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IN THE MATTER OF FACT-FINDING

BETWEEN

THE CITY OF SIDNEY, OHIO

AND

FRATERNAL ORDER OF POLICE OHIO LABOR COUNCIL, INC.

(Sergeants and Lieutenants)

**BEFORE: William C. Binning Ph.D.
SERB Fact-finder**

SERB CASE: 12-MED-03-0214

PRINCIPAL ADVOCATE FOR THE EMPLOYER

**Daniel G. Rosenthal
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PRINCIPAL ADVOCATE FOR THE F.O.P.

**Barry Gray
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INTRODUCTION

This Fact-finder was properly appointed to this case by Ohio SERB on August 15, 2012. The parties agreed to a hearing date of October 4, 2012 at the City Council Chambers of the City of Sidney, Ohio.

The parties had not resolved any of their outstanding issues at the time of the hearing. The Fact-finder offered mediation prior to the hearing and a number of issues were settled and tentatively agreed to. The parties tentatively agreed to proposal number 1, 3, 8, 10, 14, 15, 19, 21 from the City's April 9, 2012 proposal.

The parties tentatively agree to issues 9 and 13 from the City's April 9, 2012 proposal to use the language on these issues agreed to by the Patrol Officers.

On issue 17, in the City's April 9, 2012 proposal, the parties tentatively agreed to delete the dates.

The Tentative Agreements reached above were signed by the parties and all parties have copies.

The Fact-finder would like to thank the Advocates: Attorney Daniel G. Rosenthal and FOP Staff Representative Barry Gray for their excellent pre-hearing statements. I would also like to acknowledge their excellent and patient presentations to educate this Fact-finder on the outstanding issues.

OUTSTANDING ISSUES

The unresolved issues include:

1. Grievance language under Article: 6 Section: 3 and Article 25: Section: 1
2. Article 13: Wages
3. Supervisor Bonus Article 13: Section 2
4. Overtime Article 14: Section 1 and Section 2
5. Comp Time Article 14: Section 5
6. Article 29: Section 5 Supervisory Coverage: absence of calendar days
7. Article 30: Section 7 Physical Fitness. City wants to delete first 3 sentences
8. Article 30: Section 7 City proposes substitute language "recommendations" for "decisions"
9. Article 30: Section 9 Union requests dry cleaning
10. Article 31: Promotions
11. Article 32: Drug and Alcohol. City requests added language

Present at the Hearing:

For the Employer:

Daniel Rosenthal	Attorney for the Employer
Kevin Gessler	Chief of Police
William Balling	Police Captain
Ginger Adams	Finance Officer
Vickie Allen	H.R. Manager
Kelly Holthaus	H.R. Coordinator

For the Union

Barry Gray	Staff Representative FOP/OLC
William Shoemaker	F.O.P.
David Godwin	F.O.P.

CRITERIA

OHIO REVISED CODE

In Fact-finding, the Ohio Revised Code, Section 4117.14 (C) (4) (E) establishes the criteria to be considered by the Fact-finder. The criteria are listed below and were given weight by this Fact-finder in his recommendations for this matter. The criteria are:

- 1. Past collective bargaining agreements**
- 2. Comparisons**
- 3. The interest and welfare of the public and the ability of the employer to finance the settlement.**
- 4. The lawful authority of the employer**
- 5. Any stipulations of the parties**
- 6. Any other factors, not listed above, which are normally or traditionally used in disputes of this nature.**

As required, this Fact-finder offered mediation prior to the opening of the hearing. The parties engaged in good faith mediation and a number of minor issues were tentatively agreed to and they are listed above.

FACT-FINDING HEARING

After approximately an hour of mediation, a formal hearing on the above matter commenced after 11:30 a.m.

The Advocate for the City presented an opening statement and wanted on the record, that in the City's view: "Here from the beginning, the command officers have refused to engage in good faith bargaining." (Brief of Sidney). There is no record of any productive negotiating sessions between the parties.

Another significant fact in this case is that the parties entered into an MOU dated June 28, 2011, which the parties agreed to abolish the position of Lieutenant and other than one remaining Lieutenant, the other members of this unit are Sergeants and that has contributed to the development of some of the issues addressed below.

Most of the contract language changes the parties discussed were put forward by the City.

In order to cover all of the outstanding issues, the hearing went on past 6:00 p.m. to avoid scheduling another session.

The Fact-finder allowed the City to submit an amended Drug and Alcohol policy after the hearing. There was no objection from the Union. That proposal has been received and is addressed below.

ISSUE 1

GRIEVANCE ARBITRATION Articles 6: Section 3 and Article 25 Section 1

Position of the City

The City requests a change in Article 6 Grievance and Arbitration, Section 3 Add, "The Arbitrator shall have no authority to review the level of discipline the City imposes if he finds a violation of the Code of Conduct or any reasonable work rule." (Brief of City)

This issue was coupled with a related language change under Article 25: Corrective Action. Section 1: Discipline "Insert after "just cause" for violation of the Code of Conduct or for violation of any reasonable work rule."(Id.)

Position of the Union

The Union supports current language in both cases: Article 6 Section 3 and Article 25 Section 1. The Union argues that current language was adopted in the recently signed Patrol Officers Contract. The Union also referred to the Tentative Agreement between the City and the Communication Technicians.

Discussion and Recommendation

The City brought forward this proposal because it had lost a termination case by an Arbitration decision rendered February 13, 2012. The Arbitrator's decision was placed on the record of this hearing. (City Binder Tab 14).

The City's first proposal Article 6 Section 3 where an Arbitrator cannot review the level of discipline the City imposes "... if he finds a violation of the Code of Conduct any reasonable work rule." This would undermine the basic rights of employees, who enjoy the benefits of a union contract. There would be little point in even having a contract, since this proposal would eliminate due process in the collective bargaining agreement.

Recommendation

Current language is recommended for both Article 6: Grievance and Arbitration Section 3 and Article 25 Section 1.

Issue 2 Article 13: WAGES

The Union Position

The Union is asking for a wage increase of:

July 1, 2012 --4.25%

July 1, 2013 --2.75%

July 1, 2014 --2.75%

The Union offered a variety of data and arguments in support of its request including the percentage difference between Patrol Officers and First Line Supervisors and comparables to neighboring political subdivisions of similar size. These will be discussed below.

The City Position

The City is offering:

July 1, 2012—0%

July 1, 2013—1%

July 1, 2014—1%

The City offered its comparables and argued pattern bargaining since this wage package was adopted by the other FOP units in Sidney.

Discussion and Recommendation

The Union is particularly discontent with the MOU that it signed with the City on June 28, 2011 that abolished the rank of Lieutenant. The MOU stated that: "The Senior Sergeant will receive a bonus in pay equal to one percent (1%) of his or her base hourly wage during the period he or she is assigned as Senior Sergeant." (City Exhibit Tab 12). "...the one Sergeant assigned to the shift with the longest service as a Sergeant is the Senior Sergeant. (Id.) The Union argues it was forced to accept this decision. The Union's wage request is designed to increase the differential. (Union Exhibit Tab A p. 17)

The Union offers comparables that show that the Top Police Officer base pay in Sidney is \$28.31 an hour, The top 1st line Supervisor Base Pay (Sergeant) makes \$30.71 an hour; a differential of

8.5% more than the Police Officer in Sidney. (Union Exhibit Tab 5B). In this offered salary data, it is not indicated whether this Sergeant salary is "Senior Sergeant" who receives (1%) of the base.

The Union also points to the City of Sidney's Firefighters wages. "Currently a Firefighter makes \$26.95 an hour. The Assistant Fire Chief makes approximately 22% more than the Firefighter." The FOP Union argues that "Both positions (Senior Sergeant and Assistant Fire Chief) carry the same responsibility of being in-charge when the chief and second in command are not working." (Union Exhibit Tab 5A). They have the same span of control of eight members.

The "Differential Comparables" offered by the Union showed that although the average differential between the Sergeant and The Patrol Officer was relatively low, 8.5% in Sidney compared to the 17.17% in its comparables. "Top 1st Line Supervisor Base pay". The actual dollar differences were not very supportive of their position. The Top 1st Line Supervisor Base pay for Sidney was \$30.71 while the average for the offered 13 political subdivisions was \$30.06. So while there may be a disparity in the differential, the actual hourly pay is higher than average of the other 1st line supervisors in the comparables the Union selected to display. (Union Exhibit Tab 5 B). It is not clear if the offered Top 1st line supervisor pay includes the 1% agreed to in the MOU.

The Sergeants argued that they were the only bargaining unit that took a Zero wage increase in 2010 because they had agreed to a "me too" with the non-bargaining unit employees. They pointed out that the patrol unit received a 2.5% and the Firefighters never took a Zero.

One argument that was compelling, which was made by one of the Sergeants, was that the Senior Sergeant has a lot more responsibility, since the Lieutenant position was abolished. The Senior Sergeant, as a consequence of the abolishment of the Lieutenant rank, now has to do the schedules, impose discipline, and do the evaluations, etc. The 1% supplement does not seem to be adequate for these added duties. The Union also offered data supporting their argument that the City could afford the requested wage increase.

The City offered a number of different arguments to support its wage proposal. They argued pattern bargaining. The wage package they offered this unit was the wage agreement reached with the Patrol Officer Unit and tentatively agreed to by the other FOP bargaining unit.

The City offered the actual annual pay of various City of Sidney employees received, which showed that some of the Sergeants are comparatively very well paid. The Sergeants used the same data to show how far off they were from the position of Assistant Fire Chief to whom they compare themselves.

This City, as many other municipalities are arguing this fiscal year that there is a loss of revenue from state funding due to the cut in the Local Government Fund, and forecasted an estimated loss from the Estate tax elimination in Ohio. The Union did counter this by pointing to the recovery in the income tax revenues for the City in recent years. That was also demonstrated in the data the City offered. The City did not make a claim of inability to pay. However, it is facing fiscal challenges in the years ahead and should be frugal. The City also pointed to the low Median Household Income in Sidney. (See City Exhibit Tab 9). The comparables the City offered showed that the compensation for Police Sergeants, including Uniform allowance and Longevity placed Sidney Sergeants slightly above the average of its offered comparables. (See City Exhibit Tab 13)

The evidence presented does not support a sizable wage increase for the Sidney Sergeants in this era of stagnant and slow economic recovery. However, the argument the Senior Sergeants are not adequately compensated for their increased workload due to the elimination of the position of Lieutenant has merit. That argument is mitigated by the fact that the unit signed an MOU for a 1% differential in 2011. Also, the unit's wage increase request is for all the Sergeants, not just the Senior Sergeant on the shift, who they argue bears the additional responsibilities.

Recommendation

July 1, 2012 – 1% retroactive to July 1, 2012 from the date of this agreement

July 1, 2013- 1%

July 1, 2014- 2%

ISSUE 3

SUPERVISOR BONUS: ARTICLE 13: SECTION 2

CITY POSITION

This is one of a number of contract changes proposed by the City that are a result of arbitration decisions.

City language proposal: Article 13. Section 2: Supervisor bonus. Substitute for the last paragraph: "All special assignment positions will be at the discretion of the Chief of Police." (BRIEF OF SIDNEY p. 8)

The Contract language currently gives Supervisor Bonus Pay for a number of different duties or tasks. There are 11 identified duties or tasks at the beginning of the Article, and there is no language giving discretion to the Chief of Police for four of them. Later in the Article there are seven duties/tasks identified giving the Police Chief discretion on the appointment.

UNION POSITION

The Union argues for the maintenance of existing language.

DISCUSSION AND RECOMMENDATION

On the face of it, it does appear to be an intrusion on management rights. However, In the January 21, 2011 Arbitration Award of Anna DuVal Smith she wrote:

In fact, the City bargained away its right to fill the four positions not on the list as a *quid pro quo* for frozen wages. ...But the parties finally settled on protection for some (the four not on the list) and preservation of the Chief's discretion on the seven which of the eleven, are the ones that are not supervisory. (Anna DuVal Smith, FOP and City of Sidney AAA Case No 53 390 00510 10)

The Arbitrator, Anna DuVal Smith, was persuaded that the City had bargained its right away on this question, and the City was denied in Arbitration its effort to reassert its management rights on this issue. If the City feels strongly that it wants these rights back, it has to regain them at the bargaining table not from a Fact-finding.

Recommendation: Retain existing language.

**ISSUE 4
OVERTIME ARTICLE 14: SECTION 1 AND 2**

CITY POSITION

The City proposes language to substitute under Article 14 Section 1 "Overtime shall be paid only as required by the Fair Labor Standards Act using a 28-day work period."(CITY BRIEF p. 8)

Substitute for the third paragraph of Section 2: "Any Employee who takes an unauthorized absence for part or all of a regularly scheduled work day and then responds to call-out the same day shall be a paid at the regular rate of pay with a minimum guarantee of two (2) hours at that rate."(Id.)

In the fourth paragraph of Section 2, City proposes to delete: "and shall continue at that rate for eight (8) working hours. Additional hours worked during the work day shall then be compensated for at the time and one-half rate."

UNION POSITION

The Union proposes maintaining existing language.

DISCUSSION AND RECOMMENDATION

The City argues that the current language leads to excessive overtime cost. It offered a few external comparables that have FLSA language.

The Union argued pattern bargaining. This proposed language was not agreed to in the other recently negotiated contracts. Data presented on the actual costs of overtime from this Article was clarified.

RECOMMENDATION: Maintain existing language.

ISSUE 5
COMP TIME: ARTICLE 14: SECTION 5

CITY POSITION
The City proposes to eliminate Comp time. (CITY BRIEF p.8)

UNION POSITION
The Union argues for existing language.

DISCUSSION AND RECOMMENDATION

The City argues that the Comp time generates costly overtime. The Union argued pattern bargaining. This was not put into the recent Patrol Officers Contract.

RECOMMENDATION
Recommendation: Maintain current language.

ISSUE 6
SUPERVISORY COVERAGE: ARTICLE 29: SECTION 5

CITY POSITION
The City proposes new language "If an absence of five calendar days or more occurs for any reason, the Department may place an officer-in-charge during the absence, not to exceed 90 calendar days." (CITY BRIEF p.9)

UNION POSITION
The Union supports the current contract interpretation offered by an arbitrator that it should be 30 days and not the five proposed by the City. The Union also argues past practice.

DISCUSSION AND RECOMMENDATION
The contract language is silent on the issue of the number of days that must pass before the City has the discretion to place an officer in charge (CONTRACT). The City maintains that

the Union supports an Arbitrator's 30 day period because it generates overtime, and the City is then restricted in putting a Patrol Officer in charge. One problem this Fact-finder has, since he is asked to recommend a reversal of an arbitration decision through a change in contract language, is that he was not presented with the arbitrator's rationale for the 30 day period.

RECOMMENDATION: Maintain current language

ISSUE 7

ARTICLE 30: SECTION 7 PHYSICAL FITNESS

CITY POSITION

The City proposes to delete the first three sentences of the second paragraph which states:

The amount of two thousand five hundred dollars (\$2,500) per year shall be applied toward the cost of purchase of fitness equipment that would be installed into or used to maintain the equipment already in the Police Department. The \$2,500 for the bargaining unit covered by this Agreement can be combined with \$2,500 for the patrol unit for a total of five thousand dollars (\$5,000) per year. Any money not used in a year shall be carried over for use in future years.

The City argues the gym is fully equipped and this money is not needed.

UNION POSITION

The Union proposes to retain current language. The Union argues the gym is used every day by seven or eight officers. The Patrol has the same language in their contract. The Union argues the money is needed for cleaning supplies, and future gym equipment.

DISCUSSION AND RECOMMENDATION

The Contract contains strict physical fitness requirements (see Article 10 Health and Safety Section 4). The City does provide more than adequate physical fitness benefits (see Article 30 Section 7 on Fitness Center Memberships). There is not a strong case to remove this language and it is not an uncontrollable cost for the City.

RECOMMENDATION: Retain current language.

ISSUE 8

ARTICLE 30: SECTION 7: SUBSTITUTE “recommendations” for “decisions”

CITY POSITION

The City wants to change a word in Article 30 Section 7: With regard to spending the fitness equipment money, the current language states “A committee composed of the Police Chief, Captain and two members of the bargaining unit shall make decisions...” The City wants “decisions” replaced with “recommendations”.

UNION POSITION

The Union wants to retain current language.

DISCUSSION AND RECOMMENDATION

The Contract gives some protection of management rights on this issue. It states in this Article: “In the event of a tie vote in the Committee, the City Manager shall cast the deciding vote.”

RECOMMENDATION

Recommendation: Retain current language.

ISSUE 9

ARTICLE 30: SECTION 9: UNIFORMS DRY CLEANING

UNION POSITION

Under Article 30 Section 9 Uniforms the Union proposes to add “The City will provide dry cleaning for uniforms (including clothing necessary for plainclothes duty).” (UNION BRIEF p. 27) The Union argues pattern bargaining since it is now in the Patrol Officers contract.

CITY POSITION

The City maintains that this dry cleaning language was part of the total offer made by the City to this bargaining unit and it was rejected.

DISCUSSION AND RECOMMENDATION

The Union's argument for pattern bargaining rings hollow since they rejected the City's total package which included this language.

RECOMMENDATION

Recommendation: Retain current language.

ISSUE 10

ARTICLE 31: PROMOTIONS

PRELIMINARY DISCUSSION

This issue rises from the abolishment of the rank of Lieutenant in the Sidney Police Department. The abolishment of that position created a need for new language for promotion to the position of Captain. A Captain is a management position and is not a member of any bargaining unit. Language is needed to address promotion from Sergeant to Captain.

The parties engaged in good faith mediation on this issue and agreed to some new language but were unable to agree on some key issues. The Fact-finder will recommend the language the parties agreed to and make his recommendations on the outstanding issues.

The parties' positions presented below will only summarize where they differ. The recommendation will be made in the framework of the overall language agreed to by the parties in mediation.

UNION POSITION

"A Promotional Review Committee shall assess each candidate and assign each a score of 30 points for 1st place, 25 points for 2nd place, and 20 points for 3rd place."

"The total grade will be made up of the written examination (with length of service points), and Promotional Review Committee score. The weight of each component will be: Written Examination 70%, and Promotional Review Committee 30%. (Union position)"

CITY POSITION

“A Promotional Review Committee shall assess each candidate and assign each a score from 1 to 20.”

“The total grade will be made up of the written examination (with length of service points), and Promotional Review Committee score. The weight of each component will be Written Examination 50% and Promotional Review Committee 50%. (City position)

DISCUSSION AND RECOMMENDATION

The difference between the parties is over the degree of discretion the City has in promoting a Sergeant to Captain. The various positions reflect past contract language for promotion to various ranks and the language agreed to in the MOU.

RECOMMENDATION

The language recommended below is the language agreed to by the parties and the Fact-finder’s recommendations on the differences between the parties is offered in *italics*.

ARTICLE 31 PROMOTIONS

1. CAPTAIN

Whenever a vacancy occurs in the Captain’s position and there is no promotional list, the Civil Service Commission shall within 90 days of such vacancy hold a competitive promotional examination.

To be eligible to take the Police Captain’s promotional examination, a Sergeant must have a minimum of seven years continuous service as a Police Officer with the Sidney Police Department and a minimum of three years of continuous service as a sergeant with the Sidney Police Department as of the date of the examination. However, the requirement of a minimum of three years as a sergeant will be changed to one year in cases where there are not two or more candidates for the exam who meet the criteria. The requirement of one year of continuous service as a Sergeant will be suspended in cases where there are not two or more candidates for the exam who meet the criteria. No promotional examination shall be held unless at least two candidates are eligible and willing to take the examination. If less than two Sergeants meeting the seven year requirement are eligible or willing to take the promotional examination, then the time in service requirement shall be reduced to five continuous years. If less than two Sergeants meeting the five year requirement are eligible or willing to take the promotional examination, then the time in service requirement shall be reduced to three continuous years. If less than two Sergeants meeting the three year requirement are eligible or willing to take the promotional examination, then the time in service requirement shall be waived. If less than two Sergeants are still not eligible or willing to take the promotional examination, then the promotional examination shall be opened to Officers with a minimum of seven years continuous service with the Sidney Police Department. If less than two Officers meeting the seven year requirement are eligible or

willing to take the promotional examination, then the time in service requirement shall be reduced to five continuous years. If less than two Officers meeting the five year requirement are eligible or willing to take the examination, then the time in service requirement shall be reduced to three consecutive years. If less than two Officers meeting the three year requirement are eligible or willing to take the examination, then the time in service shall be waived. If less than two Offices are still not eligible or willing to take the promotional examination, then the examination shall be opened outside the department.

A standardized written examination shall be given. Seventy percent (70%) shall be considered a passing grade. Only those applicants passing the written examination will receive length in service points. Length in service points shall equal one (1) point for each full year of service as Sergeant with the Sidney Police Department as of the date of the written examination, not to exceed ten points. Only those applicants passing the written examination will proceed on to the Promotional Review Committee.

A Promotional Review Committee shall assess each candidate and *award 30 points for 1st place, 15 points for 2nd place, and 5 points for 3rd place* . The Committee shall consist of the Police Chief, a Police Captain, and a member appointed by the City Manager. The Committee's assessment may include, but not limited to, a review of the candidate's personnel file and an oral interview. Factors to be considered shall include, but not limited to, performance ratings, training and education, achievements, and disciplinary record.

The total grade will be made up of the written examination (with length of service points), and Promotional Review Committee score. The weights of each component will be: *Written Examination 50% and Promotional Review Committee 50%*.

ISSUE 11

ARTICLE 32: DRUGS AND ALCOHOL

PRELIMINARY DISCUSSION

The City sought to change this language to allow termination on a first offense for an employee's improper drug and alcohol use without coincident gross misconduct. The Fact-finder made it clear that he would not grant the City that discretion without some objective standard. The City was given time to submit language that included some objective standard to measure excessive drug and alcohol use. The Union was given an opportunity to respond the City's proposal.

POSITION OF THE CITY

Article 32: Drug and Alcohol. In the section "substance testing and assistance", replace the fourth sentence of the first paragraph with: This limitation on discipline shall not limit the City in imposing discipline up to and including termination for (1) gross misconduct which may be coincident with an employee's improper drug or alcohol use, or (2) reporting to work or working with a blood alcohol content of .04 or greater or with illegal drugs in an employee's

system in excess of the drug cutoff levels established by the Substance Abuse and Mental Health Services Administration.”

The City cites an example of an officer who reported to work intoxicated thereby placing the public in danger and, because of existing language, was given the opportunity to do it again under current contract language.

The City states that the .04 blood alcohol cutoff is the level at which CDL drivers are disqualified or discharged. The City maintains that the drug cutoff levels established by SAMHSA, a federal agency, are widely used.

UNION POSITION

The Union agreed to the City’s proposal.

RECOMMENDATION

Recommendation: The City’s language is recommended.

The Fact Finder recommends all of the above and all Tentative Agreements reached by the parties.

This Fact-finder submits the above recommendations to the parties this 7th day of November 2012 in Mahoning County Ohio.

William C. Binning Ph.D.
SERB Fact-finder