivisions.

The Employer emphasizes that it has the right to regionalize/subcontract by statute, under rights inherent to the Employer, and under the authority of the parties' collective bargaining agreement. The Employer notes that the parties' Agreement acknowledges the Employer's inherent management right to determine "organizational structure" as expressed in Article 5, section 5.1.A., and the Employer's right to "determine the overall method, process, means or personnel by which governmental operations are to be conducted" as expressed in Article 5, section 5.1.D.

The Union points out that the increase in Employer discretion over the work of the bargaining unit as proposed by the Employer through the language of the proposed new Article is presented without context. The Union notes that there is no deal in the works; there is no deadline as to some proposed shared or regional system; there are at present no facts upon which to determine whether the broad new powers suggested by the Employer in its proposal for the new Article are needed or supported by evidence in the hearing record or beneficial. The Union states that its membership has no intention of agreeing to a limitation on the guarantees of the parties' Agreement grounded in speculation about what the future may hold. The Union states that it has no reason to

agree to the language of the new Article proposed by the Employer in the absence of a factual context.

The financial challenges described by the Employer in its presentation at the hearing are real and present a daunting task to city leaders and managers in securing the resources necessary to maintain city services at a level intended by city administrators and citizens. The city of Upper Arlington, Ohio ranks among the top ten cities in Ohio in the amount of public funds generated by its citizens through the estate tax. The elimination of the estate tax will cause a severe reduction in city revenue, as will the continuing, deepening, substantial reduction of local funds that originate with the state of Ohio.

The financial difficulties encountered by the city of Upper Arlington, Ohio impact directly the public employer's ability to fund wage and benefit increases for the bargaining unit but these difficulties do not persuade the fact finder that the work of the bargaining unit should enjoy less protection. The fact finder understands the reasons the Employer seeks the wider powers expressed in the language proposed for the new Article but the fact finder does not find a sufficient factual basis upon which to recommend the language of the new Article. The fact finder's view in this regard is grounded in a lack of factual context and the fact finder's inherent reluctance to undermine the security of work assigned to a bargaining unit.

The fiscal health of the city of Upper Arlington, Ohio is of equal concern to the parties to this fact-finding because limitations in financial resources affect directly the constituency of each party. If, in the future, the Employer pursues a shared or regional system, the particulars can be shared with the Union not for purposes of approval but

with the understanding that the Union represents a necessary component of the planned change.

The Employer has wide discretion in determining how the work of the bargaining unit is to be assigned, limited only by express language in the parties' collective bargaining agreement. A diminishment in the security of the work assigned to the bargaining unit requires substantial, compelling evidence. Such evidence is not found by the fact finder in the hearing record.

The fact finder does not recommend the new Article proposed by the Employer.

RECOMMENDED LANGUAGE: New Article

The new Article proposed by the Employer is not recommended by the fact finder for inclusion in the parties' successor Agreement.

Article 1 - Agreement

The Employer proposes the deletion of Article 1, section 1.6, Enforceability of Agreement, language that expresses the parties' agreement that the collective bargaining agreement between the parties is enforceable in a court of law. The Employer describes this section as being comprised of carryover language that is no longer needed because of the enactment of Ohio Revised Code Chapter 4117.

The Employer proposes the deletion of Article 1, section 1.4, Sanctity of Agreement, language that prohibits changes to the collective bargaining agreement during the Agreement's duration unless both parties agree to the changes.

The Employer recommends the deletion of Article 1, section 1.5, Past Practices, because the Employer fears that the Union will use this language to block the regionalization of city services.

The Union opposes the deletion of the language proposed by the Employer in Article 1, arguing that there has been shown no good reason that this language, language that has served the parties well for many years, should now be removed from the parties' Agreement. The Union argues that the language within these sections, Article 1, section 1.4, section 1.5, and section 1.6, should be retained in the parties' successor Agreement.

Article 1, section 1.6 confirms that both parties have agreed to the enforceability of their Agreement. While this language may be superfluous, the removal of this language could be interpreted as a change to this issue. The fact finder has no wish to imply such a change. The language of Article 1, section 1.6 reflects what is agreed by the parties and the fact finder sees no negative effect in leaving this language intact in the parties' successor Agreement.

As to Article 1, section 1.4, Sanctity of Agreement, it is language that confirms the integrity and reliability of the Agreement between the parties during the Agreement's duration. This language expresses the agreement of the parties that the contract between the parties will remain intact and enforceable during its duration and will not be altered unilaterally. This language provides a means through which the contract may be altered through mutual agreement but requires neither party to agree to such an alteration during the term of the contract. While it is possible to construct a scenario in which this guarantee obstructs something that a party wishes to do, the fact that such a scenario exists is not sufficient, in and of itself, to persuade the fact finder to recommend the

removal of language that intends to confirm the integrity and reliability of the parties' Agreement.

The language of Article 1, section 1.5 expresses the general rule as to past practices, that is, such practices must be known to both parties and allowed by both parties over a period of time, in this case since January 1, 2008. The issue of past practice normally arises in the case of ambiguous contract language, providing a means to interpret what is intended by vague or ambiguous language in the parties' Agreement based on the prior actions of the parties over time.

A past practice is based on a long-term course of conduct that is openly known and openly permitted, with neither party complaining about the practice. It is this agreement between the parties, even if not openly expressed, that comprises a past practice as defined within Article 1, section 1.5. The agreement by the parties to a past practice during past years may have been reached among circumstances that are very different from the circumstances now faced by the city of Upper Arlington, Ohio. The language of Article 1, section 1.5 would require that the past practice continue even if either party changed its position as to the past practice based upon changed circumstances. Because of the immediate fiscal challenges faced by the parties due to recent actions by the Ohio Legislature, the fact finder recommends that past practice not stand in the way of changes needed to meet the fiscal challenges raised by changed circumstances in the near term.

The fact finder is persuaded that the language of Article 1, section 1.5 should be deleted from the parties' successor collective bargaining agreement. The fact finder is persuaded that the deletion of this language does not harm the bargaining unit but frees

the parties to find common ground on present circumstances, an ability that appears to be needed at this time.

RECOMMENDED LANGUAGE: Article 1 – Agreement

Article 1, section 1.4 – Retain current language.

Article 1, section 1.5 – Delete from parties' successor Agreement.

Article 1, section 1.6 – Retain current language.

Article 2 – Recognition

The Employer argues that Article 2, Recognition, is not meant to be a provision that creates or grants substantive rights but is to be understood only as a description of the bargaining unit. The Employer fears that the Union will cite this language as a substantive reason to block regionalization by contending that the language of Article 2 confers upon bargaining unit members a right to certain work. The Employer proposes that the following language be added to Article 2, section 2.2:

The purpose of this Article is only to recognize the bargaining unit established by SERB, and not to create substantive rights or obligations.

The Union opposes as unnecessary the language proposed by the Employer to be added to Article 2, section 2.2.

The reason for the language proposed to be added to Article 2 by the Employer is the future possibility of the Union arguing that the language of Article 2 grants substantive rights to the work assigned to the bargaining unit. In anticipation of such a claim the Employer suggests that this future, as yet unmade, argument be settled by the language proposed by the Employer to be added to the parties' successor Agreement.

The fact finder does not recommend the additional language suggested by the Employer for Article 2. Only the Employer has raised the specter of Article 2 creating substantive rights in the bargaining unit. The Union has made no such claim. There is no past dispute or disagreement in this regard to indicate a need for this additional language. The fact finder is not persuaded by the evidence in the hearing record to recommend a change to the express language of Article 2.

RECOMMENDED LANGUAGE - Article 2, Recognition

Article 2, sections 2.1 and 2.2 – Retain current language.

Article 5 – Management Rights

The Employer proposes that new language be added to Article 5, section 5.2, Limitations, a provision that refers to the broad managerial discretion wielded by the Employer that “shall be limited only by the specific and express terms of this Agreement.” The language proposed by the Employer to be added to Article 5, section 5.2 is as follows:

. . . nor is the City required to negotiate subjects during its term (for example, but not limited to, regionalization of services) that the City has already negotiated or offered to negotiate with the FOP/OLC; nor may an arbitrator engage in interest arbitration under this Agreement.

The Employer also proposes that within the last sentence of Article 5, section 5.2 the language “. . . raise the legitimate complaint or. . .” be deleted, leaving the language that empowers a bargaining unit member to file a grievance based upon an alleged violation of the parties’ Agreement.

The Union opposes the changes suggested by the Employer for Article 5.

The Employer is of the view that as the employer under the present language of Article 5 of the parties' Agreement, it is not required to bargain with the Union on issues that include regionalization and/or shared services. The Union has not expressed a position on these issues because the Union does not believe these issues are material to this fact-finding.

The Employer, understandably, is attempting to settle issues that may arise in the future between the parties concerning their respective obligations in the context of changes affecting the work assigned to the bargaining unit. This is what good managers do; they consider the future and attempt to anticipate change and the problems that inevitably arise with change.

The Union is equally credible in its argument that long-term, agreed changes to the working relationship between the parties and the relationship of the assigned work to the bargaining unit cannot and should not be affected by ill-defined, speculative circumstances that may or may not occur in the near future or the distant future or at all. The Union points out that the Employer at present is under no obligation or deadline to take any particular action related to shared services or regionalization, and there has been no description of what could be considered even a general outline of what the future holds for the work of the bargaining unit and the parties' working relationship.

The Union emphasizes that this fact-finding procedure addresses a particular three-year period, January 1, 2012 through December 31, 2014. The Union suggests that the fact finder limit his focus to this time period, base his recommendations on that which can reasonably be known or predicted at this time, and refrain from ordering additional

language for the parties' successor Agreement that is based on pure speculation grounded in nothing more than possibilities that may or may not occur in the future.

The fact finder does not recommend the additional language proposed by the Employer for Article 5, section 5.2 because, as argued by the Union, fundamental changes grounded in speculative circumstances rarely turn out to address the circumstances that ultimately arise. The fact finder is of the view that omitting the language proposed by the Employer for Article 5, section 5.2 leaves certain issues unanswered but refrains from anticipating circumstances that at this time remain unknown. It seems to the fact finder a better course to await greater clarity and certainty as to the future direction of the city before making fundamental and far-reaching changes to the parties' working relationship. The fact finder therefore does not recommend the language proposed by the Employer for inclusion in Article 5, section 5.2.

The fact finder does recommend the deletion of the language in the last sentence of Article 5, section 5.2., a sentence that at present reads: "A bargaining unit member or the FOP/OLC may raise a legitimate complaint or file a grievance based upon a violation of this Agreement." The language proposed by the Employer to be deleted is "raise a legitimate complaint or. . ." The fact finder finds the language proposed to be deleted by the Employer in Article 5, section 5.2 to be undefined by and unconnected to language of the parties' Agreement. The fact finder finds no language in the parties' Agreement that specifies what constitutes a complaint, how a complaint is to be handled when filed, and what makes a complaint "legitimate." The removal of this language leaves with each bargaining unit member recourse to that which must be maintained, access to the parties' contractual grievance procedure for a violation of the parties' Agreement. The fact finder

finds the removal of the language as proposed by the Employer makes clear to both parties and to bargaining unit members that the guarantee of access to the grievance procedure remains intact. The fact finder therefore recommends the deletion of “raise a legitimate complaint or” in the final sentence of Article 5, section 5.2.

RECOMMENED LANGUAGE: Article 5 - Management Rights

Article 5, section 5.1 – Retain current language.

Article 5, section 5.2 – Limitations. The exercise of the foregoing powers, rights, authority, duties and responsibilities, the adoption of reasonable policies, rules and regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement. The City is not required to bargain with the FOP/OLC during the term of this Agreement on subjects reserved to its management and direction except, as it affects wages, hours, terms and conditions of employment and the continuation, modification or deletion of a provision of this Agreement. A bargaining unit member or the FOP/OLC may file a grievance based upon a violation of this Agreement.

Article 6 – Grievance Procedure

The Employer proposes a change to the definition of “grievance” found in Article 6, section 6.1(A). The present definition of “grievance” reads as follows:

A grievance is any unresolved question or dispute regarding the wages, hours, terms or conditions of employment of bargaining unit members, as these unresolved questions or disputes concern the application and interpretation of this Agreement.

The Employer proposes that the above language be changed to read:

A grievance is an allegation that a specific provision of this Agreement has been violated.

The Union opposes the change, finding such a change to be unnecessary.

The fact finder finds value in language that is clearer, easier to understand, and less likely to produce variant interpretations of what the language means. The fact finder finds the language proposed by the Employer to mean the same thing as the language last agreed by the parties for the definition of “grievance.” The fact finder finds the Employer’s proposed language to be superior in its clarity and description of the specific right to which this definition attaches.

Because the fact finder finds the language proposed by the Employer to be superior to the language now found in the parties’ Agreement, the fact finder recommends the alteration of the language proposed by the Employer for Article 6, section 6.1(A).

RECOMMENDED LANGUAGE: Article 6 - Grievance Procedure

Article 6, section 6.1(A) - Grievance Defined. A grievance is an allegation that a specific provision of this Agreement has been violated.

Article 6, sections 6.1(B) and (C) – Retain current language.

Article 6, sections 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9 and 6.10 – Retain current language.

Article 12 - Employee Assistance Program

The Employer recommends the alteration of language within Article 12, section 12.1, Employee Assistance Program. The change proposed by the Employer would alter the first sentence of Article 12, section 12.1 that reads:

The City and the FOP/OLC agree that the employee assistance program shall be continued for the duration of this Agreement.

As proposed by the Employer, this language would be changed to:

The City and the FOP/OLC agree that the employee assistance program shall be available to the members of the bargaining unit under the same terms and conditions as it is generally available to the non-represented employees of the City.

The Employer contends that the language change is intended to treat all employees equally.

The Union opposes the change to this language as unnecessary and contends that to agree to the Employer's proposal requires an abdication of the Union's interest and prerogative in interacting with the Employer on the employee assistance program available to the bargaining unit.

The fact finder understands the Employer's intention to widen the pool of employees who may access a single, uniform employee assistance program. To do so, however, requires the Union to turn over to the Employer any and all prerogatives in the employee assistance program, as is the case with non-represented employees of the city. The non-represented employees have no collective bargaining rights and are subject to the unilateral decisions of the Employer as to the employee assistance program available to non-represented employees.

The Union's reluctance to share with non-represented employees the city's unilateral authority over the employee assistance program is understandable and persuasive.

The fact finder does not recommend the language proposed by the Employer for Article 12, section 12.1. The fact finder believes the Union continues to play a beneficial role in working with the Employer to maintain and improve an employee assistance

program available to the bargaining unit. The fact finder does not see as beneficial an exclusive authority on what shall be considered and what shall be done in relation to the employee assistance program to which the bargaining unit has access under Article 12. The fact finder therefore recommends the retention of current language within Article 12.

RECOMMENDED LANGUAGE: Article 12 - Employee Assistance Program

Article 12, section 12.1 - Retain current language.

Article 15 – Rates of Pay and Wages

The Employer and the Union have agreed to a change on how each bargaining unit member's contribution to the public retirement system serving the bargaining unit is to be made. What is, at present, a 10% pension pickup by the Employer, is to change, with the Employer withdrawing as the payer of the employee's contribution, leaving the employee to make the contribution directly. It is agreed by the parties that as the pension pick-up goes down, the reduction in the pension pickup will be offset by an identical amount added to each bargaining unit member's pay.

What separates the parties in the transition from pension pick-up by the Employer to direct contribution by the bargaining unit member is the rate at which the change is to occur. The Employer proposes that the change be phased in by initially moving the pension pickup from ten percent to six percent in the first year of the successor Agreement (retirement system contributions, as a matter of law, cannot be paid retroactively), followed in the second year of the Agreement by a reduction from six percent to three percent, followed by the Agreement's third year in which the pension

pickup will move to zero. With each step down in pension pickup, a step up in pay equal to the pension pickup reduction is to be effected for each bargaining unit member.

The Union proposes that the change occur entirely in the first year, with the elimination of the entire 10% pension pickup and the payment of the 10% pay increase effected at once.

The parties are in the midst of fashioning a successor Agreement that is to be in effect for three years, beginning January 1, 2012. The fact finder does not know whether an abrupt change to the pension pickup would have negative consequences that would not arise under a more gradual approach. The fact finder is inherently uneasy with abrupt change to the contractual, working relationship between the parties unless there is mutual agreement that such abrupt change should occur. The fact finder recommends the more gradual approach proposed by the Employer for the changeover to the direct contribution to the retirement system by bargaining unit members. The parties' new Agreement will span three years and the three years of the phase in of the change as suggested by the Employer appear to fit this contract term. The fact finder recommends the Employer's approach to easing the Employer out of making employee pension contributions, with increases in pay for each bargaining unit member equal to any reduction in the Employer's pension pickup to occur simultaneously. As noted above, the actual date upon which this change is to occur is complicated by the prohibition against retroactive payments.

Beyond the change in how the pension contributions are to be made, the Employer proposes no wage increase for any of the three years of the parties' successor Agreement.

The Union's proposal includes a two percent annual wage increase to occur at the beginning of the second year of the successor Agreement, and a two percent annual wage increase to occur at the beginning of the third year of the successor Agreement.

It has been pointed out that because of the relatively small size of the bargaining unit, any wage increases paid to the bargaining unit, in real dollars, have a minimal effect on the Employer's operating budget. The Union emphasizes the highly stressful nature of the work of the bargaining unit and both parties have presented evidence of wage rates among political subdivisions claimed to be comparable to the city of Upper Arlington, Ohio, as well as regional and state data as to wages and recent wage settlements.

The fact finder does not find the size of the bargaining unit to be a factor in determining whether wage and benefit increases are affordable by the public employer. The bargaining unit is separate and distinct as a group of workers performing communications work but the funds available to fill bargaining unit positions originate in the same pool of public funds that pay for a variety of municipal public safety services and other city services. Every city of Upper Arlington, Ohio employee, whether dispatcher, police officer, fireman, administrator, service worker, or clerk is directly affected by the fiscal circumstances faced by the city and each employee assumes an equal burden in helping to meet the challenges raised by present day fiscal realities.

The fact finder is not persuaded that the present fiscal circumstance of the city of Upper Arlington, Ohio includes funds available for a wage increase for the bargaining unit. The significant reductions in local funding from the state of Ohio and the soon to be eliminated estate tax present financial challenges that make wage increases, in the near term, impracticable.

The fact finder is reluctant to foreclose any possibility of a wage increase over any of the three years of the parties' successor Agreement. The fact finder recommends a zero wage increase for the first year of the Agreement (except for the pay increases occasioned by the transition from pension pickup by the Employer to direct pension contributions by the bargaining unit members) and recommends a zero wage increase for the second year of the parties' collective bargaining agreement.

The fact finder is unable to predict with any confidence the financial situation of the city of Upper Arlington, Ohio on January 1, 2014. Rather than foreclose a wage increase in the third year of the parties' successor Agreement, the fact finder recommends language that would allow a reopening of wage negotiations for wages that are to be effective January 1, 2014. The fact finder presumes that by mid-2013 the parties will be able to assess how the city has responded to the challenges presented by a lingering recession, a slow economic recovery, a reduction in local funding from the state of Ohio, and the elimination of the estate tax.

RECOMMENDED LANGUAGE: Article 15 – Rates of Pay and Wages

Article 15, section 15.1. Wages. The following regular wage rates shall be paid to members by classifications and grades beginning on the first day of the pay period that includes the date specified:

January 1, 2012

	<u>Step 1</u>	<u>Step 2</u>	<u>Step 3</u>	<u>Step 4</u>	<u>Step 5</u>
Hourly	18.8813	19.9715	21.3686	22.8929	24.5240
Biweekly	1,510.51	1,597.72	1,709.49	1,831.43	1,961.92
Annual	39,273.20	41,540.66	44,446.70	47,617.18	51,009.84

Effective the date the fringe benefit PERS pickup being paid by the City to PERS for the bargaining unit employees is reduced from ten percent (10%) to six percent (6%), the pay scale shall be increased by four percent (4%). That date is anticipated to be the beginning of the first full pay period following ratification of this Agreement by the parties. See Section 15.9 herein.

Effective the date the fringe benefit PERS pickup being paid by the City to PERS for the bargaining unit employees is reduced from six percent (6%) to three percent (3%), the pay scale shall be increased by three percent (3%). That date is anticipated to be the beginning of the pay period that includes January 1, 2013. See Section 15.9 herein.

Effective the date the fringe benefit PERS pickup being paid by the City for the bargaining unit employees is reduced from three percent (3%) to zero percent (0%), the pay scale shall be increased by three percent (3%). That date is anticipated to be the beginning of the pay period that includes January 1, 2014. See Section 15.9 herein.

If the Agreement provides for an annual increase due to a reduction in PERS fringe benefit pickup and another general increase in the pay scale for that year, they shall be added together, but not compounded on each other.

January 1, 2013 - Zero Wage Increase

July 1, 2013 – The parties agree to reopen negotiations concerning the wage rates in Section 15.1 of this Agreement for the third year of the parties' Agreement.

Article 15, sections 15.2, 15.3, 15.4, 15.5, 15.6, 15.7, and 15.8 – Retain current language.

Article 15, section 15.9. Pension Pickup. The City's method of payment of salary and the provision of fringe benefits to the employees covered by this Agreement who are participants in the Ohio Public Employees Retirement System (OPERS) are as follows:

- A. In addition to the total annual salary and salary per pay period which is otherwise payable to each full-time employee, the amount of the statutorily required employee contributions to OPERS that shall be picked up and paid as a fringe benefit by the City is set forth in Subsection 15.9(B) below. The remaining amount of the statutorily required employee contributions to OPERS shall be withheld from the employee's gross pay and picked up by the City, commonly referred to as a salary reduction pickup. Pension pickup is subject to Section 15.1 of this Article.

- | | | |
|----|---|---|
| B. | Effective Date of:
<u>Revised Pickup:</u> | % of Employee's "Salary" City
<u>Will Pay to PERS as Fringe Benefit:</u> |
| | Start of 1 st full payroll following ratification of this CBA by the parties | six percent (6%) |
| | Start of pay period that includes January 1, 2013 | three percent (3%) |
| | Start of pay period that includes January 1, 2014 | zero percent (0%) |
- C. The amount picked up by the City shall not be included in the employee's total annual salary for the purpose of computing daily rate of pay, for determining paid salary adjustments to be made due to absence, or for any similar purpose.
- D. The pickup shall be designated as public employee contributions and shall be in lieu of contributions to OPERS by each employee. No person subject to this pickup shall have the option of choosing to receive the statutorily required contribution to OPERS directly instead of having it picked up by the City or of being excluded from the pickup. The City shall, in reporting and making remittance to OPERS, report that the public employee contribution for each person subject to the pickup has been made as provided in the statute. Therefore, contributions, although designated as employee contributions, are employer-paid, and employees do not have the option to receive the contributions directly. All contributions are paid by the employer directly to OPERS.
- E. If the pickup of employee retirement contributions should no longer be permitted by the state and federal law or regulations, employees shall be paid cash for the amounts that otherwise would have been picked up under this provision.

Article 15, section 15.10 – Retain current language.

Article 17 – Hours of Work and Overtime

The Employer proposes a change to the language of Article 17, section 17.2, Overtime, that would alter the overtime eligibility threshold from “any time worked in excess of eight (8) hours in any workday or forty (40) hours in any workweek” to “any time actually worked in excess of forty (40) hours in any workweek.” The change to the language of Article 17, section 17.2 as proposed by the Employer would remove the language that says “paid status” shall include work hours as well as all hours in pay status while on any approved paid leave. The Employer also proposes language that would

allow the Employer to defer changes in overtime calculation until a date that coincides with the beginning of a pay period.

The Union opposes the changes to Article 17, section 17.2 that are proposed by the Employer. The Union emphasizes the highly stressful nature of the work of the bargaining unit and argues that the current language has served the parties very well over the years. The Union claims the Employer has failed to present a sufficiently persuasive case to alter the language that had been agreed by the parties in prior Agreements.

The fact finder understands that overtime work gives rise to premium pay, in this case one and one-half times the bargaining unit member's regular hourly rate. Under present contract language, the overtime eligibility threshold is reached either after eight hours of work in a workday or after forty hours of work in a workweek.

Under present contract language "paid status" hours during a workday or a workweek may be strung together such that the overtime threshold is reached without the provision of forty hours of actual work. Such a system is expressly described in the language of the parties' most recent collective bargaining agreement.

Paying overtime with premium pay makes perfect sense but only for extra actual work following eight hours of actual work in a workday or forty hours of actual work in a workweek.

The Employer's proposal not only limits overtime compensation to actual work but also eliminates the eight-hour workday as a measure of overtime eligibility. The Employer's proposal uses only forty hours of actual work in a workweek as an overtime threshold.

The fact finder recommends the changes proposed by the Employer that would make explicit that the overtime threshold is not reached until actual work in a prescribed amount is provided. The fact finder does not recommend the elimination of eight hours in a workday as a measure of overtime eligibility. The fact finder believes it has become economically necessary to pay overtime for actual work rather than “paper” work. The fact finder does not endorse requiring an employee to work more than eight hours in a workday without premium pay for the hours in excess of the eight hours of actual work. If, for a particular bargaining unit member, the Employer and the Union and the bargaining unit member agree that a bargaining unit member’s workday shall exceed eight hours through a mutually agreeable “flexed” schedule, the fact finder does not intend to foreclose such a mutually agreed arrangement. In such a case the forty-hour per workweek overtime threshold would still apply.

The fact finder recommends, as an administrative accommodation, the language that allows the Employer to defer changes in overtime calculation until a date after the Agreement takes effect that coincides with the beginning of a pay period.

RECOMMENDED LANGUAGE: Article 17 - Hours of Work and Overtime

Article 17, section 17.0 – Retain current language.

Article 17, section 17.1 – Retain current language.

Article 17, section 17.2 – Overtime. Bargaining unit members shall be compensated at straight time rates for all hours in paid status, except that any time actually worked in excess of eight (8) hours in any workday or forty (40) hours in any workweek shall be compensated at a rate of one and one-half (1-1/2) times the regular hourly rate. All overtime shall be authorized by an appropriate supervisor at the direction of the Police Chief. The City may defer the changes in overtime calculation until a date after the Agreement takes effect that coincides with the beginning of a pay period.

Article 17, sections 17.3, 17.4, and 17.5 – Retain current language.

Article 19 – Vacation Leave

The Employer proposes no change to the vacation language within the parties' successor Agreement for those employees within the bargaining unit who were hired before January 1, 2011. For those employees hired on or after January 1, 2011, the Employer proposes a vacation accrual schedule that is different from the vacation accrual schedule that is available to employees who were hired before January 1, 2011.

The Union opposes the change to the vacation leave Article as proposed by the Employer. The Union does not favor a bargaining unit comprised of distinct groups of bargaining unit members with different benefits under the parties' collective bargaining agreement.

The fact finder does not recommend the changes to Article 19, Vacation Leave, proposed by the Employer. The fact finder does not recommend, in the face of the Union's opposition, a bargaining unit divided by date of hire and level of benefits. The cohesion of a bargaining unit, the commonality of interest within a bargaining unit, and the equality of treatment of bargaining unit members are characteristics valued by the Union and the members of the bargaining unit. In deference to the Union's wishes about how the bargaining unit is to be comprised, the fact finder recommends that the parties retain the current language of Article 19, Vacation Leave in their successor Agreement.

RECOMMENDED LANGUAGE: Article 19 - Vacation Leave

Article 19, section 19.1 – Retain current language.

Article 23, Insurance

The Employer proposes the deletion of language within Article 23, section 23.3 that would remove maximum limits on the amount of contributions required of bargaining unit members for health and dental insurance coverage. The caps specified in the language proposed to be deleted by the Employer provided for a seventy-five dollar (\$75.00) cap per month effective January 1, 2009; an eight-five dollar (\$85.00) cap per month effective January 1, 2010; and a ninety dollar (\$90.00) cap per month effective January 1, 2011.

The Employer emphasizes that its proposed alteration of the language of Article 23, section 23.3 intends to do nothing more than treat all city employees, organized and non-organized, the same, with the same coverage in the same coverage pool. The Employer points out that in trying to reach this level of uniformity of coverage the Employer's attempts are complicated by a variety of health insurance coverage premium caps expressed within collective bargaining agreements covering the FOP/OLC dispatchers' bargaining unit; the Teamsters' bargaining unit; the International Association of Firefighters' bargaining unit; and the Fraternal Order of Police's bargaining unit. The IAFF negotiated a cap of nine percent (9%) for monthly premiums in 2011; \$105.00 or 9% of the monthly contribution in 2012; and \$120.00 or 10% of the monthly contribution in 2013. The FOP Police bargaining unit has caps of 9% or \$90.00 for 2011; and 9% or \$105.00 for 2012.

The Employer would like to remove all caps from all bargaining unit contracts so all city employees, whether organized or not organized, will share equally in the benefits and costs of the coverage pool in which they are all equal members. The Employer

emphasizes that if its goal of removing premium caps is to succeed, one of the unions must take the lead in agreeing to eliminate the cap and place its faith in the uniform and equal application of healthcare coverage among all members of the entire coverage pool.

The Union reminds the fact finder that the bargaining unit is seeking very little in terms of increased wages and benefits. The Union contends that the successor Agreement may, in fact, be a contract of retrenchment, maintaining current levels of wages and benefits and awaiting a more favorable economic climate to take the next step in wages and benefits.

The Union reminds the fact finder that a bargaining unit that agrees to a static level of wages and benefits is ill equipped to shoulder the increased contributions intended by the Employer through its proposed changes to the language affecting the contributions to be made by the bargaining unit members for healthcare coverage. The Union agrees that each party must do its part to meet the financial challenges that are presented but reminds the fact finder that the bargaining unit has been fully responsible in this regard and does not deserve to be whipsawed by increases in contributions for health care coverage coupled with no increase in wages.

The fact finder favors a wider coverage pool as a way to spread more efficiently and to greater benefit to all members of the coverage pool the risks and costs arising from the coverage pool. The treatment of all members of the coverage pool equally is a source of the coverage pool's strength and a source of confidence in the coverage pool among its members.

The fact finder favors the approach by the Employer but is unable at this time to recommend the removal of the health insurance coverage premium caps suggested by the

Employer. The removal of these caps is a worthy goal but there are financial realities that impinge not only upon the city's finances but upon the personal finances of bargaining unit members as well. The fact finder does not find that this is a time when the bargaining unit members can reasonably be asked to shed what little protection they have in terms of this very important, very beneficial, very expensive benefit.

The fact finder recommends that the monthly health insurance coverage premium caps negotiated by the IAFF and the FOP bargaining units be incorporated into the parties' successor Agreement. These caps include a 9% / \$105 monthly cap in 2012 and a 10% / \$120 monthly cap in 2013. The fact finder recommends that the cap be removed in 2014 as an example to other unions. For the dispatchers' bargaining unit's protection, the fact finder would recommend "me too" language in the event other unions in 2014 refuse to take this necessary step. Because the fact finder is asking the Union to step out on a limb first, the fact finder does not intend to open the Union to the risk of having that limb sawed off.

The Employer recommends the addition of language in Article 23, section 23.4, Administration, that would provide spousal exclusions to healthcare coverage provided to the bargaining unit and would remove language that refers to state or national healthcare programming. The fact finder recommends the proposed spousal exclusion language as necessary to the financial integrity of the coverage pool and recommends the deletion of the language as to a state or national healthcare program based upon lack of need for this language.

RECOMMENDED LANGUGAGE: Article 23, Insurance

Article 23, sections 23.1 and 23.2 – Retain current language.

Article 23, section 23.3. Coverage, The City shall make available health and dental insurance coverage for a bargaining unit member and any eligible members of the member's immediate family, as defined by the City's health and dental insurance programs. The election of such insurance coverage shall be at the option of the bargaining unit member, but the City and the member shall pay the premium costs for health insurance as follows:

The member contribution shall be determined by the amount of contribution required of eligible non-contract employees of the City covered by insurance. Such amount shall not exceed a total of nine percent or \$105 per month, for family coverage, provided that the City may modify that amount so that on or after January 1, 2013 the amount shall not exceed ten percent or \$120 per month. No cap shall apply effective January 1, 2014 except and unless another group of represented employees have secured for themselves, effective January 1, 2014, a cap on an employee's share of premium costs for health and dental insurance coverage, in which case the bargaining unit covered by this Agreement shall have attached to it the lowest cap secured by another city of Upper Arlington, Ohio bargaining unit.

Article 23, section 23.4. Administration.

A. The Health, Dental, Life and Benefits Programs shall be administered by the City Manager's designee, who is authorized to make such reasonable rules and regulations as may be found necessary, from time to time, for its proper administration.

B. The City, at its discretion, may designate an insurance agent, administrator, carrier, consultant, or third party administrator for the purposes of administering and/or obtaining life, health, dental, and liability insurance programs.

C. It is understood by the parties that the City will provide the bargaining unit employees with substantially the same level of benefits (e.g., eligibility requirements, spousal exclusions, covered procedures, pharmaceutical schedules, charges, fees, deductibles, co-payments, etc.) applicable to non-represented employees by Ordinance. However, the City is not financially obligated to absorb any costs resulting from administrative program changes, cost containment measures, or other uniform changes approved by the Ohio Department of Insurance and made by the insurance carriers or their agents, or mandated through the passage of a State or National Health Care Program. However, the City will enter into discussions with the FOP/OLC, or a subcommittee, mutually agreed

upon, to discuss any changes, which substantially impact the cost of providing health and dental coverage to a majority of the members.

D. The City may, at its discretion, change insurance carriers, administrators, or self-fund for the purpose of providing health and dental coverage to its employees, or to effect cost-containment measures which permit the continuation of such level of benefits; except that the provisions of Section 23.3 shall define the City and member's costs. The City shall provide thirty (30) days written notice to the FOP/OLC prior to any changes in insurance carriers or administrators.

E. The City shall not be liable for premiums or other charges for the benefit of a member removed for disciplinary reasons.

Article 28 - Entire Agreement

Article 28 contains one section, section 28.1, Provisions, that reads as follows:

This Contract contains the entire agreement between the parties hereto and neither party shall be bound by any statement, representation, agreement, stipulation or provisions made prior to the execution hereof and not set forth herein.

The Employer proposes the deletion of Article 28, noting that the Employer cannot agree to such language before the Employer knows the language to be included in the successor Agreement. The Employer refuses to consent to be bound by any contractual provision that would empower an arbitrator to block regionalization or restrict the Employer's rights except as the Employer has agreed to be restricted, or require the Employer to negotiate that which the Employer has already negotiated or offered to negotiate.

The Union opposes the deletion of the language of Article 28. This so-called "zipper clause," argues the Union, provides security to both parties by saying explicitly

that the parties' contract is reliable, enforceable, and not subject to extraneous influences. The Union sees value in the language of Article 28 and strongly opposes its deletion.

The fact finder is not persuaded that the removal of Article 28 from the parties' successor Agreement is of benefit to the parties. The parties' successor Agreement is the preeminent authority over their working, contractual relationship, and the emphasis on its priority as the highest authority over the parties' relationship as expressed in Article 28 is found by the fact finder to be worth retaining in the parties' successor Agreement. The fact finder recommends retaining the current language of Article 28 in the parties' successor Agreement.

RECOMMENDED LANGUAGE: Article 28 - Entire Agreement

Article 28, section 28.1 – Retain current language.

In making the recommendations presented in this report, the fact finder has considered the factors listed in Ohio Revised Code section 4117.14(G)(7)(a) to (f), as required by Ohio Revised Code section 4117.14(C)(4)(e) and Ohio Administrative Code section 4117-9-05(K).

Finally, the fact finder reminds the parties that any mistakes made by the fact finder are correctable by agreement of the parties pursuant to Ohio Revised Code section 4117.14(C)(6)(a).

Howard D. Silver
Howard D. Silver
Fact Finder

Columbus, Ohio
June 13, 2012

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the foregoing Report and Recommended Language of the Fact Finder in the Matter of Fact-Finding between the City of Upper Arlington, Ohio, and the Fraternal Order of Police, Ohio Labor Council, Inc., SERB case number 11-MED-10-1420, was filed electronically with the Ohio State Employment Relations Board at MED@serb.state.oh.us and served electronically upon the following this 13th day of June, 2012:

Mark J. Lucas, Sr., President and CEO
Clemans, Nelson and Associates, Inc.
6500 Emerald Parkway, Suite 100
Dublin, Ohio 43016
mlucas@clemansnelson.com

and

Tracy Rader
Staff representative
Fraternal Order of Police, Ohio Labor Council, Inc.
222 E. Town Street
Columbus, Ohio 43215-4611
trader@columbus.rr.com

Howard D. Silver
Howard D. Silver
Fact Finder

Columbus, Ohio
June 13, 2012