Before the State Employment Relations Board
State of Ohio

In the matter of

City of Delaware Ohio
Employer

Case No. 2015-MED-01-0004

And

Sandra Mendel Furman
Fact finder

IAFF Local 606
Union

FACTFINDER'S REPORT

Procedural Matters

The fact finder was appointed by SERB notification dated July 8, 2015. The matter was scheduled for hearing on October 14 and 28, 2015 by agreement of the parties. Pre-hearing statements were received by the fact finder and served by each party upon the opposing party prior to the hearing. There has been substantial compliance with OAC rule 4117-9-05 (F).

The hearings were held at City Hall. The fact finder offered to mediate any/all of the issues. The parties had engaged in several bargaining sessions for a successor agreement prior to selection of the fact finder. There were three mediation sessions facilitated by SERB. The fact finder also engaged in extensive mediation efforts. These were unavailing. The parties proceeded with their proofs on all issues not previously settled in negotiations.

A full two days of hearings were had. The parties presented witnesses and exhibits in support of their respective positions. Representing the Employer was Darren Shulman City Attorney. Also present and/or testifying on behalf of the City at various points in the two days were Chief Donahue; Jackie Walker, Assistant City Manager and Jessica Feller, Human Resource Manager.

Kevin Rader ArnettRader Consulting Inc. represented the Union. Various members of the bargaining committee and Local officers were also present and testified as needed: Joe Murphy, Local President; Captain Jim Oberle, Vice President; Dan Lobdell and Jarrod Lilly, bargaining committee members.

The report is submitted at the date stipulated by the parties.

Findings of Fact

1. The City of Delaware is a charter city.
2. It is the county seat of Delaware County.
3. The City has a City Manager form of administration.
4. The record does not contain any demographic information as to the population, economy or features of the City.
5. A 3% wage increase was granted effective 12-31-14 for all non-represented City employees and management level staff.
6. The Police units represented by the FOP received a 3% increase in 2015.
7. The City has the ability to pay for wage increases. It proposes a 2% across the board adjustment for all three years of the cba.
8. A wage increase of 3.75% is sought by the Union.
9. IAFF Local 606 is the certified bargaining representative for the following: all full-time, uniformed employees of the Delaware Fire Department holding the rank of firefighter; lieutenant, and captain. Some firefighters are also Paramedics which has a wage impact of an additional increased base rate.
10. The unit has approximately fifty-four (54) members including Captains and Lieutenants. (Lts.)
11. The Department has sixty (60) employees.
12. The Fire Chief is John Donahue.
13. The parties have had a collective bargaining relationship for around thirty (30) years.
14. The most current contract's (cba hereinafter) expiration date was March 31, 2015.
15. It was a three (3) year agreement.
16. There is no dispute that wage increases will be retroactive.

17. There is no joint bargaining in the City.
18. There is no "me-too" language in the cba relating to wages.
19. There was testimony that the City seeks parity among its various units.
20. Internal comparables for other unionized employees reflect the following:
    - AFSCME clerical unit 2.5% increase in 2015 and 2016;
    - FOP office and clerical-same
    - FOP Patrol-same (3% in 2014)
    - FOP Supervisors-same (1% in 2014)
    - AFSCME Techs-2% 2014; 2015; 2016
    - City Wastewater/Water (independent employee association) same as AFSCME Techs
21. In the prior cba the Union percentage wage increase was 2% in 2012 and 2% in 2013 and 2% again in 2014.
22. In the recent past certain bargaining units experienced a wage freeze.
23. The City currently has three (3) open and fully staffed fire stations. A levy provided the authorization for the building of a fourth station. There are no imminent plans to break ground for the fourth station. The City maintains that once the City decides to go forward with the opening of the fourth station, it will be eighteen (18) months before it opens.
24. The parties jointly request that matters previously agreed to in tentative agreements be incorporated in the report.
25. Currently civil service rules govern the promotional process in the Department.
26. There was some evidence that the Department has retention issues. The Union pointed to the 12-hour shift as a main factor there have been retirements.

Issues to be determined

1. Wages Article 16

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-

9-05(J) and (K).[1] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The Union proposed a 3.75% increase each year for the unit for the three-year term of the cba. It states that the City can afford the increases; that such percentage increases are justified by economic considerations and external comparables.

The City has not claimed an inability to pay rather it contends it would be unfair to other internal personnel to grant such an increase. The City claims that increases given to other personnel were done to equalize and ameliorate the effects of concessions and past wage freezes. The City claims no other surrounding like jurisdictions bargained such a high wage increase.

The City argues that external comparables (Marysville, Newark[2]) make the 2% offer equal to or better than the increases received by neighboring jurisdictions. City Ex. 10 points out that Delaware firefighters make more than Marysville firefighters and work fewer hours.

Internal comparables (FOP, PUG and AFSCME Techs) further support the proposed 2% increase. Although the FOP units got a 3% in 2015 it received a 1% in 2014. The City points out that that wage increases also directly impact overtime, vacation leave, personal leave, sick leave cash out, shift differential, pension and other benefits. City Ex. 17, 20.Therefore the costs of this proposed increase are beyond the mere salary adjustment and fiscal responsibility is required.

The fact finder believes that a 3.75% across the board increase is unreasonable under extant, known circumstances. The Union presented no data to support this increase and it's clearly out of the norm for both internal and external comparables.

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[1] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

[2] Both sides point to Marysville at various junctures depending on the issue as an appropriate comparable.

The fact finder recommends a 2% increase across the board for each of the three years of the cba. Although unnamed conciliator reports have in the first two quarters of 2015 granted 2.1% and 2.25% increases (*jurisdictions and factors unknown)* the fact finder believes that internal comparables are relevant in this jurisdiction. The fact that non-organized personnel received 3% may be galling to the unit but to further bump up the firefighters is not warranted by any compelling evidence in the record.

The City points out that this unit has never had a wage freeze unlike the other bargaining units. Nor did it accept injury leave givebacks in contrast to other units. City Ex.16. There will be as set forth herein below certain other economic advantages obtained by the unit in other language before the fact finder. These changes represent a cost to the City and a bigger paycheck for the employee.

There are also other non-economic language changes recommended which were never before part of the cba. These language gains were sought by the Union. The City strenuously opposed each/all of these. In lieu of granting Union's the sought for percentage increase, the fact finder deemed certain language changes were appropriate under the evidence and applicable guidelines. These changes represent real and sought for benefits.

SERB's available wage settlement report indicates that 1.88% is the average for units in the Columbus region of which Delaware is a part. For firefighter units, the average increase was 1.86%. This 2% recommended result represents an increase in line with area averages per the 2014 SERB annual report. It was the most recent data available. This recommended increase does not result in adverse impact on the budget.

There are sufficient resources to fund the recommendation.

RECOMMENDATION

Article 16 Wages Section 1 should be amended as follows:

Unit members to receive a 2% across the board increase for the term of the contract effective April 1, 2015; April 1, 2016 and April 1, 2017.

2. Shift Differential

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [3] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The Union seeks an additional premium adjustment of 4% for *all* employees assigned to the 40-hour workweek regardless of paramedic certification status. Thus paramedics who already receive a premium adjustment will receive another 4% if the Union proposal is recommended. There was scant testimony presented on the need for this adjustment to be applied. There being insufficient rationale presented for the additional premium for Paramedics working the 40 hour work week the Union proposal regarding same is not recommended. Current language as regards the 4% adjustment for non-paramedics on the 40-hour shift is recommended.

The Union proposes a 4.2% premium adjustment for all employees working the 42-hour shift. The 42-hour shift appears to be unique in the State of Ohio. It is a shift that began as a result of the most recent round of bargaining and was adopted as a result of the conciliator's report. The Union provided no testimony as to the reason for this adjustment. Based on other testimony however the fact finder reasonably concluded the rationale is that the shift itself is purportedly inherently objectionable to members; that it was created without a stated operational need; that employees have left the Department rather than work the shift and that it poses recruitment and retention issues. The Union stated that no employee willingly is assigned to this shift; that it is an anomaly in the State and that members of the unit should be compensated for the disruption to orderly planning that this third schedule causes.

The fact finder noted that the idea of a shift differential for the non 50-hour employees already exists in the current language for 40-hour employees. The fact finder further noted that the absence of language of a shift premium in the

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expired contract for the 42-hour group of employees was due to the fact the Union fought hard but lost on the fact of its implementation. There is a 4% premium paid for assignment to the 40-hour shift. Apparently that is seen as less desirable than the 50-hour shift.

As it is undisputed that the 42-hour shift is strongly disfavored by the bargaining unit it seems equitable to likewise provide for a premium payment for its assignment as well.

There was no testimony as to why the differential of 4% was reached for the 40-hour group. But looking to the like language and recognizing the strong antipathy of the unit about the 42 hour shift to place a slightly higher premium on assignment to *that* shift would work towards balancing the interests of the City in having that shift staffed and meeting Union concerns about the claimed disruptive nature of that shift on its members.

An additional concern raised by the Union follows. The Union seeks clarification as to the duration of temporary assignments to the 40-hour workweek. According to un-rebutted testimony, persons may get assigned to the 40-hour shift for a variety of reasons. The Union concedes that a temporary assignment should not merit a 4% differential; nor should assignments to that shift that are dictated by light duty and initial recruit training purposes.

The Union presented testimony that shift changes are made which cause hardships to employees' work, sleep and family life. The Union contends that it is a reasonable and equitable result to balance management's need for operational changes with an employee's ability to plan that a shift change will not exceed two weeks absent the other factors of new recruit training or light duty. At the same time exigent circumstances that by its nature would be rare and unusual, will permit an assignment in excess of two weeks. The burden would be on the Department to show such circumstances existed. The Fact finder agrees and so recommends.

RECOMMENDATION

Article 16 Section 3 shall be amended as follows:

Members assigned to the 42-hour shift shall receive a 4.2% differential to the base salary.

All other wage shift increases built into the varying shifts shall remain status quo as per existing language in the expired predecessor agreement.

[New language appearing in Article 16 section 3 regarding the capped duration of a temporary assignment to a different shift shall read as follows:]

No member may be involuntarily assigned to another shift for a temporary assignment in excess of two (2) weeks absent the following circumstances: light duty; orientation of new employees or other exigent management needs.

3. Pension Pick Up Article 16 section 4

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [4] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The Union proposes deletion of the pension pick up language from the predecessor agreement. The City made no compelling case as to need for inclusion of the language from the expired cba. It stated it was concerned that historical reference would be lost if the language were deleted.

Apparently all preconditions affecting the "pension swap" described in the language have occurred making the language moot. The Union claims it is now unnecessary for any known purpose at this moment. The fact finder agrees.

RECOMMENDATION

Article 16 section 4 regarding Pension pick up shall be deleted.

4. Hours of Work and Overtime Article 18

Section 1(b)

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-

[4] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

05(J) and (K).[5] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The Union seeks a clarified definition of hours of work for its 50-hour employees. Its interest is reflected in an arbitration award issued by the undersigned. That dispute concerned primarily the ability of the Chief to mandate overtime under particular circumstances. The Union stated its interest was to establish in language a long extant fact on the ground-that 50 hour employees typically and usually work a 24 hour on; 48 hour off schedule plus have unpaid Kelly days each month to complete the pay cycle.

The City anticipates that the suggested language is a smokescreen to argue against the requirement that under certain circumstances mandatory overtime may be ordered. The City also expressed concerns that this sought for language would be constantly cited to impinge on management rights regarding hours of work and assignment of overtime.

Interestingly the current language defines the workweek for the added 42-hour shift. The City resists similar language for the long established 50-hour workweek. The fact finder finds that it is a clearer statement of existing long established practices to define the 50-hour workweek as it typically and usually exists. Staffing and assignment concerns are otherwise addressed in other cba language, MOUs or Standard Operating Procedures (SOPs). Nothing in the language proposed by the Union restricts the City from making such assignments as are allowed under Management Rights and extant cba language. However in order to allay the City's concerns about mandatory overtime/special events the fact finder recommends a clarifying sentence.

RECOMMENDATION

Article 18 Section1 (b). shall read as follows:

For fifty-hour employees the workweek shall consist of fifty (50) hours and a three-platoon system. This is to be worked as a twenty–four (24) hour shift

[5] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

followed by forty-eight (48) consecutive hours off duty. Each member shall receive one (1) day off (Kelly Day) during each 27-day period.

Nothing in the above description of the 50 hour workweek shall otherwise restrict the City from assigning overtime in accordance with other overtime provisions in the cba, SOPs in existence on date of execution of the cba and/or in MOUs in existence on date of execution of the cba, or any subsequently mutual understandings/agreements of the parties.

5. Article 18 Hours of Work/Overtime
Section 3.

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [6] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The Union seeks clarification by way of cba language concerning the assignment of overtime. Overtime assignments have been a frequent matter of contention between the parties. The Union claims its interest is in having a clear statement of when and under what circumstances overtime may be required and available.

The City's response is that there is no need to add language to an already fully detailed cba. It claims it reviews SOPs with the Union and that the Union's concerns are directly taken into account before a SOP is issued/revised. It provided certain anecdotal instances of incorporating Union concerns. It expressed concerns that it is inundated already with an unreasonably high amount of grievances. It stated that a minimum number of jurisdictions have overtime provisions in the cba.

The fact finder finds that it is more usual, useful and predictable for both parties to have overtime language referenced specifically in the cba. The Union stated a legitimate concern that absent cba language addressing such a term involving wages and hours that it would be at a constant disadvantage in terms of notice of its obligations and rights. Nor is it at all clear that any recourse exists for improper/alleged improper application of a SOP. Overtime clearly affects wages and

[6] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

hours and is an appropriate subject for bargaining. Decades of case law reinforce that.

Although it may be true that there have been many grievances filed in the past three (3) years, it is likewise true that many of those grievances involved overtime. Cementing at least for a three (3) year period the existing practices –as memorialized by and through a management promulgated SOP-provides benefits to both sides. The cba is a mutually acceptable reference document outlining the means/methods of overtime assignment that is binding provides guidance and stability. Management's concerns are implicitly addressed as it wrote the SOP; the Union's concerns that it has no predictability regarding overtime are addressed for the term of the cba.

Management also has a stated and reasonable stake in its contractually sanctioned intent to control the assignment and use of overtime. Although the Union commented at the hearing that many City employees receive and use overtime (or compensatory time in the case of exempt employees) this fact in no way militates against the legitimate governmental interest in controlling overtime use. It is a high ticket budget item and is often the subject of public scrutiny.

There cannot be a contractually sanctioned claim for minimum levels of entitlement to overtime as an expected portion of a firefighter's pay. Overtime will undoubtedly always exist as a necessity for the fire safety forces but efforts by management to curb its necessity are legitimate so long as other cba provisions are followed.

Between the Chief's desire to control the use of overtime, his desire to safely and fully staff the Department, the requirements of the FLSA as it applies to Fire departments and the Union's request to know when its members may reasonably be expected to work overtime the following language is recommended to meet the competing concerns and conform to the requirements of RC 4117.14.

RECOMMENDATION

Article 18 Section 3 is amended to add the following language:

Overtime shall be administered in accordance with SOP #1.141. [Overtime]

dated 8-1-08 as amended 4-27-14. Any further amendments to the Overtime SOP shall be by agreement of the parties.

The Union recognizes that due to the nature of Fire Department duties there may be a request by the City on an occasional, limited basis to waive certain provisions of the overtime SOP. The Union agrees to engage in good faith efforts in such limited circumstances to agree to such waivers so as to provide for smooth, efficient provision of services to the public.

Section 9. Kelly Day

The parties **stipulated** during the course of the hearing to the below language for Kelly Day:

The Kelly Day for each member covered by Article 18 Secrion1 (b) shall be scheduled by April 15 of each year to coincide with prescheduled vacation scheduling in Article 25. A member's receipt of a Kelly Day shall not affect the bi-weekly salary to which the member is otherwise entitled. If crew strength is from one (1) to nine (9), then one (1) member minimum per duty day for each FLSA period shall be permitted off on a Kelly Day. If crew strength is from ten (10) to eighteen (18) two (2) members shall be permitted off on a Kelly Day. If crew strength is from nineteen (19) to twenty-seven (27) then three (3) members minimum per duty day for each FLSA period shall be permitted off on a Kelly Day.

RECOMMENDATION

The parties adopt the above-cited language in Article 18 Hours of Work and Overtime, section 9.

6. Contracting Out-Article 34

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [7] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The Union seeks additional language in the Contracting Out section of the cba that would effectively prevent the City from contracting out *any* services

[7] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

currently performed by the bargaining unit. (The Union charter and by-laws prohibit the representation of part time employees.)

The City opposes the restrictive language. The City intends at some indeterminate date to open a fourth fire station in the City's northwest quadrant. It intends to hire part time firefighters to fill out shifts and deal with shortages of staff related to days off, training and to avoid additional overtime. Its most recent intentions are stated in Union Ex. 6: The Fire Department February 2, 2015 Final draft of the Part time Firefighter program.[8] The plan stated that six (6) part timers would be hired in 2015.[9] This has yet to occur in large part due to continued Union opposition.

The parties have had multiple conversations about the intended hire/use of part timers. The Union's concerns are obvious: there could be reduced staffing levels in its unit; the part time employees might have the ability to restrict/limit overtime opportunities; experience and training and safety issues may exist and the mere presence of a part time staff erodes union security. These concerns are legitimate but must also be balanced against management's staffing and public safety concerns, desired service response times and cost control.

The fact finder sought information from the parties about the use of part timers in other fire departments. From the material provided by each party it is clear that part timers do exist as personnel in certain jurisdictions. It is not a majority of jurisdictions but neither is it so scarce as to be an outlier situation. Those departments using part-timers have provisions limiting use of part timers so that same cannot be used to avoid payment of overtime. (See Westerville, Marysville, Mt.Vernon, American Township (Lima), Zanesville, West Licking Township)

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[8] The final draft states at p. 3:

> The Part-Time Fire Fighter program is designed to fill in the void created when our full-time firefighters are on leave. Our firefighters are permitted to have three (3) firefighters scheduled off each day due to leave. This is inclusive of their vacation time, holiday time, personal day and Kelly Days. This equates to approximately 26,280 hours annually. By filling this gap, the Department and the citizens can be assured that the existing primary fire/EMS apparatus will be staffed. Union Ex. 6

[9] The plan likewise references additional hiring intended of two (2) full time positions. Pg. 4, Final Draft. Hiring of additional staff would allay but only in some part the Union erosion concerns.

The fact finder understands fully the passion of the Union is seeking to avoid the use of part timers and/or getting a complete ban on contracting out. However the parties should continue to bargain over this issue which at this juncture is still a future possibility not an imminent event.

The City believes it has a fundamental management right to determine the number and classifications of employees needed in the Department. It is correct. The City also has indicated it will continue to meet and discuss the issue of part timers with the Union to get clear understandings on numbers, use and scope. It has that obligation as a matter of law. But the fact finder does not recommend the creation of new language setting up a bar to the hiring of any persons performing like duties of the current unit.[10] Rather the fact finder intends that but is not mandating the means and methods by which certain pre-conditions be set forth as a matter of understanding so as to allow future discussion of the part timers and the possibility of written understandings about the part timers' scope/use.

RECOMMENDATION

Article 34 Contracting Out
Current Language

7. Earned Time Article 39

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [11] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

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[10] A significant understanding is in place between the parties regarding the intended future use of part-timers. It is/will be in the form of a signed MOU. It states:

> **Part time personnel will not be called in to cover full-time members' unscheduled absences.**
> **This MOU will not be considered a past practice against either party and will not be construed as IAFF acceptance of the part time program.**
>
> **Contracted special duty: Special duty paid by an external party will be offered first to full time personnel.**
>
> **This MOU will expire on March 31, 2018 unless renewed by both parties.**

The fact finder recommends this MOU be executed and adopted as part of the parties' cba.

[11] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public

The Union seeks changes in the means/methods by which its members may take time off. The Union presented documentary evidence and testimony indicating that its members cannot use leave earned due to staffing issues. The Union pointed out that despite buy-back language members have had to forfeit earned leave because it was not possible to schedule the time off.

The City does not view this as a significant issue and stated it makes every effort to permit employees to take time off.

The fact finder notes that there is no language regarding the time off rights for 42 and/or 40-hour employees. The lack of language creates an anomalous situation leaving the process undefined and unknown for those two groups.

The Union proposed language for both groups. Discussion was had at the hearing mostly on the 40-hour group and the desire to increase the number of 50-hour employees who may be off to four (4) from its current level of three (3)[currently inclusive of Kelly Days].

The fact finder read the grievance presented by the Union as part of its exhibits and considered all the testimony. The fact finder was not convinced that the 40-hour employees should as a matter of course all be entitled to take earned leave without restriction.

Regarding the changes proposed for the 50 hour employees the Union made a sufficient showing that four (4) persons off-two (2) Kelly Days absences and two (2) additional personnel off on earned time is an appropriate means of avoiding forfeited time off.

The City pointed out that if it were allowed to hire part timers the leave requests could be more easily managed and granted. That is a potential result as illustrated by City Ex. 43. It also pointed out in Ex. 44 that the Chief has allowed off more than three (3) employees at his discretion during the past eighteen (18) months. It prepared a chart showing that extended days off–as many as eight (8) to nine (9)- are currently possible with no change in the cba language. City Ex. 45.[12]

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services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

[12] The Union countered that the graph lumps all three shifts together and is not dispositive of the true effects of the leave limits currently extant in the cba.

Despite the Chief's demonstrated willingness to accommodate leave whenever he can, members still lose leave.

This is a close issue for the fact finder. Despite some evidence that there exist many opportunities for members to take leave the undisputed fact also remains that others have had to forfeit leave. The overtime costs to fill the shift are considerable. Adding another full time firefighter/paramedic to the shift would clearly eliminate many of the problems but the City has seemed disinclined to incur that direct personnel cost at this time. See City Ex. "Cost of Adding an Additional Firefighter Paramedic to Each Shift to Allow More Time Off" (no Ex. number; presented at hearing.)

The record as it exists at time of hearing shows significant numbers of lost/forfeited leave hours and no part timers. The countervailing issue is the cost of overtime necessary to cover absences. Again the use of part timers may work to "solve" the staffing gaps in addition to whatever other spill-over issues may exist down the road. Because the Union made a showing of the adverse impact current leave policies have on its members the below language is recommended.[13]

RECOMMENDATION

Article 39 Earned Time shall read as follows:

Section 1.Current language

Section 2. Current language para.1.

Para.2
Requests for time off submitted more than three (3) working days in advance prior to the time of the proposed leave shall be approved or denied three (3)

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[13]The fact-finder had an initial inclination to delay the imposition of the recommended earned leave language as a contingent matter- to make it effective only after the hiring of part-timers. Many of the cba provisions will be impacted by future use of part timers. Unfortunately positions and respective explanation of the entire interplay between the potential addition of "x" numbers of part timers and the various language proposals and even existing language would have made a two-day hearing even longer. It may be that part timers will alleviate some staffing concerns caused by training, shift assignments, overtime costs, absences and leave requests. It may be also true that part timers will add to the numbers of grievances currently complained of by the City. Discussions concerning the addition of part timers are continuing and were/are part of a LMI process. It is hoped that the next three (3) years will provide some anecdotal/evidentiary basis for addressing the City's needs and the Union's concerns in this critical area. The ordinance is in place (City Ex. 49) but the hiring has not yet occurred. See City Ex. 50 also.

working days prior to the proposed leave, based on the known manpower situation at that time. Requests for time off submitted less than three (3) working days prior to the proposed leave shall be approved or denied by the end of the shift in which it was received, based on the known manpower situation at that time.

A member's request for time off shall be guaranteed if eligible under sections 5, 6, and 7 of this article. Once a request for time off is granted it cannot be revoked unless the Fire Chief declares and emergency and all leaves are cancelled. Requests may be denied if it is known that members will be off on pre-scheduled vacation (Article 25), sick leave (Article 26) and/or earned time (Article 39) and/or non pre-scheduled vacation in accordance with sections 5 and 6 below.

Section 3. Current language

Section 4. Current language

Section 5. Time off for 50-hour employees

Two (2) bargaining members may request leave and it shall be granted. These requests may be in the form of pre-scheduled vacation (Article 25), and/or earned time (Article 39) and/or non-pre-scheduled vacation listed in the order of priority. These members do not need to show up or be available for work at the beginning of their scheduled shift.

The Fire Chief or his designee may approve additional requests.

No more than two (2) persons may use Kelly days as a form of leave at the same time unless approval is granted by the Fire Chief or his designee.

The intent is that up to four (4) persons may be off on leave: two (2) persons using any eligible non Kelly Day leave and two (2) persons for Kelly Day leave, unless additional persons are otherwise approved by the Chief or his designee. When the 50-hour shift has more than eighteen (18) assigned members, a third member may request earned leave as listed in the above paragraph and it shall be granted. There will at that time also be three (3) persons allowed off on Kelly Day.

Section 6. Time off for 42 Hour employees

When one (1) to three (3) member(s) are assigned to any 42-hour shift, one (1) bargaining unit member may request leave and it shall be granted. If four (4) or more members are assigned to any 42-hour shift, two (2) members may request leave and it shall be granted. These requests may be in the form of pre-scheduled vacation (Article 25) and/or earned time (Article 39) and/or non-

pre-scheduled vacation listed in the order of priority. These members do not need to show up or be available for work at the beginning of their scheduled shift.

Section 7. Time Off for 40-hour employees

Up to half of the members assigned to a division staffed with more than one (1) member assigned to a 40 hour shift may request leave and it shall be granted as long as the request is submitted prior to the day off requested (rounding down such that if the unit is staffed by three members, two can take off).

Requests submitted on the 40-hour shift on the day off requested shall be granted unless the member is needed to backfill an operational position that would otherwise need to be filled by use of overtime.

The Fire Chief or his designee may approve additional requests.

Section 8. Current language of prior section 6 (Payment upon Separation)

8. New Article-Promotions

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [14] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The new language proposed by the Union attempts to provide for a means to recognize seniority as a factor in promotion to a higher rank. The current practice is that all promotions are handled through civil service testing and procedures.

Recent actions by the civil service commission (CSC) have caused the Union to seek contractual provisions protecting its interests regarding promotions for firefighters. Recent changes include an increased passing score-from 70% to 75% and adding the requirement of an Associate Degree and holding of a Paramedic certificate. The Union points to the fact that time–in-service counts for police promotions and that experience serves for the police in lieu of a two-year degree.

[14] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

Similar provisions do not exist for firefighters. The Union further testified that the most recent civil service examination did not allow two (2) current employees to be considered due to the increased passing score required. Most significantly the charter only permits external applicants to be considered for the Chief position yet the civil service rule now allows external candidates for lower ranked promotional positions if internal candidates cannot fill the positions. The Union contrasts the 75% passing score for fire promotions with that of the police: the passing rate is higher for the fire promotions. The Union also pointed out that adding a Paramedic requirement is in conflict with the cba.

The City counters that it is a charter city and has the right to handle promotions through means sanctioned in its charter. It argues that it desires a professional fire department and the revised qualifications are necessary to achieve that goal. It further states that the Commission accepts Union and individual input and changes may be affected through that means. It further stated that there is no requirement for parity to exist between the promotional process for police and fire as the jobs are inherently different. Finally it argues that cbas containing promotional language are in a minority for surrounding jurisdictions. (4/11)

The fact finder has no language proposed by the City on promotions. Therefore the only language to be considered is that proposed by the Union. The City protested that the Union's eleventh hour introduction of promotional language violated the ground rules. Although it does not waive its contention that the matter of promotions is improperly before the fact finder it contends existing CSC rules and regulations are fair and reasonable. The City has a stated interest in increasing professionalism of the Department and such is in the public interest. The City argues that imposing a Paramedic requirement for promotions is reasonable as all new hires must be Paramedics. It makes no sense to allow a non Paramedic to supervise Paramedics.

The fact finder agrees that it is best practice and consistent with SERB rulings that promotions are part and parcel of the bargaining process. Evidence was present in the record that jurisdictions in/around Delaware County have cba provisions regarding promotions. (See e.g. Concord Township; Newark City,

Norwich Township, Violet Township, Upper Arlington)[15] All require promotions be limited to current members.[16] Whitehall's cba references the civil service commission but it is unknown if it allows only current members of the department to take promotional examinations. Genoa Township has a seniority provision but its applicability was unknown as the entire cba was not in evidence. Regardless promotional language in firefighter units It is not an outlier concept. Of the Union provided data 70% of those jurisdictions have promotional language in the cba.

The fact finder notes that the issue of the promotional language was spurred on by the City's actions in opening promotions in the Fire Department to non-current firefighters. The charter language presented at City Ex. 36 would seem to prohibit such a result. (See also ULP and Arnett letter presented by the Union.) The CSC's recent changing of the passing score and the addition of new criteria further accelerated the Union's drive for cba protection. The Union's proposal in no way eliminates the use and role of the CSC. Rather it makes the process part and parcel of the cba and limits the ability of the CSC to change minimum qualifications outside of the cba process.[17]

The fact finder agrees that the requirement of a Paramedic certificate as a pre-requisite for a successful promotion makes operational sense. However the requirement should be a matter of advance notice for all future applicants. At the same time, existing language in Article 19 must be adhered to as well.

The fact finder adopts in most respects the Union's proposed language set forth below. All candidates as a matter of course will and must possess the Ohio EMT Basic Certification, and possess a Paramedic certificate unless otherwise exempt under Article 19. The Union language effectively incorporates the CSC process but places some restrictions on the minimum qualifications consistent with current practices and existing language.

RECOMMENDATION

New Article ___ Promotions

[15] The Upper Arlington Civil Service Commission has jurisdiction for all promotion issues-not the parties' cba grievance procedure. The Upper Arlington agreement is analogous to the City's position.

[16] Passing score in Newark is 70%; which used to be the score to pass in Delaware until recently)

[17] The Union proposal did not propose to revert back to the passing score of 70%.

Vacancies in positions above the rank of firefighter shall be filled in accordance with the Rules and Regulations of the Delaware Civil Service Commission except where otherwise provided.

No person shall be considered for promotion to any bargaining unit position above the rank of firefighter unless that person has completed five (5) years in the rank of firefighter with the City of Delaware. In those instances when there are less than two (2) persons in the rank of firefighter who have served five (5) years therein and who are willing to take the promotional examination or successfully pass the examination, the five (5) year service requirement shall not apply and the examination shall be opened to members of the department with less than five (5) years service in the rank of firefighter.

All persons who are otherwise covered under grandfather provisions related to EMT-P certification retain such status.
Article 19 provisions remain unaffected.

Minimum qualifications for members testing for Lieutenant:

1. **A minimum of five years continuous service with the department**
2. **Possession and maintenance of valid Ohio Firefighter II and Ohio EMT-B certification**
3. **Must retain all certifications required of the position and the State of Ohio**
4. **Must possess and retain a valid Ohio driver's license**
5. **NIMS 300 (within one year of appointment)**
6. **Possession and maintenance of Ohio EMT-P certification**
7. **Possession of a Paramedic certificate except as otherwise exempted under Article 19**

Minimum qualifications required for members testing for Captain:

1. **A minimum of seven (7) years of continuous service with the department or a minimum of three (3) years experience as a Lieutenant**
2. **Associate Degree preferably in the area of Fire Science, Emergency Medical Services, Public Administration or Business Administration. Consideration will be given in lieu of an Associate's Degree for a minimum of ten (10) years of full-time experience with the Department**
3. **Possession and maintenance of a valid Ohio Firefighter II and Ohio EMT-B certification**
4. **Possession and maintenance of Ohio EMT-P certification[18]**
5. **Must retain all certifications required of the position and of the State of Ohio**

[18] This has been a requirement since 2011.

6. **Must possess and retain a valid Ohio driver's license**
7. **NIMS 300** [19]
8. **NIMS 400**[20]
9. **State of Ohio-Certified Fire or EMS Instructor (within one (1) year of appointment)**

9. New Article- Respiratory Medical Certification Committee

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [21] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

There was significant amount of discussion about the respiratory medical certification requirement at the two (2) days of hearing. The fact finder found that this issue had no anecdotal evidence to indicate that the Department was in any way adversely affecting the rights of members. There has been no process in place in years past despite a state mandate to conduct such testing. City Ex. 53.

The Union seeks cba language setting forth the specifics of the testing protocols and seeks the establishment of a committee to oversee the process of the respiratory certification. It does so in light of a concern that the testing process may somehow adversely impact its members. It raises concerns that at this juncture are completely speculative but insists it is being proactive to ensure evenhanded application of the testing procedure.

The City does not want to include detailed language about the testing process in the cba. It points out that only one (1) jurisdiction in the surrounding geographic area contains language on this mandate. It states that the process can be handled by means/method of a SOP.

The fact finder is concerned that this matter has not yet had enough real time existence as a concern or matter of potential conflict between the parties. A MOU would be an intermediate approach to having some data upon which to base future

[19] This has been a requirement since 2012
[20] This has been a requirement since 2012.
[21] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

language.[22] A SOP is not grievable thus any Union concerns are unable to be addressed in a potentially final matter. (i.e. arbitration) The fact finder notes that multiple proposals have been exchanged on this issue and deems one to capture the interests of both parties. The fact finder recommends the following language be adopted as a memorandum of Understanding (MOU).

RECOMMENDATION

MOU Annual Respiratory Medical Certification

The annual respiratory medical certification shall be governed by the provisions of SOP 1.2.3 as amended 7-1-15.

Any further revisions shall be first reviewed by a committee consisting of an equal number of persons representing the Department and the same number representing the Union. In the event consensus cannot be reached by the committee as to any changes unless the matter concerns a state mandate, no changes shall be implemented during the term of the cba.

10. Transfers/Vacancies

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [23] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

Currently there is no contractual language governing transfers or vacancies. The Union points out that the FOP units have language that permits choice of shift assignment by seniority on an annual basis. Final say to override the selection belongs with the Police Chief provided his decision to veto is not arbitrary, capricious or without just cause. In the event of a promotion or hire after the annual shift bid the Chief retains full authority to place the person consistent with departmental need. Union Ex.10.

In contrast the Fire Department has in place a SOP. City Ex. 57. Members of the Department may indicate a shift/station/division preference.

[22] Grandview Heights handles the issue of minimum performance standards via a MOU. City Ex. 56.

[23] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

Preferences are indicated in September and if approved take effect in April. The Chief will fill preferences “”to the extent possible.” Assignments will last a year unless there are extenuating circumstances.

Regarding vacancies the Chief will again “to the extent possible” incorporate preferences in assigning staff…Chief will select the person best suited for the position organizationally, which may not be one of the personnel who expressed interest.” This language gives no recognition to seniority and provides the broadest discretion to the Chief. As the SOP is not grievable no recourse may be had for a member who is placed in a position.

The Union presented two additional exhibits: one a letter showing a transfer to crew 1 then a subsequent intended transfer to the 42-hour (12 hour) shift. The other document presented in support of its position only indirectly concerns transfers/shift preference. The ultimate status of the Huston grievance is not part of the record. Regardless the material presented shows that a member wants to leave his current assignment and has not presently means to do so absent consent of management.

Newark City firefighters cba has a bidding process for assignments linked to seniority and qualifications with a grace period allowing for the member to obtain such qualifications. The Chief retains discretion to override the most senior person’s bid for limited specified circumstances. [24] Westerville has shift preference language as well.

The Union presented detailed language governing transfers and vacancies. The language goes beyond that contained in the police cbas and allows an individual to seek transfer out of a current position and provides a methodology for filling vacancies.

The City presented no formal proposal on this issue. It claimed the SOP provided relief for disaffected individuals and that management retained its rights

[24] Various table of contents were presented and partial sections of cbas from geographically proximate jurisdictions in an effort to present some information on comparables. Unfortunately the table of contents was insufficient in certain instances to glean whether or not a section did/did not deal with bidding/transfers/filling of vacancies. Upper Arlington has a vacancy provision but seniority does not trump the Chief’s discretion. Likewise seniority provisions were not placed in evidence for the most part.

to fill vacancies and assign employees as part of its stated and inherent management rights. No testimony on this matter was presented to explain how and why operational needs could not co-exist with a bid/transfer/seniority system.

At the fact finder's request, information was sought concerning other jurisdictions with transfer and vacancy language. These provisions exist in multiple fire districts and departments but not in many others. SERB indicated 30% of the departments have such provisions. See also City Ex. 55.

In the large majority of jurisdictions without shift transfer/bid language the departments had no more than two (2) stations and had less than forty-five (45) employees.

The Union notes that none of the other jurisdictions cited by the City have a 42-hour shift. It is that shift according to the Union that provides a significant impetus for the desired cba language.

Westerville has a very detailed vacancy and transfer provisions that provide that seniority controls. The following other neighboring fire departments have shift bid provisions: Orange Township; Madison Township; Columbus, Whitehall, Jefferson Township and Marysville.

The fact finder finds that a vacancy and transfer provision giving weight to a member's seniority is well within the scope of the statutory mandate under RC 4117.14. The City chose not to present counter language to the Union instead resting on the SOP. The fact finder commented during the hearing and again herein that the SOP provides no recourse for an adversely affected employee. Furthermore it provides on its face no recognition to employees with long and loyal service. The City's refrain through most of the hearing was "we have too many grievances" thus adding cba language will just engender and support the filing of even more grievances which will drain City time and resources and take away from its mission. The opposite scenario has as much potential effect. If there is a known and stated process for handling vacancies and transfers then if it is properly applied per the cba language grievances would be minimized and outcomes predictable.

With no other language proposed in the record, the fact finder recommends the Union proposal with slight language clarifications be adopted as a new article.

RECOMMENDATION

NEW ARTICLE Vacancies and Transfers

Section 1. Seniority

The Fire Chief shall establish and post a seniority list along with qualifications of members by January 1st each year. This list will be used to determine the selection of members for vacancies.[25]

Section 2. Vacancies defined

In order to fill vacancies due to promotion, retirement, transfer or a member otherwise leaving employment, an announcement of the vacancy shall be posted for bid beginning in January 2017.

New positions added to current staffing levels shall be considered as vacancies and subject to bid.

Section 3. Posting

Once the Fire Chief becomes aware of a vacancy in the Department he shall post the vacancy for fifteen (15) days at all stations. Once the vacancy has been filled, any backfills shall likewise be posted for seven (7) days.

Section 4. Members who have passed probationary status may request reassignment. The Chief shall post the position for bid. Members

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[25] The fact finder believes the parties should consider having the seniority language in its own separate section of the cba. It should be defined before its applicability is stated. The fact finder re-ordered the paragraphs.

The parties might also wish to consider a process by which the Union can review the list and identify possible errors prior to its publication. The fact finder also was unclear what "qualifications" might be listed; the parties should work together to define what will be on the list and what is relevant for listed qualifications. **The fact finder recommends that a MOU serve as an interim arrangement on the details of the seniority list. The content is too nebulous at this point until the parties meet and discuss the various factors and considerations involved.**

Additional editorial changes were made to simplify and clarify language. In order to allow for an orderly transition to the new language, **the fact finder recommends that this article not be in place until 2017, in order to allow for development of the seniority list, posting procedures and determination of qualifications.**

requesting reassignment must accept the position of the successful bidder.

No bids are allowed until the position has been posted. No vacancies shall be filled until the relevant posting period has ended.

Section 5. Vacancies shall be filled based upon seniority provided that the minimum qualifications for the position are met. [I.e. certified paramedics may apply for firefighter/paramedic openings; HAZMAT rescue techs are eligible to bid on ladder/rescue assignments]. Probationary employees are not eligible to bid on vacancies.

Members taking a vacancy through the posting/bidding process may not re-bid nor seek re-assignment for a one-year period from the date of being placed in the vacancy. This does not prevent a member who has taken a bid from seeking and accepting a promotion.

Vacancies not filled through the bidding process shall be filled by the least senior non-probationary employee.

11. Article 14 Continuation of Existing benefits and Changes of Agreement

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [26] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

The City seeks removal of the so-called "past practice" article. It argues that the Union has filed fifty-five (55) grievances during the term of the current cba. Twenty (20) grievances have cited past practice and no other article. City Ex. 23-24. The City cites to the personnel time and costs associated with the processing of and preparing for the various pre-arbitration steps of the grievance procedure. It states that the Union often cites Article 14 in the absence of other articles and lacks the essential elements of past practice in some of those grievances. It further argues that the inclusion of such language is a minority practice among like jurisdictions. (1/11)

[26] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

The fact finder is not empowered to determine the merit of any grievance resolved, unresolved or withdrawn. The issue is whether or not Article 14 should be eliminated or in some form modified.

The Union argues that Article 14 is necessary to preserve and protect long-standing benefits that are not otherwise addressed by specific contract language.

The fact finder finds one argument made by the City to be telling. The cba looks toward preparation of a written list of past practices. The responsibility for the preparation of such is list is mutual. Neither party has done so despite the same language being present for two (2) cba cycles. This may be because all past practices have been otherwise memorialized in MOUs or contract language, or because no one has made the effort to make a list or because the language has outworn its usefulness.

The first paragraph in Article 14 has been in existence since the first cba. It likely made for a clear understanding that certain practices were still in place despite no cba language memorializing same. But the second paragraph added at least two (2) cbas previously to the currently expired cba changes the balance.

Since no one saw the importance of creating the list the continued necessity for Article 14 is demonstrably lacking. The Union will even absent the language be able to argue past practice in an appropriate case, pursuant to long established arbitral practice.

RECOMMENDATION

Article 14 be deleted.

12. Article 11 Grievance Procedure

The fact finder has taken into consideration relevant factors set forth in R.C. 4117.14 (C) (4) (e), and has followed the guidelines set forth in OAC 4117-9-05(J) and (K). [27] Some of the listed factors were not relevant. Other factors had no evidence or arguments in support presented in the record.

[27] The relevant factors to be considered are: past collective bargaining agreements; comparables as defined in the rules; public welfare and interest; ability to pay and administer; effect on public

The City proposes amending the grievance procedure to eliminate the ability to take to arbitration disciplines less than a suspension.[28] It points to the high number of grievances filed during this most recent cba period. It recites the cost of personnel time and how this time drain affects city operations. It cites to two State of Ohio cbas which limit the ability of parties to appeal verbal warnings and written reprimands past specified pre-arbitration steps of the grievance procedure. It seeks similar restrictive language in Delaware.

The Union proposes no change in the grievance language.

Interestingly there was scant evidence presented from either side that grievances involving minor discipline were a significant issue. The City presented a grievance on a PIP and one concerning a written reprimand involving a Captain's failure to attend a meeting.

The record does not make a strong enough argument that there is a need to add restrictive language to the cba regarding limiting access for verbal reprimands and written warnings based upon evidence on the numbers of grievances involving these matters-*at this time.* The Union no doubt understands the economic costs of pursuing such low impact disciplines to arbitration. At the same time, the City has introduced several exhibits showing it is willing to settle matters pre-arbitration. Despite the fact the City has made a strong argument that grievances are unusually high in number vis a vis any other bargaining unit in the City, the City's request to address the larger issue by this proposed "fix" is not recommended.

The fact finder has no objection <u>per se</u> to the limiting language contained in the OSTA-State and SEIU –State cbas. Given a different evidentiary record, the recommendation would have been different. The fact finder notes that the relationship in the Department between management and the Union is a work in progress. Denying access to the grievance procedure for discipline at this juncture is not good labor practice.

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services; lawful authority of the employer; parties' stipulations and other traditional factors related to bargaining.

[28] At one point in the hearing the City suggested that all non-economic matters not be subject to the grievance procedure. The fact finder indicated on the record that proposal was not going to be recommended. The proposal was over reaching, over broad and would not serve any of the statutory interests at stake.

Recommendation

No Change to Article 11.

13. Tentative Agreements

At the request of the parties the fact finder incorporates herein as if fully rewritten all tentative agreements initialed by both parties during bargaining.

Respectfully submitted,

s/Sandra Mendel Furman

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Certificate of Service

An electronic copy of the fact finder report were sent by electronic mail to the State Employment Relations Board, 65 East State Street, 12th floor, Columbus, Ohio 43215; to City of Delaware c/o Darren Shulman and to IAFF Local 606 c/o Kevin Rader on November 19, 2015.

s/ Sandra Mendel Furman
Sandra Mendel Furman, Esq.