

STATE EMPLOYMENT RELATIONS BOARD
FACT FINDER'S REPORT AND RECOMMENDATION

IN THE MATTER OF:

CUYAHOGA COUNTY SHERIFF'S OFFICE

AND

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION

Case Number:
2014-MED-09-1083

Before Fact Finder: Thomas J. Nowel
March 6, 2015

PRESENTED TO:

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INTRODUCTION

Thomas J. Nowel was appointed to serve as Fact Finder by the State Employment Relations Board in the matter as noted on the cover page on December 14, 2014 in compliance with Ohio Revised Code section 4117.14 (C) (3). The previous collective bargaining agreement expired on December 31, 2014. The parties had engaged in approximately six bargaining sessions prior to Fact Finding. Both parties indicated that tentative agreement had been achieved on issues not submitted as open issues at fact finding and requested that they be incorporated as a part of the Report and Recommendation of the Fact Finder. The parties are in agreement that the successor agreement be for a term beginning January 1, 2015 and ending on December 31, 2017. The parties agreed to devote a day of mediation with the fact finder on January 23, 2015. Although the parties worked hard at resolving issues at impasse, they were unable to achieve settlement. A full evidentiary hearing was conducted on February 9, 2015. The parties agreed that the Report and Recommendation of the Fact Finder would be issued on March 6, 2015. Following the close of the evidentiary hearing, Arbitrator Harry Graham issued an Award at Conciliation for the bargaining unit representing Deputies at the Sheriff's Department. The Employer submitted the Award to this Fact Finder for consideration regarding certain open issues in the instant matter. The Union initially objected to the submission of the document based on the hearing having been completed, but the Fact Finder suggested that the parties submit written

position statements regarding the Award. The parties agreed to proceed in this manner, and the Graham Award was then accepted into evidence.

The Union represents a bargaining unit of approximately 126 full time employees in the classification of Protective Services Officer (PSO) of the Cuyahoga County Sheriff's Office. Although Protective Services Officers are not certified law enforcement officers, they are trained and certified in order to function as armed security officers who are assigned to approximately thirty county facilities. The bargaining unit includes the one classification of Protective Services Officer. Sergeants and Lieutenants are excluded from this bargaining unit.

Those participating for the Union at hearing include the following:

Daniel J. Leffler, Esq., OPBA Attorney
Dean Conforte, Union Director
James W. Rookard, Union Director
Leroy O. Hucks, Protective Services Officer
Dana Myrick, Protective Services Officer
Effrem Speigner, Protective Services Officer
Ellen Eschmeyer, Protective Services Officer

Those participating for the Employer at hearing include the following:

Todd M. Ellsworth, Assistant Law Director, Cuyahoga County
Cishma Haines, Employee Relations Specialist

OUTSTANDING ISSUES:

1. Article 13, Wages
2. Article 15, Longevity
3. Article 16, Uniform and Equipment
4. Article 18, Overtime, Section 1 and Section 2
5. Article 21, Assumption of Rank
6. Article 27, Seniority
7. Article 30, Health and Safety

8. Article 46, Vacations (Side Letter)
9. Article 56 (new), Promotions

BACKGROUND

In analyzing the positions of the parties regarding each issue at impasse and then making a recommendation, the Fact Finder is guided by the principles that 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, and 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 the 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 positions, submit exhibits, present testimony and discussion, and engage in rebuttal of the submissions and arguments of the other party. The Fact Finder will transmit the Report and Recommendation, by way of electronic mail, to the parties on March 6, 2015.

DISCUSSION AND RECOMMENDATIONS

The Union states that its economic proposals, which are at impasse, are reasonable and represent equity. In addition, Union proposals at impasse are affordable as the economy and financial viability of the County have improved significantly. At hearing, the Union presented a slide presentation which illustrated an improved and expanding economy both nationally and in the state of Ohio. The unemployment rate nationally was at 5.6% in December 2014. The unemployment rate in Ohio was 5.7% in August 2014, and the economy across the state continues to improve. The Union states that the U. S. economy has seen the highest growth in over ten years. Likewise, Cuyahoga County has seen economic growth and expansion. During the "State of the County" address this past year, outgoing County Executive, Ed Fitzgerald, reported on the improved financial health of the County budget. He reported on the increase in sales and use tax revenues. The new medical mart and convention center have generated additional revenue. Fitzgerald reported further, in the 2014 Second Quarter Report, that the casino tax was generating \$7.5 million in 2014, and county expenditures were 3.3% under budget. The Union states that there are a number of developments which have had a positive impact on County finances including its new administrative headquarters on East 9th Street and the fact that population shifts include a higher level of education by those who are migrating to the Cleveland area from other locations in the country. The Union cites the increase of tourism in the greater Cleveland area, and the return of LeBron James to the Cleveland Cavaliers NBA basketball team which has generated

increased ticket sales and spending in the downtown area. County bond ratings are high which is a reflection of economic expansion. Reserve funding is significant, as reported by former Executive Fitzgerald. The County has the ability to fund the Union's proposals at fact finding.

The Employer states that it is not claiming inability to pay but rather a limited ability to pay. While the national economy has seen improvement, as illustrated by the Union, Cuyahoga County has not recovered lost employment which occurred during the recession. The County lost \$67 million in revenue over the last state biennial period due to reductions in state funding. A decrease in property tax revenue has also impacted the County budget. The 2015 outlook in the general fund is a slight operating surplus but adherence to budget constraints are necessary. There are thirty-six separate bargaining units at the County. Revenue growth has not been sufficient to overcome recent losses. The Employer states that the County charter requires increased investment in economic development. Although sales tax revenues have increased 13.9% since 2011, a 7.2% decline in property tax value, since 2013, has had a negative impact on the general fund and Health and Human Services Levy fund. In addition, County Council has passed legislation (ordinances) which mandates a 25% reserve balance in the general fund. Except for the sales tax, most revenue streams are flat. The slow economic recovery in the region demands careful budgeting on the part of the County. The Employer notes that the regional jail project could impact the 2015 budget. Additionally, the Employer states, its wage and economic proposals in the instant matter are in line

with the cost of living. The Consumer Price Index increased 1.3% over the past twelve months. The Employer states that its proposals are reasonable based on available economic data and the constraints imposed by budgetary realities.

1. Article 13, Wages

The Union proposes three general wage increases: 2% effective January 1, 2015; 2% effective January 1, 2016; 2% effective January 1, 2017. The Employer likewise proposes a 2% wage increase effective January 1, 2015 and another 2% increase effective January 1, 2016. The Employer proposes a wage reopener to be effective January 1, 2017.

The Union proposes a \$1.50 equity wage adjustment on all steps of the wage schedule effective January 1, 2015 and prior to the implementation of any percentage wage increase.. The Employer rejects the wage adjustment proposal.

UNION POSITION: The Union states that the Protective Services division is the lowest paid in the Sheriff's Department. Officers are trained to carry a firearm and they perform certain "enforcement" functions. Clerical employees and lab assistants in the Probation Department enjoy higher wages at the top step of their wage scale than PSOs. The Union emphasizes that the highest paid Protective Services Officer earns approximately \$35,000 annually. The Union states that this is a unique bargaining unit as it is the only armed county protective services department in the state. It is therefore difficult to provide external comparables. The Union nevertheless illustrates the comparison of bargaining unit wages to police

departments in Cuyahoga County. The Union states that Cuyahoga County court security officers are currently training to become armed. The negotiated wage rate for court security officers, who complete training, will be greater at the high step of the wage schedule than Protective Services Officers. The court officers unit is relatively new while Protective Services has been in existence for twenty-five years, and the duties of officers are complex and expansive. The Union states that security officers at the City of Cleveland Public Utilities Department perform duties similar to the bargaining unit. The four year step of the wage table in 2015 calls for an hourly wage of \$21.96, significantly higher than Protective Services. The Union cites the collective bargaining agreement between the County and employees of the Kennel. The parties negotiated equity wage increases of \$1.50 per hour for each year of a three year Agreement. This is the basis of the Union's proposal in these negotiations. The Union states that the work performed by the bargaining unit is critical to the safety of the public and employees, but wages for other unionized County employees far exceed those of the bargaining unit. Wages for the deputies in the department and correction officers significantly exceed those of Protective Services Officers. Based on the high step of the wage schedule, the difference between the wage of a deputy and PSO is \$10.54 per hour after application of a 2% wage increase, and the difference between a correction officer and PSO is \$3.84 per hour in 2015. The Union cites the recent Report and Recommendation of Fact Finder Robert Stein who recommended a \$.40 per hour equity increase for correction officers in the Sheriff's Department. The Union states that the Employer accepted the Stein Fact Finding Report. And Fact Finder Nels Nelson recommended

a pay adjustment of \$750.00 for the Deputy Sheriff bargaining unit in addition to pay increases of 2% for each year of the new three year Agreement, and, although the County rejected the recommendation, it proposed an equity increase at conciliation. Wages for all Sheriff Department employees are below external comparables, and Protective Services Officers are significantly underpaid based on internal comparable wages. The Union states that an equity increase of at least \$.80 per hour and up to \$1.50 must be included in the recommendation based on the services provided by bargaining unit employees.

EMPLOYER POSITION: The Employer states that bargaining unit employees are paid a competitive wage, and this is especially true when benefits are considered. There is no cost to employees for the health insurance plan enjoyed by most employees (Metro Health Select), and the state pension plan provides a significant benefit. The wage proposal offered by the Employer increases the competitive level of wages, and 100 of approximately 126 bargaining unit employees are at the top of the wage schedule. Bargaining unit employees have enjoyed an increase in wages of 30.3% since 2002. The Employer argues that pattern bargaining is an important factor to be considered, and internally county employees across the board have received wage increases of 2% in 2014 and 2015. This includes the largest bargaining unit of County employees who are represented by AFSCME. The Employer has given consideration to equity wage increases when a compelling reason to do so has existed, but the Union's proposal of \$1.50 per hour increase is not justified. The Employer states that the negotiated \$1.50 per hour equity

increase for each of the three years of the collective bargaining agreement for Kennel workers was justified based on the very low wage being paid. The justification for this increase does not transfer to Protective Services. The Employer states that it is important to note that Protective Services Officers are not law enforcement officers as stated in County Ordinance No. 02013-0015. Therefore there is little comparison to deputies employed by the department, and, likewise, there is little comparison to correction officers who monitor felons and work in a dangerous environment at all times. The Employer argues that it must take a cautious approach to wage increases. The County has not fully recovered from the recession as the Cleveland-Akron region continues to trail the rest of the U. S. in leading economic indicators. The Employer states that its wage proposal follows the pattern set across County departments, and there is no justification for the Union's proposed equity adjustment.

RECOMMENDATION: The Employer presents a compelling argument that the regional economy has not enjoyed the same level of recovery as that of the country in general and therefore must budget within the constraints of existing revenue streams. And the loss of local government funds, based on recent state budgets, continues to have an impact. Nevertheless, based on the pattern of bargaining which has occurred over the past few years between the Employer and its numerous bargaining units and the recovering health of the county budget, Union proposals at fact finding are generally affordable and within the County's ability to fund.

The Protective Services division of the Cuyahoga County Sheriff's Department is unique in the state of Ohio. Various counties employ security guards and officers, but, unlike, Cuyahoga County, they are not armed and do not participate in the training required to carry firearms. Although it is difficult to assemble a list of external comparables, it is possible to review the competitive level of the wages of Protective Services Officers as suggested by the statute. The Union suggests that it has based its equity increase on that obtained by county kennel workers, but the Employer's argument, that the wages of this group of workers were so low that a significant increase was necessary, is compelling. Nevertheless, the gap between Kennel workers and PSOs has been significantly narrowed following the three equity increases and across the board wage adjustments. This is a factor to be considered in the recommendation. Protective Services Officers are not certified law enforcement officers as are the deputies in the department. Therefore, a reasonable gap between their wage schedules is to be expected. And the Employer's argument, that correction officers work in an environment which is conceivably more dangerous than that which is experienced by Protective Services Officers, has some merit. Nevertheless, it is important to note that PSOs have continual contact with the public with all the unknowns involved and the potential for volatility. Some members of the public who enter the Justice Center and other County facilities are not particularly happy. Officers are trained to carry firearms, and they have the authority to detain until an arresting officer arrives. The Union states that the wage rates for Cuyahoga County court security officers are also in excess of those in the bargaining unit based on the completion of firearms training.

This unit of employees is somewhat new to the county while Protective Services has been in existence for at least twenty-five years. This is a factor to be considered by the fact finder as is the Union’s argument that the wages of Public Utilities Security Officers at the City of Cleveland are significantly greater than bargaining unit employees. These employees perform security duties similar to the bargaining unit, and they are armed. A comparison to regional city police officers, as suggested by the Union, is not a relevant comparable. A relevant list of comparable categories of workers and their wages is as follows.

	2014 wage, high step
Deputies	27.25
COs	20.41
Court Security (armed)	17.39 high step
Public Utility Security	21.53
PSO	17.05

In a recent fact finding decision at the County, Fact Finder Nels Nelson recommended an equity increase of \$750 added to the base rate of the wage scale for deputies in addition to the patterned 2% across the board wage increases in 2015, 2016 and 2017. Although the Employer rejected the Nelson Report and Recommendation, the wage recommendation was based on external comparables which indicated that Cuyahoga County deputies were underpaid compared to their regional peers. Fact Finder Robert Stein recommended a \$.40 per hour equity increase for Cuyahoga County correction officers in addition to 2% wage increases in 2014, 2015 and 2016. Fact Finder Stein found that correction officers were underpaid compared to their regional peers. Evidence indicates that the Employer accepted Fact Finder Stein’s recommendation.

The common thread found in the Fact Finding recommendations for equity wage increases of Fact Finders Stein and Nelson is that affected employees in the Cuyahoga County Sheriff's Department are underpaid compared to their regional peers, and this argument can then generally be applied to the Protective Services Department. In response to the significant disparity in wages between deputies and correctional officers in the department and Protective Services Officers and based further on the generally lower pay compared to regional peers as determined by Fact Finders Stein and Nelson, this recommendation includes an equity increase. In addition, the fact that Court Security Officers will realize a higher top pay step than PSOs after one year in the revised pay schedule, following firearms training, suggests that the application of an equity increase here is fair and reasonable. The Union's argument, that the court security unit is a relatively new unit as compared to the twenty-five year existence of the Protective Services unit, is compelling and a factor in the development of the recommendation.

The parties are in agreement regarding 2% general wage increases in 2015 and 2016. The Union proposes an additional 2% wage increase in 2017, and the Employer proposes a wage reopener. This recommendation incorporates the Union's proposal for a 2% wage increase in 2017 which would negate the necessity of additional collective bargaining negotiations and the possibility of statutory dispute resolution procedures.

Following hearing at fact finding in the instant matter, Arbitrator Harry Graham issued his conciliation award regarding the new collective bargaining agreement for deputies. He rejected the equity increase recommended by Fact

Finder Nelson, but he awarded the Employer's wage proposal which nevertheless included a small equity increase. Arbitrator Graham emphasized the principle of not disturbing the general pattern of wage increases and the fact that there has been little inflation. These opinions are well taken by this neutral. The recommendation here for an equity increase is based less on external factors and more on the significant wage gap between Protective Services Officers and deputies and correction officers. The gap between these units, as the Union states, continues to widen when percentage wage increases are applied.

This recommendation regarding an equity wage increase mirrors that which was recommended by Fact Finder Stein and accepted by the Employer, \$.40 per hour increase effective January 1, 2015 and added to the base rate of each step of the wage schedule prior to the addition of the across the board increase. The recommendation includes a 2% wage increase effective January 1, 2015; 2% wage increase effective January 1, 2016; and 2% wage increase effective January 1, 2017.

The recommended change to Article 13 is as follows.

Article 13, Wages

Section 1. The 2015 wage step scale shall be modified effective January 1, 2015 as follows: The salary for bargaining unit employees shall be adjusted with a \$.40 per hour equity adjustment added to steps 1 through 5 as follows:

The parties will calculate the new hourly wage schedule and insert here.

Following the equity adjustment, an across the board wage increase of 2% shall then be applied to the above equity adjusted wage schedule effective January 1, 2015.

Section 2. Employees shall receive an across the board wage increase of 2% effective January 1, 2016.

Employees shall receive an across the board wage increase of 2% effective January 1, 2017.

2. Article 15, Longevity

The Union proposes an increase in longevity from \$187.50 after five years of employment and an additional \$37.50 each year thereafter to \$300.00 after five years and \$50.00 each year thereafter. The Employer proposes current contract language, no increase in the longevity benefit.

UNION POSITION: The Union states that Protective Services Officers earn the second lowest rate of longevity of the eleven bargaining units in the Sheriff's Department. In addition, the bargaining unit was not provided with longevity until the commencement of the collective bargaining agreement which has just expired. Longevity benefits provided for deputies and command officers include \$375.00 after five years and \$75 each year thereafter. Correction officers earn \$300.00 after five years and \$50.00 each year thereafter. The Union's proposal mirrors the benefit level provided for correction officers.

EMPLOYER POSITION: The Employer states that Protective Services Officers were not provided with longevity pay benefits until the collective bargaining agreement which expired in December. Other bargaining units have negotiated increases in the benefit over a series of Agreements, and this bargaining unit must do the same. The Employer argues that the Union's proposal is more than a significant increase and is not reasonable. The Employer proposes no change in the current benefit.

RECOMMENDATION: There are eleven separate bargaining units in the Sheriff's Department. Each of the eleven collective bargaining agreements provides for longevity benefits. This includes seven different longevity benefit plans. There is no pattern in respect to the longevity plans which are contained in the various Agreements. The Employer states that the PSO bargaining unit only recently, in the last Agreement, enjoyed longevity benefits and must wait, as have other bargaining units, before the benefit is increased. This argument is consistent with the bargaining process, but the Employer has proposed no increase in these negotiations, and, as the Union argues, the bargaining unit receives a longevity benefit which is inferior to most Sheriff Department employees. The Union states that, although the PSO department had previously been assigned to the County administration office, it has existed for at least twenty-five years. It is a compelling fact and argument that employees in the department were not provided with a longevity pay benefit until the previous collective bargaining agreement, while their peers in many other County departments have been provided longevity pay for many years. Although court security officers are not attached to the Sheriff's Department, they are County employees and many duties are similar to those of the bargaining unit. The department is relatively new. The longevity benefit provided court security employees is greater than that provided to Protective Services Officers based on evidence provided at hearing. The recommendation is to increase the longevity benefit enjoyed by bargaining unit employees to the current level provided to court security, \$250.00 after five years and \$75.00 for each year thereafter but with a \$1225.00 limit

Article 15, Longevity

Section 1. Effective January 1, 2015, Employees who have five (5) years of continuous, uninterrupted service with Cuyahoga County shall be paid a longevity allowance of \$250.00. Longevity will be paid in the pay period in which the anniversary date occurs. The Employee shall also be paid the amount of \$75.00 for each year of full continuous service after the initial five (5) years and is to be added to the original amount set forth for the five (5) year period with a limit of \$1225.00. The said amounts, previously covered, shall be paid every year until the Employee retires. In the year of retirement, said allowance shall be paid but include the full years and prorated months in the retirement year.

3. Article 16, Uniform & Equipment

The Union proposes an increase in the annual uniform maintenance allowance from \$575.00 annually to \$1000.00.

The Employer rejects the Union's proposal for an increase in the allowance and proposes minor changes in the list of initial uniform issue (jacket and badge).

UNION POSITION: The Union argues that the uniforms of Protective Services Officers are identical to that of deputies in the department. Deputies are paid an annual uniform maintenance allowance of \$1400.00. Prior to the move of Protective Services to the Sheriff's Department, the County provided vouchers as opposed to an annual allowance. This was a benefit to employees as the allowance is taxable and therefore worth less than the value of vouchers. The value of the current allowance is less than \$400.00 which is less than the actual cost of replacement. The Union states that the fact finder, during previous negotiations, recommended an increase in the allowance, but the negotiations were concluded without the recommended modification. In addition, the Union opposes the changes to the list of initial uniform and equipment issue.

EMPLOYER POSITION: The Employer states that the Union proposal is excessive and nearly a 75% increase in the allowance. The current allowance is sufficient for the maintenance of bargaining unit uniforms, and the parties, during prior negotiations, agreed to the increase to \$575.00. The Employer states that initial uniforms and equipment are provided by the County, and the current allowance is a fair amount for replacement costs. The Employer states that the proposed changes to the list of initial issue are reasonable and not of significant substance.

RECOMMENDATION: The Employer position, that the current uniform and equipment allowance is sufficient, was not factually contested at hearing. While it is true that the allowance enjoyed by deputies is significantly greater than that provided for Protective Services Officers, it is also true that, at times, deputies provide services in a more demanding and often different environment. The parties negotiated an increase in the allowance from \$425.00 to \$575.00 during the last negotiations. There is no compelling reason to recommend another increase at this time. Available financial resources should be focused in those areas which impact employee wages as recommended in other sections of this report. The minor changes to Section 1 of this Article, as proposed by the Employer, appear to be reasonable and are therefore recommended as follows.

Article 16, Uniform & Equipment

Section 1. The initial uniform issue shall be completed by the Employee's 90th day. The initial uniform issuance shall be:

Headgear	1 Winter	Duty Belt	1
Headgear	1 Summer	Handcuffs	1

SS Shirts	4	Handcuff Case	1
LS Shirts	4	Ammunition	18
Rounds		Badge	2
Tie	2	Name Tag	1
Pants	4	Biohazard Kit	1
All Purpose Jacket	1	Less-than-Lethal Device	
Speedloaders	2	Holster	1
Belt keepers	4	Rain Coat	1

4. Article 18, Overtime

The Union proposes to include sick leave as “hours worked” or active pay status for purposes of overtime calculation. Sick leave is currently not counted as time worked for overtime purposes. The Union proposes further to allow bargaining unit employees the ability to bank compensatory time for two years as opposed to one year.

The Employer proposes to modify the election by employees to receive pay or compensatory time from daily to weekly.

UNION POSITION: The Union states that the loss of overtime pay due to employee illness or the illness of a member of the immediate family is essentially unfair and a lack of equity. Protective Services Officers are regularly assigned to scheduled and mandated overtime, and premium pay may be lost due to illness during the week. The department is scheduled for a significant amount of overtime. Sick leave is counted as time worked for a number of Sheriff Department bargaining units, and pre-approved medical appointments count as time worked for other categories of employees. The Union argues that this is a matter of fairness and equity.

The Union states that, its proposal to bank compensatory time for two years as opposed to one, is a benefit which is enjoyed by most other bargaining units in the Sheriff's Department and should be extended to the PSO bargaining unit.

The Union is opposed to the Employer's proposal to change from daily to weekly the employee's right to designate pay or compensatory time for overtime hours worked.

EMPLOYER POSITION: The Employer states that sick leave, as time worked for overtime purposes, was deleted in a previous negotiations for correction officers, and sick leave has not been included as time worked for employees in any subsequent negotiations. The Employer states that this same proposal of the Union was not recommended by Fact Finder Stein in his recent Report and Recommendation for correction officers. The Employer prefers current contract language regarding the one year banking of compensatory time, but argues that the change to weekly from daily notification by the employee regarding pay or comp is the current reality in terms of the processing of this information, and compensatory time cannot be used until the following week in any event.

RECOMMENDATION: Among the numerous bargaining units in the Sheriff's Department, there is no consistency regarding the manner in which paid accumulated sick leave is counted for overtime calculation during the work week. Sick leave is excluded for correction officers and Protective Services Officers, but it is counted as time worked for correction officer corporals and sergeants and for

deputy lieutenants. Paid sick leave which is utilized for pre-approved medical appointments is considered time worked for deputies. A pattern of bargaining does not exist in the Department, and evidence indicates that Protective Services Officers work a significant amount of overtime. No evidence was presented by the Employer to infer that sick leave usage is a problem in the PSO division of the Department. Fact Finder Stein recommended that sick leave not count as hours worked for overtime calculation in his report for the correction officers bargaining unit based on the fact that the Employer illustrated excessive sick leave use and, in some cases, an abuse of the benefit. The Employer did not raise this as an issue in the instant case. The recommendation is to include the use of sick leave for pre-approved medical appointments as time worked for purposes of overtime pay. This recommendation allows the Employer to manage the use of sick leave but also ensures that Protective Services Officers schedule necessary medical appointments during work hours without concern that such time will deprive one of premium pay. This may be especially important for employees who work scheduled overtime on a regular basis and who therefore find it difficult to schedule medical appointments. Medical appointments may include physicians (MD), dentists, optometrists, psychologists and other medical professionals.

The Employer's proposal to modify the employee's election regarding cash payment or compensatory time from a daily basis to a weekly basis is reasonable, and evidence suggests that the payroll department is administering the selection on a weekly basis in any event. This recommendation includes the Employer's proposal.

The Union's proposal to extend from one year to two an employee's ability to bank compensatory time is recommended. Evidence indicates that all employees in the Sheriff Department, with the exception of correction officers, bank compensatory time for up to two years.

Article 18, Overtime

Section 1. An employee required to work more than forty (40) hours in any workweek shall be compensated at one and one-half times his/her regular rate of pay, or, at the Employee's option, receive compensatory time credited at one and one-half hours for each overtime hour worked up to two hundred forty (240) hours. Employees shall be provided with the opportunity, on a weekly basis, to state their choice of compensation. Compensated holidays, vacation, compensatory time, and sick leave utilized for pre-approved medical appointments shall be considered time worked for purposes of overtime calculation. Employees called into work on a scheduled day off shall be compensated at the rate of one and one-half times his/her regular rate of pay.

Section 2. Compensatory time may be accumulated up to two hundred forty (240) hours. Compensatory time shall be used within two (2) years of accrual. After two (2) years, accrued compensatory time shall be paid to the Employee.

5. Article 21, Assumption of Rank

The Employer proposes to delete this provision of the Agreement.

EMPLOYER POSITION: The Employer states that this provision of the Agreement was never utilized, and it was included in the Agreement based on language in another collective bargaining agreement in the Sheriff's Department. It has no practical application to bargaining unit employees.

UNION POSITION: Although the Union officially opposes the proposal to delete this provision, it states that it has not had practical application to employees in the bargaining unit.

RECOMMENDATION: The bargaining unit is limited to one classification. The position of Sergeant is in a separate bargaining unit, and employees have not been assigned to this position pursuant to this article during the term of the previous Agreement. The Employer's proposal to delete Article 21, Assumption of Rank, is recommended.

6. Article 27, Seniority

The Employer proposes to add a provision which requires an employee, whose PERS disability leave has ended, to apply for reinstatement within thirty calendar days. An employee, who fails to apply within thirty days, will lose seniority. The Union opposed the modification to Article 27.

EMPLOYER POSITION: The Employer submits its proposal due to Article 27 being silent on the issue.

UNION POSITION: At hearing, the Union stated that the proposal was no longer an issue.

RECOMMENDATION: The recommendation is to include the Employer's proposal in Article 27, Section 5.

Article 27, Seniority

Section 3. An Employee shall lose his/her seniority when the Employee:

1. resigns or retires; or
2. is discharged for just cause; or
3. is absent from scheduled work for at least three (3) consecutive work days without valid excuse; or
4. fails to return to work within fourteen (14) calendar days after the initial date of receipt of certified mailing of a recall notice after layoff; or
5. fails to apply for reinstatement within thirty (30) calendar days of discontinuation of PERS disability retirement benefits.

7. Article 30, Health and Safety

The Employer proposes a new section to be included in Article 30, Section 5, which would allow for physical fitness assessments to be conducted on bargaining unit employees. The proposal includes training related to specific areas of job performance including use of force and self defense. Following training, employees will be subject to assessments to be developed by a certified expert. Such assessments are to be utilized by the Employer for performance evaluations and the potential for promotions within the Sheriff's Department. The Employer proposes that the Union would have input regarding the assessment process through the Labor Management Committee structure. The Employer ultimately will have the right to implement. The Union is opposed to the proposal to modify Article 30 in this manner.

EMPLOYER POSITION: The Employer states that its proposal is critical in that physical fitness assessments are important in order to measure the readiness of Protective Services Officers in use of force, self defense and other job related settings. The Employer states that it is willing to form a Labor Management Committee to discuss the issues contained in its proposal and to utilize an outside expert in the development of the assessment tools. It is important that Officers train in the “use of force continuum.” The Employer states that it wishes to be cutting edge in these areas as controversy in the Cleveland area and other parts of the country require a higher level of readiness and training. The Employer states that the bargaining agreements, which represent correction officers and corporals, contain new language regarding these issues. The Employer states that, while it is willing to engage in discussion with the Union through the labor management committee, it may implement training and the assessment process at some point during the term of the new Agreement. The Employer states that employees, who are not able to successfully complete assessments, will have a second opportunity to train and complete the assessment. Failure to pass assessments will be noted in employee performance evaluations and promotional opportunities.

UNION POSITION: The Union states that the Employer’s proposal originally contained language which included disciplinary action. While that specific wording is now deleted from the proposal, the failure to pass assessments could result in disciplinary action up to and including discharge. The Union states that Protective Services Officers have been hired by the County without physical standards and

examinations. To now expose employees to discipline or termination based on a failed physical assessment is completely arbitrary. The Union states further that the collective bargaining agreement already contains language regarding the Employer's right to require employees to submit to fitness for duty examinations. The Union argues further that the Employer has never approached the Union regarding the development of training and assessment standards until it was "ambushed" during negotiations. The Union argues that a proposal of this nature requires lengthy collaboration between the parties with the possibility of an incentive based program. The Union states that, while the Employer is now concerned regarding physical fitness standards among bargaining unit employees, Protective Services Officers have specifically been forbidden to use the gym which is located in the Justice Center. The Union states that it is not opposed to a number of concepts contained in the Employer's proposal, but the parties must be equal partners in the development of such standards. The Employer cannot have the final and unilateral ability to implement a plan following the deliberations of a labor management committee. While the Union prefers that the Employer's proposal is not included in the renewal Agreement, it is willing to engage the Employer in a labor management committee in which the parties are equal partners.

RECOMMENDATION: Both parties present credible positions and arguments regarding the issues contained in the Employer's proposal. The Employer desires a workforce of Protective Services Officers who are physically capable of performing their duties and who are adequately trained regarding use of force, self defense and

other areas of concern. The workplace has changed. Public perception is evolving. Nevertheless, the Union makes a compelling argument that Officers have been hired without the necessity of passing certain physical standards. To now expose employees to the potential of poor performance evaluations and the possibility of discipline is an unfair game changer. As the Union speculates, how many poor performance evaluations move to the level of progressive discipline? And, as the Union states, the Employer currently has the ability to enforce certain physical and mental fitness standards based on Article 44, Fitness-For-Duty Examination/Other. Section 1 of this provision states the following.

If the Employer has reasonable suspicion to believe that an Employee is medically or psychologically unable to perform all of the duties of a Protective Services Officer for reasons other than set forth in the preceding article, the Employer may relieve the Employee from duty. The Employer shall place the Employee on paid administrative leave and pay the costs of a medical or psychological examination that is required by the Employer. An Employee found by the qualified medical professional selected by the Employer to have a medical or psychological disorder, condition, syndrome, or is otherwise unable to perform his/her duties shall be relieved of duty.

This provision goes on to define the process by which an employee may return to duty if given medical clearance which is acceptable to the Employer. At hearing, there was evidence that the Employer has never or rarely utilized provisions of Article 44. This is problematic if accurate.

To move from a system in which hiring standards do not include physical fitness and health standards to one which exposes current employees to a physical

assessment is a significant shift in culture. This is especially true if the Employer has not utilized provisions of Article 44. What makes the proposal additionally difficult for the Union to accept and a Fact Finder to recommend is that the substance and composition of the assessments the Employer has proposed are completely unknown. The Union's assertion, that the discussion should have commenced prior to contract renewal negotiations, is valid. For many of these same concerns, Fact Finder Nelson did not include the Employer's proposal on this issue in his Report and Recommendation for deputies as issued this past December 2014, and Fact Finder Stein, who presided over the fact finding hearing for correction officers, recommended that the parties discuss the issues in a labor management committee. He stated, "Requiring employees to meet physical fitness standards represents a cultural sea change that has not been a part of the requirements of the position in the past. A change of this magnitude takes time, preparation, and cooperation in order to be integrated into the culture of any organization, even law enforcement in which it is more commonly found."

The Union's point, that the Employer has the ability at any time to train employees regarding self defense techniques, use of force and other appropriate subjects, is well taken.

Following hearing in the instant matter, Arbitrator Harry Graham issued a conciliation award on this and other issues at impasse for the deputies. His award included the Employer's proposal in this matter, a proposal which mirrors that which is before this Fact Finder. What is important to note is that Arbitrator Graham was required, by statute, to select one or the other proposal on the table at

conciliation. He did not have the ability to submit an award based on an attempt at compromise, and it is assumed that the Union's proposal, as in these proceedings, was a complete rejection of the Employer's proposal. Nevertheless, in the changing environment in which law enforcement finds itself along with public perception, the concepts suggested by the Employer are credible and important to the safety of employees and the public. Arbitrator Graham's choices were no language or that proposed by the Employer, and he noted that other collective bargaining agreements contain language regarding these issues. The goal in this fact finding recommendation is the establishment of a process which, as Fact Finder Stein noted, advances the ability of the parties to make that cultural change utilizing a cooperative model. It also allows for the adoption of the Employer's basic proposal if the parties are unable to mutually develop a policy following the work of the labor management committee.

The recommendation is the formation of a special labor management committee, similar to that recommended by Fact Finder Stein, dedicated solely to issues contained in the Employer's proposal as follows.

Article 30, Health & Safety

Section 5. The parties shall form a special Labor Management Committee to address issues of operational safety and security including training for bargaining unit employees on such topics of use of force, use of force continuum, self defense and related matters. The committee will address job related training and/or testing which is job related and consistent with the operational needs of the Sheriff's Department. It is understood that the parties are equal partners regarding the development of a health and safety agreement, and to this end they agree to utilize an interest based approach to develop training and assessment tools. The parties hereby agree to contact the Federal Mediation and Conciliation Service or the State Employment Relations Board to provide a facilitator and the training necessary to engage in an interest based labor management approach as outlined herein.

Training in the interest based process will be scheduled no later than ninety (90) days following execution of the new Agreement between the parties, and the labor management committee will meet no less than once each month commencing no later than 30 days following interest based training until the project is completed or no later than twelve (12) months from the date of the first labor management committee meeting. The parties may agree to extend the twelve (12) month period. The Employer may implement training and assessment tools in the event the committee is unable to finalize the project following twelve (12) months of committee deliberations although implementation will be based in part upon concepts and deliberations resulting from the work of the labor management committee. It is understood that the goal of the Employer is not disciplinary in nature. The committee may meet more than once monthly based on consensus agreement. Each party is free to submit issues of health and safety to the labor management committee including recommendations regarding the utilization of an expert assessor and trainer. The Employer does not relinquish its right to require training of bargaining unit employees at any time.

While one or the other party may feel that little or no progress will result from a labor management committee approach, the utilization of an interest based approach often results in successful outcomes as the parties address their mutual concerns and then brainstorm solutions in a non-adversarial environment. The Employer has expressed an interest in a cutting edge policy, and the use of an interest based labor management committee approach may produce this outcome through the use of a cutting edge approach. Proper facilitation and training are requirements for success, and FMCS and SERB facilitators are especially qualified facilitators.

8. Article 46, Vacation

Although the Employer states that it proposes current contract language, in reality it proposes an end to a side letter between the parties which permitted up to

ten bargaining unit employees to take vacation on any given work day. The Union opposes the elimination of the Side Letter.

EMPLOYER POSITION: The Employer states that the issue of how many employees may take vacation on any given work day is a permissive subject of bargaining and should not be given consideration by the Fact Finder. Further, the Side Letter was signed by the former Sheriff, who no longer holds the office, and this makes the document invalid. Additionally, the former Sheriff did not have the authority to execute the Side Letter at the time of signing. Only the County Executive was authorized to negotiate and execute an agreement of this nature. The Employer states that the Fact Finder must not consider the content of the Side Letter and the Union's proposal to retain it as part of the collective bargaining agreement.

UNION POSITION: The Union states that the Side Letter contains a legitimate agreement which was negotiated by the parties during the last negotiations. The Union states that it arrived at the agreement to allow up to ten employees to take vacation on a given work day following its willingness to reduce call in pay and court time pay during the negotiations. When the Employer attempted to avoid compliance, the Union grieved, and the Employer granted the grievance. The Union states that it is unwilling to eliminate the Side Letter and proposes its continuation during the term of the new Agreement.

RECOMMENDATION: While this Fact Finder cannot answer for the State Employment Relations Board as to the Employer's position that the Side Letter and its contents are a permissive subject of bargaining, history of bargaining such issues would suggest otherwise, and it is clear that the parties bargained over this issue during the previous negotiations. In any event, the Employer was willing to comply with the content of the Side Letter following the Union's grievance. The Employer may have a practice of requiring all agreements between Union and Employer to be executed by the County Executive, but evidence indicates the Side Letter was legitimately negotiated between the parties and is a valid agreement. The fact that the previous Sheriff signed the Side Letter does not invalidate it because there is now a new office holder. If the Union representative, who negotiated the collective bargaining agreement, left the organization, the collective bargaining agreement would not be considered invalid. The Fact Finder treats the Side Letter as a legitimately negotiated agreement between the parties. It does not have an expiration date, but it is open for re-negotiations as are provisions of the collective bargaining agreement. During discussions between the parties prior to the commencement of the hearing at fact finding, it appeared there was some flexibility on this issue. The recommendation is to allow for the continuation of the Side Letter, or, if the parties agree, to move its provisions directly into Article 46, Vacation, and to allow for a maximum of eight employees, as opposed to ten, to schedule vacation on a given date.

Paragraph 5 or New Section of Article 46. Effective upon final approval of the successor agreement, the Employer agrees that the number of Employees scheduled or approved vacation leave will be a maximum of eight (8) Employees on any given date.

9. Article (new) 56, Promotions

The Union proposes a new article which details the promotional procedure which allows Protective Services Officers to promote to the position of Sergeant.

UNION POSITION: The Union states that its proposal mirrors the civil service process which is generally and currently utilized by the County. It is important that bargaining unit employees are aware, through inclusion of this article in the Agreement, of their rights to promote to the level of Sergeant. Additionally, the Union suggests that employees, who return to the bargaining unit following promotion, not lose previously accumulated seniority in the bargaining unit.

EMPLOYER POSITION: Although the Employer originally opposed the inclusion of this provision in the Agreement, it indicated at hearing that Sections 1 through 3 were acceptable.

RECOMMENDATION: It is appropriate that, for informational purposes, language regarding promotions is included as part of the collective bargaining agreement. It is to be noted that there are no promotional opportunities within the bargaining unit as all employees are Protective Services Officers, and the proposed language mirrors the current civil service process. The Union's proposal for language

regarding seniority status for employees who return to the bargaining unit is also appropriate. It is recommended that Article 56 read as follows.

Article 56, Promotions

Section 1. The Employer agrees that a request shall be made to the appropriate governmental agency, or some other private, independent testing entity, to conduct promotional examinations within the boundaries of Cuyahoga County. The Employer will maintain from such entity a current eligibility list for a period of two (2) years. No Employee with less than three (3) years of continuous, uninterrupted service with the Employer in the bargaining unit shall be eligible to sit for a promotional examination.

Section 2. The Employer shall appoint from the "rule of three" on the eligibility list, as established as a result of the examination.

Section 3. The Employer shall provide the Union with notification of all requirements, examination requests and schedules for promotional examinations at the time that the request or schedule is made. The Employer shall provide a list of applicable references and make available study material used in connection with the examination, where applicable or as determined by the testing entity.

Section 4. An employee promoted to a position outside of the bargaining unit who is later deprived of that position and is returned to regular work within the bargaining unit shall have his name immediately restored to the Department seniority list with all seniority held at the time of the promotion, but not accumulated. An Employee restored back into the bargaining unit cannot replace another Employee, but will be assigned to duties entitled by his/her classification. If seniority will not carry, the Employee shall be placed in accordance with the "Layoff and Recall" article of the current Agreement.

CONCLUSION

The Fact Finder has reviewed the pre-hearing statements of the parties, all facts presented at hearing and the extensive number of exhibits submitted by the parties at the evidentiary hearing. In addition, by agreement of the parties, the record of hearing was reopened, at the recommendation of the Fact Finder, to give

consideration to the award at conciliation as issued by Arbitrator Harry Graham for the deputies bargaining unit which is also represented by the Ohio Patrolmen's Benevolent Association. The fact finder reviewed the award, and the parties submitted briefs in order to present their arguments regarding relevant issues contained in Arbitrator Graham's decision. The Fact Finder has given consideration to the positions and arguments presented by the parties regarding each issue at impasse and to the criteria enumerated in Ohio Revised Code Section 4117.14 (G) (7) (a-f).

In addition to the specific recommendations contained in this Report and Recommendation, all tentative agreements, which were reached between the parties prior to fact finding are hereby incorporated. Any issues or sub-issues not addressed during negotiations are also intended to remain current contract language for purposes of this Report and Recommendation.

Respectfully submitted and issued at Cleveland, Ohio this 6th Day of March 2015.



Thomas J. Nowel
Fact Finder

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th Day of March 2015, a copy of the foregoing Report and Recommendation of the Fact Finder was served by electronic mail upon Todd M. Ellsworth, Esq., Cuyahoga County Department of Law; Daniel J. Leffler, Esq., Ohio Patrolmen's Benevolent Association; and Donald M. Collins, Esq., 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