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FACT FINDING REPORT

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

May 21, 2015

In the Matter of:)

The American Federation of State, County,
and Municipal Employees, Local 2429)

vs.)

The City of Sidney)

SERB Case No.
14-MED-09-1281

APPEARANCES

For the Union:

Marcia Knox, Bargaining Representative AFSCME
Sylvia Smith, AFSCME Local 2429 Secretary
James Stewart, AFSCME Local 2429 President

For the City of Sidney:

Dan Rosenthal, Attorney for the City of Sidney
Ginger Adams, City of Sidney Finance Officer
Vicki Allen, City of Sidney Human Resources Manager
Larry Broughton, City of Sidney Utilities Director
Gary Clough, City of Sidney Assistant City Manager
Kelly Holthaus, City of Sidney Human Resources Coordinator

Fact Finder: Dennis M. Byrne

Background

The fact-finding involves the City of Sidney (Employer/City) and the forty-six members of its full-time service, maintenance, and clerical departments represented by the American Federation of State, County, and Municipal Employees (AFSCME) Local 2429 (Union). Prior to the Fact Finding Hearing, the parties engaged in nine (9) negotiating sessions to try to find a mutually agreeable settlement for a successor agreement for their contract that expired on December 31, 2014. In spite of their efforts, the parties were unable to reach a final agreement; and twenty (20) issues remain on the table. The open issues are: 1) Article 3: Management Rights, 2) Article 5: Compensatory Time for Negotiations, 3) Article 9: Pregnancy Leave, 4) Article 12 (10): Fair Share Fee, 5) Article 13: Wages, 6) Article 14 (2): Language Changes, 7) Article 14 (4): Increase in Compensatory Time Accumulation, 8) Article 14 (5): Language Change, 9) Article 14 (6): New, 10) Article 15: Longevity Pay, 11) Article 17 (2): Vacation New Language, 12) Article 17 (4) Vacation-Sick Leave Conversion, 13) Article 20 (2): Change in Definitions of "Immediate Family", 14) Article 21 (6): Insurance Committee, 15) Article 21 (7): Insurance Buyout, 16) Article 23 (4): Cost of Training, 17) Article 23 (New): Other Benefits: Bonuses Payments for Certifications, 18) Article 25 (A): Seniority Language Change, 19) Article 27: Discipline, 20) Article (New): Hours of Work, and 21) Article 28: Duration.

Since the parties were unable to reach an agreement on the issues, they scheduled a Fact Finding Hearing. Prior to the hearing, the Fact Finder attempted to mediate a settlement. That effort was unsuccessful, but the parties were able to explain their positions on the issues and discuss their areas of disagreement. The Hearing commenced

at 1:00 P.M. on Wednesday April 22, 2015, at the Sidney City building. The hearing ended at approximately 3:30 P. M.

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

- (1) Past collectively bargained agreements, if any.
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.
- (3) The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards of public service.
- (4) The lawful authority of the public employer.
- (5) Any stipulations of the parties.
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or private employment.

Introduction:

This is a somewhat unusual negotiation in that there is a laundry list of demands put forth by both parties. The parties have negotiated for a number of years, and it is a mature contract. However, the Union and to a lesser extent the City are proposing a number of significant changes to the document. This seems to be the result of a gradual erosion of the Union's position on a significant number of issues when compared to other City bargaining units. The Union is attempting to regain parity with those other bargaining units on a number of issues, and the City does not believe that there is any reason to meet the Union's demands. The City is also making demands on the Union with regard to issues that have also been contained in the contract for years. In situations

like this, Neutrals often recommend the status quo is unless there is are good reasons to change contract provisions that have worked for the parties for years.

The most contentious issue is Fair Share Fee. The City is demanding that Fair Share Fee language be deleted from the contract. The City claims that it has received complaints about the Fee and that some (one) employee is very unhappy with the philosophy behind Fair Share fee in general, and the fact that the fee must be paid in particular. Unsurprisingly, the Union is adamantly against the City's demand.

The Fact Finder does not believe that there is a need for a long discussion about Fair Share Fees. The law is clear that the fee is constitutionality permissible.¹ The issue between the parties seems to revolve around the one individual who does not want to pay the fee. However, at the current time, Ohio is a union shop State, and the fee is legal. Of course, the Union must meet the Hudson requirements on only using the fee for collective bargaining related expenses.

At the current time, the bargaining unit consists of forty-six members, and forty-four or forty-five are members of the union. Testimony during the hearing indicated that up to five individuals had paid dues but not joined the Union at sometime in the past. However, most of the nonmembers joined the Union so that they would have the right to vote on the prospective contract. That is, a nonmember who pays dues under the Hudson rebate criteria does not have all of the rights that dues-paying members enjoy. Therefore, at the current time the overwhelming majority of the bargaining unit members are full union members. The Union argued that the actions of the membership speak for

¹ See: *Abood et al. v. Detroit School Board of Education et al.* 431 US 915, 997 S. Ct. 2989. *Chicago Teachers v. Hudson* 475 U.S. 292 301-302, and *Knox et al. v. SEIU International Union, Local1000* 567 U.S. (2012)

themselves; and with 98% of the bargaining unit membership paying dues as full-time union members there is no reason for the Fair Share Fee to be an issue.

The City claims that it has had complaints about the fee and the treatment of nonmember(s). It should be pointed out the same language found in the Local 2429 contract is found in all other City Contracts. The City agrees that it has not raised this issue with other City bargaining units, but claims that the situation with Local 2429 is unique. It is clear that at least one individual has problems with the entire concept of union membership and paying a fair share fee. Moreover, the disaffected individual “lobbied” other members of the Union to attempt to bring them around to her way of thinking. However, there is no solid evidence that there is any real discontent with the Union. Therefore, the evidence shows that the vast majority of potential union members have joined the Union. In order for a union to be certified as the sole bargaining agent, it only needs fifty percent plus one (in this case twenty-four) of the eligible votes to win an election. The percentage of potential members who have actually joined the Union is close to 100%. This indicates that there is no systemic problem with the current situation.²

The next major stumbling block to an agreement is the wage issue. The Union members have not received a general base rate increase for over three years. In 2013 the unit was slated to receive a 1% bonus payment, but City income tax receipts did not reach a threshold amount; and the bonus was cancelled. The Union testified that other City bargaining units received base rate increases during the same period. Consequently, the Union argues that its membership should receive a significant wage increase for two

² There is some possibility that either the U.S. Supreme Court or the Ohio Supreme Court may opine on the issue of Fair Share Fees sometime in the future. If the law on the issue changes, then all union contracts will have to be modified.

reasons. First, the Union believes that there is an equity problem. That is, other employees received wage increases while the members of Local 2429 had their wages frozen.

In addition, the Union also argued that the only unit to complete its negotiations with the City on a new contract, the Firefighters, negotiated wage increases above what the City is offering Local 2429's members. The result is that the Union believes that they should receive a makeup wage increase for the three years that their wages were frozen and a further increase for the coming year equal to the raises negotiated by the firefighters.

The City agrees with the Union's facts, but argues that 1) fiscal prudence and 2) a survey that it conducted showed that the Union members were not underpaid when compared to other comparable jurisdictions proved that the City's wage offer was reasonable. Therefore, in some ways, the Union is basing its demands on the concept of internal parity, and the City is basing its offer on external parity. This is a fundamental difference of opinion on the main economic issue in these negotiations.

There is one other major area of disagreement. During the life of the expiring contract, the Union filed a grievance on the way that the City schedules the Union members. In the event of a snow emergency, etc., the City will change the employees' schedules. The schedule changes cause some hardship on the employees. The exact reason that the grievance was filed was because the City changed the union members' schedules forcing them report to work early (before their regular start time), but then sent them home before the end of their normal shifts. This action minimized overtime payments to the affected employees. The Union lost the arbitration (City Ex. 5). The

Union is making a number of demands with respect to schedules, hours of work, etc., in an attempt to overturn the arbitration decision. The City rejected all of these demands.

Because Local 2429 is not a conciliation unit, the only recourse to an impasse is either acceptance of the City's last, best offer or a strike. In general, strikes are not a very acceptable way of settling disputes in the public sector. Therefore, while a conciliation unit has the right to have any dispute be heard and settled by a neutral under the dispute resolution procedures of ORC 4117, non-conciliation units must decide on a course of action when negotiations reach an impasse. This means that non-conciliation units are often faced with Hobson's choice: either it must accept a proposal that it dislikes or strike. Consequently, there are both philosophical and practical considerations that separate the parties. The Union truly believes that its members are treated poorly compared to other City bargaining units; but if the City maintains its positions, then the Union membership will be faced with a difficult decision.

Issue: Article 3: Management Rights

Union Position: The Union demands that the last sentence of Section 4 be deleted from the contract.

City Position: The City rejects the Union's demand.

Discussion: The last sentence of Section 4 reads:

“This does not constitute bargaining about any of the rights protected by Section 4117.09 and is not a waiver of the City's right to refuse to bargain about any and all of the rights contained in that section.”

The Union states that its demand is not meant to change any rights of Management protected by 4117.08 in its entirety. However, the Union believes that the language is

confusing and may be interpreted to suggest the employer may refuse to bargain on all sections of 4117.08. The City stated the exact same language is found in all other contracts within Sidney and that it is against the Union's demand because the Union did not prove the language change is needed.

The Fact Finder recognizes that the Union may have a valid position on this issue. However, there was no evidence presented at the hearing that showed that the language under consideration had caused or was causing any problems for the parties. Moreover that meaning of the language in ORC 4117.08 is clear, and it covers any issue related to "wages, hours, terms and other conditions of employment". Therefore, the Fact Finder cannot recommend the Union's position on this issue.

Finding of Fact: The Union did not prove that there was any need for its suggested language.

Suggested Language: Current Contract Language

Issue: Article 5: Compensatory Time for Negotiations

Union Position: The Union demands an increase in the compensatory time allowed for members of the negotiating teams to thirty (30) hours from the current twenty (20) hours.

City Position: The City rejects the Union's demand.

Discussion: The Union's demand is an issue of first impression. The Union argues that the time it is demanding is the same amount of time that every other bargaining unit in the City has in their contracts. The City stated that the Union had never used the twenty (20) hours currently available in the contract; and therefore, it did not prove a need for an increased benefit.

The Fact Finder notes that the parties had nine (9) negotiating sessions and a fact finding; and even then, the Union did not use its allotted compensatory time for negotiations. Therefore, the Union did not prove a need for an increased benefit. The Fact Finder agrees with the City's position on this issue. The mere fact that a benefit is found in every other contract does not automatically prove that a benefit should be in the Local 2429 contract. Of course the reverse is also true. That is, the fact that a clause is not in every other contract does not mean that that clause should not be Local 2429's contract. However, there must be some proof that a change in the existing contract language is necessitated by either an equity consideration or a demonstrated need.

Finding of Fact: the Union did not prove a need for a change in the current contract language.

Suggested Language: Current Contract Language

Issue: Article 9 (2) Pregnancy Leave

Union Position: The Union demands that the last sentence of Section 2 be deleted from the contract.

City Position: The City rejects the Union's demand based on comparability with its contracts with other City bargaining units.

Discussion: The Union withdrew this demand, and the parties agreed on current contract language.

Finding of Fact: There is no dispute between the parties.

Suggested Language: Current contract language.

Issue: Article 12: Union Dues Check-Off

City Position: The City demands that the check-off language be deleted from the contract.

Union Position: The Union rejects the City's demand.

Discussion: In its proposal, the City stated that a significant number of employees in the bargaining unit do not wish to pay a fair share as a condition of employment. However, the testimony at the hearing was that only one person was vocal about the issue. Her statements on the issue to other bargaining unit members elicited an angry response from the Union President that was publicly posted on a bulletin board. This action caused some emotional distress to the individual involved. When the Union was approached by the City and asked to remove the offending letter, it was removed. The City testified that the person involved in the incident complained to the City Administration about the incident.

The Union testified that up to five (5) members of the bargaining unit paid a fair share fee in the past. However, all (or four) of these individuals joined the Union in order to have a voice in the negotiation process and a vote on the prospective contract. Therefore, only one or perhaps two of the forty-six members of the bargaining unit do not belong to the Union. This is not a significant number of employees.

In addition, fair share fees are legal in Ohio and the Nation; and as long as the Hudson requirements are met for determining the amount of the rebate for political activity, there is no reason that a fair share fee should cause a problem. This question has been litigated for forty years, and every conceivable argument against the fee has been advanced. The Union is required to provide services to all bargaining unit members and

the fair share is a fee for service. There will be different political views on fair share as long as there is a disagreement on the place of unions in the economy.³ However, the City did not prove its position on this issue. The testimony did not prove that a “that there are a significant number of employees in the bargaining unit who do not wish to pay the fee.”

Finding of Fact: The City did not prove its contention that the fair share fee language should be removed from the contract.

Suggested Language: Current contract language.

Issue: Article 13: Wages

Union Position: The Union demands 2.0% in the first year of the prospective contract and 1.5% in the second and third years of the agreement. This amounts to 5.0% over the life of the agreement.

City Position: The City offers 1.0% in each year of the agreement.

Discussion: This is the most contentious issue in the negotiation. The City’s representatives were adamant that the City would only pay 1.0% per year of the prospective contract. The City gave three reasons for its position. First, the City argues that the employees are already well paid when compared to employees working in other jurisdictions performing the same or comparable work. Second, the City contends that it is still recovering from the effects of the recession and that it had to be careful how much new financial liability it took on. Finally, the City argues that SERB data show that 1.0% is reasonable raise throughout Ohio.

³ Again it must be acknowledged that both the U.S. Supreme and Ohio Supreme Court may rule against Fair Share Fees and then all contracts must follow the current law. However, until that happens, fair share is a reasonable fee for service.

The Union originally demanded 3.0% per year, but moderated that demand during the mediation effort. The Union's position is based on internal comparability and equity considerations. The Union proved that while it took a wage freeze over the last three years, other city employees and bargaining units received base rate increases. The Union is demanding a 1.0% base rate increase as a catch-up for the previous years. The Union believes that this is less than it deserves, but will make up for 1.0% that it was promised but did not receive in 2013. The 1.5% increases in the second and third contract years mirror the raises given to the firefighters for the same period.

The last contract that Local 2429 signed with the City contained an unusual provision found in no other City contract. That proviso was that that the Union membership would receive 1.0% bonus payment if city income tax receipts were greater than \$13,516,419.00.⁴ If the tax receipts were less than that amount, then the Union would not get the 1.0%. The City justified this language by stating that it had to be careful in budgeting, given the precarious condition of its finances. There was no reason given why the precarious finances only affected the AFSCME unit, except for a statement that Local 2429 had less bargaining power than other City bargaining units. Presumably, this relates to the fact that it is a non-conciliation unit. There was also testimony that showed that City's non-unionized employees also got raises equaling 1.0% in 2014.

The Fact Finder is well aware of the parties' bargaining positions. However, the data are overwhelmingly clear that the Local 2429 members were treated differently than other City employees with regard to wages in 2014. That is, Local 2429 members had their wages frozen while other employees received 1% to 2% in their base rate. The data is equally clear that the Local 2429 membership received significantly less than any other

⁴ The actual tax receipts were \$13,460,000.00. The difference was approximately .4%.

City bargaining unit over the life of the expiring contract. An examination of the other contracts submitted by both parties shows that the Sergeants received 2.0% in 2013 and 2.0% in 2014. The patrolmen received 1.0% in 2013 and 1.0% in 2014. The communications staff received 1.0% in 2013 and 1.0% in 2014, and the firefighters received 1.5% in 2014, 1.5% in 2015, and 1.5% in 2016

The question is why did the members of Local 2429 receive less? The Union stated that when it negotiated its contract, it was trying to help the City as it faced financial problems. Therefore, it was willing to accept the tax language and freeze wages. It can be surmised that the City asked its other bargaining units for similar language and that these units either 1) refused, or 2) between the time that the AFSCME contract was signed and the time that other bargaining units signed their agreements, the City's financial condition had brightened to the extent that tax receipts were running ahead of projections.

Regardless, Local 2429's membership was subject to a condition that no other City bargaining unit faced. Therefore, the Fact Finder finds that the 1.0% catch-up raise demanded by the Union is reasonable given all of the data in the record. In addition, the Union also should receive the 1.0% offered by the City in year 1 of the prospective contract.

Finding of Fact: The Union proved that its membership was the only group of City employees that received no base rate increase over the past few years. This finding applies to both non-bargaining unit employees and bargaining unit employees.

The second question involves the raises for the prospective contract. The City argued that a survey that it conducted proved that the AFSCME members were well paid

even with 1.0% raises over the next three years compared to other similarly situated employees. That data was presented in a spreadsheet, (Attachment 3) submitted with the City's prehearing statement. The Fact Finder has examined the attachment. It is a compilation of various jurisdictions that seem to have little in common except geography. The Fact Finder did some research of the list of jurisdictions submitted by the City and finds that many of the jurisdictions cannot be considered comparable to Sidney.⁵ Based on his analysis, the Fact Finder believes that Celina, Defiance, Fairborn, Piqua, and Xenia are the most comparable jurisdictions to Sidney.

However, without going into great detail, the data do not support a finding that the Sidney labor force is underpaid. The data also do not show that the members of Local 2429 are at the top end of the wage scale. The data do support the City's contention that the employees are not underpaid when compared to other employees doing comparable work in other jurisdictions is true. It must also be noted that the Union did not present comparables data. The Union's position is based on internal comparability,

The City also presented evidence from the SERB Wage Settlement Breakdown. The data do not show the wage settlements for 2014 because that data is not available. However, the data show the negotiated wage increases for 2013 range from 1.12% to 1.66%. For cities the average increase is 1.66%, and for the Unit Type "other" category the average settlement was 1.45%. The data stratified by contract year show settlements of 1.46% for the first year, 1.48% in the second year, and 1.58% in the third year. The data also show that 2011 and 2012 were the worst years for wage increases and that negotiated wages began to rise quickly in 2013. Based on overall economic conditions,

⁵ The Fact Finder analyzed the jurisdictions found in Attachment 3 with Citydata.com. He used population, income, per capita income, and housing values as the selection criteria.

the wage settlements for 2014 and 2015 will probably be higher than the 1.58% settlements negotiated in 2013.

The question then comes down to a question of the relative weight given to internal v. external comparability in light of all of the other data presented by the parties. One way to approach the problem is based on the data. The 2013 settlements were in the range of 1.5% for the single year and the three-year average. As the economy improves, the settlements should be expected to rise, or at the very worst, not fall. Therefore, 1.5% is either a modest raise or a minimal raise assuming that the economy continues to strengthen. Based on all of the above information, the Fact Finder believes that 1.5% per year is a reasonable base rate increase.

Finding of Fact: A 1.5% base rate increase in the second and third years of the contract is reasonable given any realistic assumptions about future economic performance.

Suggested Language: The wage scale found on page 20 of the parties' contract shall be adjusted up by 2.0% for all steps and classifications on December 21, 2014. The scale shall be adjusted up by 1.5% on December 20, 2015 and on December 18, 2016. In addition, the tax receipt requirements shall be deleted from the contract.

Issue: Article 13: Account Clerk Reclassification

Union Position: The Union demands that all account clerks be reclassified to Account Clerk II.

City Position: The City rejects the Union's demand.

Discussion: The Union representative testified that the Account Clerk I job classification has been required to take on new responsibilities, learn new software, change their office

procedures, etc. The reason is that the City decided to merge the Tax and Utility Departments in order to make it easier for the citizens to pay their bills. Therefore, the Tax Clerks and the Utility Clerks had to be cross-trained to perform each other's job. Consequently, the Clerks had to perform more duties than they previously performed. The Union argues that its suggested reclassification would recompense the clerks for their increased workload.

The City countered this argument by stating that most jurisdictions cross-trained their Clerk classification employees to save money and to increase the efficiency of their operations. There was no information supporting this statement in the record. In addition, the City contends that its survey data (Attachment 3) proves that the clerks are well paid compared to other individuals performing similar work.

The Fact Finder is aware that the clerks have taken on more responsibility. However, the City's arguments about the need for it to exercise caution given the state of the City finances must also be considered. Moreover, the comparables data submitted by the City do not show that the clerks are underpaid compared to individuals doing similar work in other jurisdictions. Consequently, the Fact Finder is not recommending a reclassification at this time.

Finding of Fact: The Union did not prove that the Tax and Utility Clerks should be reclassified at this time.

Suggested Language: Current contract language.

Issue: Article 14: Overtime Compensation

Union Position: The Union demands that Section 14 (2) of the contract should be changed by striking out language that allows the City to change daily work schedules without paying overtime.

Management Position: The City rejects the Union's proposed change and counters with current language.

Note: There are four (4) separate demands on this Article. Each will be discussed separately.

Discussion: This is the first of a number of changes to the contract that the Union is demanding as a result of the arbitration decision that found that the City did not have to pay overtime to employees whose schedules were changed to have them report for work earlier than they usually reported. The Employer also sent them home before the scheduled end of their shift. The result was that the affected employees only work eight (8) hours a day even though he/she must report to work before the beginning of their regularly scheduled shift.

The Arbitrator found that the City had a long-standing practice of changing schedules in order to maximize the efficiency of the City's operations in the event of some type of "emergency." The situation discussed by the Arbitrator was caused by the need for snow removal. The Arbitrator found that the parties' contract, especially the Management's Rights Clause, allows the City to change daily schedules. Furthermore, the Arbitrator found that daily schedules are not changed often, and only for some type of unusual occurrence. Based on these factors, the Arbitrator found that the City had the right to change daily schedules.

The City argued that the Union's suggested language was an attempt to undermine the contractual basis for the Arbitrator's decision. The Union agreed that it was demanding changes in the contract because of the Arbitrator's award, but contended that negotiations were the forum available to both parties to change contract language that it wanted modified. The Fact Finder agrees with that position. However, in this instance given the Arbitrator's analysis of the situation, the Fact Finder does not believe that the Union proved that the contract should be modified. The Fact Finder understands the Union's desire to change the language; but given the long-standing application of the language in question, the Fact Finder finds that the Union proved that it does not like the contested language, but not that it should be changed over the objections of the Employer.

Finding of Fact: The Union did not prove that the Overtime Clause should be changed at this time.

Suggested Language: Current contract language

Issue: Article 14 (4): Compensatory Time

Union Position: The Union demands that the employees be allowed to earn 120 hours of compensatory time. Currently the employees are allowed to earn 80 hours of compensatory time.

City Position: The City amended its position to have compensatory time deleted from the contract. If that position is rejected, the City rejects the Union's demand and counters with current language.

Discussion: The Fair Labor Standards Act allows public employers to offer compensatory time to their employees with 1) prior consultation and approval of the affected employees or 2) under a union contract. In this case the parties have agreed to allow the employees to earn a limited number of compensatory time hours. The Union is demanding an increase in the number of compensatory time hours earned. The Union's rationale for this demand is that employees often need time off to attend to personal business. However, as in many issues raised in this negotiation, there was no evidence put into the record to prove that the current eighty (80) hours of comp time earned per year was causing any problems. This is especially true given the "use it or lose it" provision of Article 14 (4). Therefore, the Fact Finder cannot recommend this issue at this time. This is especially true given the Employer's objection to the demand.

The City did not prove that there was any reason that the ability of the Union membership to earn comp time should be deleted from the contract. That is, there was no testimony on the issue, and there was no evidence that the comp time earned by the vast majority of the union membership was causing any problems for the City.

Finding of Fact: The Union did not prove that there was a need for an increased compensatory time bank.

Suggested Language: Current contract language

Issue: Article 14 (5): Compensatory Time in the Water Treatment Facility

Union Position: The Union demands that the employees be given the choice between compensatory time and overtime pay for overtime hours worked.

City Position: The Employer counters with current contract language.

Discussion: Currently the City offers members of Local 2429 a choice between taking compensatory time or overtime pay for overtime hours worked with the exception of the water treatment plant workers. The employees in the water treatment facility must take overtime pay. The Employer's representative argued that allowing these employees to take comp time would lead to situations where there would be a pyramiding of overtime because of the nature of the work, and the limited number of water treatment personnel.

The FLSA allows a union and an employer to negotiate the right to use comp time. Section 7 (o) states that an Employer can always decide to pay overtime hours in cash. The published Labor Department rules on comp time, especially Rule 553.32, state that under certain conditions that seem to have been complied with in this instance, the Employer can pay some members of a bargaining unit in comp time and other members in cash. Consequently, the City is complying with the FLSA. Given that fact, the Fact Finder cannot recommend the Union's position on this issue. While it seems unfair that the water treatment plant employees are not given the same choice of comp time v. pay that the other members of Local 2429 enjoy, it is legal. In this instance, the Employer's rationale for its actions leads to a situation whereby the affected Union member is paid in cash. That is, he/she is recompensed for working overtime.

Finding of Fact: The City is following the FLSA when it pays overtime hours in cash; and therefore, the affected employees are fairly paid for their hours of work.

Suggested Language: Current contract language

Issue: Article 14 (6): New

Union Position: The Union is demanding a new section in article 14 that states that no employee's schedule can be changed to avoid paying overtime.

City Position: The City rejects this demand.

Discussion: The language

“No employee's regular work schedule will be changed to avoid the payment of overtime.”

was proposed as a way to negate the arbitration decision about mandatory schedule changes. That decision found that the current scheduling system in Sidney that allows the City to change schedules with little notice conforms to long standing practice, is not used very often, and is meant to increase the efficiency of the City's operations. In spite of the Arbitrator's findings and analysis, the Fact Finder would be willing to change the current system for some proven reason. However, the Union gave no rationale for the demand other than that it does not like the decision that the Arbitrator handed down. Without some evidence that the requested change is needed, the Fact Finder does not find that there is any reason to change the current language (practice).

Finding of Fact: The Union did not prove that there was a need for the suggested language.

Suggested Language: None

Issue: Article 15: Longevity Pay

Union Position: The Union demands that Section 15 (4) that bars employees hired after January 1, 1998 from receiving longevity pay be deleted from the contract.

City Position: The City rejects the Union's demand.

Discussion: This is a contract provision where the AFSCME contract is deficient when compared to the contracts of all other City bargaining units. There is no similar language found in any other contract between Sidney and its organized employees. Again, there was no real discussion of the reason(s) that the prohibition on longevity is in the contract. Therefore, any tradeoffs, etc., that were made by the parties when the clause was negotiated are not found in the record. However, the Union's position that the Local 2429 contract is different than all other City contracts with regard to longevity is factual. Moreover, the City's justification for many of its positions is based on internal parity: that is, "this language (provision) is found in all other City contracts." This is a case where the City is against internal parity as a reason for having the same language in all City contracts.

The Fact Finder believes that the Union's position on this issue has merit, but without some information on the history of the language, the cost of the demand, etc., the Fact Finder does not believe that he has sufficient information to recommend what could be a very costly item for inclusion into the contract. However, it should be stressed that this is a situation where the Union has made a strong equity argument that shows that its members are not treated in the same way that other City employees are treated with respect to longevity pay.

Finding of Fact: There was not enough information presented during the hearing for the Neutral to make an informed judgment about the cost of and the reason for the current longevity language. Consequently, the Fact Finder does not believe that he should recommend removing the current language from the contract.

Suggested Language: Current contract language.

Issue: Article 17: Vacations

Note: During the hearing, the parties agreed to some language changes in Article 17 (2).

Union Position: The Union demand is for employees with over twenty years of continuous service to have the right to convert eighty (80) hours of sick leave into vacation.

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

Discussion: Currently contract language allows employees with a sick leave bank over 1440 hours to convert 40 hours of sick leave into vacation on an hour for hour basis. The Union wishes to raise the conversion amount to 80 hours for employees with 20 or more years of service on the same hour for hour basis. The Union argued that senior employees with large sick leave banks should have the right to convert an extra 40 hours of sick leave into vacation leave. The City rejected the demand.

This is another demand where the Fact Finder does not have enough information to intelligently make a recommendation. That is, there was no discussion of the number of employees that would be affected, etc. The threshold of a sick leave bank with at least 1440 hours equates to 36 weeks of accumulated sick leave. However, if an employee has a serious illness that requires hospitalization and recuperation, then 36 weeks of sick leave can be used in the recovery from one illness. On the other hand, Workers' Comp allows an injured worker to be paid for time off, and FMLA allows an employee to take unpaid leave. This means that any scenario can be constructed based on various assumptions. Therefore, without more factual information on the cost and potential

impact of the demand, the Fact Finder does not believe that he has enough information to make an intelligent recommendation on this issue.

Finding of Fact: The Union did not prove that this was a problem with the current contract language.

Suggested Language: Current contract language.

Issue: Article 20: Sick Leave

City Position: The City demands that the definition of immediate family be changed for an employee's use of sick leave.

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

Discussion: The Employer demands that the definition of immediate family be restricted to spouse, parents, child, Stepchild or adopted child. The rationale is that the same language covers all non-bargaining unit employees. The Fact Finder believes that there are three reasons for rejecting the City's demand. First, no other bargaining unit has the same definition of immediate family in their contract. The current language found in the Local 2429 contract is identical to the language found in all other contracts between the City and its other bargaining units. Second, changes in the structure of the family have led to a situation where older parents in-law, grandparents, etc. often are present in a household. Finally, there was no reason given for the suggested change other than internal comparability. Consequently, given the Union's objection to the language, the Fact Finder does not believe that the City proved that there is a need for its suggested language.

Finding of Fact: The City did not prove that there was any need for its suggested language.

Suggested Language: Current contract language.

Issue: Article 21: Medical Insurance

Note: There were a number of changes in Article 21 (6) that were agreed to by the parties.

Union Position: The Union demands that language be added to the agreement that requires that any change in the level of benefits to be mutually agreed upon between the City and the Union. In addition, the Union wants language inserted into the agreement that the Union Representative to the Health Care Committee will be paid if committee meetings take place outside of scheduled work hours.

City Position: The City rejects the Union's demands.

Discussion: The Medical Insurance language found in all of the contracts between the City and its organized employees is essentially the same. It can be assumed that all non-bargaining unit employees also have similar (the same) coverage. This makes sense because it is hard to justify the reasons for and cost of administration for different insurance plans for different employees of the same employer. Therefore, the City's position on the Union's demand that any change in the health plan be "mutually agreed between the City and the Union" essentially gives the AFSCME unit a veto on program changes. The Fact finder agrees and finds that it is not reasonable that a single bargaining unit should have a veto over the entire City's health insurance plan.

The second part of the Union's demand is that a member of the Health Insurance Committee will be paid if he/she must attend meetings during off duty hours. It must be noted at this point that there was no testimony that the current language had caused any problems. However, the Union's demand is 1) reasonable and 2) may have implications for other unionized members of the Health Care Committee. AFSCME is not the bargaining unit for all city employees, and this demand may have implications for individuals not covered by the AFSCME/Sidney contract. Therefore, the Fact Finder believes that this is an issue for a Labor Management Committee. That is the forum for the parties to address issues of mutual concern that should be amicably settled. If the parties are unable to reach an agreement on this issue, the next round of negotiations is the place to settle the issue.

Finding of Fact: The Union did not prove that its suggested language changes in 21 (6) were necessary. In addition, questions about the compensation of Health Committee members are questions that should be answered in Labor/Management Committee meetings.

Suggested Language: Current contract language with the changes that the parties have agreed upon.

The Union also raised another issue with regard to the Medical Insurance Clause.

Union Position: The Union demands that the Union member to the Health Insurance Committee be selected by the Union.

City Position: The City agreed with the Union on this point.

Discussion: The Union argued that as the sole representative of the employees that it should pick the Union's representative to the Health Insurance Committee. The City's Representatives were surprised by this demand because they philosophically agreed with the Union's statement. The City asked how the member was selected at the current time and the Union replied that the member was selected with little (no) input from the Union. The City suggested that this was an issue that should go to the Labor/Management Committee for discussion. That is, the City's representatives needed some time to determine the facts of the matter. The Fact Finder agrees.

Finding of Fact: The Union *should select* (emphasis added) the union member to the Health Insurance Committee. If the parties are unable to agree on the Union's role in picking the union representative to the Health Insurance Committee, then during the next round of negotiations the Union should make a specific demand on this issue.

Suggested Language: None

Issue: Article 21 (7): Insurance Buyout

Union Position: The Union demands that the health insurance buyout be increased from \$500.00 to \$1,000.00.

City Position: The City rejects the Union's demand.

Discussion: Given the cost of health care per covered employee, most employers have offered an insurance buyout provision as part of their contracts. This contract offers a \$500.00 buyout. Given the cost of insurance, that amount is very low when compared to most other contracts. The City argues that allowing the employees to opt out of the insurance program would lead to an "adverse selection" problem and might increase the

City's overall cost because 1) since there would be fewer employees in the plan, the risk to the remaining plan members would be higher, and 2) the remaining members would be older and sicker than the employees who opted out of the plan. However, most insurance costs are based on the City's experience rating and a few individuals leaving the City's plan will have minimal effect on either the size of the unit and/or the experience rating of the remaining pool of covered employees, etc. That is, the chance of any real adverse selection problem is very remote.

The Union argues that this is a win-win situation because some of its members would receive a higher benefit from opting out of the plan and the City would save thousands of dollars by not covering an employee. The Fact Finder agrees. The amount of the buyout payment is not significant even at \$1,000.00 based on the cost of insurance coverage per person in any insurance plan. Any incentive for an employee to drop out of the plan works to the City's advantage and leads to significant savings. With some safeguards written into the contract, e.g., the opting out employee must provide proof of insurance, etc. there is no downside for either party. Consequently, the Fact Finder is recommending the Union's position on this issue.

Finding of Fact: Increasing the medical opt out provision to \$1,000.00 should be a win-win proposition for the parties.

Suggested Language: The buyout amount listed in Article 21 (7) shall be increased to \$1,000.00.

Issue: Article 23 Other Benefits:

City Position: The City demands that the Union members reimburse the City on a prorated basis for any City paid training if the affected employee leaves the City within five (5) years of the date of the training. The City also demands that the Employees return all textbooks (materials) that the City provided when the training is completed.

Union Position: The Union did not agree with the reimbursement language and claimed that the textbook (materials) language is unnecessary.

Discussion: The discussion on this issue was almost entirely over the textbook language. The City contends that the materials are very expensive and that other employees who take the same courses at a later date can reuse them. The Union argued that its members already returned the textbooks and that there was no need for the suggested language. This is a question of fact. The City and the Union agree in principal that materials are owned by the City and should be returned. The Fact Finder notes that most course materials are updated periodically because the state of the art in a particular field and/or the law relating to that field often changes. Therefore, the usefulness of a course text (materials) often is zero within two to three years of publication.

With regard to the tuition reimbursement, the Fact Finder agrees that a five year prorated repayment schedule is reasonable. If the Employer pays for training, it has the right to expect that the training will be used to enhance the employee's job performance. If the employee leaves the City's employ because he/she can find a better position because of his/her enhanced credentials, then the City has paid to increase the human capital of another employer. This is unreasonable.

Finding of Fact: Textbooks and other course materials are the property of the City if paid for by the City. A prorated reimbursement for tuition (fees) is reasonable if the affected employee leaves the City's employ within five years of the completion of the training.

Suggested Language: Article 23 (4)

Cost of Textbooks and Training: The City shall pay the cost of textbooks for job-related educational improvement. The City shall also pay employees, at their regular hourly rate, for all time spent by employees attending job-related educational improvement classes. Prior approval of the City Manager is required for determining if the educational improvement is job related. All books purchased must be returned to the City upon completion of the course. Any employee who resigns from the City within five (5) years after completing these courses and takes a job in the same or a similar position with another employer shall pay back to the City the reimbursement received on a prorated basis over the five-year period with 20% of the reimbursement being forgiven each year beginning from the date the course was completed. Such reimbursement costs owed the City maybe withheld from the employee's final paycheck.

Note: The Union also proposed new language in Article 23 (4) for employees of the Water Department. The employee would receive a \$1,000.00 annual stipend after completing and obtaining a state certification. Each addition certification would also lead to another \$1,000.00 annual stipend. The City agreed that there might be some benefit from having the Water Department personnel receive various state certifications. The parties agreed to talk about this proposal in Labor/Management meetings.

Issue: Article 25: Separation From Service

Union Position: The Union demands that the least senior full-time employee be the first full-time employee laid off in a RIF.

City Position: The City counters with current language. That is, the least efficient member of the Department shall be the first laid-off. Efficiency is defined by service rankings for the preceding twelve months.

Discussion: This is the age-old question of who is the first person laid-off. The least senior or the least qualified. Unions invariably argue that the last one hired is the first one fired, and employers invariably argue that the least qualified (efficient) person is the first one fired. Ultimately, seniority is usually the deciding factor. The reason is that anyone who has a long tenure with an employer has proved that he/she can do the job; and therefore, is qualified. Actually, most employers believe that more senior employees have more accumulated human capital and are the most valuable employees in terms of job performance. However, the debate continues.

In this situation, the parties' positions mirror their affiliation. In other words, where you stand often depends on where you sit. The Fact Finder notes that in this instance neither party presented any evidence that the issue was practical v. philosophical. That is, there was no testimony on the prevalence (if any) of layoffs, etc. Therefore, the Union as the moving party did not meet its burden of proof on this issue. Consequently, the Fact Finder cannot recommend the Union's position.

Finding of Fact: The Union did not prove that there was any need to change the existing language.

Suggested Language: Current contract language

Issue: Article 27 Discipline:

The Union demands that language be inserted into the contract that requires the Employer to take disciplinary action within thirty (30) days of the discovery by the Employer of the action that led to the discipline.

City Position: The City rejects the Union's demand because it would place an unnecessary constraint on the Employer's right to discipline.

Discussion: The parties' contract contains an arbitration clause that follows the usual timelines for processing grievances. Therefore, the discussion on this issue seems to involve the decisions outside the grievance procedure's procedural guidelines. However, the language of Article 27 is applicable to actions that could lead to discipline; and most of these situations would be covered by the grievance procedure. Therefore under most circumstances, the language of Article 6 (2) should apply.

There are some issues that occur, that do not lead to immediate discipline. However, it is hard to understand how more than thirty days is necessary from the time that the Employer *learns of the event* until discipline is meted out (emphasis added). There will be times where an investigation is needed, but a modification of the time line to include investigations should handle that problem. Otherwise it is hard to see how the Union's suggested language is not in both parties best interest.

The question is whether thirty (30) days is a reasonable time frame. The Fact Finder believes that it is. Many (most) contracts contain some time frame for the Employer to discipline an employee. This contract is no exception, and the relevant timelines are found in the grievance procedure language. In this case, the Union's

suggested language is deficient because it may not allow time for an investigation of an employee's behavior or of some incident to take place, but with that proviso it is hard to understand how the Employer needs more than thirty (30) days to decide whether an employee's actions warrant discipline.

Finding of Fact: Language stating the time frame for the imposition of discipline is reasonable.

Suggested Language: Article 27 (New)

Inserted at the end of paragraph 1; When the City takes disciplinary action resulting from charges against an employee, such action will be initiated no later than thirty (30) work days following the knowledge by the supervisor of the events upon which disciplinary action is based: or if an investigation into the event is necessary, the discipline will be initiated no later than seven (7) calendar days after the conclusion of the investigation.

Issue: Article New: Hours of Work

Union Position: The Union is proposing language that defines the normal work schedule for Local 2429 members.

City Position: The City rejects the Union's proposal.

Discussion: Both parties agree that this proposal is a reaction to the Arbitration decision with respect to daily schedules. The decision, while not to the Union's liking, is well reasoned and based on the parties' contract and a long-standing scheduling practice in Sidney. The Fact Finder agrees that negotiations are the time to try to change contract language that one side or the other finds objectionable. However, in this instance, the current contract, especially the Management Rights clause, is controlling. The Fact

Finder agrees that language allowing an employer to change schedules with almost no notice is unusual. However, that is the long-standing practice in Sidney. The Arbitrator analyzed the contract and the situation (snow emergencies) and found that the City 's position was allowed under the contract and was standard operating procedure.

If the Union presented evidence of an abuse by the City in its scheduling practice, then the Fact Finder might recommend the Union's position on this issue. However, the Union did not present any evidence that the City was abusing the scheduling system. Therefore, the Fact Finder believes that the Arbitrator's judgment should be respected in this situation.

Finding of Fact: The Union did not prove that there was a need for its suggested language.

Suggested Language: None

Issue: Article 28: Duration

Union Position: The Union demanded that the new contract start on January 1, 2015 and run through December 31, 2017.

City Position: The City made no demand on this issue.

Finding of Fact: The Contract shall be effective from January 1, 2015 through December 31, 2017.

Suggested Language: This contract shall be in effect from January 1, 2015 through December 31, 2017. Negotiations for a successor Agreement shall commence 90 days before that date. The Union and the City shall then promptly present their respective

proposals to each other and shall meet in an attempt to conclude all negotiations within the next 45 days.

Signed this 21st day of May 2015, at Munroe Falls, Ohio.

Dennis M. Byrne, Fact Finder