

STATE EMPLOYMENT RELATIONS BOARD

**FACT FINDER'S REPORT
AND
RECOMMENDATION**

IN THE MATTER OF:

CUYAHOGA COUNTY SHERIFF DEPARTMENT

AND

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION

Case Number 2012-MED-10-1262
Deputy Lieutenants

Before Fact Finder: Thomas J. Nowel
January 8, 2016

PRESENTED TO:

Todd M. Ellsworth, Esq.
Cuyahoga County Department of Law
Assistant Law Director
2079 East 9th Street, 7th Floor
Cleveland, Ohio 44115
tellsworth@cuyahogacounty.us

George E. Gerken, Esq.
Ohio Patrolmen's Benevolent Association
10147 Royalton Road, Suite J
North Royalton, Ohio 44113
gerkenlaw@gmail.com

Donald M. Collins, Esq.
State Employment Relations Board
65 East State Street, 12th Floor
Columbus, Ohio 43215
med@serb.oh.us

INTRODUCTION

Thomas J. Nowel was appointed to serve as Fact Finder in the case as captioned on the cover page by the State Employment Relations Board on October 9, 2015 in accordance with Ohio Revised Code Section 4117.14 (C) (3). Hearing in the matter was held on December 8, 2015 at the offices of the Cuyahoga County Sheriff in Cleveland, Ohio.

The existing collective bargaining agreement, which expired on December 31, 2012, was the first between the parties. The parties agreed to extend the original collective bargaining agreement while other bargaining units engaged in negotiations at the Sheriff's Department. The parties engaged in both formal and informal negotiations until reaching impasse on a number of issues. The parties reached tentative agreement on many issues on the table, and they are incorporated in this Report and Recommendation.

Prior to the commencement of the evidentiary hearing, the Fact Finder discussed possible settlement of certain outstanding proposals, and the parties successfully resolved a number of issues prior to the commencement of the hearing. The parties agreed to the issuance of the Report and Recommendation on January 8, 2016. The evidentiary hearing was then convened at 1:30 pm.

The composition of the bargaining unit is three Deputy Lieutenants who are assigned to the Cuyahoga County Sheriff's Department.

OUTSTANDNG ISSUES:

Article 14, Wages

Article 16, Court Time/Call-In Pay, New Section 2

New Article 36, Promotional Examinations

Current Article 40, On-Duty Injury/Illness Leave

Article 55, Expiration and Renewal

Those participating at hearing for the Employer included the following:

Todd M. Ellsworth, Assistant Law Director

Jason Sobczyk, Human Resources/Employee Relations Specialist 2

Those participating at hearing for the Union included the following:

George E. Gerken, OPBA Attorney

Miguel A. Caraballo, OPBA Director

Donald Gerome, Lieutenant

Bryan Smith, Lieutenant

BACKGROUND

In analyzing the positions of the parties regarding each issue at impasse and then developing a recommendation, the Fact Finder is guided by the principles which are outlined in Ohio Revised Code Section 4117.14 (G) (7) (a-f) as follows.

1. The past collectively bargained agreement between the parties.
2. Comparison of the issues submitted to fact finding relative to the employees in the bargaining unit involved 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 interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, the effect of the adjustments on the normal standard of public service.
4. The lawful authority of the public employer.

5. The stipulations of the parties.
6. Other factors, not confined to those listed above, which are normally or traditionally taken into consideration in determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact finding, or other impasse resolution procedures in the public service or in private employment.

During the course of the hearing, the parties had full opportunity to advocate for their respective positions, submit exhibits, present testimony and discussion, and engage in rebuttal of the submissions and arguments of the other party.

ANALYSIS AND RECOMMENDATIONS

1. Article 14, Wages

The Union proposes to increase the base pay rank differential of Deputy Lieutenants to 16%. The rank differential between Deputy Sergeants and Deputy Lieutenants is currently 12%.

The Employer rejects the proposal and submits that current contract language be maintained in the new Agreement.

UNION POSITION: The Union states that the rank differential between Deputy Sergeants and Deputy Sheriffs is currently 18%. The Union states that its proposal of a 16% differential will create monetary equity between bargaining unit employees and Sergeants. The Union states that, during the initial negotiations between the parties, the Employer stated, in relation to the differential, that it could not expect to reach parity in one or two labor agreements based on the process of

collective bargaining. The Union now challenges that assertion. The Union states that Conciliator Nels Nelson granted an increase in the rank differential to 12% at the conclusion of the initial negotiations between the parties. The Union cites the Cuyahoga County Comprehensive Annual Financial Report for the Year ended December 31, 2014 (Union Exhibit 6). The Union states that the report highlights an improving economy following the recession of 2007 to 2010. The report cites new construction and revenue generating projects such as the Horseshoe Casino, Global Center for Health Innovation and new Convention Center. The Union goes on to state that the Republican National Convention will generate significant new revenue for the county, and the return of LeBron James to the Cleveland Cavaliers NBA team has resulted in higher revenues generated by increased ticket sales and the spin off of spending in local restaurants and entertainment venues. The Union states that carry over of unencumbered funds has increased, and the Sheriff Department budget is healthy. The Union states that, in light of the Employer's ability to pay, the cost of its proposal for three bargaining unit employees is \$12,000 per year. This figure includes "roll-up" costs. The Union states that the unit of Lieutenants has been reduced by the Employer to three employees. There were six Lieutenants prior to 2009 and four until 2012. The Union states that the duties of bargaining unit employees have increased with a significant level of responsibility (Union Exb. 11). The Union argues that internal comparables support its case for a 16% differential. It argues as well that external comparables support its case as follows. The differential between Lieutenants and Sergeants at the Summit County Sheriff's Department is 16% after two years in the position (Union Exb. 9), and 16% in

Lorain County following six months in the position (Union Exb. 10). The differential between Lieutenants and Sergeants is 18% in Medina County (Union Exb. 12). The Union reminds the Employer and Fact Finder that the County Sheriff received a 7.25% pay increase this year. The Union states that a competitive wage will allow the Employer to retain and attract quality employees in the rank of Lieutenant. The Union argues that the Fact Finder should recommend its proposal based on the Employer's ability to fund the increase; the lack of impact an increase in the differential would have on any other bargaining unit in the Sheriff's Department; the importance of rank differential equity in the Department; and based on regional Sheriff Department rank differentials which mirror the instant 16% proposal.

EMPLOYER POSITION: The Employer states that there is no reason for an increase in the rank differential and that it is important that it be maintained at 12% for the term of the new Agreement. The Employer states that the 2016 – 2017 Executive's Recommended Biennial Budget (Emp. Exb. 8), includes a \$68 million shortfall. A balanced budget is achieved by asking each County department to reduce expenditures by 10%. The Employer argues that, in light of this budget reality, the Union differential proposal is inappropriate at this time. The Employer emphasizes that Deputies received a 2% across the board wage increase and .5% equity increase in 2015. This increase automatically adjusted the wages of Sergeants and Lieutenants by 2.5%. The Employer argues that an additional increase in wages for Lieutenants upsets parity and breaks the pattern of bargaining in the Department. Most other County bargaining units received a 2% increase in wages for 2015 (Emp.

Exb. 8-D). This includes AFSCME, Teamster and UAW bargaining units. The Employer argues and emphasizes that the proposed increase in these negotiations, if granted, would be leveraged against the County in its future negotiations with other bargaining units. The pattern of bargaining would be disrupted. The Employer states that the Deputies' bargaining unit engages in the difficult wage negotiations in the Sheriff's Department. It has generally been understood then by the parties that no further wage negotiations are required in the Sergeants' and Lieutenants' bargaining units based on the rank differentials. The Employer states that the Union has made an argument regarding the non-bargaining unit 2015 wage increase. The Employer states that non-bargaining employees had not received a base wage increase for eight years. The Employer states that casino revenue is restricted and must be utilized in specified budget funding. The Sheriff Department is prohibited from utilizing revenue derived from the casino. The Employer reminds the Union and Fact Finder that many county funding sources are restricted and are not available for cost of personnel. The funding of services and programs for the community are critical components of the distribution of revenue and County budget. The Employer states that it is important that the Fact Finder recommend current contract language regarding the wage provision of the new Agreement.

RECOMMENDATION: Both parties make compelling arguments for their positions. The economy has improved in the Greater Cleveland area but still trails other areas of the country since the end of the recent recession. Nevertheless, the future is bright based on the completion of important construction projects, and, as the Union

suggests, potential revenue generated by planned events including the Republican National Convention in July 2016. The Employer argues a conservative approach to spending. The Fact Finder understands this approach. The Union argues that the proposed increase is well within the Department's ability to pay, \$12,000.00 per year cost. This argument also has merit. The Employer has not taken an official position of inability to pay during these proceedings. The Cuyahoga County Annual Financial Report For the Year Ended December 31, 2014 (Union Exb. 6) paints the picture of a political subdivision which has recovered from the recent recession and is benefitting from the revitalization of the region. This report illustrates financial improvement and stability with increased revenues generated by completed new construction and spin-off activities. Without discussing the merits of the Union's proposed increase in rank differential, it is clear that the Employer has the capacity to fund the proposal.

The Union argues that its proposal is based on equity. Rank differential between Deputies and Deputy Sergeants is 18%, and the Union states that its proposal to increase the Lieutenants' differential for the term of the new Agreement to 16% will create actual dollar equity between Lieutenants and Sergeants. The Union's argument, that the responsibilities of Lieutenants are comprehensive and expansive, is compelling as illustrated by Union Exhibit 11. In addition, the recent Memorandum of Understanding with the City of Cleveland assigns Cuyahoga County Deputy Lieutenants to oversee and investigate certain incidents of use of firearms by Cleveland Police Department personnel. It is unclear if this was a recommendation of the U. S. Department of Justice consent agreement with the City,

but the new responsibility will serve the community well based upon the expertise of bargaining unit members.

The Union proposed an increase in rank differential to 16% during negotiations for the initial collective bargaining agreement between the parties. Fact Finder Burt Griffin, during those negotiations, recommended the 16% proposal. Following rejection of Griffin's Report and Recommendation, Conciliator Nels Nelson issued an award which increased the differential from 7.69% to 12%. The Employer argues in the instant case that the granting of the Union's proposal would impact other bargaining units in the Sheriff's Department. In response to this argument during the previous negotiations, Conciliator Nelson made the following analysis. "It is difficult to see how another bargaining unit could successfully argue that restoring the Lieutenants' rank differential justifies an increase in its wage schedule" (Union Exb. 13, pgs. 9 - 10). This analysis was relevant in 2011 and continues to be so in the instant case.

The Union argues that external comparables support its proposal. Rank differentials between Sergeants and Lieutenants in Summit, Lorain and Medina Counties mirror the proposal in the instant negotiations. Although there was no information regarding comparable duties, the responsibilities of Cuyahoga County Lieutenants are comprehensive, and the new MOU with the City of Cleveland will increase that level of responsibility including the possibility of public scrutiny.

This Fact Finder is cognizant of the statutory guidelines for SERB neutrals. The Union's proposal is affordable, and it does not impact the pattern of bargaining with other Sheriff Department bargaining units. The Union's case is supported by

external and internal comparables. In addition to a comprehensive list of responsibilities, Lieutenants will assume additional and significant tasks regarding the MOU with the City of Cleveland. The community is well served by members of the bargaining unit. In addition, the short history of bargaining between the parties supports the proposal to increase the differential as the Conciliator partially closed the gap in the last round of bargaining.

The proposal of the Union to increase rank differential from 12% to 16% is hereby recommended effective January 1, 2016 and contract language is as follows.

Article 14. Wages

Beginning January 1, 2016 and thereafter, there shall, at all times, be a minimum base pay rank differential of 16.00% between the rank of Deputy Sheriff Sergeant and the rank of Deputy Sheriff Lieutenant, in addition to longevity pay and uniform allowance as articulated in this Agreement. If at any time, the base pay difference between a Deputy Sheriff Sergeant(s) and a Deputy Sheriff Lieutenant(s) is less than 16.00%, then the Employer shall immediately remedy the situation by raising the rate of pay of the affected Deputy Sheriff Lieutenant(s) to 16.00% greater than the rate of pay of the highest paid Deputy Sergeant(s). Members of the Bargaining Unit shall be paid in accordance with this Article effective January 1, 2016.

2. Article 16, Court Time/Call-In Pay

The Union proposes new Section 2 which would provide for one hour of pay for any day an employee is assigned to on-call on a scheduled workday. Additional compensation of three hours of pay would be provided for an on-call assignment on a scheduled day off.

The Employer rejects the proposal of the Union and argues for current contract language.

UNION POSITION: The Union argues that new on-call assignments are the result of new task forces. This includes in particular on-call status resulting from the Memorandum of Understanding with the City of Cleveland. Bargaining unit Lieutenants will investigate certain cases involving use of deadly force by members of the Cleveland Police Department. The MOU was effective December 1, 2015. The Union suggests that a Lieutenant is on-call at all times, and the on-call assignment precludes travel, socializing, consuming alcoholic beverages and other normal activities. The Union states that those employees, who are on-call, must be immediately available for duty. The Union states that, although the Employer argues that there is no pattern of on-call pay supplements at the Sheriff's Department, dispatch employees have bargained a benefit for employees who may be assigned on-call status. The Union argues that its proposal is one of fairness and equity.

EMPLOYER POSITION: The Employer states that there is no policy or structure regarding on-call assignments. The MOU with the City of Cleveland was executed a number of weeks prior to hearing at fact finding. No policies have been developed regarding on-call assignments. The Employer suggests that it is premature to discuss on-call pay at this time. Based on these concerns, the Employer believed this proposal was off the table. The Employer urges the Fact Finder to reject the proposal and new Section 2 as proposed by the Union.

RECOMMENDATION: A pay benefit or supplement may be a legitimate request for employees who are assigned to on-call status and who cannot leave the area and are unable to participate in the usual off-duty activity with family and friends. The Employer states that there is no system, policies or structure to an on-call system affecting Lieutenants and that no other Sheriff Department employees receive on-call pay. Testimony by bargaining unit employees regarding the hardship on-call status causes was compelling, but it was unclear exactly how employees are assigned to on-call status and under what circumstances. It was unclear if a traditional on-call system has been instituted. There simply is not sufficient information to justify the recommendation of an on-call pay structure. The Union proposal is not recommended, but the Employer is urged to meet with the Union if a true on-call system is developed which impacts bargaining unit Lieutenants pursuant to Article 13, Labor/Management Meetings. There are a number of on-call pay supplement provisions in safety force collective bargaining agreements in the region for reference. The recommendation is to maintain current contract language regarding Article 16.

3. New Article (36), Promotional Examinations

The Union proposes a new article which would establish a comprehensive testing procedure to be utilized by the Employer in the case of a vacancy in the rank of Captain. The proposal favors the promotion of bargaining unit Lieutenants and requires appointment based on the "rule of three" from an eligibility list.

The Employer rejects the proposal and inclusion of the new article in the Agreement.

UNION POSITION: The Union argues that incumbent Lieutenants should have first opportunity to fill any vacancy in the rank of Captain. This is an issue of fairness, the importance of appointing from within the bargaining unit. Bargaining unit Lieutenants are experienced and have generally served within the Sheriff's Department for a number of years. The Union states that it is a violation of basic fairness to promote from the outside. Furthermore, the Union states that Captains were in the unclassified service of the County, but the position has been moved to the classified service pursuant to the Ohio Revised Code. Based on the classified service status, promotion to the position of Captain requires competitive testing as required by the statute making the Union proposal relevant and appropriate. The Union urges the Fact Finder to recommend adoption of its proposal.

EMPLOYER POSITION: The Employer argues that the position of Captain is a top departmental administrator. The Sheriff should not be restricted to members of the Lieutenants bargaining unit when considering qualified candidates. The organizational chart of the Sheriff's Department (Emp. Exb. 13) illustrates that Captains report to the Chief Deputy who reports directly to the Sheriff. The Employer states that, although the position of Captain is now in the classified service, which requires testing, the Personnel Review Commission is the local civil service agency responsible for developing testing requirements and hearing

appeals. The Commission is a county agency, and it has not developed a test for the Captain position. The Employer states that the bottom line is that the Sheriff must have flexibility in selecting personnel for this top management position.

RECOMMENDATION: Ohio Revised Code Section 124.11 A (9) and A (28) describe essentials characteristics of positions in the unclassified service. Included in the unclassified service are employees who may act in place of the principal officer or those who are in a fiduciary or administrative relationship to the employing agency. There was little information at hearing to illustrate the duties of Captains when they were in the unclassified service. Since the last negotiations between the Employer and this bargaining unit, the position of Captain was transitioned to the classified service. Again, there was minimal information comparing the relationship the position of Captain had with the Sheriff before and after becoming a part of the classified service. The Employer cites ORC Section 124.31 as the authority for the local Personnel Review Commission, but this citation reinforces the requirement to fill vacancies in the classified service by promotion based on merit and by “conduct and capacity in office.” The Employer argues that the Department Table of Organization illustrates the critical administrative relationship between the Sheriff and the two Captains. This argument is compelling. The Union proposes a testing procedure which initially limits participants to the Lieutenants bargaining unit. Again, the Employer’s argument holds merit, that the Sheriff should have a broader list of applicants from which to select a successful applicant for a top administrative position in the Department. This clearly does not preclude Deputy Lieutenants from

competing for a vacant Captain position. And there is strong possibility that the position would be filled from the rank of Lieutenant. It should be noted that, if Captains were included in the bargaining unit, the Union proposal and argument would be far more compelling. But Captains are non-bargaining unit employees regardless of their new status as classified civil service employees. There is no evidence that other collective bargaining agreements with the Sheriff's Department include provisions allowing for limited testing for non-bargaining unit positions. The Union was not successful during the last negotiations regarding this proposal, and it was not recommended or granted in fact finding or conciliation. At hearing, the Union stated that it was asking "for an equal shot." Members of the Lieutenants bargaining unit are not denied an equal shot, but the proposal provides for more than an equal shot. The Union proposal regarding new Article 36, Promotional Examinations, is not recommended.

4. Article 40, On-Duty Injury/Illness Leave

The Union proposes to modify this provision of the Agreement by adding accidents which occur during department sponsored training outside a traditional classroom setting.

The Employer is opposed to any modification of the injury provision of the Agreement.

UNION POSITION: The Union states that, on certain occasions, the Employer has compensated employees, who have been injured during training activities, pursuant

to Article 40. This in spite of the fact that the language does not explicitly provide coverage in the case of training injuries, and the Employer's position that provisions of this article are not to be applied for injuries or illness which may occur due to training activity. One member of the bargaining team testified to his non-compensated injury which was life threatening. The Union argues that its proposal is one of practicality and fairness. The proposal was modified by the Union, prior to the commencement of the evidentiary hearing, to limit compensation provided by Article 40 to department sponsored training outside the traditional classroom including but not limited to SWAT, bicycle patrol, diving marine patrol, field force, self defense and firearms range. The Union urges the fact finder to recommend its modification of Article 40.

EMPLOYER POSITION: The Employer suggests that Article 40 has been applied fairly and consistently. The Employer states that no other collective bargaining agreement at the Sheriff's Department contains explicit language to include injury/illness benefits based upon a training accident. The Employer argues that to modify this provision based on the Union's proposal would have a significant impact on the bargaining relationship with all other bargaining units in the Department. The established pattern in Department collective bargaining agreements is obvious, and the Lieutenants Agreement should not be modified in these negotiations.

RECOMMENDATION: The Union states that the genesis of its proposal is the inconsistent application of the injury/illness benefits by the Employer. If the

Union's contention is accurate, the application of this provision of the Agreement is problematic. Clearly the testimony of the bargaining committee member, who was severely injured during outside training, was compelling, but there was no specific or clear evidence at hearing regarding individuals who may have received benefits following an injury sustained during training activity. A disagreement regarding the application of the benefits provided for in Article 40 may have been resolved in a different dispute resolution forum if evidence exists that certain employees received benefits following training accidents and others not in spite of the lack of clear contract language in this area. Those proofs, if they exist, were not available during hearing at fact finding. The Employer's contention that the Union's proposal breaks the pattern established throughout the Sheriff's Department bargaining units is compelling. The Union's proposal to amend Article 40 to include certain training accidents is not recommended.

5. Article 55, Expiration and Renewal

The Employer proposes a three year Agreement commencing January 1, 2016 and terminating December 31, 2018.

The Union proposes a termination date of December 31, 2015.

EMPLOYER POSITION: The Employer states that the parties have extended the current Agreement and have also been in bargaining for a lengthy period of time. The Employer argues that a termination date in 2015 would not be prudent. The parties should not be at the table again within the next few weeks. A three year

Agreement ending on December 31, 2018 is the reasonable approach the Fact Finder should recommend.

UNION POSITION: The Union suggests that the termination date should be dependent upon the resolution of certain critical issues at the bargaining table. Not knowing if or how these issues might be resolved, the Union suggests December 31, 2015 as the termination date.

RECOMMENDATION: The Employer's proposal for a three year Agreement commencing on January 1, 2016 makes good bargaining sense. It is difficult to understand how the relationship between the parties would be enhanced if the bargaining process commenced again in the next weeks or months. The Union's proposal is understandable as well. There are one or two crucial issues on the table in the eyes of the Union. The Union alluded to the idea of a three year Agreement, consistent with the Employer's proposal if the rank differential issue was resolved in its favor. The Fact Finder's recommendation includes the Union's proposal regarding this issue effective January 1, 2016. The Employer's proposal of a three year Agreement, commencing January 1, 2016 and terminating December 31, 2018, is hereby recommended.

Article 55. Expiration and Renewal

This Agreement is effective January 1, 2016, subject to approval by the Cuyahoga County Council, and notwithstanding any other dates referenced on the cover of the Agreement, as footers on each page or elsewhere therein, unless specifically indicated. The Agreement shall remain in full force and effect until 11:59 pm on December 31, 2018, and shall thereafter continue in full force and effect from year to year and shall be renewed for successive years unless written notice of

termination or a desire to modify or change this Agreement is given by either party at least one hundred twenty (120) days prior to the expiration date. Upon receipt of such notice, a conference shall be arranged within thirty (30) days.

CONCLUSION

The Fact Finder has reviewed the pre-hearing statements of the parties and all facts presented at hearing including exhibits presented during the evidentiary hearing. The Fact Finder has carefully reviewed the positions and arguments presented by each party and the criteria enumerated in Ohio Revised Code Section 4117.14 (G) (7) (a-f).

In addition to the recommendations contained in this Report, all tentative agreements reached by the parties during negotiations and immediately prior to the commencement of the evidentiary hearing and all unopened articles of the Agreement are hereby incorporated in this Report and Recommendation by reference.

Respectfully submitted and issued at Cleveland, Ohio this 8th Day of January 2016.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas J. Nowel
Fact Finder

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th Day of January 2016, a copy of the foregoing Report and Recommendation of the Fact Finder was served by electronic mail upon Todd M. Ellsworth, Esq., representing the Cuyahoga County Sheriff's Department; George E. Gerken, Esq., representing the Ohio Patrolmen's Benevolent Association; and Donald M. Collins, General Counsel, State Employment Relations Board.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas J. Nowel
Fact Finder