# Before the State Employment Relations Board

In the Matter of:

| | | |
|---|---|---|
| Ohio Patrolman's Benevolent Association | ) | 2014-MED-10-1371 |
| and | ) | |
| Portage County Sheriff | ) | Virgil Arrington Jr. Fact Finder |

---

Fact Finding Report and Recommendation

Issued June 15, 2015

---

For the OPBA:

Michael John Hostler
10147 Royalton Road, Suite J.
P O Box 338003
North Royalton, OH 44133
attyhostler@yahoo.com

For Portage County Sherriff:

Ronald J. Habowski
215 West Garfield Road
Aurora, OH 44202
ronbasswood@gmail.com

## 1 The Parties

The OPBA represents the bargaining unit consisting of deputies in the Portage County Sheriff's Department. It is represented by OPBA attorney, Michael John Hostler. Its negotiating team at the fact finding hearing consisted of Deputies Heath Wilson, Liz Ittel, and Marcia Zwick. There are six OPBA collective bargaining units in the Sheriff's office, two for corrections officers, two for dispatchers, and two for deputies. While each contract is negotiated separately, they tend to be very similar in content and benefits. The instant bargaining unit consists of 44 employees, although that number is constantly fluctuating.

The Portage County Sheriff, David Doak, is represented by attorney, Ronald J. Habowski. Also present at the hearing as witnesses were Portage County Human Resources Director, Paul Janis, and Nick Codrea.

## 2 Standard of Review

I am guided by the Ohio Administrative Code as to what I may consider, which includes the following:

1. Past collectively bargained agreements, if any, between the parties;
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, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
4. The lawful authority of the public employer;
5. 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 in private employment.

## 3 Status of Negotiations

The most recent contract expired on December 31, 2014. The parties met on two occasions and, after exchanging proposals, agreed to expedite matters by submitting the matter to fact-finding. Negotiations were further frustrated by several deaths in the families of the parties' respective attorneys. The issues to be addressed here include the following:

1. Article 19 – Compensation – The Union is seeking 3% raises for each of three years, whereas the County has offered 1.5% raises for two years with a reopener in the third year.
2. Article 22 – Overtime Pay and Court Time – the Union is seeking an increase of minimum court time from two hours to three, along with the ability to accrue and accumulate 480 hours of compensatory time off instead of the current limit of 40 hours.
3. Article 23 – Longevity – The Union is seeking to increase the compensation for longevity.
4. Article 25 – Insurance – The Union is seeking to restore health insurance coverage for employees' spouses who have insurance available elsewhere, and to return the employee premiums to 2011 levels.
5. Article 29 – Sick Leave – The Union is seeking to clarify that sick leave may be taken to care for an employee's grandparents and to increase the amount of sick leave that can be cashed out upon retirement.
6. New Article – The Union is proposing a new article to require four patrol deputies to be on duty at all times.

## 4 Summary of Recommendations

1. Article 19 – Compensation – I recommend a wage increase of 1.5% effective January 1, 2015, 2% effective January 1, 2016, with January 1, 2017 subject to a reopener of negotiations.

2. Article 22 – Overtime Pay and Court Time – I recommend that minimum court time be increased to three hours. I recommend that there be no change in the amount of compensatory time off that a member can accrue.

3. Article 23 – Longevity – I recommend that longevity pay be increased from $5.00 per year per month to $7.00 per year per month.

4. Article 25 – Insurance – I recommend no changes to the health insurance provisions of the agreement.

5. Article 29 – Sick Leave – I recommend that sick leave may be taken to care for an employee's grandparents and that members be able to cash out 40% of unused sick leave hours in excess of 1,500 hours.

## 5 A Word about Comparables and the Evidence

The most spirited discussion throughout the fact finding hearing concerned each party's choice of jurisdictions with which to compare this bargaining unit. The Union offered comparables consisting of many cities and counties in Northeast Ohio. The County stuck with nine counties in northeast Ohio that I will term "the Northeast Nine."[1]

The County claimed that the parties have historically and exclusively used the same nine counties as comparables. Initially, the Union disputed this assertion but later clarified that, while the parties have urged different comparables during *negotiations*, they have always used the Northeast Nine in *fact-findings* and conciliations. The reason for this distinction, according to the Union, is that the parties have typically used one of the six OPBA bargaining units as a lead in fact-finding, with the result being used to resolve the other five contracts. In the past, the lead bargaining unit consisted of corrections officers, and since the cities and townships do not have corrections officers, it made sense to use only counties as comparables.

In the current round of negotiations, the deputies' bargaining unit has taken the lead. Since deputies are similar to municipal police officers

[1] The nine counties are Ashtabula, Cuyahoga, Geauga, Lake, Mahoning, Portage, Summit, Stark, and Trumbull.

in duties, the Union urges that it is now appropriate to compare this bargaining unit with those in municipalities and townships.

The County counters that the Union has "cherry picked" jurisdictions that portray Portage County in the worst light. It notes that, in 1999, it was the *Union* that relied on the Northeast Nine while the *County* offered a different group of counties. At that time, the Union objected to the County's proffered comparables saying the parties had historically relied upon the Northeast Nine. The fact-finder, Robert Stein, agreed with the Union, writing, "I find the Union's argument regarding the history of bargaining between the parties to be persuasive. Although the Union has tried different combinations of comparable data to 'sell' certain positions over the years, the fact-finders and conciliators appear to have consistently used the nine counties of northeast Ohio as comparables in rendering awards." He noted that this had been a nine year history of bargaining, meaning that, at this point in time, the consistent history of comparables has been in place for some 25 years.

There are distinct benefits from using the same comparables from one contract term to the next. For example, it provides consistency in compensation and benefits. It is no secret that, due to economics, wealth and other factors, some jurisdictions pay their employees more than others and, no matter how one looks at the data, there will always be a highest paid and a lowest paid jurisdiction. The collective bargaining process has never succeeded in providing parity among the jurisdictions, one obvious reason being that, as lower paid jurisdictions attempt to catch up, those in the higher rungs receive offsetting increases ensuring that they remain in the higher rungs. The consistent use of the same comparables helps ensure that the relative placement of jurisdictions among themselves remains consistent.

In addition, if the parties can recognize and agree to use the same comparables, as they have done for the past 25 years, they can more easily settle contracts without the need for fact-finding and conciliation.

Like Mr. Stein before me, I am persuaded that the best group of comparables in this situation is the Northeast Nine. In addition to the long history between the parties, I believe it best to compare counties to other counties, rather than to cities and townships.

Thus, to the extent I have been given evidence, I will be looking to the Northeast Nine for comparable data. I will not consider the munici-

pal or township contracts provided by the Union, nor will I consider those counties outside the Northeast Nine.

Having settled on nine counties to use as comparables, I am compelled to note that the parties have provided me with little direct and relevant evidence about these nine counties. The Union provided me with select provisions of the collective bargaining agreements (CBA) for three of the nine counties (Cuyahoga, Geauga, and Lake). The County has provided me with excellent demographic data to assist in knowing how Portage County generally ranks with the other eight. However, the parties have generally not provided me with detailed information concerning how the other eight counties have dealt with the benefits and provisions at issue in this fact-finding.

I also have been given little information concerning the actual financial health of Portage County. I have not been provided with the County's budget or other financial statements, other than a single sheet statement from the County's 2013 audit. The County provided a chart showing that the labor force in Portage County has been steadily declining since 2008. The Union has countered with a table showing that the County has recently received some $1.2 million in casino revenues. What is missing from this anecdotal evidence is useful documentation demonstrating the County's actual revenues, expenses, and ending fund balances from year to year. Evidence of a single revenue source taken in a vacuum says nothing about the County's overall financial health, and I would suggest that a labor force chart is not as effective evidence as financial statements themselves.

Given the dearth of evidence, I have obtained the CBAs of the Northeast Nine as they are presented at SERB's website. I have also obtained the 2014 and 2015 Portage County revenue and expense statements that are available at the County's website. I do this under the authority of Ohio Administrative Code, 4117-9-05(J), which reads, "The fact-finding panel, in making findings of fact, shall take into consideration all reliable information relevant to the issues before the fact-finding panel." Since I agree with the County that the Northeast Nine are relevant comparables, then their current CBAs on file with SERB are relevant and reliable, and since one of the issues in any fact-finding hearing is the financial health of the employer, its revenue, budget and expense statements as presented at its official website are equally relevant and reliable.

## 6 Article 19 – Compensation

The Union has demanded 3% raises for each of three years beginning in 2015. The County has offered raises of 1.5% for the first two years with a reopener for the third year.

The Union claims its members are underpaid compared to the jurisdictions it has offered as comparables. The County counters that Portage County compensation ranks around 5th of the Northeast Nine and that, based on the relative revenues of the nine counties, a fifth place ranking makes sense.

In the Northeast Nine, Cuyahoga County has provided raises of 2% for 2015–2017 (after applying a .5% equity adjustment in 2015). Geauga County has given 3% raises for 2014–2016. Summit County has a contract ranging from 2014 through 2016, in which it provided raises of 1.5% in 2014 (Portage County gave 2% raises in that year), 2% in 2015, and 2.25% in 2016. Stark County has given 3%, 2%, and 3% for the same years. The contracts on file with SERB for the remaining counties are too old to be helpful on this issue.

In addition to the Northeast Nine, it is relevant for me to consider internal comparables as well. While this Union enjoyed 2% raises in 2013 and 2014, the County's non-bargaining employees received no raise in 2013 and only a 1.5% raise for the last three months of 2014. They have also received a 1.5% raise effective 2015, as have the County's other non-Sheriff unions. Thus, in 2014 and 2015, the Union fared considerably better than the County's non-bargaining employees.

With other County employees uniformly receiving a 1.5% in 2015, I am very reluctant to recommend Union raises that will only once again widen the gap between this Union and the County's other employees as happened in 2013 and 2014.

That said, I believe that the Union should receive more in 2016. The County can adjust non-bargaining raises in 2016 to avoid any internal inequity, and I believe a 2% raise in 2016 is more in line with the external available comparables. The County has recommended a wage reopener for 2017. While I would prefer that wage increases be locked in place for all three years, doing so at this time could result in wage increases that are locked in too low. If the current recovery out of the recession continues, then it is quite possible that the County will be able to pay more in 2017 than it can currently foresee. Therefore, I believe a re-

opener would be prudent to allow both parties to have a clearer picture of the Union's needs and the County's ability to meet those needs. Therefore, I recommend that Article 19 be amended to read as follows:

> 19.01 Effective the first (1st) of January, ~~2012~~ **2015,** ~~2013~~ **2016**, and ~~2014~~ **2017** compensation (i.e., wages and rank adjustment) shall be paid per the following schedule:
>
> Effective 01/01/**2015** ~~0~~ **1.5**%
>
> Effective 01/01/**2016** 2.0%
>
> Effective 01/01/**2017** **The parties mutually agree to re-open negotiations for wages effective 1/1/2017 by one party or the other serving notice to negotiate on the other party. The period for the re-opener of negotiations shall commence on or about June 1, 2016. The reopener shall be limited to the issue of wages for 2017 unless the parties mutually agree to reopen negotiations on other issues. The reopening of this agreement shall invoke the dispute settlement procedure set forth in R.C. Section 4117.14.**

## 7 Article 22 – Overtime

Concerning Article 22, the Union has requested two changes. First, it seeks to increase the mandatory minimum court time from two to three hours. Second it has asked to increase the number of hours of compensatory time off that can be accrued by its members.

As to court time, Portage and Stark counties are the only two of the Northeast Nine that provide two hours minimum court time. All of the others provide either three or four hours minimum. Given these consistent comparables, I recommend that Article 22 be amended to provide three hours of minimum court time.

I recommend no change to the provisions concerning the accumulation of compensatory time off (also called "comp time") As to comparables, the Northeast Nine do not have consistent comp time provisions in their contracts and some have greater restrictions on comp time than does Portage County.

Compensatory time off provides employees with no financial benefit beyond that available through overtime pay. It is, instead, an alternative form of overtime compensation. Indeed, by taking comp time, an employee foregos the cash payment s/he would have otherwise received from working overtime. Of course, it is not unusual for employees to prefer more time off to money, and I certainly do not fault anyone for that preference.

On the other hand, comp time can cause greater expenses for employers than simply paying overtime in cash. When a person earns overtime, he earns it at time and a half. So an employee who works 10 hours of overtime earns 15 hours of comp time to take off later. When an employee takes comp time off, his shift may may need to be backfilled by another employee who, in turn, may be working overtime to cover the missed shift. So, the second backfilling employee works 15 hours of overtime to cover the comp time being used by the first employee who worked 10 hours of overtime. If the second employee elects comp time, then he could be backfilled by an employee or employees who, together, would be working 22.5 hours of overtime (15 hours at time and a half). Thus, the use of comp time can result in a snowballing effect to the employer who would have to find a way of paying ever increasing amounts of overtime. This stacking effect does not happen when overtime is paid in cash. While employers can limit the *accrual* of comp time, their ability under federal law to govern its *use* is more limited. Under 29 U.S.C 207(o), an employee "who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 CFR 553.25 goes on to state,

> Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

Courts have held that the need to backfill a position with another em-

ployee working overtime does not constitute an undue disruption that would justify the denial of the use of comp. time. See, *Beck v. City of Cleveland*, 390 F.3d 912 (6th Cir. 2004). The only effective way for employers to deal with this state of affairs has been to limit the amount of comp time that employees can accrue in the first place. Indeed, the instant parties agreed at the hearing that the current limit of 40 hours was negotiated in the past as a reduction of the hours of comp time one may accrue, no doubt a change intended to address the County's limited ability to govern the *use* of comp time once it has been accrued.

Given the realities of federal law as it relates to the use of comp time, and given that the current limit was mutually agreed upon by the parties as a reduction of the accrual cap, I recommend that no change be made concerning comp time.

I, therefore, recommend that Article 22 be amended to read as follows (with respect to court time only).

> 22.03 An employee who must appear in court in a capacity related to his official duty as an employee of the Portage County Sheriff's Department prior to or after leaving work or on a day when he is not scheduled to work shall be compensated at a minimum of ~~two (2)~~ **three (3)** hours at the appropriate rate, as defined herein above so long as such time does not abut or overlap his shift.

## 8 Article 23 – Longevity

The Union has requested an increase in the amount paid for longevity. Its specific proposal is a complex formula based on a progressively increasing addition to the employee's hourly rate.

The current contract language is not a model of clarity, saying that members who have at least five years of service will receive an additional "$5.00 per year, per month." After considerable discussion at the hearing and my own consideration of similar provisions in comparable contracts, it appears that this language means that for each year of service, the member will receive an additional $5.00 in pay per month. Thus, a member with five years of service should receive an additional $25.00 per month ($5.00 x 5 years of service) or $300.00 over the course of a year. A member with 25 years of service should receive an additional $1,500.00 a year.

When considering the Northeast Nine, there is little consistency on longevity payments, not only in terms of raw amounts, but also in terms of method of calculation. For example, Trumbull County pays $4.00 per month, per year, less than Portage County. Other counties, such as Stark and Summit pay a percentage of a member's base pay, with Stark paying from 2.5% to 6% depending on years of service, and Summit paying between 1% and 2.5%. While Stark's payments are higher than Portage's, Summit's are lower. Other counties express it as a lump sum; Cuyahoga County pays an annual sum of $375 plus $75 per year of service. Geauga County pays anywhere from $500 to $3,000 depending on one's longevity. Ashtabula County pays an additional $0.25 to $1.00 per hour. Despite the wide range of provisions among the Northeast Nine, it appears that most of them pay more in longevity than Portage County.

To provide greater parity with other counties in the Northeast Nine, I recommend that the amount for longevity be increased to $7.00 per month for each completed year of service. However, I make this recommendation with a serious caveat that the amount for longevity must be properly computed and paid in accordance with the contract; after the hearing, I'm not convinced that it is.

Under the plain contract language, the longevity payment is intended to be monthly lump sum payment calculated at $5.00 for each year of service paid each month. Thus a five year employee would receive $25.00 per month in a lump sum, or $300 per year. However, Mr. Janis testified that, in making this payment, the Auditor first converts the lump sum into an hourly rate and then pays that hourly rate for all hours worked, whether regular hours or overtime. In order for this method to work properly, the Auditor must divide the monthly longevity lump sum by the *actual* number of hours worked in a given month including overtime hours. This, of course, means that the longevity hourly rate for a given employee would fluctuate from month to month depending on the number of hours actually worked. This would be made even more complicated if the members are paid biweekly as they would have different hourly rates for longevity in the different pay periods in a given month. If, however, the Auditor bases the longevity hourly rate on the number of standard hours worked (2,080 per year or 173.33 per month), and then applies that hourly rate to the number of hours actually worked, the member will receive considerably more than the contractual lump sum if the employee works more than 173.33 hours in the month.

Members could also be overpaid if the computed hourly rate is paid at time and a half for overtime hours. It was not clear to me in the hearing which method is used by the Auditor to determine the hourly rate for longevity. The latter method would certainly be easier to administer, but it produces results inconsistent with the contract; the former method provides accurate results, but would be more difficult to apply from pay period to pay period. Longevity is contractually a lump sum; converting it to an hourly rate for purposes of payment only invites the opportunity for error.

Therefore, in addition to recommending an increase in the longevity amount, I feel compelled to add language to both clarify the benefit and ensure its proper application. Therefore, I recommend that Article 23 be amended to read as follows:

> 23.01 Each full-time employee shall be entitled to a longevity benefit upon completion of five (5) years of continuous service. **For each completed year of service, the eligible employee will receive an additional seven ($7.00) per month.** ~~The longevity benefit shall be computed at the rate of five dollars $5.00 per year, per month.~~ **The longevity amount provided for herein shall be computed as a monthly lump sum. When computing the longevity amount for inclusion in a given paycheck, the County shall ensure that it uses a method of computation that does not result in a member being overpaid or underpaid for this benefit. Upon request from the Union, the County shall disclose its method of computation so that the parties may ensure proper application of this provision.**

## 9 Article 25 – Insurance

In 2007, the CBA was changed with respect to medical insurance. Under the new provision, health insurance benefits would no longer be spelled out in the contract. Instead, the Union would receive the same health care coverage and premiums that the County Commissioners provided to all other County employees.

This provision explicitly recognized and acknowledged the power

and authority of the Commissioners to unilaterally make changes to health insurance coverage without further negotiation with the Union. Over the years, the Commissioners have made premium increases based on actual costs to the County of paying health claims. The County is self-insured and the money it spends on health care is not in the form of insurance premiums but in the form of actual medical expenses. Such a system is cost effective for a larger employer, but it makes predicting health care costs more difficult as County administrators never know when an employee will become sick or injured and need medical attention. As medical expenses have increased, so have employee premiums, going from $17.21 for single coverage in 2009–2011 to $28.29 in 2014 and 2015. When expressed as a percentage of the overall medical costs, the employees' premium has increased from 9.19% in 2009 to 10.30% in 2015, a relatively modest increase even though the difference in raw dollars is clearly more dramatic.

One step the Commissioners have recently taken to contain costs is to deny coverage to employed spouses who can obtain health insurance from their own employers. This change currently affects eight of the 44 Union members.

The Union has proposed that the CBA be amended to require the County to cover spouses, regardless of the availability of other insurance. It has also proposed that its members' premiums be frozen at the 2011 level.

Essentially, the Union is attempting to take back some of what it bargained away in 2007. It complained at the hearing that, in 2007, when it agreed to use the same health insurance the Commissioners provided to other employees, County representatives pointed out the Commissioners would be slow to change the insurance provisions as any such changes would affect the Commissioners themselves. However, since 2007, two of the three Commissioners have been replaced, and the Union claims that the current Commissioners are not affected by the change in spousal coverage. Although the County disputes this claim, I find it to be irrelevant. When the Union accepted the insurance provision in 2007, it contractually agreed to abide by the discretion and authority of the Commissioners *even if it disagreed with the exercise of that authority*. It accepted the risk that, at some point in time, the Commissioners would exercise their discretion in a manner not to the Union's liking.

There are ample benefits to having a single insurance policy for all

County employees. Administration is straightforward as all employees have the same benefits. In addition, costs are shared equally with all employees paying the same premiums. It is eminently fair, even if out of the Union's control more than it would now like. With the parties having agreed to this provision in 2007, I do not recommend any changes to it.

## 10 Article 29 – Sick Leave

The Union has two proposals with respect to sick leave. The first, it claims, is to correct an apparent error in language. Specifically, Article 29 permits employees to use sick leave for, among other things, "serious illness, injury, or death in the employee's immediate family." Paragraph 29.09 states that "immediate family" embraces several familial relationships including the "spouse's grandparents," but it does not include the employee's grandparents. By contrast, the paragraph (and Article 32, dealing with funeral leave) includes both sets of grandparents in its definition of "immediate family" for purposes of leave for a family member's death. The Union claims that the omission of the employee's grandparents was an obvious oversight.

The County's official position is to retain the current language although Mr. Janis suggested that, if a correction was to be made, it should be to *exclude* both the employee's and the spouse's grandparents. The Union counters that the County never made such a proposal in negotiations.

It obviously makes no sense to have a benefit that applies to illness in the employee's spouse's grandparents, but not the employee's grandparents themselves. The benefit should apply either to both sets of grandparents or to neither. Funeral leave applies to both. Therefore, I agree with the Union that sick leave should apply to both.

The Union also requests an increase in the amount of sick leave that can be cashed out upon retirement. Again, while there is inconsistency among the Northeast Nine, Portage County remains near the bottom on this benefit. Those that pay more typically do so for those employees with higher sick leave balances, the obvious intent being to dissuade the cavalier use of sick leave. I believe that such an incentive can and should be provided to this Union.

I, therefore, recommend the following amendments to Article 29 of the CBA.

> 29.09 When the use of sick leave is due to illness or injury in the immediate family, "immediate family" shall be defined to include the employee's spouse, children, parents, step parents, **grandparents** and spouse's grandparents.
>
> [remainder of the paragraph unchanged].
>
> 29.10 Upon the retirement or disability of an employee who has not less than ten (10) years of continuous employment with the Employer and who, **after the execution of this Agreement by both parties,** has qualified for benefits from a State of Ohio Public Employee Retirement System, such employee shall be entitled to receive a cash payment equal to the following formula:
>
> A. **25%** ~~(14)~~ of the first 960 hours of unused sick hours earned by the employee.
>
> B. **30% of hours in excess of 960 but less than 1,501 hours of unused sick hours earned.**
>
> C. **40% of of hours in excess of 1,500 hours of unused sick hours earned.**

## 11New Article – Minimum Staffing

The Union has proposed a new article that would provide for minimum patrol staffing for the deputies. It points out, correctly, that Portage County is a large county with much territory within its patrol jurisdiction. However, on this issue, the Union has provided me no evidence of any comparable provision among the Northeast Nine, and the County asserts that there is no comparable.

Traditionally, staffing and shift assignment levels of a department are management rights. See, e.g., Article 3 of the CBA. The Union has not provided me with a compelling argument or evidence to support the elimination of such a right of management. I, therefore, do not recommend the Union's proposal.

## 12 Article 46 – Duration

I recommend that Article 46 be amended to read as follows:

46.01 This Agreement shall become effective at 12:01 a.m. on January 1, ~~2012~~ **2015** and shall continue in full force and effect, along with any amendments made or annexed hereto, until midnight, December 31, ~~2014~~ **2017.**

/s/ Virgil Arrington Jr.
Fact Finder

June 15, 2015