

FACT FINDING REPORT  
STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
May 23, 2013

In the Matter of: )  
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The American Federation of State, County, )  
And Municipal Employees (Local 1958) )  
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and )  
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The City of New Philadelphia )  
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SERB Case No:  
12-MED-08-0732

APPEARANCES

For the Union:

Mike DeLuke, AFSCME Bargaining Representative  
Judy Baker, Local 1958 Bargaining Committee  
Heather Denham, Local 1958 Bargaining Representative  
Ron McAbier, Local 1958 Bargaining Representative

For the City of New Philadelphia:

Matt Baker, Clemans, Nelson and Associates; Attorney for New Philadelphia  
Amy Gilland, Assistant Service Director for the City of New Philadelphia

Fact Finder: Dennis M. Byrne

**Background**

This fact-finding involves the City of New Philadelphia (City/Employer) and its Clerical and Technical Workers represented by the American Federation of State, County, and Municipal Workers Local 1958 (AFSCME/Union). The bargaining unit consists of the eleven (11) full-time and three (3) part-time clerical workers employed by the City. Prior to the Fact Finding Hearing, the parties engaged in a number of negotiating sessions over a successor agreement for a contract that expired on December 31, 2012. The parties made numerous changes to their contract, but were unable to reach agreement on all of the open issues. Consequently, there are twelve (12) issues still on the table. These issues are: (1) Recognition; (2) Promotions; (3) Hours of Work; (4) New Jobs; (5) Leaves of Absence; (6) Holidays; (7) Vacations; (8) Wages; (9) Health Benefits; (10) Work Rules; (11) Substance Abuse Policy; and (12) Duration.

The Fact Finder and the parties engaged in prolonged discussions in a mediation/fact finding and were able to reach agreement on a number of issues. However, under the rule of “none are settled until all are settled,” the Fact Finder is giving recommendations on the open issues. The Hearing commenced at 10:00 A.M. on May 2, 2013 at the New Philadelphia City Building and ended at approximately 3:00 P.M.

The Ohio Public Employee Bargaining Statute sets forth the criteria the Fact Finder is to consider in making recommendations in Rule 4117-9-05. The criteria are:

- (1) Past collectively bargained agreements, if any.
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.

- (3) The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards of public service.
- (4) The lawful authority of the public employer.
- (5) Any stipulations of the parties.
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or private employment.

### **Introduction:**

New Philadelphia has four groups of organized employees; 1) the Police Officers, 2) the Firefighters, 3) the Service Workers, and 4) the Clerical Workers. The Clerical Workers are the last unit to negotiate a new agreement. This means that the City and its organized employees have discussed many of the issues important to both, and have reached agreement on these issues. For example, the wage and health and benefit issues both have been finalized in other labor contracts; and both parties recognize that internal comparability issues will probably dictate that the Clerical Workers will include the same language that appears in other unions' contracts in their agreement.

The City agrees with this appraisal with a proviso. The City pointed out that all of the other bargaining units had made numerous changes in noneconomic issues as a quid-pro-quo for wage increase and the new Health Insurance language found in their contracts. The City demands that the clerical workers accept these same "language" changes in return for the same wage and health care terms found in the City's contracts with its other bargaining units. The Union balked at some of the City's proposals; and as a result, the parties were unable to finalize their agreement.

Before the City started discussions with any of its bargaining units, it hired a consultant, Clemans, Nelson and Associates, to help it with negotiations. Clemans,

Nelson recommended that the City audit its contracts to make sure that the provisions found in the agreements were 1) reasonable from the employer's point of view, and 2) did not violate existing Federal or State laws. In addition, Clemans, Nelson also recommended numerous editorial and grammatical changes to the agreements. Consequently, the parties discussed changes to most (all) of the existing articles and this made finding an agreement on the key issues more difficult. The Union membership, rightly or wrongly, came to distrust the reasons for some (many) of the suggested changes. Consequently, a major disagreement between the parties is the Union's desire to maintain language that it believes protects the interests of its membership; language that the Employer wants to change. The Fact Finder and the parties discussed these issues at length and the Fact Finder believes that the Union's concerns are valid but overdrawn.<sup>1</sup>

**Issue:** Article 2 – Recognition

**City Position:** The city demands language changes to Article 2 that it claims clarify unclear language about “new Classifications.”

**Union Position:** The Union rejects the City's demand and counters with current contract language.

**Discussion:** According to the City, the current language creates ambiguity because the language may contradict applicable State law. The contested language reads, ”... if new

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<sup>1</sup> In order to insure that the proposed editorial and grammatical changes do not change the basic meaning of the various articles, the Fact Finder will maintain jurisdiction over the proceedings until the parties are satisfied with the Employer's proposed changes. Of course this only applies to grammatical and editorial changes. The parties will follow ORC 4117 on voting, etc., on the Fact Finder's recommendations.

classifications are created by the City, which are similar to any of those listed above, the said classifications shall become part of the bargaining unit. “ The City wants to delete this language and follow SERB procedures to determine whether the proposed change to the bargaining unit is reasonable. The Union sees this as an attempt by the City to weaken the language of the contract; and consequently, rejects the City’s position. The Union argues that the proposed language has caused no problems over the years, and if a problem arises, arbitration is the way to settle any dispute.

The discussion on this issue was productive because the parties were able to find some common ground. Furthermore, this issue is only a potential problem because neither party was able to give an example of a specific incident where the language has caused a problem. The parties agree that SERB is the Agency that certifies and clarifies which employees have a community of interest and belong in the same bargaining unit. Therefore, the discussion of the issue, while not leading to an agreement, did show that both parties were aware of SERB’s role in unit determination under ORC 4117.

The Fact Finder agrees with the thrust of this discussion. SERB is the agency that is the arbiter of unit determination. There is no evidence that the proposed change may ever impact the bargaining unit; but if it does, then SERB should make the final decision on unit certification and clarification.

The City also proposed some changes to the language in Section 2.1. Essentially, these changes modify the Taft-Hartley language that defines mandatory items of collective bargaining as “wages, hours, and other terms and conditions of employment” to “all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of this collective

bargaining agreement, except as otherwise specified in R.C. 4117.08 and division (E) of R.C. 4117.03 of the Revised Code. This is the language found in ORC 4117 defining mandatory items of negotiation. As such it is unobjectionable.

However, the last clause is redundant. Section 4117.08 relates to Management Rights and that language is found verbatim in the Management Rights language of the parties' contract. Section 4117.03 Division (E) concerns public school employees, and does not relate to other public employees. Consequently, the Fact Finder does not find that the Employer's suggested changes affect the relationship between the parties, or materially change the meaning of the current language in Section 2.1. But, the proposed changes do reflect Ohio Law. Consequently, the Fact Finder is recommending the following language.

**Finding of Fact:** SERB is the Agency that has the legal responsibility to answer questions surrounding bargaining unit certification and clarification.

**Suggested Language:** Delete the Note (Paragraph 4) in Article 2.

**Section 2.1:** The Employer recognizes the Union as the sole and exclusive representative of all permanent employees in the Bargaining Union as defined below; for the purpose of collective bargaining with respect to all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of this collective bargaining agreement.

**Issue:** Article 17 – Promotions

**City Position:** The City desires to add language that institutes a thirty (30) day probationary period for all promotions, and language that clarifies that if a promoted employee returns to his/her previous position, then he/she cannot bid for another

promotion for one hundred and eighty (180) days from the date of his/her return to the former position.

**Union Position:** The Union did not object to the institution of a probationary period. However, the Union demands that the one hundred and eighty (180) day freeze on applying for a new promotion start from the date the promotion becomes effective.

**Discussion:** This appears to be an issue that arose because of the Employer's Representative's analysis of the contract. There was no real discussion on the issue, and neither side had any information of a situation where the language in question was ever binding on the parties. In general, the City's suggested language is unobjectionable. But, it is much more applicable to a larger bargaining unit. The City's proposed language on a probationary period and one hundred and eighty (180) day freeze on applying for a promotion when an applicant returns to his/her former position by choice is standard language found in many contracts throughout the State and the nation.

The City also proposed a number of other changes to the provision. These changes do not change the meaning of the contract and seem to be designed to make the article more easily understood. The Fact Finder is recommending that these changes be incorporated into the contract.

**Finding of Fact:** The City's suggested changes to Article 17 are standard language in many (most) contracts.

**Suggested Language:**

**Section 17.1** the last sentence shall read:

Bargaining unit employees may bid on vacancies any time during the posting period.

**Section 17.2:** The qualified bidding full-time employee in the Bargaining Unit who has the most seniority and who meets the qualification outlined in the job description, shall be awarded the position.

If no bids are received from qualified full-time bargaining unit employees, ...

If no bids are received from anyone in the Bargaining Unit (full-time or part-time) or City-wide, then the Employer will have the choice of hiring a new employee, offering the vacant position to a qualified City employee who is not a member of the bargaining Unit, or assigning the job to qualified bargaining unit employee with the least seniority in the Department in which the vacancy occurs. ...

**Article 17.5:**

“... that employed would be forbidden to bid on another position for one hundred and eighty (180) days from the date of their return to their former position.

Promoted employees or employees filling a vacancy shall serve a thirty (30) day probationary period during which the Employer may elect to return the employee to his/her former position, and such action shall not be subject to appeal via the grievance and arbitration procedure.

**Issue:** Article 20 – Hours of Work

**City Position:** The City wants to make two changes to this article. First, it desires to add the phrase “subject to availability and recall” to Sections 20.1 and 20.4. Second, it demands the right to change the workday.

**Union Position:** The Union rejects the City’s demand and counters with current contract language.

**Discussion:** The City’s position(s) are based on operational efficiency considerations. It wants the right to make sure that someone is available to serve the public. In the same vein, it wants the right to change the hours of operation from the current 8:00 A.M. to 4:00 P.M. if it determines that there is a need to “maintain or improve the efficiency and effectiveness of operations.”

At the outset of the discussion, it must be noted that there was no testimony proffered at the hearing that there was any problem with the current workday. The City is attempting to change the language to cure a problem that does not currently exist. However, any City Department exists to serve the citizens of New Philadelphia and it is possible that a situation might arise where a specific City Department might need to change its hours of operation.

The question is how the City goes about implementing any changes. In the current situation, the City could change the hours that a Department was open by either unilaterally changing the workday or it could hire someone to staff the Department during the hours that it is open. If it changes the workday, the Union would have to be consulted and the Union might decide to grieve the issue. That means that a Neutral would decide the issue. The City could also raise the issue at negotiations and go through the dispute resolution process outlined in ORC 4117. In this circumstance, the Union would have the opportunity to offer its ideas and suggestions on the issue during negotiations.

The problem for the Fact Finder is that the City has not given a reason for its proposed change in the workday other than a vague statement about “operational efficiency and effectiveness.” The Fact Finder believes that the City must have the ability to modify its operations if a proven need arises. However, in this instance the City is attempting to provide itself the flexibility to cure a problem that does not currently exist. If the City had a demonstrated need to change the workday because of its need to serve the public, this Fact Finder would be willing to consider changes to the definition of the workday

Moreover, the Union membership has structured their days around the hours that they work. Any unilateral change in the workday would be a hardship on the employees affected. Therefore, this is an issue of valid and competing interests between the parties. Situations like this are the reason that collective bargaining exists. But, in this instance, without some specific reason for the suggested change, the Fact Finder does not find that the City proved its position that there is a need to change the definition of the workday.

The City's second demand is intended to allow it to deny the employees the right to take their breaks if there is an operational reason. The contract allows the employees to take two paid fifteen-minute breaks per shift. The Employer wants to add language that restricts the employee's right to a break "subject to availability and recall." This language seems to mean that the employee might be required to work through his/her break if there is so much business that his/her presence is required at her workstation. Again, there is no evidence in the record that this has ever been a problem. The current contract language does not specify when an employee can take his/her break, and if there is a crush of business at a given time, the supervisor would have the right not to allow a union member to leave his/her work site for a break at that time. However, it is hard to see how there would not be some time during the day when a union member could have time to go to the restroom, etc.

This City's suggested language is reasonable. However, it seems better suited to larger, non-clerical bargaining units. It is possible that the City would have the need to change the workday to meet the needs of the public. The City exists to serve its citizens and if the City proved that there was any need to change the hours of operation in order to serve its citizens, the Fact Finder would(might) agree with its suggested language.

Absent some demonstrated need to change a longstanding practice, a practice that would have a significant impact on the Union membership, the Fact Finder does not believe that the City proved that there is currently a need to change the language of Article 20 with the exception of allowing the supervisor to recall an employee from his/her break if there is a need for his/her presence because of an unforeseen eventuality.

**Finding of Fact:** The City did not prove that there is a need for its suggested language.

**Suggested Language:**

Section 20.1 The workweek shall be Monday through Friday. The workday shall consist of nine (9) hours and shall include two (2) paid rest breaks each of fifteen minutes duration, subject to recall. The lunch period shall be one (1) hour unpaid as scheduled by the employer.

Section 20.4: The workweek for employees of the General Services Department and the Secretary to the Service Director (currently two) shall be Monday through Friday. The workday shall consist of eight and one-half (8 ½) hours and shall include two (2) paid rest breaks each of fifteen (15) minutes duration subject to recall. The lunch period shall be one-half (1/2) hour unpaid as scheduled by the Employer.

**Issue:** Article 22 – New Jobs

**City Position:** The City wishes to change the existing language of Article 22 and consider any differences in the parties' positions on New Jobs as midterm bargaining.

**Union Position:** The Union disagrees with the Employer's analysis and counters with current contract language.

**Discussion:** The parties' positions differ with regard to what happens when a new bargaining unit job is created due to a change in technology or any other factor. The parties' current language mandates that they meet and negotiate a rate of pay and classification for the new job. If they cannot agree, then according to the present

language, they select an Arbitrator to hear the evidence and determine how the new job is to be classified and that decision determines where the employee falls on the pay grade.

The Employer contends that this is similar to the issue presented in Article 2 and should be determined through the regular dispute resolution procedures found in ORC 411. That is, the Employer sets a temporary pay rate, and the issue is negotiated during the next round of negotiations. The Union believes that the current language is more expeditious and mandates that a neutral make the final determination.

The Fact Finder agrees that the issue is related to the issue raised in Article 2. However, that situation concerned an entire new classification; and the question was whether the jobs were part of the bargaining unit. In this situation, the language states that the job is properly in the bargaining unit, and the question is how does it fit on the pay scale. The two issues are conceptually different. The problem seems to arise because the word "classification" is used in both articles. However, an entirely new classification is not the same as placing a new employee within a current classification to determine where that person fits on the pay scale.

The problem with the City's position is that even if the issue is raised during the subsequent round of negotiations, there is no reason to expect the parties to agree. Because this is a non-conciliation unit, if the Employer does not 1) agree with the Union's position on the issue, and 2) does not agree with any Fact Finder's recommendation that endorses the Union's position, then there is no recourse for the Union but a strike.

The current language gives closure. If the parties cannot agree on the issue, then an arbitrator makes a final, binding decision. Both sides are allowed to present their

positions, and a neutral decides. This is the role of arbitration. Moreover, there was no testimony that this language had ever caused a problem for the parties, so the discussion is theoretical. For example, the parties might agree on the classification and the wage rate for a new job, and then the issue would be moot.

Given all of the facts in this matter, the Fact Finder does not believe that the Employer proved that there is a need to change the existing language. In this situation, the parties have negotiated a standard dispute resolution procedure that is well within the bounds of acceptable industrial practice.

**Finding of Fact:** The City did not prove that there was any reason to modify the language of Article 22.

**Suggested Language:** Current Contract Language.

**Issue:** Article 24 – Leaves of Absence

**City Position:** The Employer demanded numerous changes to this article, and each will be discussed separately.

**Union Position:** The Union agreed to some of the proposed changes, but not others. Each open issue will be discussed below.

**Section 24.1:** The Employer is recommending that the term “active pay status” be defined in this section. The current language says the Active Pay Status excludes periods of leave including sick leave. The Employer suggested changing this language to “Active Pay Status shall be defined as all hours in which an employee actually works and receives pay exclusive of all paid leaves.” The Union agreed with the thrust of the City’s proposal, but had problems with the wording. The parties discussed the issue and agreed

on the wording “Active Pay Status shall be defined as all hours in which an employee receives pay from the City excluding sick leave.”

**Suggested Language:** Active Pay Status shall be defined as all hours in which an employee receives pay from the City excluding sick leave.

**Section 24.1:** The Employer is suggesting a number of changes in this language. The City wants to change the wording from, “the time from a triggering event for a request for a physician’s slip” from three (3) days to three (3) workdays, and this change is unobjectionable. The Union agreed with this change.

The next series of proposed changes deal with a doctor’s slip for an absence of three or more days. Currently, the contract allows the Employer to ask for a slip, but the language states that the City “may require” a slip for an absence of three (3) or more (work) days. The City proposes to make the language mandatory. Realistically, the current language allows the City to ask for a slip every time there is an absence of three (3) or more consecutive workdays. Therefore, the Employer is asking to change language that gives it the right to do what it requests. A work rule stating that every time an employee misses three (3) or more days requires a doctor’s slip is an easy way to do what the Employer desires. However, because the City has the right to do what it is suggesting under the current language, its proposed change does not harm the Union membership. Therefore, while the Fact Finder does not believe that there is any compelling reason to change the current language, he is recommending the City’s position on this issue because it adds certainty to the situations where the employee must furnish a doctor’s slip to the Employer.

**Suggested Contract Language:** Article 24.1

Insert the following language at the end of the second paragraph of Section 24.1:

“...Application for use of the sick leave shall state the reason. Any falsification will be cause for loss of accumulated sick leave in the amount of the request and subject the employee to progressive discipline. After an absence of three (3) consecutive workdays, a physician’s slip shall be required before payment for sick leave will be authorized.”

**Section 24.3:** Disability Leave: The Employer desires to remove this section from the contract. The Union disagrees with this deletion. This section of the contract is concerned with extended leave. The current language allows the employee to take off up to one year for a qualifying event. The Employer argues that the current language means that it cannot fill a vacancy for at least one year, and the result is a potentially excessive amount of overtime payments.

There are a number of factors at work in this issue. First, the affected employee is allowed to use all of his/her accumulated leave and any other leave that may apply. Second, in most cases the FMLA may (probably would) apply. Third, the proposed disability leave may only be extended up to one year. It is very possible that FMLA and accumulated time may extend for close to a year. Fourth, there was no testimony that the current language had ever caused any problems. Therefore, the Employer’s language is curing a problem that never existed and might never exist. However, the leaves currently available to an employee along with his/her accumulated sick leave allow the employee to take considerable time off. Consequently, the Fact Finder is recommending the City’s position on this issue.

**Suggested Language:** Delete Section 24.3.

**Section 24.4 (B):** Personal Days: The Employer proposes to add, “use it or lose it” language to this section. The Union agreed with this suggested change. However, the Union pointed out that the Employer’s position would probably insure that all personal days would be used. The Union wondered whether the suggested change might not cost more than a system that allowed the Employer to pay for the time.

**Suggested Language:** Section 24.4 (B) delete the words, “or scheduled will be paid at the employee’s base rate of pay on the first pay in December”, and replace with the words “by December 31<sup>st</sup> shall expire and are not subject to carryover or payout to the employee.”

**Section 24.5:** Military Leave

The parties agreed on language changes in this section.

**Suggested Language:** The Current language shall be replaced with:

The parties agree that military leave and pay shall be administered in accordance with all applicable laws.

**Section 24.6:** The Employer demanded language that required the employees to return to work if they had to report off work for jury duty but were not selected to serve on a panel. The discussion on this issue finally came down to a question of what was the current policy. Some research proved that the City’s suggested language embodied current City policy. The Union believed that the current contract language reflected City policy, and when it learned that the policy was the same as the language that the Employer was suggesting, it dropped its objections to the City’s proposal.

**Finding of Fact:** The Employer's suggested language is current City policy and the Union agrees that the parties should follow the City's policy on this issue.

**Suggested Language:** Section 24.6

**Jury Duty:** the Employer shall grant full pay for regular scheduled working hours actually spent on jury duty on any day when an employee is subpoenaed for Jury Duty by the United States, or any political subdivision. However, the employee shall return to the Auditor of the City any stipend received from the court for time served for Jury Duty. Any money paid to the employee for travel and/or meals or any other expenses incurred by the employee need not be returned to the City. Failure to follow the provisions of this requirement or falsification will be grounds for suspension. Any employee who is released from jury duty prior to the end of their regularly scheduled shift shall return to work and complete their regularly scheduled work shift.

**Section 24.8 and 24.9:** The Employer desires to have these two sections, Maternity Leave and Parenting Leave, deleted from the contract because the FMLA and City policy give more generous benefits than those enumerated in the contract. The Union agrees with this analysis.

**Finding of Fact:** The FMLA covers these two sections.

**Suggested Language:** Delete these sections from the contract and add

The parties agree that the Employer and the employees shall comply with the Family Medical Leave Act of 1993 and all applicable amendments. The Employer may promulgate policies in furtherance of the Family Medical Leave Act that are not inconsistent with the law.

**Section 24.10:** Union Leave: The Employer wishes to delete the part of the article that allows a union member to take a job with AFSCME International and continue to accrue seniority for one (1) year and have an unlimited right of return to his/her former position. The Union demands to keep current language on these issues. This is an unusual clause

because it allows a union member to take another job with a different employer and maintain seniority and have the right of return to his/her previous employer. That is unreasonable. The Fact Finder understands why this language was included in the contract, but AFSCME International is a different employer than the City of New Philadelphia. If a City employee takes a job with another employer, they have effectively terminated their employment with New Philadelphia.

Again, the language is less objectionable than it appears, because there was no testimony that an employee has actually taken a job with AFSCME International. However, it is illogical for an employer to maintain an employment relationship with an employee who has voluntarily severed the employment relationship.

**Finding of Fact:** An employee who leaves the City to work for another employer has effectively quit his/her job.

**Suggested Language:** Union Leave

Employees elected or appointed delegates to conferences or conventions shall be granted time off without pay to attend such conference. Such conferences or conventions shall not exceed a period of four (4) workdays per calendar year. (the rest of language is deleted.)

**Section 24.11:** Personal Leave of Absence: The Employer wants to delete the entire section from the contract. The Employer did point out that this provision had been used in the past, and an employee was able to stay on unpaid leave for one (1) year. The Employer contends that this causes either overtime or staffing problems because it 1) cannot fill the position, or 2) the position is filled with a temporary transfer and that creates another unfilled position. The Union agreed that the current language may cause

problems, but argued that there are situations where a good employee might need extended time off.

The Fact Finder notes that the language in Section 24.11 uses the permissive term “may” rather than the mandatory term “shall” when discussing this leave. Moreover, there are times when the leave may be justified. The passage of the FMLA led to less use of unpaid personal leave because many of the reasons that an employee requested an unpaid leave are related to situations covered by the FMLA. Again, it must be stressed that the Employer can turn down the leave request. However, the language in the contract allows the Employer and employee some flexibility to deal with unforeseen circumstances. Consequently, the Fact Finder is not recommending the deletion of this language from the agreement.

**Finding of Fact:** There are valid reasons for an employee to request an unpaid leave of absence.

**Suggested Language:** Current contract language

#### **Section 24.12** Medical Leaves of Absence

**City Position:** The City demands to change the current language to allow an employee the right to a medical leave of absence for a maximum of one hundred and eighty (180) days.

**Union Position:** The Union rejects the City’s demand and counters with current contract language.

**Discussion:** The City’s position is based on its need to have an employee present for work. The current language allows the employee to take a leave for as long as he/she

needs to be off work. The City wants to change this to a maximum of one hundred and eighty days. The current language specifies that the reason for the leave must be related to a job-related disabling condition. Again, this language seems better suited to a larger unit where injuries are more common than in an office environment. It is possible that a union member could suffer a work related injury that required hospitalization, etc.

However, there was no testimony that any such injury has ever occurred. Moreover, if the injury is long term, the Bureau of Workers' Compensation would most likely become involved in the situation.

Six months is a significant period of time for an office worker to be off the job for a job related injury. This is especially true because the employee would also usually have sick leave and FMLA leave time available. The Fact Finder believes that it is possible that an employee could suffer a job related or stress related condition that would require his/her absence from work, but even in those situations, the Bureau of Workers' Compensation would be involved. However, the occurrence of a long term, job related injury is somewhat unlikely all things considered.

Consequently, the Fact Finder believes that the Employer's position is reasonable. Six months is long enough that an employee could recuperate from a broken bone, or recover from carpal tunnel surgery, etc. Therefore, the Fact Finder is recommending the Employer's language on this issue.

**Finding of Fact:** The Employer's position on this issue is reasonable.

**Suggested Language:**

Section 24.13: An Employee unable to work because of a job-related disabling condition shall be entitled to an injury leave of absence at his regular rate of pay for up to ninety (90) calendar days provided he is medically certified as being unable to work. If, after the expiration of the initial ninety (90) day injury leave period

the employee remains medically certified as being unable to work the Service Director may, in his discretion, grant up to an additional ninety (90) calendar days of injury leave but only in thirty (30) day increments. The employee shall be required to provide medical certification of his inability to work for any injury leave or injury leave extension. Any injury leave of absence will not be charged against the Employee's sick leave. Any approved injury leave shall cease if the employee collects lost wage benefits form Worker's Compensation or Pension Benefits during the period of injury leave.

During such injury leave of absence, the Employer will maintain regular payments into medical and pension plans to insure continued coverage for the Employee and any dependents.

Seniority, vacation benefits, sick leave accumulation and pension credits shall continue to accrue for the time spent on such injury leave of absence.

If the Workers' Compensation is retroactive to the date of the injury, the Employee will reimburse the City of New Philadelphia the amount of the compensation award for the period of duplication.

**Issue:** Article 24.14 – Light Duty

This article is related to Article 24.13 and the changes are editorial

**Suggested Language:**

Section 24.14 Assignment During Disability Any Employee who, as a result of a job related disabling condition is unable to return to full duty may be assigned to "light duty" on the recommendation and limitations set forth by a certified physician however, the assignment and duration of "light duty" shall be at the discretion of the Service Director.

This situation is for temporary assignments only.

Any employee assigned to light duty shall continue to receive all compensation and fringe benefits, including accumulation of seniority attached to his normally assigned position.

No superior shall ask, order or demand that any person assigned to "light duty" perform any task or assignment other than those which the Service Director has set out.

**Section 24.5** Job Related Physician Visits

**City Position:** The City wants to insert the phrase “on the day of the event into the language of the Article.

**Union Position:** The Union rejects the City’s proposed change and counters with current contract language.

**Discussion:** The City’s proposed change would require that the affected worker see a physician on the day of the qualifying event. There are times when this may not be possible. However, the City’s position that an employee who is claiming to be injured or ill while at work within a reasonable period is reasonable. This is especially true because the current contract language requires that the individual be paid for time spent visiting the physician.

**Finding of Fact:** The Employer’s position is reasonable.

**Suggested Language:**

Section 24.15 Job Related Physician Visits.

Employees suffering injuries or illnesses while on duty due to job-related activities shall be paid for all time lost from work while receiving medical treatment and examinations on the day of the event at their regular base rate of pay. Employees shall be provided with the necessary transportation to and from a medical facility on the day of the event.

**Issue:** Article 25 – Holidays

**City Position:** The city wishes to add language to the Section that requires an employee to work the day before and the day after a holiday in order to be paid for the holiday.

**Union Position:** The Union desires to maintain the status quo.

**Discussion:** The City’s position on this issue is similar to the position of most employers. Any employer wishes to add this language to its contract(s) in order to ensure that there are sufficient employees at work on the day before and the day after a holiday to keep the operations running. This happens because employees often wish to have a

“long weekend” and by judicious use of sick leave, vacation leave, etc., the employees can schedule a block of time off.

The Fact Finder believes that most contracts contain similar language to the language proposed by the City and that this language is the norm for the nation and Ohio. Consequently, the Fact Finder is recommending the City’s position on this issue.

**Finding of Fact:** The language suggested by the City is found in many (most) labor agreements.

**Suggested Language:**

Section 25.1 All Employee in active pay status shall be paid for the following holidays provided the employee works, or is on approved leave, on the employee’s regularly scheduled shift immediately prior to, and following, the holiday...

... For purposes of this Article “active pay status” shall be defined as all time in which the employee is receiving pay from the City at the time the Holiday occurs excluding any period of unpaid leave, or periods in which he employee is receiving Temporary Total Disability Benefits from the Ohio Bureau of Workers’ Compensation.

**Issue:** Article 25 - Holidays

**City Position:** The City wants to maintain the status quo with respect to part time holiday pay.

**Union Position:** The Union demands that part time employees receive six (6) hours of holiday pay for all ten (10) holidays enumerated in the contract.

**Discussion:** The Union witnesses testified that the part time employees were a valuable part of the clerical unit, and that they deserved better pay and benefits. Furthermore, these witnesses testified that the part time and full time staff performed the same jobs, and that the part timers were a key component of the City’s work force. The Employer

did not dispute this testimony. However, the City does not believe that it can afford to pay the Union's demand.

The Fact Finder is impressed by the full time union members' loyalty to the part time staff. However, the Fact Finder does not find that the evidence in the record shows that the part timers are underpaid for their efforts. There is a difference between full time employees and part time employees, and that difference is manifested in differences in wages and benefits. Consequently, the Fact Finder is not recommending any changes in the holiday pay of the part time staff.

**Finding of Fact:** The record did not prove that the part time staff is underpaid.

**Suggested Language:** Current Contract Language with the addition of the following sentence to Section 25.5.

Section 25.5 Members classified as part-time shall be eligible for six (6) hours of holiday pay for the following four (4) holidays, provided the employee works, or is on approved leave, on the employee's regularly scheduled workday immediately prior to, and following, the holiday.

**Issue:** Article 26 – Vacations

**City Position:** The City desires to change the wording of Section 26.3 because the current language contains the word "emergency" which is not defined.

**Union Position:** The Union understands the City's position, but rejects its proposed language change.

**Discussion:** The City believes that a problem exists in the language of Section 26.3 because the language states that, "...the supervisor of the Department will have the power to refuse to grant the vacation request or to postpone it, should an emergency arise."

The City's position is that the term emergency is not defined and without a definition the language is ambiguous. There was no testimony that the current language has ever

caused a problem. In its submission the City stated that on one occasion there were multiple requests for the same vacation day and an entire City Department would be forced to close down if all the requests were granted. However, in that case the supervisor(s) were able to circumvent the problem under the terms of the current contract language.

The current contract language states that if there is a conflict (in vacation requests) between two bargaining unit members, the employee whose seniority is superior will be given the (requested) vacation period. This may imply that only one (1) union member can be off on vacation at any time. More realistically it means that the Departmental Supervisor can allow vacation requests only if the number of individuals absent from work will not adversely affect the Department. The language also gives the Supervisor the right to postpone a vacation. Therefore, the Employer seems to have the ability to control the number of individuals on vacation under current contract language.

In another vein, the clerical unit is an AFSCME unit. AFSCME has organized many other departments, often including the engineer's office. These units often work on roads and other infrastructure that is more likely to have a true emergency. The language Section 26 (4) does not seem particularly well suited to an office environment. It makes perfect sense for other employees who plow snow, repair water mains, etc. The Fact Finder believes that the language in the Clerical contract is imprecise because it was modeled after other language in contracts where the term emergency is a term of art.

This is good news in the sense that the imprecision probably does not really affect the members of Local 1958. It is bad news in that the language does not give the Departmental supervisor much guidance on how to respond to an unusual occurrence.

The language also states that the supervisor has the power to postpone or refuse to grant a vacation request if an emergency arises. It is hard to see how an unforeseen event, unless it is a true catastrophe that requires that all City employees show up for work, will suddenly affect the clerical staff. Again, it must be noted that the language in question has never actually caused a problem for the City.

**Finding of Fact:** The language in Article 26.4 is imprecise, but it has not caused a problem for the City.

**Suggested Language:** Section 26.4

“...The Supervisor of the department will have the power to refuse to grant the vacation request or to postpone it, should events dictate that the employee is needed at work on a requested vacation day. All requests for vacation must be submitted the Department supervisor no later than thirty (30) days from the date such vacation would start. If a vacation request is not timely submitted, the supervisor may deny the request.

**Note:** The Fact Finder suggests that the parties try to find acceptable wording for this article because the language does not really apply to a clerical unit.

**Section 26.2:**

**City Position:** The City wants to maintain current contract language.

**Union Position:** The Union is demanding a vacation carryover or a vacation buyback instead of the current “use it or lose it” system currently in place.

**Discussion:** The current “use it or lose it” system is somewhat unusual. In many (most) jurisdictions there is an unused vacation carryover or buyback provision. This type of system usually works well for both parties and often reduces the total vacation cost to the employer. The reason is that a person who does not use his/her vacation is available for work, and the employer does not have to replace the individual, which often includes

overtime payments or having a department with less than a full staff. Moreover, many jurisdictions view vacation as earned compensation that should be paid to the employees.

Nonetheless, New Philadelphia has a system that forces the employees to use their vacation, and the City does not want to change the practice. As long as the City insures that the employees are able to take their vacation during the course of the year, then the employee is not harmed by the policy. The theoretical justification for the City's position is that vacation is a time away from work that allows the employees to "recharge their batteries" and have time with family and friends. There was no testimony that the current system was not working or that the Employer did not allow the employees to take their vacation hours.

The Fact Finder believes that the current system may not be the best way to handle vacation scheduling. Nonetheless, in the absence of any demonstrated problems with the current system, the Fact Finder is not recommending a change to a long-standing policy.

**Finding of Fact:** The employees are able to use their vacation hours in the year in which they are earned.

**Suggested Language:** Current Contract Language

**Note:** The parties agreed to change the units of vacation from weeks to days. For example, in Section 26.1 subparagraph A, two weeks is replaced by eighty (80) hours, etc. In addition, in Section 26.7 the word cash is replaced by the words "check or electronic deposit" because the City does not pay benefits in cash.

**Issue:** Article 28 – Wages

**City Position:** The City is demanding a wage freeze over the life of the prospective contract.

**Union Position:** The Union demand is for parity with other City workers who have been awarded 2.75% in the first year, 2.50% in the second year, and 2.25% in the third year of their prospective contracts. In addition, the Union demands that the language of Section 28.1 be amended to roll the \$.09 cent per hour payment referenced in the section into the base wage.

**Note:** Both parties recommend that Section 28.4 be deleted from the contract.

**Discussion:** The City recognizes that its wage offer has been undermined by the agreements that have been signed with other City bargaining units. The Union's demand is for parity with these units. Given the size of this unit and the cost of the Union's demand, it is unreasonable for this unit to be singled out for a wage freeze over the life of the prospective contract. In recognition of this fact, the City demanded that if the Union did receive the wages paid to other employees, then the members of Local 1958 should also accept the noneconomic language changes agreed to by other organized employees.

The second part of the Union's demand is that the \$.09 cents per hour payment be rolled into the base rate. It is clear that the payment is paid to all workers for all hours worked. It is compensation. There was no real testimony on this issue, but the Fact Finder assumes that is a type of "hourly bonus" paid to the employees during the recession to avoid the rollup costs of a wage increase. However, "A rose by any other name..." is still a rose. In this instance, the payment is part of the hourly rate paid to employees; and, as such, it should be included in the base rate.

**Finding of Fact:** Internal parity considerations mean that the Union membership should receive raises equal to the raises enjoyed by other City employees. In addition, the \$.09 cents per hour payment to each employee for every hour that they work is part of the wage and should be rolled into the base rate.

**Suggested Language:** The wage rates in Article 28 (1) should be changed by the addition of \$.09 per hour. In addition, the base wage will be increased by 2.75% in the first year of the prospective contract, by 2.5% in the second year of the prospective contract, and by 2.25% in the third year of the prospective contract.

**Issue:** Article 29 – Health Benefits

**City Position:** The City demands that the Union membership accept the changes to the health care plan accepted by all other City employees.

**Union Position:** The Union realizes that it will be on the same plan as other City employees.

**Discussion:** All other City employees have agreed to the City's position on this issue. The City has slightly different plans with the Police Department and the Fire Department, and offered the members of Local 1958 their choice of plan. The Service workers accepted the police language, and the Fact Finder recommends that the clerical workers accept the same language.

**Finding of Fact:** All City workers have accepted the City's position with regard to health insurance.

**Suggested Language:** The Fact Finder recommends that the members of Local 1958 use the same language agreed to by the Service workers in their contract.

**Issue:** Article 39 – Work Rules

**City Position:** The City has demanded changes in the language of the work rule provision to clear up imprecision in the language.

**Union Position:** The Union rejects the City’s position and counters with current contract language.

**Discussion:** The City contends that the current language of Article 39 is imprecise because it uses the words reasonable and unreasonable. The City believes that these terms are undefined, and perhaps indefinable in the context of a labor contract. The Union agrees that there is some imprecision in the language, but argues that the current language has not caused any problems. Even with its shortcomings, the current language has worked well for the parties over the years.

The Union also expressed some concern that the City’s proposed language would preclude it from going to arbitration over a work rule that it believes is “unreasonable.” The Fact Finder is not convinced by this argument. A union always has the right to grieve changed work rules and/or the interpretation of changed contract provisions if it believes that its members are being unfairly treated. At a minimum, an arbitrator will examine the issue to see if he/she has authority to hear the case. This finding is reinforced by the bargaining history of this issue. The City has stated that it is trying to change imprecise language, not the meaning of the Article. Therefore, the Fact Finder believes that the City’s position on this item is reasonable.

**Finding of Fact:** The language of Article 39.2 is imprecise.

**Suggested Language:** Section 39.2

The parties agree that the City has the right to make work rules and regulations provided that such work rules and regulations do not conflict with specific provisions of the Collective Bargaining Agreement. The Union reserves the right to grieve such work rules and regulations in the event that the Union determines that such work rules and regulations are in conflict with specific provisions of this agreement.

**Issue:** Article 42 – Substance Abuse Policy

**City Position:** The City has negotiated a substance abuse policy with all of its other unionized employees and demands that the members of Local 1958 agree to the same policy.

**Union Position:** The Union agrees that it will have to accept a substance abuse policy.

**Discussion:** The discussion on this issue is the same as the discussion on the Health Insurance Article.

**Finding of Fact:** The parties agree that the contract will contain a substance abuse clause.

**Suggested Language:** The Fact Finder recommends that the members of Local 1958 use the same language that is found in the Service Workers contract.

**Issue:** Article 43 – Duration

**City Position:** The City wants a three-year contract that expires on December 31, 2015 and that becomes effective on the date of ratification.

**Union Position:** The Union agrees to a contract that expires on December 31, 2015, but wants the effective date to extend from the expiration of the prior agreement.

**Discussion:** The difference in the parties' positions is retroactivity. The Union wants all of the wages, etc., to become effective on the first day of January 1, 2013. The

Employer wants the agreement to be effective when it is signed. The Employer made two arguments in support of its position. First, the Employer argues that it was willing to negotiate with the Union at any time, but the Union requested delays to see what other City bargaining units settled for. Next, the City believes that if the contract is retroactive to the expiration date of the previous agreement, then all provisions are retroactive and there is some cost to the Union on some of the issues, especially the Health Insurance Plan.

The Fact Finder agrees that if the contract is retroactive to the expiration date of the previous agreement, then all provisions are retroactive. This means that any payments for Health Care, etc., should be prorated to the beginning of the contract year. However, there was no discussion that the parties discussed retroactivity and decided that the contract would not be retroactive. The Union membership has seen their wages stagnate for the last few years, and the Fact Finder does not believe that the take home income of the Union membership should continue to be depressed without some evidence that the parties discussed retroactivity.

**Finding of Fact:** This contract should be retroactive to the end of the proceeding contract.

**Suggested Language:** Article 43 – Duration of the Agreement.

This Agreement shall be effective January 1, 2013 and shall remain in full force and effect until 11:59 PM. December 31, 2015, and from year to year thereafter, unless either party gives written notification to modify amend, or terminate this Agreement. Such notification must be given not less than 90 days prior to the expiration of this Agreement.

Prior to the Fact Finding, the parties reached agreement on many issues; in addition some open issues were settled during the Fact Finding/Mediation Hearing. All of these issues are included in this report by reference.

Signed this \_\_\_\_\_day of June 2013, at Munroe Falls, Ohio.

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Dennis M. Byrne, Fact Finder