**HARRY GRAHAM** ARBITRATOR

Croix de Pommard/Souverain Balliage de Pommard

32335 BRIGHTON PARK BLVD.
SOLON, OHIO 44139-1387
Phone 440-349-9120
Fax 440-349-9121
E Mail grahamarb@yahoo.com

May 7, 2013

Mr. Michael A. DeLuke
Staff Representative
AFSCME Ohio Council 8
1145 Massillon Rd.
Akron, OH 44306

Mr. Matthew B. Baker
Clemans, Nelson & Associates
485 Metro Place South, Suite 200
Dublin, OH 43017



Re: **SERB Case No. 2012-MED-08-0741, AFSCME Ohio Council 8, Local 1958 and the City of New Philadelphia, OH.**

Dear Mr. DeLuke and Mr. Baker:

Enclosed please find two copies of my recommendations to the parties in the matter captioned above. You will also find enclosed my invoice with W-9 attached which I trust you will forward to the appropriate authority for payment.

Sincerely,

Harry Graham

Harry Graham

In the Matter of Factfinding

Between

AFSCME Ohio Council 8, Local 1958

And

The City of New Philadelphia, OH.

SERB Case No. 2012-MED-08-0741

Before: Harry Graham

**APPEARANCES:** For AFSCME Ohio Council 8, Local 1958:

Michael A. DeLuke
Staff Representative
AFSCME Ohio Council 8
1145 Massillon Rd.
Akron, OH 44306

For The City of New Philadelphia, OH.

Matthew B. Baker
Manager of Administrative Practice
Clemans, Nelson & Associates
485 Metro Place South, Suite 200
Dublin, OH 43017

**INTRODUCTION:** Pursuant to the procedures of the Ohio State Employment Relations Board a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record was closed at the conclusion of oral argument in New Philadelphia on April 19, 2013.

**BACKGROUND:** The parties have a long relationship. Union Exhibit 25 represents their initial Agreement. It is dated March 5, 1986 and its terms were retroactive to January 1, 1986. Thus, their Agreements span 27 years. By all accounts their relationship has

been stable with little change occurring in the terms of the first Agreement but for the customary and expected alterations in its economic provisions. In this round of negotiations the Employer came to the table with an ambitious agenda. It had identified potential problem areas it sought to address. The Union asserted the agenda of the Employer represented concern for difficulties that had not manifested themselves during the previous decades of their relationship. In its view if and when the City could point to endemic difficulties in its operations resulting from the Agreement negotiations to address such problems could occur. In the absence of such specific problems the Union basically asserted that little or no change should occur in the terms of the Agreement but for economic issues.

In labor relations the appeal of tradition is strong. Unless an employer or a union shows a need for change alterations in the terms of an agreement are not ordinarily awarded by a neutral. In this situation the Employer raised the specter of difficulties. It alluded to problems it could foresee. It did not show that the terms of the Agreement, largely unchanged since 1986, had hampered the delivery of services to the citizenry of New Philadelphia in any significant fashion. Thus, the City bears a very, very heavy burden to secure recommendations on its behalf from this neutral, a neutral with more than 40 years experience throughout the width and breadth of the United States.

**ISSUES:** The following issues are in dispute between the parties:

1 Article 24, Leaves of Absence

2 Article 26, Vacations

3 Article 27, Shift Differential

4 Article 43, Foul Weather Gear

5 Article 48, Duration of the Agreement

6 Article 20, Hours of Work

7 Article 22, New Jobs

8 Article 23, Job Descriptions

9 Article 44, Work Rules

10 Article 47, Substance Abuse Policy

**ISSUE 1, ARTICLE 24, LEAVES OF ABSENCE**

**POSITION OF THE UNION:** The Union proposes change in Section 7 of Article 24 dealing with Bereavement Leave. Its proposal would expand the relationships available for use of such leave, e.g. to stepmothers, stepfathers, in-laws and grandparents. The Union points out that its proposal would merely harmonize the Agreement with existing City policy with respect to bereavement leave.

**POSITION OF THE EMPLOYER:** The City is seeking substantial change in Article 24. Its proposal spans the entire lengthy Article. In Section 24.1 four (4) alterations are proposed. These deal with installation of a requirement employees who use sick leave to care for a child outside the home be required to provide the City with a physician's statement demonstrating the need for such leave. The current Agreement permits the City to require, but does not mandate, provision of such a statement. Similarly, the City proposes that if an employee uses sick leave for more than three (3) consecutive work days that a doctor's slip be submitted before the employee is permitted to return to work. As above, the City currently may require such documentation.

The City also seeks supporting evidence if sick leave is used on a regularly scheduled workday before or after a holiday. If medical documentation is not provided

the City will not grant sick leave. The City asserts some employees are abusing sick leave and are often absent the day before and/or the day after a holiday.

The Employer is also seeking elimination of payment of the "skilled labor rate" to employees on sick leave. It wishes to pay solely the base wage. Presently there is a practice of paying the higher rate, a practice the Employer desires to end.

At Section 24.2 the Employer proposes to include numbers to ensure consistency in the Agreement.

More significantly, the City proposes to delete Section 24.3 dealing with unpaid leave for incapacity. Such leave is available to employees who have exhausted all their sick leave. As seen by the City, the employee remains on the rolls and cannot be replaced. This results in overtime or fewer employees working as an absent employee may not be replaced. That an employee may "request" such leave may also lead to assertions of inequity in the granting or withholding of the leave.

Section 24.4(B) permits an employee to save personal leave days and cash them in at the end of the year. Such practice should end as leave is to be used, not cashed in the opinion of the City.

At Section 24.5 the City urges that the existing contract language be stricken and replaced with its commitment to follow all laws applicable to military leave. At Section 24.6 the Employer seeks to alter the current contract language to provide that pay be made only for actual time spent in jury selection or service on a jury. Any pay received as a juror should be returned to the City and if an employee is released from service before the end of the shift the employee would return to work and complete his or her

shift. At Section 24.7 the Employer proposes an administrative change in numbering for sake of clarity and consistency.

As viewed by the City Sections 24.8 and 24.9 are redundant. The Family Medical Leave Act deals with the subject matter therein.

Section 24.10 enables an employee to leave City employment and take a position with the Union. Seniority would continue to accrue. While working for the Union the Employee would maintain the right to return to their City position. The City has never experienced this situation but contends it should not be exposed to such a risk.

Section 24.11 permits an employee to request an unpaid leave of absence for up to six (6) months. The Employer wishes to eliminate that benefit.

Historically the Agreement at Sections 24.12, 24.13 and 24.14 was the same as the Agreements involving bargaining units represented by the IAFF and FOP. A grievance arose in the FOP unit. As seen by the City that grievance demonstrated difficulties with the language. In the current round of negotiations the FOP and IAFF agreed to identical changes to resolve those difficulties. As both have the same language, no reason exists not to extend it to AFSCME the Employer urges.

**DISCUSSION:** As noted above, the Employer has proposed a very, very ambitious agenda of change in Article 24. The Agreement has been in effect for many years. In order to effect change the City must demonstrate it has experienced serious difficulties in the leave program. It has not done so. One grievance from the Fraternal Order of Police, a different bargaining unit, does not suffice to demonstrate the City has experienced hardship or problems with administration of the Agreement with respect to leaves. It has not been shown that abuse of leave has occurred. If the City believes

leaves have been abused its first response should be discipline, not change in the terms of an Agreement that have existed since 1986. No record of discipline with respect to leave abuse exists.

That the members of AFSCME be treated the same as all other City employees, union-represented and non-represented alike, is certainly reasonable. The addition of various persons, e.g. stepmother, stepfather etc. as proposed by the Union to the list of people for which bereavement leave may be taken is recommended.

Recommended as well are the changes proposed by the Employer at Section 24.5, 24.6 and 24.7. No other changes in Article 24 are recommended.

**ARTICLE 26, VACATIONS**

**POSITION OF THE UNION:** In Article 26, Vacations, the Union proposes that employees be permitted to carry-over unused vacation or elect a monetary payment. It points out that employees represented by the police and fire unions have this benefit. No reason exists for AFSCME-represented employees not to have it as well the Union contends.

**POSITION OF THE EMPLOYER:** The City proposes to change the reference to vacation accrual from "weeks" to "hours." This is presented to bring the terminology into consistency with the pay stub which deals in hours, not weeks.

More substantively, the City desires to alter Section 26.4 dealing with vacation denial. The Section refers to denial of vacation in the event of an "emergency." The term is not defined. The City indicates from time to time numbers of employees have requested vacation on the same day. This has proven problematic for the City. Thus,

the City proposes the Supervisor be able to deny vacation request if he/she feels the presence of the Employee is necessary at work.

Practice provides vacation is to be requested on a City form. Such language should be in the Agreement the City proposes.

It also proposes that vacation of less than five (5) days be requested at least two (2) days prior to the requested time off. That would permit coverage for an absent employee. It also proposes language providing that vacation leave be approved prior to the employee being absent from work. It has developed that employees have absented themselves before the supervisor is aware a request for vacation leave has been submitted.

Finally, Section 26.5 provides that employees leaving City service be compensated in cash for unused vacation leave. As the City no longer makes cash payments it desires to make such payments via check or electronic funds transfer.

**DISCUSSION:** Currently the Agreement provides that unused vacation will be forfeited. Nor will payment be made for unused but earned vacation. Other employees in City service have the benefit sought by the Union in this Article. It is recommended to the parties.

Similarly, changes sought by the Employer are unremarkable. Its proposed changes in Section 26.1and 26.5 are recommended. The proposal of the City in Section 26.4 is also recommended with the exception of the proposed changes in the sentence, "The supervisor of the department will have the power to refuse to grant the vacation request, or to postpone it should...." That sentence should remain unchanged.

**ISSUE 3, SHIFT DIFFERENTIAL**

**POSITION OF THE UNION:** The Union proposes a fifteen cent (.15) increase in shift differentials. This would apply to all eligible for shift differential pay. The Union points out that shift differentials have not been increased for many years.

**POSITION OF THE EMPLOYER:** The City opposes the proposal of the Union. It sees no necessity to increase shift differentials.

**DISCUSSION:** At hearing the assertion of the Union that shift differentials had remained unchanged for many years was not rebutted. The shift differential pay is low by contemporary standards. It is recommended that shift differential pay be increased by five cents (.05) per hour effective the first pay period in which the Agreement becomes effective. It is also recommended that there be another five cent increase (.05) effective the first pay period of the third year of the Agreement. No increase is recommended in the second year of the Agreement.

**ISSUE 4, FOUL WEATHER GEAR**

**POSITION OF THE UNION:** The Union is proposing a new section be added to the existing Article 43 concerning foul weather gear. It seeks a stipend of $300.00 payable the first pay period of each year of the Agreement. At the hearing a great deal of discussion occurred over this issue. According to the Union there has occurred a payment of $150.00 per year for many years. That is not found in the Agreement but it has been made for many years. It has been applied to the purchase of work boots. As the cost of those boots has increased the payment has not. Those boots are necessary for members of this bargaining unit. Police and Fire Fighters in New Philadelphia

received an increase in the analogous stipend. No reason not to award AFSCME represented employees an increase exists according to the Union.

**POSITION OF THE EMPLOYER:** The City proposes no change in the foul weather gear stipend. No change is necessary it asserts.

**DISCUSSION:** The parties will acknowledge that substantial time was spent at hearing discussing this issue. Members of the Union bargaining committee pointed out that the cost of work boots used in the field had increased without a commensurate increase in funds to pay for them. At the hearing the parties agreed upon a stipend of $225.00 in 2013, $275.00 in 2014 and $300.00 in 2015. Payment is to be made in October of each year.

**ISSUE 5 DURATION:** It is recommended the Agreement be made retroactive to January 1, 2013 and continue through December 31, 2015.

**ISSUE 6, HOURS OF WORK:**

**POSITION OF THE UNION:** The Union proposes no change in work hours. As it relates history in New Philadelphia there is no difficulty in working hours sufficient to justify a change in the Agreement.

**POSITION OF THE EMPLOYER:** The City is seeking to delete the phrase "reasonable travel time" in Section 20.1. It would replace it with "The fifteen (15) minute rest breaks and one-half (1/2) hour lunch period shall include any necessary travel time within the specified time provided." As seen by the City the concept of "reasonable travel time" has come to be abused. People have been away from the job site for more than the prescribed 15 minute break period. In essence, the break time has been extended. Thus, the requested contract change is reasonable the Employer asserts.

In the same vein, the City desires authority to schedule lunch breaks. The supervisor should retain authority to establish beak times which should not be adjacent to lunch or the start or end of the work shift. In Section 20.3 the concept of work hours remaining as currently scheduled should be altered by the phrase "shall be scheduled by Management and may vary by season." The City points out that there are tasks, e.g. road repair and striping that can be carried out in the longer daylight hours of summer. Such work may currently not be performed after the end of the present shifts due to the existing language of Section 20.3. Should such work be required or desired, it could involve overtime pay. That is undesirable according to the City.

**DISCUSSION:** At hearing the Employer marshaled considerable argument that abuse of break time had occurred. Discipline has been administered but the problem remains unabated. Human nature being what it is this sort of situation is difficult to completely resolve. That said I am persuaded that there is a problem that is addressable via contract language. The proposal of the City for change in Section 20.1 is recommended to the parties. In Section 20.2 the proposal of the City is also recommended with the addition of the sentence, "Such break times will be approximately mid-way in the first and second half of each shift." That sentence should follow the sentence ending with "and the supervisor shall have the discretion to establish these break times." In Section 20.3 the language should read "The work hours for each department within the bargaining unit shall be scheduled by management."

**ISSUE 7, NEW JOBS**

**POSITION OF THE UNION:** The Union proposes there be no change in the current contract language. None is necessary in its opinion.

**POSITION OF THE EMPLOYER:** The City is seeking to delete current contract language that provides for arbitration in the event the parties disagree over the proper rate for a new job. It asserts the proper mechanism for establishing a rate is for negotiations to occur.

**DISCUSSION:** This language has been in the Agreement for many years. It was not shown that any particular difficulties had resulted from its inclusion. No change in Article 22 is recommended.

**ISSUE 8, JOB DESCRIPTIONS**

**POSITION OF THE UNION:** No change should occur in the Job Description article, Article 23, according to the Union.

**POSITION OF THE EMPLOYER:** The City desires to eliminate Article 23, Job Descriptions, in its entirety. As seen by the Employer it is cumbersome to administer. Employees have come to bid on jobs daily. Further, if a person in a higher rated position wishes to perform duties associated with a lower rated position and bids into it, that person continues to be paid the wage associated with his/her higher rated position.

The language establishes a joint job description committee. That has never occurred. Thus, the relevant language should be stricken from the Agreement according to the City.

Finally, the Agreement provides that in the event of a dispute over a rate the parties may have recourse to arbitration. That should not occur in the opinion of the City.

**DISCUSSION:** That employees bid on jobs daily is unusual to say the least. Bids should be made no more often than quarterly.

That the job description committee has not met does not mean it may not meet. The potential utility of such a committee is significant. Further, the parties have not gone to arbitration over a job rate. There has been no steady procession of arbitrations over rates. No particular reason has been shown to eliminate the recourse to arbitration over rates. As it has not been a source of difficulty for the parties it is not apparent why it should be eliminated from the Agreement.

**ISSUE 9, WORK RULES**

**POSITION OF THE UNION:** The Union advocates no change in Article 44 dealing with work rules. No problems justifying change have been experienced by the parties. Hence, no change is warranted according to the Union.

**POSITION OF THE EMPLOYER:** Article 44 refers to the establishment of "reasonable" work rules. A grievance may be submitted over such work rules. The Employer desires to add the phrase "or in conflict with specific provisions of this Agreement" to the existing language. It asserts difficulties with Article 44 have occurred in the past.

**DISCUSSION:** A persuasive case for change in Article 44 was not put forth. No change in the existing language is recommended.

**ISSUE 10, SUBSTANCE ABUSE POLICY**

**POSITION OF THE UNION:** Current language should be maintained according to the Union. Failing that, its proposal on this matter, Union Exhibit 9, should be adopted by the parties the Union contends.

**POSITION OF THE EMPLOYER:** The City is proposing that its existing substance abuse policy as included in its City Policy Manual be incorporated into the Agreement. The other unions with which the City deals, the FOP and IAFF have agreed to the City

policy. No reason for AFSCME-represented employees to do otherwise exists according to the City.

**DISCUSSION:** Just as the appeal of tradition is strong, so too is the appeal of consistency. It was not shown why members of this bargaining unit should have a different substance abuse policy than their counterparts elsewhere in City service. The proposal of the Employer is recommended to the parties in its entirety.

All tentative agreements including those reached at the hearing are recommended to the parties by reference and included in this report.

Signed and dated this 7th day of May, 2013 at Solon, OH.

Harry Graham
Factfinder