

FACT FINDING REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
December 11, 2015

In the Matter of:)	
)	
Ohio Patrolmen's Benevolent)	
Association)	
)	SERB Case No.
)	14-MED-09-1313
vs.)	
)	
)	
The City of Niles)	
)	

APPEARANCES

For the OPBA:

George Gerken, OPBA Bargaining Representative
Dan Adams, Niles Police Department, OPBA Bargaining Unit representative
John Marshall, Niles Police Department, OPBA Bargaining Unit Representative
Jim Villecco, Niles Police Department, OPBA Bargaining Unit Representative

For the City of Niles:

Matthew Baker, Clemans, Nelson and Associates; Employer Advocate
Michael Esposito, Clemans, Nelson and Associates; Employer Advocate

Fact Finder: Dennis M. Byrne

Background

This fact-finding involves the members of the Niles Police Department Gold Unit (Officers) represented by the Ohio Patrolmen's Benevolent Association (OPBA) and the City of Niles (Employer/City). There are nine (9) members of the bargaining unit including five (5) Captains and four (4) Lieutenants. Prior to the Fact Finding, the parties held a number of negotiating sessions, but were unable to come to a final agreement. However, the parties did reach tentative agreement on twenty-one (21) articles, including Article 1, Preamble; Article 2, Union Recognition; Article 3, Management Rights; Article 4, Dues Deduction; Article 5, Non-Discrimination; Article 6, No Strike – No Lockout; Article 10, Probationary Periods; Article 12, Seniority; Article 13, Bulletin Boards; Article 15, Reporting Pay and Minimum Holdover; Article 19, Longevity Pay; Article 22, Military Leave; Article 23, Service Related Injury; Article 26, Liability Insurance and Indemnity; Article 29, Promotional Examinations; Article 30, Labor/Management Committee; Article 31, Waiver in Case of Emergency; Article 32, Severability; Article 33, Health and Safety; Article 34, Educational Compensation; and Article 37, Leaves of Absence.

Before the formal Fact Finding Hearing, the Fact Finder attempted to mediate the dispute, but the parties were unable to reach final agreement on a new contract. There are seventeen (17) issues still on the table. These issues are: 1) Article 7, Employee Rights; 2) Article 8, Disciplinary Procedures; 3) Article 9, Grievance Procedure; 4) Article 11, Union Representation; 5) Article 14, Hours of Work/Overtime; 6) Article 16, Vacations; 7) Article 17, Holidays; 8) Article 18, Sick Leave/Funeral Leave; 9) Article 20, Clothing Allowance; 10) Article 21 Court Duty; 11) Article 24, Wages and Rank Differential; 12)

Article 25, Medical Insurance; 13) Article 27, Pensions; 14) Article 28, Miscellaneous; 15) Article 35, Retirement Incentive, 16) Article 36 Layoff and Recall, and 17) Article 38, Duration

The Hearing was held over two days. The first day, devoted to mediation, was October 30, 2015, and the second day, devoted to the formal hearing, was November 12, 2015. Both days started at 9:00 A.M. and ended at approximately 5:00 P.M. The hearings were held at the Niles City Building located at 34 W. State Street, Niles, Ohio.

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:

The “Elephant in the Room” that affected these negotiations is that the Auditor of State placed the City in Fiscal Emergency on October 7, 2014. There are six different conditions that may lead to the declaration of a Fiscal Emergency, and Niles was found to have a deficit in certain Fund Balances (Condition 5). That finding led to the declaration

of Fiscal Emergency.¹ The City had Nita Hendryx and Timothy Lintner from the State Auditor's office testify about the City's financial condition and the Fiscal Emergency declaration. Their testimony was that the City was in dire financial straits, and that Niles' financial future was dim unless the City took steps to cut its spending and/or increase its revenues.

The Union attempted to prove that the City's financial condition was not as bad as the City (Auditor's Office) claimed. The Union also testified that a) the City could raise revenues by imposing new taxes, and b) there were other steps that the City could take that would make it more efficient. Changing the way that taxes are collected in Niles was one example that the Union mentioned. The Auditor's representatives agreed with the Union's overall contention, but stated that it would be at least five years before the City's financial condition would improve to the point where the City was no longer in Fiscal Emergency.²

The Union also testified that the City should be able to meet its demands regardless of its financial condition because the demands were modest. The Auditor's representatives did not address that point specifically, but both representatives stated that the City could not take on new financial commitments at this time. The Fact Finder finds that the Auditor's representatives were persuasive in their presentation and that the City of Niles is facing severe, long-term budgetary problems.

The Auditor's Office Performance Audit made some general recommendations for ways that the City could be operated more efficiently, and some specific

¹ The Auditor also found that the City might be in violation of Condition six, Treasury Deficiency, but given a lack of data that conclusion could not be confirmed.

² The City had a tax increase on the ballot that would have helped on the revenue side, but the citizens did not approve the levy.

recommendations related to each City department, including the Police Department, on ways to cut costs and improve efficiency. The Auditor recommended that the Police and Fire Departments develop better ways to measure productivity. That change coupled with a change in the manning requirements found in the police and fire contracts would allow the City to provide better service(s) with fewer personnel and less overtime usage according to the Auditor's analysis. These recommended changes would require changes in the City's collective bargaining agreements with a number of bargaining units including the OPBA supervisor's unit. The City responded to these recommendations by demanding a number of changes in the Supervisors' contract designed to end manning requirements and lower overtime costs.

The Audit also recommended changes in the City/FOP contract that would end the current Retirement Incentive Program, reduce severance payments, end the vacation sellback program, end the sick leave bonus payment, reduce vacation leave, and reduce the number of paid holidays. The Employer made a number of concessionary demands to the supervisors based on those recommendations. In general, the City's demands are meant to give the City (Police Chief) more flexibility to run the department with fewer personnel. In terms of economic issues, the City believes that the Auditor's Performance Audit makes clear that the City can no longer afford to fund the wages and benefits found in the current contract; and consequently, the City demands that the Union make concessions in a number of areas and accept a wage freeze.

There is another issue that caused problems for the parties during these negotiations. The City hired an outside advocate to negotiate its labor contracts because of its financial condition and the recommendations about labor agreements in the

Auditor's report. The consultant examined the contract and recommended changes in a majority of the clauses. In some instances these changes require the rewriting of an entire clause. The Union objects to this approach. The Union pointed out that the contract had been in place for many years and that many of the clauses that the City wished to change had never caused the parties any problems. Therefore, the Union's position on many of these changes is, "if it ain't broke, don't fix it." However, the City contends that many of the changes that it is demanding reflect the dismal financial condition of the City, and other changes are needed to allow the Police Administration to operate more efficiently. Regardless of which party's position is correct, the fact remains that the number of demands put forth by the City caused the negotiations to drag on for an extended period.³

Issue: Article 7: Employee Rights

City Position: The City demands that the language of Article 7 (7) be deleted from the contract. The result would be to change the amount of time a civilian has to file a complaint against a police officer.

Union Position: The Union demands current contract language.

Discussion: It should be noted that there has been no problems with the language in question. However, the City contends that the current language could be read to mean that the Employer would not be able to investigate any verbal and/or written complaint that was filed more than the (10) days after the incident that gave rise to the complaint occurred.

³ Both parties submitted voluminous documentation in support of their positions. The Fact Finder based the above discussion on Union Exhibits under Tabs 5,6,7,8,9, and 10 in the Union Exhibit book. The City's Exhibits 1 through 11 in the City's Exhibit book were the basis for the City's presentation.

The language in question states that, “All complaints by civilians which may result in disciplinary action of any employee shall be reduced to writing and signed by complainant within ten (10) days of the alleged incident. The Union argues a) that there should be a time limit and ten (10) days has proven to be a reasonable time frame: and b) that the officer in question should have the right to know why he/she is being investigated. The Union also stated that requiring the complainant to identify him or herself protects the officer from potential harassment.

The Fact Finder is not convinced by the City’s presentation and logic. If there is a verbal or anonymous complaint, the Department has the responsibility to investigate. If the complaint is found to be true and discipline may be involved, the investigating officer can sign the complaint. Given that there is no proof that the language in question has ever caused a problem, the Fact Finder does not believe that the Employer proved there was any need to change the current language.

Finding of Fact: The Employer did not prove that there was a need to delete Section 7, i.e., give a complainant unlimited time to file a written complaint.

Suggested Language: Current contract language

Note: The parties agreed to language changes in Sections 2, 5, and 8 of Article 7. The Fact Finder recommends inclusion of these changes into the contract.

Issue: Article 8: Disciplinary Procedure

City Position: The City demands numerous changes in the Article. A number are substantive and a number are editorial.

Union Position: The Union desires to maintain current contract language.

Discussion: The disciplinary and grievance procedures are in many ways the heart of any labor agreement. These clauses are the mechanism that insures that the employees are treated fairly (according to the contract) and have some recourse for management actions that a union member believes violate the terms of the agreement. As such, there is no benefit to either party of negotiating clauses that are slanted toward either management or the union. Therefore, the goal of both parties is language that works for both. In that vein, there was no testimony that the current language does not work. This means that the party attempting to modify the current language bears the burden of proving that there is a need for its suggested changes. Management's suggested changes:

1. Section 2 (A), editorial change accepted by both parties.
2. Section 2 (C) Listing of types of discipline. The City desires to add Reduction in Rank to the list of approved disciplinary procedures. The Union objects. This language allows the Employer a way to discipline an employee for offenses that are more serious or habitual than offenses leading to a verbal or written warning, but less serious than offenses leading to termination. As such, there does not seem to be any reason for the Union to object to the language. The Union claimed that this was a way that its membership could be discriminated against; but given that the affected member has access to the grievance procedure, an Arbitrator will usually (always) examine reasons for a reduction in rank. Therefore, the Fact Finder believes that this language change may benefit both parties.
3. Section 3 (A): This is the section devoted to predisciplinary conferences. The Employer has demanded a rewrite the entire section. The major change is the change from the phrase "City wide supervisor" to Hearing Officer. The Union

objected to this change, but the City's proposal is language that is found in most contracts. It is also true that the Hearing Officer can be a "city wide supervisor." Consequently, the Fact Finder believes that this change is reasonable. There is no change recommended in the rest of Section 3(B).

4. Section 3 (C): A language change agreed to by the parties.
5. Section 3 (E): A language change agreed to by the parties, adds the term Hearing Officer to sentence two (2) in the text, and other agreed upon language changes later in the same sentence.
6. Section 3 (F): The language is unusual in that it gives the charged employee's immediate supervisor a roll in the actual grievance procedure. An immediate supervisor is the first line of management and that person is usually the one that imposes the discipline. Therefore, as a participant in the process, the supervisor usually is the "charging party" and a witness in any disciplinary hearing. The Supervisor usually is not involved in other ways. This language is vague and unusual. Moreover, this topic is usually covered in the Employer's Policies and Procedures. Consequently, the Fact Finder is recommending that this Section be deleted from the contract.
7. Section 4. The City is demanding that this entire section be deleted from the agreement. The language in question gives a five-day (5) window from the point that the Employer knew or reasonably should have known that a rules infraction has occurred until the employee is called in and informed that there is a disciplinary investigation being conducted. Time lines are standard in disciplinary procedures; and while a five (5) day window may be somewhat short,

there was no testimony that this language ever caused any problems. Therefore, the Fact Finder believes that this language should remain in the contract.

8. Section 5: The Employer demands that this section be modified. The Employer's suggested language is essentially the same as the current language with the exception of adding the phrase "Reduction in Rank." (See Section 2 (C) above). Therefore, the Fact Finder is recommending current contract language on this section with the addition of the words "Reduction in Rank".

9. Sections 6 and 7: Minor language changes agreed to by the parties.

Finding of Fact: Section 1 of the Article states that discipline shall be for Just Cause.

That language allows an employee that is charged with a violation of the contract a method to contest the charges against him/her. The rest of the Article is devoted to policies and procedures related to discipline.

Suggested Language: Article VIII Disciplinary Procedure

Section 2: (C) Disciplinary letters and any other types of reprimands are to be specifically isolated to the type of offense for the progressive discipline.

Discipline shall (be) limited to the following:

1. Documented Oral Reprimand
2. Written Reprimand
3. Suspension without pay or suspension of record only
(Employer's Discretion)
4. Reduction in Rank
5. Termination

Section 3: whenever the Employer or his designee determines that an employee may be disciplined for any reason where (the) discipline involved may include a suspension, reduction in rank, or termination, a pre-disciplinary conference will be scheduled. This conference shall be scheduled during the employee's regular work hours and will be administrated by a Hearing Officer who is selected by the Employer or his designee. (Rest of Section 3 is current language.)

Section 2 (F) deleted and Section 2 (G) renumbered.

Section 5: Records of disciplinary action shall have no force and effect nor shall it be considered for any subsequent disciplinary charges in accordance with the following schedule.

Documented Oral Reprimands – 6 months
Written Reprimands – 12 months
Suspensions of three (3) days or less – 18 months
Suspensions of four (4) days or more – 24 months
Reduction in Rank – 24 months

Upon the employee's written request, records of such disciplinary actions shall be removed as outlined below providing there has been no intervening disciplinary action taken during the same time frames listed above.

(Rest of Article remains the same with the exception of minor language changes in Section 6 and 7 agreed to by the parties.)

Issue: Article 9: Grievance Procedure

City Position: The City has demanded numerous changes to the Article; most of which were agreed to by the Union.

Union Position: The Union demand is for current contract language.

Discussion: In Section 1: Grievance Defined, the City wishes to change the definition of a grievance found in the current contract. Elkouri and Elkouri discuss this issue and conclude that there is some disagreement over what constitutes a grievance. The working definition that they suggest is, “a formal complaint by persons who believe that they have been wronged.”⁴

Therefore, either the definition currently in the contract or the Employer's suggested definition can work as the definition of a grievance. The current definition is more encompassing than the Employer's suggested change because it references “any failure of the Employer to comply with all applicable laws” along with referencing the contract. The Employer's suggested definition is confined only to the contract. Given

⁴ Elkouri and Elkouri How Arbitration Works page 201.

the “rule” that the moving party has the burden to prove that the change is needed, the Fact Finder is not recommending the Employer’s suggested change. That is, the Employer cited no evidence that the current language had ever caused any problems.

Section 2: Qualifications: This section discusses which bargaining unit members are involved in a policy grievance. The employer wants only bargaining unit members who actually sign the grievance form to be members of the class. The Union pointed out that given vacations and other legitimate reasons for being absent for work that some members who desired to be part of the class would not be available to sign the grievance form.

This discussion led to a conclusion that a Union Representative could sign the grievance form, if the absent member gave him a “power of attorney.” This could be by email, a documented phone call, or any other reasonable method. The parties agreed on this concept.

Finding of Fact: The City did not prove that there was any need to change the definition of a grievance found in Section 1 of the Grievance Procedure. In Section 2, the parties agreed that a Union Representative could sign an employee’s name to a policy grievance if the member was on an approved absence from work.

Suggested Language: Qualifications: the OPBA or an aggrieved bargaining unit member can initiate a grievance. Where a group of bargaining unit members desires to file a grievance involving a situation affecting each bargaining unit member in the same manner, one bargaining unit member selected by such group shall process the grievance(s); however all employees wishing to be included in the grievance shall be listed on the grievance form. All employees signing the form shall be entitled to any remedy that results from the grievance. If an employee is on an approved absence from work, that employee can authorize the appropriate Union official to sign the grievance form. The authorization can be made either electronically, by documented phone call, or by other appropriate means. The Union must keep a list of all members who authorize the Union to sign the grievance form and the member’s authorization request.

Note: The parties agreed to all the other numerous suggested changes to this Article, and the Fact Finder recommends that these changes be incorporated into the parties' agreement.

Issue: Article 11: Union Representation

City Position: The City is demanding deletion of Section 3.

Union Position: The Union demand is for current contract language.

Discussion: The language in question concerns Union Time, and the Employer is demanding a concession. The OPBA Director is allowed three (3) hours per month to work on union business. The three (3) hours is paid in comp time. The City's position is that it cannot afford to pay for union time when the City is in fiscal emergency. Moreover, the City is concerned that the public may not understand why the City is paying union members for doing union business, i.e., not working for the city. Finally, the City is trying to delete all comp time from the contract; and since the Union work is paid in comp time, the City believes that this language should be deleted. A discussion on Comp Time will come later in this report.

When a jurisdiction is in a fiscal emergency a smooth working relationship between the parties is mandatory, because the parties will have reason to meet numerous times over the coming years. In addition, three (3) hours per month in paid in comp time or cash will not materially affect the City's finances. Therefore, the Fact Finder does not believe that the City proved that there is a need to delete Union Time from the contract.

Finding of Fact: The City did not prove that there is any justification for deleting union time from the agreement, especially in a time period where labor peace, a good working relationship between the parties, is very important to both the City and the Union.

Suggested Language: Current Contract Language

Issue: Article 14: Hours of Work and Overtime

City Position: The City demands an extensive rewrite of the entire clause.

Union Position: The Union demand is for current contract language.

Discussion: This is an issue that is closely related to the City's attempt to make changes in the Collective Bargaining agreement that follow the Auditor's recommendations which he deemed necessary for the City to emerge from Fiscal Emergency. The clause contains a number of sections that contain provisions about manning levels, scheduling, and the efficient operation of the Department. The City contends that its financial condition, coupled with the State Auditor's suggestions, mean that the Union must be willing to change some of the language found in this article.

The City demands that the first sentence of the Article be deleted. That sentence defines a schedule as a twenty-one turn (21) rotating shift schedule with two (2) supervisors on each turn. The Union made an argument that the way that the parties had always interpreted their agreement is that if one of the supervisors was not on duty, he/she was not replaced. The City claims that the language in question is a manning clause and hinders the City in its attempt(s) to find a more efficient scheduling pattern. The Fact Finder agrees that language that requires two supervisors to be scheduled on

each shift may lead to some scheduling inefficiencies, and therefore, agrees with the City's position on this issue.

Suggested Language: Delete the first sentence of Article 14

Section 1 (1): Section 1 defines the work period as twenty-one (21) days for those employees on a rotating schedule. The last sentence states that the current scheduling practice cannot be changed during the life of the Agreement unless the parties mutually agree to any proposed changes. This language effectively denies the Department the opportunity to try to find a new, more efficient scheduling methodology. Given the current state of the City's finances, the Fact Finder recommends the City's position on this issue, i.e., the last sentence shall be deleted.

Suggested Language:

Section 1: The standard work period for all employees who are scheduled to work on a rotating shift shall be twenty-one days. The work period shall be computed starting at 12:01 A.M. Sunday and end on the twenty-first day (Saturday) following. Each Work period thereafter shall be computed beginning the next Sunday and run for the next twenty-one (21) day period.

The Employer's second demand is the insertion of the word "normally" into the second paragraph of Section 1. The sentence would read, "The scheduled hours for each shift shall (**normally**) be as follows. The Fact Finder agrees with the City's position on this change. The same change is recommended for the fifth paragraph of the Hours of Work article on page fourteen (14) of the contract.

The next change demanded by the Employer is that the eighth paragraph of Section 1 on page 14 of the contract be stricken from the agreement with the exception of the first sentence that reads, "Supervisors cannot be ordered by the Chief to flex or to change their scheduled days off." The next sentence of the paragraph states that the

employees cannot be ordered to work overtime. However, the rest of the language allows the Supervisors to volunteer to work more than eight hours a day or forty hours per week without overtime pay. The first part of the sentence restricts the employer from using personnel currently on duty in case of emergency, etc. The second part of the paragraph is illegal. An employee cannot volunteer to work with no pay or no overtime premium if he/she is performing his/her usual job duties. Consequently, the Fact Finder is recommending the City's position on this language.

The Employers next set of proposed language changes start on paragraph 10 on page 14 of the contract. The Employer proposes to delete paragraphs 10, 11, and 12 from the contract. These paragraphs contain language related to flex schedules. Flex schedules are built into the contract to allow the supervisors to change their scheduled shift in order to cover a shift with a supervisor shortage, i.e., a shift where both scheduled supervisors are not available to work.

The Fact Finder is recommending that paragraph 10 be changed by the addition of a period after the words 'days off' and the sentence will read, "Supervisors shall not be required by the Chief to change their scheduled days off."

The Fact Finder is recommending that in Paragraph 11 all references to manning be deleted from the clause. Finally, the Fact Finder is recommending deletion of Paragraph 12.

The City contends that these three (3) paragraphs are related to manning, and consequently, they should be deleted from the contract. The Fact Finder disagrees with that blanket assertion. The fact is that nine (9) supervisors are employed by the Niles Police Department and that these officers must be assigned duties on a daily basis.

Therefore, not every reference to supervisors' schedules is directly related to manning. The Fact Finder believes that the flex scheduling practice in the contract may work to the advantage of both the City and the Supervisor depending on the exact circumstances that are causing scheduling problems. Therefore, the Fact Finder is recommending of the City's proposed language and current contract language on the flextime issue.

Suggested Language: (Paragraphs 10, 11, and 12 of Article 14 (1))

Supervisors shall not be required by the Chief to change their scheduled days off.

Supervisors shall be requested to flex their schedule(s) when the shortage is caused by a supervisory shortage (as defined elsewhere in this article.) due to no scheduled supervisor being available for their scheduled shift (i.e.: A call off or scheduled time off from a patrolman or dispatcher does not require a supervisor to flex his schedule to fill the shortage).

Paragraph 12: delete

The next changes demanded by the Employer also relate to the minimum manning provision. The Employer demands that the first line of paragraph 14 of the parties' agreement be retained, but the rest of the paragraph and the following paragraph be deleted. The language in these paragraphs is not applicable because the Fact Finder is recommending that the minimum manning provision of the contract be deleted. Therefore, the Fact Finder is recommending the Employer's position on these proposed changes.

The Employer is also demanding that paragraph 17 be deleted from the contract. This paragraph relates to Split Day Exchange. The language allows a supervisor with a minimal amount of comp time in his/her bank to "cash in" the split time day for eight (8) hours of compensatory time. This works to the benefit of both parties, and the Fact Finder is not recommending the Employer's position on this issue.

Section 3: The Employer demands that the work period be extended from one hundred and twenty hours (120) to one hundred and twenty-eight hours (128). The Employer is using the Fair Labor Standards Act hours that police officers can work before overtime is paid as the base for the contract. The parties have agreed to use the one hundred and twenty (120) hour schedule for decades. The City justified its demand by referencing its financial problems. However, the Fact Finder is recommending a number of other changes in this Article, and he believes that there is no rationale for extending the work period without some quid pro quo. Therefore, the Fact Finder is not recommending any change to Article 14, Section 3.

Section 4: The parties agreed on some minor language changes.

Section 5: The Employer demands that the eight (8) hours on duty be worked without a lunch break. The Union responded that its members usually “ate on the fly” rather than taking a normal lunch break. Therefore, the Fact Finder recommends current contract language on Article 14, Section 5.

Section 6: The Employer is demanding that any supervisor who works a forty-hour (40) week have his/her hours increased to forty-two (42) hours. This is the same demand as the Employer put forth in Section 3 above. The Fact Finder is not recommending this change. (See discussion in Section 3 above.)

Section 8: At this point, the Fact Finder believes that he must discuss compensatory time. Currently, the contract allows a supervisor to earn compensatory time in lieu of overtime payments. In addition, the supervisors may bank up to three hundred hours of comp time. Unused comp time will be paid on retirement. The Employer is demanding that all comp time language be deleted from the contract.

The Union is against this demand. The Union argues that an informal agreement has existed for many years that the use of accumulated comp time cannot cause an overtime situation. This is the result of an understanding between the parties that the absence of one (1) supervisor from each shift does not necessitate a call out of another supervisor. That is, the manning requirement in the contract is actually one supervisor per shift.

The supervisors believe that the use of comp time allows the union membership to take time off for family functions, etc. This is valuable to the Union members, and they do not believe that the City's suggested language will actually save the City any money. Consequently, the Union argues that comp time should stay in the contract. The City states that it would prefer to pay cash to the supervisors when the hours are worked rather than book the comp time and allow the time to accrue.

The Fact Finder believes that there is a place for comp time in the compensation structure of many employers. There are even times when the Employer may prefer to have the employees take comp time rather than an immediate payment in cash. This may be true in Nile; but a problem can arise if the hours must be paid at one time due to retirement, death, etc. Therefore, given the City's precarious financial condition, the Fact Finder is recommending that the comp time accrual be reduced to one hundred and fifty (150) hours to reduce the City's liability to pay for unused comp time when the Employee leaves the City's employ for any reason. Any accumulated hours over one hundred and fifty (150) must be used in the year after the signing of the contract. Any hours over one hundred and fifty (150) that remain in an employee's comp time bank will be forfeited one (1) year after the signing of the contract. The requests for the use of

accumulated comp time will not be unreasonably denied. That is, the employees earned the time under the terms of the existing contract, and they should not be punished for following the rules.

Section 9 (G): The city demand is that training while an officer is not on duty be paid at the employee's hourly rate rather than the overtime rate, i.e., 1 ½ times the hourly rate. The Fact Finder recognizes that the City's demand is for a concession. However, the supervisor is still being paid for attending a training session albeit at a reduced rate. In light of the City's financial problems, the Fact Finder is recommending the City's position on this issue.

Section 9 (H): The language in question reads, "Supervisors shall replace Supervisors." This is a manning requirement. The Fact Finder has analyzed and made the recommendation that manning clauses be deleted from the contract. Therefore, the recommendation is that Section 9 (H) be deleted from the agreement.

Article 14 (J), (K): These two (2) Sections of Article 14 deal with the retirement incentive and the sick leave buyout. The provisions are unusually generous by any standard. These provisions are also very unusual and the State Auditor's report recommended that Section 14 (J) be deleted from the contract, and that Section 14 (K) be rewritten to conform to State Law. That is, one quarter (¼) of up to nine hundred and sixty (960) hours of accumulated sick leave, i.e., two hundred and forty (240) hours be paid to the employee upon separation from service.

Currently, the retirement incentive is one week's pay for each year up to thirty (30) years for any employee with at least twenty-two (22) years of service. The Auditor estimates that this could cost the City approximately a quarter of a million dollars

(\$250,000.00) in any year given the age and service distribution of the labor force. The Auditor states that no other comparable jurisdiction pays a retirement incentive, much less one as rich as the incentive in Niles.

The same argument was put forth with regard to the sick leave cash out. The Niles plan is the richest among all of the comparables cited by the Auditor. The Auditor's suggestions are the basis of the City's demands. The Union recognized the financial impact of these benefits years ago and negotiated language that allowed the supervisors to work and be paid for overtime for the three years (3) prior to retirement to spread the cost of paying for the benefits out over three years (3). The language that applies to the three-year window prior to retirement is the subject matter of Sections 14 (J) and 14 (K).

The Fact Finder is mindful of the employees' concerns in this instance. It is clear that the City cannot afford to fund the benefits that it negotiated into the contract. The Fact Finder understands the City's financial problems, but the employees who are approaching retirement made plans based on the benefits in their contract and simply having these benefits wiped out will have a severe effect on the employees. The language negotiated in Sections 14 (J) and 14 (K) was an attempt to make sure that the retirement benefits negotiated by the parties would not have to be paid in a lump sum. However, at this time the City cannot afford to continue the benefit in its present form. Nevertheless, the Fact Finder is not recommending the City's position on this Section. The recommendation on the retirement benefit and sick leave buyout will be discussed when Articles 18 and 35 are discussed.

Section 10: This section outlines some of the duties currently performed by the Captains. Currently, the Detective Bureau and Juvenile Bureau are both commanded by Captains. The Employer sees this as a manning requirement. However, there are five (5) Captains currently employed by the City, and they must have some job duties. While the composition of the officer corps may change over time, at the present time at least five Captains must be assigned positions within the Department.

Moreover, there is a City Ordinance that requires the positions to be held by a Captain (Union Exhibit 23). Therefore, the Fact Finder believes that having a Captain command the Detective and Juvenile Bureaus is reasonable given all of the facts in evidence. This command structure has been in place since 1984 and has caused no problems.

The City contends that the Employer must have discretion to schedule in the most efficient way possible. However, it should be noted that this contract expired on December 31, 2014, and the successor agreement will not be signed until sometime at the end of 2014 or even in the first half of 2015. Therefore the parties will be back at the table in less than eighteen (18) months. If the scheduling of Captains is a problem, then those problems can be addressed further at that time.

It should be stressed that this is not a manning provision in the Fact Finder's opinion. It should be clear that the Fact Finder believes manning provisions per se should be eliminated from the contract. The City is in a fiscal emergency and the State Auditor and many other Neutrals have opined that manning clauses should be viewed negatively in this situation (Tab 14 in the Employer's Exhibit book). This Fact Finder agrees with this finding. However, this recommendation is just an acknowledgement that the

Captains currently employed by the Niles Police Department must be assigned duties commensurate with their rank. Therefore, the Fact Finder is not recommending the City's position on this issue with the exception of subparagraph E, which is clearly a manning provision.

Section 11: The Employer wants to add language to paragraph A stating that shift trading cannot cause overtime. The testimony at the hearing was that shift trades could not cause overtime at the present time. Therefore, the Employer's language simply codifies current practice and is unobjectionable.

Paragraph B allows supervisors to switch their days off in order to work special details if done in accordance with the contract. The Employer wants to add a phrase stating that the Chief must approve the switch. This is also unobjectionable. In almost any scenario, the supervisor would have to inform the Chief that he/she was switching days off so that the Chief knew who was working in case an emergency arose. Therefore, the Fact Finder is recommending the City's position on this issue.

Paragraph C allows a supervisor to flex his/her schedule to attend college classes. The Employer's proposed changes require that the Chief be notified of the schedule change and that the supervisor maintain contact with the Department in case he/she is needed in the Department, i.e., called back. This is also unobjectionable. The supervisors are members of the Department and work set schedules. These proposed changes insure that the Chief knows where his supervisors are when they are supposed to be on duty, but when they are not working according to their schedule.

Section 12: This Section states that supervisors are supervisors and cannot be required to perform duties not commensurate with their rank. In some ways this is simply common

sense. However, it also affects manning. and the Fact Finder is recommending the Employer's position on this issue.

Finding of Fact: There should be modifications to Article 14 to reflect the fact that the City is in a financial emergency.

Suggested Language:

Section 1: Paragraph 1: See Suggested Language

Paragraph 2: insert the word normally into the first sentence.

Paragraph 3: Current contract language

Paragraph 4: Current contract language

Paragraph 5: Insert word normally into the sentence.

Paragraph 6: Current Contract Language

Paragraph 7: Current Contract Language

Paragraph 8: Delete the entire paragraph after the words days off in sentence 1

Paragraph 9: Current Contract Language

Paragraph 10: Place a period after the words days off, delete rest of the paragraph

Paragraph 11: See Suggested Language

Paragraph 12: delete

Paragraph 13: Current Contract Language

Paragraph 14: Delete paragraph after the first sentence

Paragraph 15: delete

Paragraph 16: Current contract language

Paragraph 17: Current contract language

Section 2: Current contract language

Section 3: Current contract language

Section 4: minor language changes agreed to by the parties

Section 5: Current contract language

Section 6: Current contract language

Section 7: Current contract language

Section 8: Compensatory Time: Employees shall be able to earn overtime and compensatory time at the rate of time and one-half and bank said time up to a maximum of one hundred and fifty (150) hours. Unused compensatory time will be paid upon retirement, or in the event of death to the estate of the employee, at the employee's current average hourly rate of pay. Pre-approved compensatory time-off can only be cancelled for a state of emergency, not solely because it will create overtime.

The Employee must reduce his/her overtime bank to one hundred and fifty (150) hours within one (1) year of the signing of this contract. Any unused time over the one hundred and fifty hours will be forfeited. The Employer will not unreasonably deny Employee requests to use accumulated compensatory time.

Section 9 (G): Outside of normal work hours, all scheduled training is paid at the applicable hourly rate of pay for time worked.

Section 9 (J): See Discussion of Article 18

Section 9 (K): See Discussion of Article 35

Section 10 (A), (B), (C), (D): Current contract language

Section 10 (E): delete

Section 11 (A), (B), (C): Management's suggested language

Section 12: Delete

Issue: Article 16 – Vacations

City Position: The City demand is for a two-week reduction in the vacation schedule, and numerous language changes in the other sections of the vacation clause.

Union Position: The Union demands a two-week increase in the vacation scale after ten (10) years of service.

Discussion: The vacation schedule in Niles is generous by any standard. Currently, the top end of the scale is seven (7) weeks of vacation with 20 years of service and eight (8) weeks of vacation with 25 years of service. The vacation schedules of most comparable jurisdictions top out with six (6) weeks of vacation after twenty-five (25) years of service. The Fact Finder is unaware of another vacation schedule that is as generous as the one in Niles. Therefore in this case, common sense dictates that a jurisdiction in financial emergence cannot be expected to continue funding a vacation schedule as generous as the schedule found in Niles. Consequently, the Fact Finder is recommending that the vacation schedule be reduced.

Finding of Fact: The vacation scale in Niles is more generous than the vacation scale found in almost any comparable jurisdiction.

Suggested Language:

Section 1: Members of the bargaining unit shall be entitled to vacation in accordance with the following schedule:

<u>Increments</u>	<u>Weeks</u>
6 months but less than 2 years	1 week
3 years but less than 6 years	2 weeks
6 years but less than 10 years	3 weeks
10 but less than 15 years	4 weeks
15 years but less than 20 years	5 weeks
25 years	6 weeks

Section 2: Current Contract Language

Section 3: Current Contract Language

Section 4: The Union demand is for current contract language. The Employer's proposed language is a notification requirement to the Chief of Police or his designee of vacation requests (scheduling), but does not change the substance of the Section. The Fact Finder believes that the supervisors already have to notify the Chief if they wish to use vacation in the manner outlined in Section 4. However, the language proposed by the Employer is standard contract language; therefore, the Fact Finder suggests that the Section be modified according to the Employer's proposed language.

Section 5: Current Contract Language

Section 6: Change word from 'weeks' to 'leave' per the Employer's proposal

Section 7: This is the vacation sell back provision mentioned in the Auditor's Report.

The Auditor recommends that the provision be deleted from the agreement, but Management has made no demand on this Section of the contract. That is reasonable from the Fact Finder's point of view. The language in question allows the union members to sell back up to three (3) weeks of vacation. In general, employees need to take vacation to relax and relieve the stress of their job. In this instance, the employees can trade time off for pay. The employee is paid one way or the other, but in one case the employee is absent from work; in the other case the employee is present and receives pay for working and pay for vacation. This can be seen as "double dipping." The question about the cost of the benefit is related to the amount of overtime use vacations cause. There was no information on overtime caused by vacation time off presented at the hearing. In any event, neither party presented a demand on this issue. Therefore, the Fact Finder is recommending current contract language.

Section 7: Current contract language

Section 8: Delete section because it is no longer applicable

Section 9: Current contract language

Section 10: Current contract language

Issue: Article 17 – Holidays

City Position: The City demand is for a two-week reduction in the vacation schedule, and numerous language changes in the other sections of the vacation clause. The City also demands that Section 2 of the contract be modified to change the amount paid to a supervisor who works any holiday from 2 1/2 times the base rate to 2.0 times the base rate, and that Section 3 of the current article be deleted from the contract. The City also suggested a number of language changes to the current language.

Union Demand: The Union demands a thirteenth holiday, May 1st (Law Day), be added to the list of paid holidays.

Discussion: The Union's demand is for an extra day off to partially compensate the officers for the fact that their wages have been frozen for seven (7) years. The Fact Finder understands the Union's frustration. However, the City is in Fiscal Emergency, and that fact means that the Fact Finder cannot recommend another holiday for this bargaining unit because a) the City's spending must be controlled, and b) that would create an inequity with other organized and unorganized workers. The result would be that the Supervisor's contract would become a pattern and the new holiday would spread across the City. In the City's present financial situation, the City cannot afford to spend more on holiday pay, the overtime that would be caused, etc. Therefore, the Fact Finder cannot agree to the Union's demand.

Finding of Fact: The City cannot afford to meet the Union's demand.

Suggested Language: Current Contract Language for the enumeration of paid holidays.

Note: The City also suggested that the term "holiday pay" be defined in Section 1. The change does not in any way change the meaning of Section 1. The Fact Finder believes that the City's proposed language should be added to the contract.

Section 2: The City is proposing to change the current formula for calculating holiday pay for holidays worked from the current two and one half (2 ½) times the base rate to two (2.0) times the base rate. The Employer justifies this demand with reference to the City's financial distress. However, the amount in question is small, and the current language has been in the contract for years. Therefore, the Fact Finder does not believe that the change demanded by the City would impact the City's financial condition in any meaningful way, but it would work a hardship on the employees. That is, the benefit to the City is less than the cost to the employees. Therefore, the Fact Finder is not recommending the Employer's proposed language on this Section.

Suggested Language: Current Contract Language

Section 3: The Employer is demanding that this section be deleted from the contract.

The section deals with compensatory time for holiday pay. The Employer wants to delete all reference to Comp time from the contract. The Fact Finder has already discussed comp time in this report and did not recommend that all references to comp time be removed. Consequently, the Fact Finder does not recommend the Employer's position on this issue.

Suggested Language: Current Contract Language

Section 4: The City's suggested modification is a reasonable language change and is recommended by the Fact Finder.

Issue: Article 18: Sick Leave/Funeral Leave

City Position: The City is demanding an end to the current sick leave payout upon retirement found in the contract and wants to replace the current language with the statutory language on sick leave cash out. In addition, the Employer has proposed major revisions in most Sections of this article.

Union Position: The Union is demanding an increase in the Sick Leave Retirement Incentive.

Discussion: The current sick leave buyout provision is unusually generous and has been in the contract for years. Briefly, for officers hired prior to 1/1/1988 the first 518 hours of accumulated sick leave will be paid at the officer's straight time rate. The rest of the hours are paid at the federal minimum wage. For officers hired after 1/1/1988 and working at the time the benefit was added to the contract, the first 100 hours of accumulated sick leave will be paid at the officer's straight time rate and all other hours will be paid at the federal minimum wage rate. All other employees will get a lump sum payment for all hours at the federal minimum wage. In order to qualify for the payment, an officer must have at least ten (10) years continuous service with the employer.

The Auditor's Report recommends ending this payment and states that no comparable jurisdiction has such a payment. The Auditor recommends that the current plan be replaced with the language in ORC 124.39 that specifies that the payment for unused sick leave should be one-quarter (1/4) of the first nine hundred and sixty hours

(960) of accrued sick leave up to two hundred and forty (240) hours. The Auditor estimates that this change in all City contracts would save the City over \$100,000.00. This is the Employer's demand.

The Fact Finder understands that the City is in a financial crisis, but the ramifications of the City's proposal are vast and would have a severe impact on the group of employees who are nearing retirement. There is an equity consideration in this issue. Nonetheless, it is clear that some changes must be made to the sick leave buyout language. The employees have made tradeoffs in the past to get the current contract language (benefits) that are in the contract. Now because of factors beyond the employees control, the City demands that they make a significant concession to "help the City out" of its financial morass. Moreover, if concessions are not forthcoming and the City defaults on its obligations, the outlook is even bleaker.

Therefore, the Fact Finder is recommending a concession on this issue. Assuming that \$30.00 is the base rate, that the average sick leave accumulation is 2000 hours, and the federal minimum wage is \$8.50, the current language leads to a payout of \$28,137.00 for an employee hired prior to 1/1/1988. The payout is \$19,150 for an employee hired after 1/1/1988 but on the payroll when the benefit was negotiated into the contract. For all other employees the payout under the same assumptions is \$17,000.00.

The Fact Finder is recommending that the payout be capped for the first 1,000 hours of accumulated sick leave. The first 250 hours are paid at the employees' straight time rate, and the next 750 are paid at the federal minimum wage rate for employees hired prior to 1/1/1988. This leads to a buyout of \$14,075.00 or fifty percent (50%) of the present buyout. For those individuals hired after 1/1/1988 the buyout is \$10,650.00.

For all others the buyout is \$8,500.00. If the City's proposal is accepted, paying all employees for 240 hours at a base rate of (\$30.00) leads to a buyout of \$7,200.00.

Therefore, if the Fact Finder's recommendation is accepted, the savings are substantial.⁵

The Fact Finder recognizes that the methodology outlined above that cuts the number of hours paid at the employee's base rate and uses the federal minimum wage for the remaining hours, might not be a workable long-term compromise. However, the proposed modification leads to substantial savings, and the parties will be back in negotiations in approximately two (2) years. If the bonus needs to be refined further, then the next round of negotiations is the place to make further changes.

Finding of Fact: The City cannot afford to keep paying for accumulated sick leave under the methodology contained in the contract.

Suggested Language: For employees hired prior to 1/1/1988 the sick leave buyout will be capped at 1000 hours. The first 250 hours will be paid at the employees' straight time base rate. The rest of the hours will be paid at the federal minimum wage. For employees hired 1/1/1988 the first 100 hours will be paid at the employees' straight time rate and the remaining hours will be paid at the federal minimum wage rate. For all other employees (those referenced in Section 6 of the current agreement) the payment will be all hours paid at the federal minimum wage rate.⁶

There were numerous other changes put forth by the parties. They will briefly be listed below.

Section 1: Language change defining work. The Fact Finder recommends this change

Section 2: Current contract language for the first paragraph. In the part of Section 2

entitled Expiration of Sick Leave, the Fact Finder recommends deletion of the first

paragraph and current contract language for the rest of the Article.

⁵ The actual savings may be higher or lower depending on the employees' exact service distribution, their actual base rate wages, and the actual number of accumulated sick leave hours.

⁶ There is much discussion that the federal minimum wage rate will dramatically increase over the next few years. This means even if the Fact Finder's recommendation on this issue is accepted, the parties will have to modify their arrangement when the minimum wage is changed.

Issue: Section 3:

City Position: The City demands language that the employee must notify the Employer when he/she is off work for more than three (3) days. The Employer is also suggesting that a reference to the FMLA be added to Section 3.

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

Discussion: The Fact Finder does not believe that an employee can be off work for an extended period and not have to prove that he/she was sick. However, the contract does not explicitly state that a physician's note is needed for absences of more than three (3) days. The Employer demands that a notification requirement be added to the language of Section 3.

Finding of Fact: All employers require a doctor's certificate when an employee is absent for an extended period.

Suggested Language:

Section 3: if medical attention is required, the bargaining unit member shall present a certificate from a licensed physician, stating the nature of the illness, etc., to his supervisor.

Rest of Section 3: addition of Employer's suggested FMLA language.

Section (New): Physical Examination

City Position: The City is proposing that it have the right to require an employee to have a medical examination at any time.

Union Position: The Union rejects the City proposal as overly broad.

Discussion: The Union argued that the Employer needed some reasonable cause to order an employee to undergo a physical. The Union also contends that the Drug Policy

contained in the agreement gives the Employer the right to demand that an employee take a physical for probable cause. The Employer contends that there are other reasons for requiring a physical outside of a suspicion of drug or alcohol use.

Finding of Fact: If the Employer believes that an employee is unable to perform his job satisfactorily, the Employer should have the right to demand that the employee have a physical.

Suggested Language: Section: New

If the Employer has reasonable suspicion to believe that an employee is unable to satisfactorily perform the his/her job duties, the employee may be required to take an examination, conducted by licensed physician, to determine the employee's physical or mental capability to perform the duties of the employee's position. If found not qualified, the employee may be placed on sick leave, without pay (if there is no form of paid leave available to the employee) or disability separation. The City shall pay for the examination.

Section 4: Current contract language

Section 5: Current contract language with the addition of the suggested change(s) in the maximum number of hours recommended in the discussion of Article 18.

Section 6: **Suggested Language:**

Bargaining unit employees who have a minimum of ten (10) years of continuous employment with the City who are eligible and elect to retire in accordance with the rules and regulations established by the appropriate retirement board shall receive payment for accrued but unused sick leave according to the following schedule: all accumulate sick leave up to one thousand (1,000) hours shall be cashed out paid at the federal minimum wage.

Section 7: **Issue:** Sick Leave Incentive Payment

City Position: The City demands that Section 7 be deleted from the contract.

Union Position: The Union demands current contract language.

Discussion: The section deals with a \$125.00 payment to the employees for not calling off sick more than one (1) day per quarter. The maximum payment is \$500.00 per year. The employee can take the bonus in cash or comp time. The auditor mentioned this benefit in his report and recommended that it should be deleted from the contract. As with other contract clauses found in this contract, the benefit is exceptional. The Fact Finder understands the State Auditor's and Employer's position on this matter. However, again the employees were able to negotiate this clause into the contract as a quid pro quo for some other issue. Consequently, the Fact Finder is recommending that the benefit be changed to make it less costly to the Employer, but not deleted from the contract.

Finding of Fact: The sick bonus language in this contract is unusually generous.

Suggested Language: Section 7

Should an employee utilize one day or less of sick leave from January 1 to June 30 of any calendar year he/she shall be entitled to a bonus payment of \$125.00, which will be payable no later than two pay periods following the last day of that half-year. Likewise should an employee utilize one (1) or less sick days from July 1 to December 31, he /she will receive another \$125.00 bonus payment. Absence from work due to a work related injury shall not disqualify an employee from the utilization of this benefit. Use of more than four (4) days of injury leave pay in one half-year will disqualify the employee from receiving the sick leave bonus.

Section 8 (D): The parties agree that the following language should be added to the contract.

8 (D): The Employer may grant additional bereavement leave to be deducted from the employee's accrued but unused sick leave if requested by the employee.

Section 9: Current Contract Language

Section 10: Family and Medical leave

The Employer, the Union, and the employees agree that they shall follow the provisions of the Family Medical Leave Act of 1993 (FMLA) and all amendments thereto. Employees are required to use FMLA leave for all qualifying events.

Available paid leave must be used by the employee concurrently with FMLA leave before utilizing unpaid FMLA leave.

Section 11: Attendance Policy

There was only one proposed change to this section. The Union wanted the sentence that, “An Absence for which an employee has a statement from a licensed physician notifying the employer that the employee was unable to perform his duties will not be considered an occurrence” added to Section 11. The Union’s rationale for this sentence is that the language is contained in the FOP contract. That is, internal parity should control in this instance. The Employer had nothing to say on this issue. Therefore, the Fact Finder is recommending the inclusion of this sentence as the second sentence in Section 11 (B) under the heading Medical Excuse required.

Issue: Article 20 – Clothing Allowance

Union Position: The Union demands a one hundred (\$100.00) dollar increase in the uniform allowance.

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

Discussion: This is an issue of first impression, and there was little discussion on this item. The Union stated that there had been no increase in the uniform allowance since 2010 and that the membership deserved an increase because clothing costs, etc., continued to rise. The City claimed that its financial condition precluded it from making any increase(s) to any economic item. Therefore, the City rejected the Union’s demand.

The Fact Finder notes that the total cost of the demand is twenty-seven hundred (\$2,700.000) dollars for three (3) years. This is a miniscule amount. However, the

Union's evidence on this issue did not show that the uniform allowance is substandard (Tab 11 in the Union's Exhibit Book).

Finding of Fact: The Union did not prove that the current allowance is substandard.

Suggested Language: Current contract language

Issue: Article 21 – Court Duty

City Position: The City demands that any reference to Comp Time be deleted from the Article, and it also made a minor change in the body of the text.

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

Discussion: The parties agree on the body of the text, their only disagreement is over the use of comp time. The comp time issue has been addressed earlier in this report and the Fact Finder is not recommending the deletion of comp time from the agreement.

Consequently, there is no dispute on this issue.

Finding of Fact: There is no disagreement on this issue.

Suggested Language: Current Contract Language with the addition of the numeral '3' after the word three in the first paragraph of Article 21.

Issue: Article 24 – Wages

Union Position: The Union demand is for eleven (11%) percent in the first contract year, and one (1%) percent in years two and three of the prospective contract.

City Position: The City, citing its financial condition and other evidence, is demanding a base rate freeze for the duration of the contract.

Discussion: This is the most contentious of the issues dividing the parties. There are no wage rates in this contract. Rather, the parties agree that the lieutenants will receive a seventeen (17%) percent rank differential based on the patrolmen's wage rate, and the captains will be paid seventeen (17%) percent more than the lieutenants. This process has been used to set the supervisors' wage rates for years.

During negotiations for the last contract, the supervisors decided to change the way that the pension pick-up was paid. Rather than having the City pay the employees' pension payment for them, a pretax reduction in salary, the supervisors asked the City to add the ten (10%) percent in their wages. The result is that the pension payment is now "paid" by the employees rather than the City, but in reality, the City still picks up the pension payment. Therefore, even though the employees' taxable earnings rose by ten (10%) percent, nothing changed with respect to the employees' take home pay except their taxes increased somewhat.

There are a number of reasons for the supervisors to demand this change, but the main one is usually that when employees approach retirement age, they want their wages (base rate) to be as high as possible so that their pensions are maximized. In this situation, the accounting switch of who actually makes the payment can have beneficial effects on future pension benefits. However in either case, the employer is picking up the employee's pension payment. The only real change is who writes the check to the pension system. Therefore, after the change in the pension payer from the City to the employee, the supervisors' wages were approximately twenty-eight (28%) percent higher than the patrolmen's wages, i.e., $\text{base rate} \times 1.17 \times 1.1 = 1.28$. But it must be iterated that the rank differential was still the mandated seventeen (17%) percent.

During the next round of negotiations, the patrolmen asked the City to change the way that it picked up their pensions. Again, the reason is probably the age and service distribution of the unit. Because it does not change the total amount that the City is paying to the employees, the City readily agreed to the change. However, the City recognized that the way that the pick-up is paid would change the patrolmen's base rate. That is, if the amount paid increases (seemingly) and the hours worked remain the same, the base rate must rise.

Knowing that the supervisors' base rate was tied to the base rate of the patrolmen, the City negotiated language that specified that the (seeming) base rate increase would not be used in the calculation of the supervisors' wages. A Fact Finder and a Conciliator found that this was an acceptable way to proceed, and both agreed with the City's position on the issue of the supervisor's wages.

The supervisors, arguing that the base rate of the patrolmen was now only seven (7%) percent less than their base rate took the matter to arbitration. The Arbitrator examined all of the evidence and decided that, because the base rate of the patrolmen had risen (it had to when the pension pick-up was folded into the base rate), that the supervisors were no longer being paid seventeen (17%) more than the patrolmen, they were only being paid seven (7%) percent more. He ordered the City to increase the supervisors' wages by ten (10%) percent.

The City took the case to court. The City argues that the Arbitrator made a mistake and awarded the supervisors a pay increase of ten (10%) percent for no reason. That is, he exceeded his authority. The case has not been settled at this point in time.

During these proceedings, the City also asked the current Fact Finder to freeze the supervisor's wages during the life of the next contract in its original submission. In its second submission, (the hearing ran for two days), the City asked that the Fact Finder reduce the supervisor's wages by ten (10%) percent because the City believes that the Arbitrator's Award was flawed and that the supervisors should not be paid an extra ten (10%) percent.

In addition, the City argued that comparables data show that the supervisors are well paid, and that the comparables data proves that a wage freeze is justified regardless of the City's financial position. The Union disagrees with the City's analysis.

The Fact Finder is aware that there is an "old saw" that a party should not get in arbitration what it could not get in negotiations. Therefore, the Fact Finder has an inclination not to become involved with this mare's nest. Only if he believes that there is absolute proof that the Arbitrator made a mistake will the Fact Finder opine on this matter. Unfortunately for both sides, the Fact Finder finds that there is some support in the Arbitrator's award for a conclusion that he made a mistake. However, there is not enough data to fully prove that supposition.

The only data in the Arbitrator's Award is a table on page 5, based on a Union exhibit that shows that starting in 2013, the spread between two similarly situated employees falls from \$7.69 to \$5.35. The Arbitrator uses this fact as justification for his finding that the supervisors are not being paid according to the contract. However in percentage terms, the same data show that the supervisors' wages drop from a differential of thirty-one (31%) percent to a differential of twenty (20%) percent. It is noteworthy that the differential never falls below seventeen (17%) percent.

That seems to be the basis for the Arbitrator's Award.⁷ The numbers show what the Arbitrator claims, however when all of the numbers in the table are examined, a different picture emerges. First, the Captains' wages are always exactly seventeen (17%) higher than the lieutenant's wages. But, the lieutenant's wages are never just seventeen (17%) percent higher than the patrolmen's wages. Actually, the listed lieutenants' wages are thirty-on (31%) percent higher than the patrolmen's, and the captains' wages are approximately fifty-three (53%) percent higher than the patrolmen's wages until 2013. Again, it must be noted that even in 2013, that even after the change in the way that the patrolmen's pension is paid, the supervisor's wage rate is twenty (20%) higher than the patrolman's rate. The only place a seventeen (17%) percent differential is found is between the lieutenants and the captains.⁸

The only way that this can occur is if the supervisors' wages include the rank differential and the pension pick-up. This is the City's position; and the (miniscule) data cited in the Arbitrator's report give support to the City's position, at least as much, as the Union's position. Therefore, the Fact Finder believes that the evidence in the record before him tends to support a finding that the supervisors were erroneously awarded a ten (10%) wage increase.

The City's second contention is that the supervisors are well paid when compared to other similarly situated supervisors in other comparable jurisdictions. The City's argument is based not on job title, but on supervisory position vis-a-vis the patrolmen. The Niles Police Department has only two supervisory ranks, lieutenants and

⁷ At a minimum, the Arbitrator found the Union's exhibit to have some probative value because he specifically mentioned it and replicated it in his award.

⁸ The Arbitrator's analysis can only be true if the differential falls substantially below seventeen (17%) percent.

captains i.e., there are no sergeants in the Department. In most departments there are three supervisory ranks: sergeants, lieutenants, and captains. The parties presented evidence that in 1984 the position of sergeant was abolished, and the sergeants were renamed captains. In addition, the rank of lieutenant was created. Therefore, there have been only two supervisory ranks in the Department since 1984 (Union Exhibit 23).

The City presented voluminous data that the supervisors are well paid if compared to supervisors in a similar supervisory position. That is, if the lieutenants are compared to sergeants and captains are compared to lieutenants in other departments, the data show that the Niles' Supervisors are not underpaid in any way.

If during past negotiations the Captains were compared to Captains in other departments and the Lieutenants were compared to Lieutenants in other departments, then the wages of a first line supervisor in Niles were compared to the wages of second line supervisors in other jurisdictions, and second line supervisors were compared to third line supervisors in other jurisdictions. This would explain why the wages of the Niles supervisors are still among the highest of the first and second line supervisors based on the comparables data (Employer Exhibits under E-9 and E -10 in the Employers Exhibit book).

The Union presented some evidence based on comparables (Tab 11 in the Union's Exhibit Book). These data show that if a Niles lieutenant is compared to the comparable lieutenant, there is a disparity in pay. If the lieutenant is compared to a sergeant in a comparable jurisdiction then the disparity disappears. The same is true for the captains. The question then becomes what is the correct comparison group?

Sergeants usually run a shift, preside at roll call, and perform other duties assigned to them. For example, they are often on the road. While there was no evidence presented by the parties on job duties, the front line supervisor in Niles will perform many of the same duties. Reading the parties' contract shows that lieutenants and captains are often the front line supervisor. The duties of the Niles supervisors may be a hybrid, but ultimately the lieutenants perform many of the duties performed by sergeants in other jurisdictions. To paraphrase Gertrude Stein, "what is in a name/ A rose ..." The Fact Finder believes that the evidence proves that the supervisors in Niles are paid the same as supervisors in other jurisdictions that perform the same duties.

Finding of Fact: There is reason to believe that the Arbitrator who awarded the supervisors a ten (10%) percent wage increase made a mistake in his analysis. In addition, the data prove that the Niles supervisors are paid as well as other supervisors in other jurisdictions who *perform similar duties* (emphasis added). Finally, the City's financial condition precludes a base rate increase at the current time.

Suggested Language: Current Contract Language. The Fact Finder also recommends that the parties add an addendum to their contract spelling out exactly how the seventeen (17%) rank differential leads to the supervisor's pay level.⁹

Issue: Article 25: Hospitalization (Health Insurance)

Union Position: The Union demands some changes in the prescription benefit, but on the substance of the Article, the Union demands current contract language.

⁹ There is no reason for the percentage to be exactly seventeen 17%. Percent. The differential depends on time in rank, longevity, etc.

City Position: The City is demanding a number of changes related to the formation of a Health Care Cost Containment Committee. In addition, the City wants caps put on its potential dollar exposure to implementing recommendations made by the committee; and finally, the City is proposing a fully paid optional plan called the “City” plan.

Discussion: This is another issue with a twist. In this instance, the Mayor started to talk (negotiate) with the Union in July 2014. After some time, he stepped aside and the City retained an outside advocate. However, before he stepped aside, the Mayor struck an agreement on Health Care with the patrolmen represented by the FOP. Subsequently, the Mayor offered the same language to the Supervisor’s unit (and all other City bargaining units) and the parties agreed that the supervisors would accept the FOP language. The outside Counsel for the City contends that the Mayor did not make a binding agreement. The Mayor in his testimony agreed that there was a tentative agreement, but he claimed that there was no final agreement.

In support of its position, the Union entered three emails into the record (Union Exhibit 24). The relevant portions of the email read: (Email 2) “(Mayor Infante) ...I have known (no?) problem removing the health Care Issue from Negotiations upon your acceptance (FOP plan). Each union will have to accept it separately. This was followed a few hours later by this email. “(Email 3) Thanks Mayor and I’ll pass along the information and you may consider this out (our) acceptance of the plan as we discussed. Thanks for all of your efforts as well.”

These emails indicate that the parties came to an agreement on the health care issue and took it off the table. The agreement is that the Supervisors Unit (OPBA) will accept the same language as the language negotiated between the City and the FOP

Patrolmen's Unit. Based upon this evidence, the Fact Finder finds that there is no disagreement between the parties on this issue. The Fact Finder understands that the City may wish that the deal had not been struck. However, the language of the emails proves that the OPBA unit will accept the same Health Care Plan as the FOP unit. Absent an agreement by the parties to reopen the issue, the Fact Finder believes that he should not offer a recommendation on this issue.

In this context it must be noted that the just expired contract between the parties contained the statement, "Health Benefit Plan will be the same as the Patrol(men)'s health plan." This language is identical to the language proposed by the Union for the prospective contract. That is, the parties were continuing a practice whereby the OPBA unit mirrored the larger FOP unit on health care.

It should also be noted that both parties' submissions for Fact Finding contain 1) nearly identical language with regard to the formation of a Health Care Cost Containment Committee, and 2) The City submitted a plan for a voluntary stand alone City Insurance Plan. There is nothing to stop the City from instituting this plan because the employees are not required to join the plan. Therefore, the only difference in the parties' submissions is a section about the situation in which both spouses work for the City. This language allows the employees to decide which spouse will pay the premium. Finally, the employer also demanded the inclusion of language on Employee Premium Contribution that, according to the City, will have no impact during the term of the proposed contract. Therefore, there is little difference in the parties' positions on Article 25 for the duration of the prospective agreement.

Finding of Fact: The parties agreed to use the FOP contract language on the Health Care Plan.

Suggested Language: Current Contract Language with appropriate dates changed.

Section 6 (C): The Committee will investigate methods to contain the overall cost of health care. These methods may include, but not limited to, reduction of benefits, establishing a bid process, scope of final determination, as the method utilized to contain the overall cost of health care shall be vested to and the sole responsibility of the committee.

(The Fact Finder has already stated that he does not believe that he should make recommendations on this issue. However, the Fact Finder would urge the parties to add the following language to their contract.) *The Committee shall make a final vote on any Plan changes no later than thirty (30) days prior to the deadline for selecting a Plan. The parties will attempt to reach consensus, but failing that a majority of the voting members will decide the issue. Recommendations will be in compliance with applicable Federal and State law.*

Issue: Article 27: Pensions

City Position: The City originally wanted current contract language with the addition of one sentence at the end of the Article. However, in its amended submission the City demands that the Union members pay their own part of the pension and that demand amounts to a ten (10%) reduction in the supervisors' wages.

Union Position: The Union demands current contract language.

Discussion: The City's amended position reflects a fear that the court, the Fact Finder, perhaps a Conciliator, will uphold the Arbitrator's ruling. If the Arbitrator made a mistake, something that the City's negotiators believe is the case; then the City's amended position removes the problem from the City's point of view. However, the Court has not ruled on the issue; and the Fact Finder believes that the evidence, such as it is, points in the direction that the Arbitrator did make a mistake.

The Arbitration statute allows an Arbitrator to make a mistake in fact or law as long as the Arbitrator does not go outside of the bounds of the contract. In this case, the Arbitrator appears to have followed his mandate exactly. Therefore, it is hard to see how the court will overturn his decision. However, collective bargaining is a different. The demand is that the Fact Finder recommend a change in a contract provision. This is, interest arbitration is concerned with changes in the provision in question. Grievance arbitration is concerned with the interpretation of the provision as written.

The City's amended demand is a way around the problem from the City's point of view. However, if the Fact Finder recommends acceptance of the City's position, and the union rejects the recommendation, a Conciliator will still decide the issue.

Therefore, the union's positions is that the Arbitrator 1) decided the issue properly and that the increase in the base rate for the patrolmen should translate into a ten percent increase in the supervisor's wage, 2) the City's position that the base rate recommended by the Arbitrator double counts the pension pick-up will be the underlying factor in any potential conciliation hearing.

The difference between the two positions is the main difference between the parties; and regardless of what this Fact Finder recommends, there is a distinct possibility that a Conciliator will ultimately decide the issue. Consequently, because there is no problem with the pension article, the Fact Finder believes that the wage issue should be decided with a debate on wages. That is, the disagreement is over wages not pensions.

Finding of Fact: The parties have no difference of agreement on the pension article per se.

Suggested Language: Current Contract Language

Issue: Article 28: Miscellaneous

Union Position: The Union demands that the union members be allowed to take home their official vehicle.

City Position: The City is proposing to delete Sections 2, 4, 5, 6,7, 9, 10, and 11.

Discussion: As with so many articles in this contract, each section deals with a different issue. Therefore, each will be discussed in order.

Article 1: Police Equipment: Current Contract Language

Article 2: Maintenance of Rank: The language in question states that if a Captain retires, the rank structure will stay 5 captains and 4 lieutenants. This mirrors the language found in the City Ordinance that created the Lieutenant and Captain ranks. The Fact Finder does not see this as a manning provision. Rather it states that the ranks should match the ranks listed in the ordinance if a captain retires i.e., there cannot be five (5) lieutenants and four (4) captains. The Fact Finder does not equate retirement with layoff. Therefore, the Fact Finder does not believe that the City proved a need to change the current language.

Recommendation: Current Contract Language

Article 3: Current Contract Language

Article 4: This section is concerned with training. The first sentence states that the City shall comply with all statutorily mandated training requirements. The rest of the Article discusses other training. The supervisors are allowed to apply for a maximum of forty (40) hours of training that must be approved by any number of City officials. The Article also mentions manning. However, given the City's financial condition the Fact Finder

recognizes that the City cannot subsidize voluntary training. Therefore, the Fact Finder is recommending the City's position on this issue.

Recommendation: Delete Section 4

Section 5: This section is about public records requests. The public records law covers copies of official documents, therefore there is no need for this language.

Recommendation: Delete Section 5

Section 6: This section deals with access to copy machines and is outdated.

Recommendation: Delete Section 6

Section 7: This section deals with mutual aid pacts. This is not a subject for the OPBA contract.

Recommendation: Delete Section 7

Section 8: Current Contract Language

Section 9: This section deals with minimum manning. This issue has been discussed numerous times. To iterate, in a time of financial emergency, the Management of the Department must have the flexibility to deploy the Department's manpower in the most efficient way possible.

Recommendation: Delete Section 9

Section 10: This section deals with drug and alcohol testing. There is already a mutually agreed upon policy on this issue.

Recommendation: Delete Section 10

Section 11: This Section deals with the use of official cars. The Union contends that the use of take home official cars reduces response time when officers are called out. The Union believes that this is a safety issue for both the officers and the public. The City

claims that it must provide insurance for official cars and that their insurance rates will rise. That is, this is a cost issue. However, the language in question already contains a provision that the City must be able to afford the cost of allowing the supervisors to use official vehicles. Consequently, the Fact Finder is not recommending deletion of this Section. In a time of emergency, visibility is valuable to a police department. With fewer resources, quick response times are also vital.

Recommendation: Current contract language.

Issue: Article 35: Retirement Incentive

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

City Position: The City wants to delete the entire provision.

Discussion: This is an unusual and very costly benefit. Essentially, each member of the Department receives one (1) week of salary for each year of employment with the City. The benefit is capped at thirty (30) years for the most senior supervisors. It is capped at twenty five (25) years for members with less than twenty two (22) years of service as of 1/1/2010. According to the State Auditor and the City's advocates, this benefit is unique to Niles. Both the Auditor and the City argue that the City cannot afford this benefit..

This is similar to the sick leave buyout in that it is a benefit that the union membership expected to get and planned on as a part of their final remuneration from the City when they retired. The only way that the benefit makes sense is as an inducement for the officers to remain with the Niles Police Department rather than look for another position. Regardless, the benefit is too expensive to be maintained in its current form.

That Fact Finder is recommending a reduction in the retirement incentive. The Fact Finder believes that changing this article will save the City a significant amount. However, the employees are the ones asked to shoulder the load. That is reasonable because the alternative is a layoff. But there should be a buffer. Therefore, the Fact Finder is recommending that the benefit be reduced by one half (1/2). This will be a significant saving to the City. If the City's finances do not improve over the next years, then the next round of negotiations is the place to revisit this issue.

Finding of Fact: The retirement incentive payment is Niles is a unique benefit that is very costly to the City.

Suggested Language: Retirement Incentive

Section 1: Each bargaining unit member shall be entitled to a retirement incentive that shall equal one (1) week's salary for each two (2) years of completed service with the city. This incentive shall be capped at thirty (30) years for all bargaining unit members. Effective January 1, 2010 all bargaining unit members with less than twenty-two (22) years of completed service will be capped at twenty-four years for this incentive.

Section 2: Delete

Section 3: Supervisory employees with at least twenty-two (22) years of completed service may waive the retirement incentive and opt to work optional overtime hours as described in Article 14 Section 9 equal to the amount that would have been paid to the supervisory employee under this retirement incentive section.

Issue: Article 36: Layoff and Recall

City Position: The Employer is demanding a rewrite of the entire Article in order to maximize the Department's flexibility in scheduling.

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

Discussion: The discussion will match Employer's demand(s) on each Section of the Article.

Section 1: The Employer wishes to add the phrase 'job abolishment, or employees who are reduced in hours or furloughed' to the language in Section 1. The language in question is not usually found in Police contracts. The reason is that most police officers and/or supervisors will not see their jobs abolished or be put out on an involuntary furlough because the provision of police services requires a force that is able to meet the needs of the community. It is possible to have fewer offices if the Department cannot afford to pay the staff. However, the reduction in force will almost always be achieved through a layoff. Therefore, job abolishment and furloughs have less meaning to the sworn ranks than to civilian employees of the Department or private sector employees.

Suggested Language: Current contract language

Section 2: The Employer is trying to add that layoffs are by classification seniority rather than be departmental seniority. The Employer contends that if there is a need to reduce the size of the Department, the Employer may need to retain certain skills that are found in specific job classifications. Again, it is hard to see how this argument applies to the supervisors in Niles. Most (all) Supervisors have risen through the ranks and can perform the duties of other ranks. This is especially true in Niles because the lieutenants and to a lesser extent captains already can be working on the road (patrol). Therefore, while the Employer's suggested language may apply to some other departments, it does not really apply to Niles.

Suggested Language: Current Contract Language

Section 3: Current Contract Language

Section 4: This is the Notice of Recall section of the Article. The Fact Finder is recommending that electronic mail be added to the recall letter.

Suggested Language: Notice of recall shall be sent to the employee(s) by registered mail and email, with a copy to the OPBA. The Employer shall be deemed to have fulfilled its obligation by mailing the recall notice by registered mail, return receipt requested to the last mailing address of the employee and by email to the employee's electronic mail account. It is the responsibility of the employee to inform the Employer of his/her electronic mail address.

Section 5: This section outlines the time lines that must be met for an employee to return to work. The Employer's demands in this area are reasonable.

Suggested Language: The recalled employee shall have seven (7) calendar days following the date of the receipt of the recall notice but, no later than fourteen calendar days from the date the notice was sent by the Employer to return to work. Failure to return to work in the specified time shall be considered a waiver of recall rights and the employee shall be removed from the recall list. An employee who does not wish to return to work may notify the Employer of such and will be removed from the recall list.

Section 6: It shall be the responsibility of the employee to insure that his/her current mailing and electronic addresses are on-file with the Employer at all times.

Issue: Article 38: Duration

City Position: the City wants to delete paragraphs D and E, and amend paragraph C.

Union Position: The Union is demanding current contract language.

Discussion: The Employer objects to the inclusion of language that continues the current contract in full force and effect until a new agreement is reached. The Employer's reasoning is that the Union might drag on negotiations and not sign a new agreement if concessions are on the table. However, these negotiations are

for a police unit in the State of Ohio under the aegis of SERB and regulated by ORC 4117. It is hard to understand how SERB would not be involved if an Unfair Labor Practice charge was filed, or how a fact-finding hearing would not be convened when at least one party to the negotiations demanded a hearing. That is, the parties are at impasse. Therefore, the Fact Finder believes that the current language and/or the Employer's suggested deletion would actually make no difference in negotiations between the City and its safety forces.

In Section 1 (C) the Employer's suggested addition of the phrase "as expressly stated in the Agreement" is unnecessary. The paragraph in question is a "4 corners" clause that states that only the rights guaranteed by the contract or by law are open to arbitration. The addition phrase takes away the protections afforded to the employees by law that are not stated in the agreement. It is possible that some relevant statutory provision is not mentioned in the contract, especially since the City is in a state of Fiscal Emergency.

Section 1: (D) states that any disagreement over the interpretation of contract language will be settled by mutual agreement between the parties. The parties negotiated the agreement and should know what it says. However, if there are disagreements about the meaning of the language, the arbitration procedure is the chosen method for settling interpretation disputes.

Finally, the Employer's suggested deletion of Section 2 of the Article is reasonable. The language in question is a severability clause and there is a Severability Article already in the contract.

Suggested Language: Duration of the Agreement

Section 1 (A): This Agreement shall be retroactively effective upon execution and shall remain in full force and effect until December 31, 2017, unless otherwise terminated as provided herein.

Section 1 (B): Current Contract Language

Section 1 (C): Current Contract Language

Section 1 (D): Delete

Section 2: Delete.

All articles tentatively agreed to by the parties are included in the Fact Finder's recommendations by reference.

Signed this 11th day of December 2015, at Munroe Falls, Ohio

/Dennis Byrne/

Dennis M. Byrne, Fact Finder